



# RIGHT TO PRIVACY AND SPECIAL INVESTIGATIVE ACTIONS

## PRAVO NA PRIVATNOST I POSEBNE ISTRAŽNE RADNJE

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### ABSTRACT

Special investigative measures (or special investigative techniques or covert investigative measures) are special and specialized methods based on the use of certain techniques, and special resources, actions and measures in practice, which have a significant operational dimension. These are special actions aimed at obtaining evidence distinguished from standard or usual actions of obtaining evidence or standard manner of collecting evidence. Special investigative actions constitute the investigation activities (*ultima ratio*) scrutinizing serious criminal offences in cases when evidence cannot be obtained in any other way or their collection would entail the unproportional difficulties.

Special investigative actions are a novelty in this region introduced in criminal procedure legislation of Bosnia and Herzegovina in 2003 through provisions which are more or less in force in the same wording as they were firstly defined. Special investigative actions are:

- a) surveillance and technical recording of telecommunications;

### APSTRAKT

Posebne istražne radnje (ili specijalne istražne tehnike ili prikrivene istražne mjere) predstavljaju posebne, odnosno specijalizovane metode koje se zasnivaju na korišćenju određenih tehnika, te u praktičnoj primjeni posebnih sredstava, radnji i mjera, a koje imaju posebno važnu operativnu dimenziju. Radi se o posebnim radnjama dokazivanja izdvojenim iz standardnih ili klasičnih radnji dokazivanja, odnosno standardnih načina prikupljanja dokaza. Posebne istražne radnje predstavljaju i istražnu djelatnost do koje se dolazi (*ultima ratio*) u slučaju istraživanja teških krivičnih djela u onim situacijama kada na neki drugi način nije moguće pribaviti dokaze ili bi to predstavljalo nesrazmjernu teškoću.

Posebne istražne radnje predstavljaju novost na našim prostorima koja je u sadašnjem kapacitetu tek 2003. godine uvedena u krivičnoprocesno zakonodavstvo u Bosni i Hercegovini, i to odredbama koje su još uvijek u toj prvobitnoj formi manje-više na snazi. Posebne istražne radnje jesu:

- a) nadzor i tehničko snimanje telekomunikacija,

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- b) access to the computer systems and computerized data processing;
- c) surveillance and technical recording of premises;
- d) covert tracking and technical recording of individuals and objects;
- e) use of undercover investigators and informants;
- f) simulated purchase of certain objects and simulated bribery;
- g) supervised transport and delivery of objects.

The debate among experts on special investigative actions, their effects and their implementation, possible breach of basic human rights and freedoms is as old as the special investigative actions themselves. According to those who speak in favor of their use, they have met the expectations of their creators, and the wider public alike, when it comes to the results achieved in finding and collecting evidence of the most serious crimes. On the other hand, not sufficiently researched is their use from the point of view of the highest-ranked national and international legal instruments in terms of the protection of the right to respect the private and family life, especially in practice, during the implementation of these actions. One can raise a question whether these actions, in their current form, are able to withstand control and criticism of the contemporaries?

**Key words:** special investigative actions, criminal procedure, human rights and freedoms, right to privacy.

- b) pristup kompjuterskim sistemima i kompjutersko sravnjenje podataka,
- c) nadzor i tehničko snimanje prostorija,
- d) tajno praćenje i tehničko snimanje lica, transportnih sredstava i predmeta koji su u vezi sa njima,
- e) korišćenje prikrivenih istražilaca i korišćenje informatora,
- f) simulovani i kontrolisani otkup predmeta i simulovano davanje potkupnine i
- g) nadzirani prevoz i isporuka predmeta.

Stručne rasprave o posebnim istražnim radnjama, njihovim efektima, ali, i u slučajevima njihove primjene, sasvim mogućim i izvjesnim kršenjima osnovnih ljudskih prava i sloboda su stare koliko su stare i same posebne istražne radnje. Po njihovim zagovornicima, a posmatrajući ove radnje isključivo iz ugla postignutih rezultata prilikom otkrivanja i dokazivanja najtežih krivičnih djela, naročito u oblasti organizovanog kriminaliteta, one su sasvim opravdale očekivanja svojih kreatora, ali i šire javnosti. S druge strane, čini se da je dosta neistraženo polje njihovog djelovanja zasnovano na najvišim domaćim i međunarodnim dokumentima, a tiče se zaštite prava na privatnost i poštovanja porodičnog života, posebno kada je praktični aspekt, odnosno konkretno, primjena određene posebne istražne radnje u pitanju, te odgovor na važno pitanje: mogu li ove radnje, ovakve kakve su danas, izdržati kontrolu i kritiku savremenika?

**Ključne riječi:** posebne istražne radnje, krivični postupak, ljudska prava i slobode, pravo na

## INTRODUCTION

The right to privacy belongs to the basic and most important human rights. It comprises the protection from arbitrary and excessive intrusion into the privacy by the authorities, public and other individuals. It is enshrined by all important international human rights documents starting from the Universal Declaration<sup>1</sup>, and the International Covenant on Civil and Political Rights (Article 17) to European Convention on the Protection of Human Rights and Fundamental Freedoms (Article 8). For instance, the European Convention and the International Covenant offer guaranties to the right to privacy which comprises the right to respect of one's private and family life, home and correspondence, and the honor and reputation.<sup>2</sup> Also, the elements of this right were subject to further elaboration and precision by means of the concrete rights formulation on the one hand and by means of new contents inclusion, on the other. It should be noted that the person's private life comprises a series of the narrower rights, such as: the right to the personal data protection<sup>3</sup>, the right to name and reputation, the right to moral and physical integrity and the right to sexual orientation<sup>4</sup>. The right to respect of correspondence includes the secrecy of letters, telegrams, postal items/consignments and other communication means, such as the telephone connections and modern means of distant communications. Any democratic state must protect

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<sup>1</sup> Universal Declaration on Human Rights prescribes that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks" (Article 12)

<sup>2</sup> Although the European Convention on Human Rights does not expressly provide the guaranties for the protection of the honour or reputation in the way the International Covenant does, the European Court of Human Rights in its judgments gives rather wide interpretation of the right to privacy so that it includes the violation of the honour or reputation. See ECHR: *Lindon and others v. France*, Applications 21279/02 and 36448/02 and 2007 Judgment.

<sup>3</sup> First, and currently the most important international instrument in the area of personal data protection is the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and the Protocol to this Convention. According to this instrument the states must take the necessary measures in its domestic law to give effect to the basic principles for data protection set out there with regard to automatic processing. Also, they are bound to provide one or more supervisory authorities and offices for the transfer of personal data to a recipient that is subject to the jurisdiction of a state or organization that is not party to the Convention. See: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data adopted by the Council of Europe in 1981 CETS No. 108 and the Additional Protocol to the Convention for the protection of individuals with regard to automatic processing of personal data, regarding supervisory authorities and transborder data flows adopted by the Council of Europe in 2001, CETS No. 181.

<sup>4</sup> See ECHR: *Dudgeon v. United Kingdom*, Application 7275/76 and 1981 Judgment

these values and provide necessary means for that purpose.<sup>5</sup> The right to privacy, however, is not an absolute right. Namely, a margin of appreciation is left to the public authorities to interfere with the enjoyment of this right in a legally provided manner and to an extent necessary for the protection of a democratic society values.

All the constitutions in Bosnia and Herzegovina provide for the protection of the personal privacy. For instance, provisions of Article II/3f of the Constitution of Bosnia and Herzegovina in its relevant part read as follows: “All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: f) The right to private and family life, home, and correspondence”. On the other hand, provisions of Article II/A2 of the Constitution of the Federation of Bosnia and Herzegovina, in its original content provide the following: “All persons within the territory of the Federation of Bosnia and Herzegovina shall enjoy the rights: ... g) to privacy”. And finally, provisions of Article 13 of the Constitution of the Republic of Srpska provides that “Human dignity, physical and spiritual integrity, personal privacy, personal and family life shall be inviolable”. All in all, the protection of privacy, personal and family life, home and correspondence is one of the basic human rights implementation of which is a prerequisite for the proper functioning of any modern democratic society.

The constitutional guarantees of the right to privacy are further elaborated in the criminal legislation applicable in Bosnia and Herzegovina, which provide for specific sanctionable criminal offenses involving the violations of this right. For instance, these concrete criminal offenses are: violation of the inviolability of the home, unlawful search, unauthorized disclosure of secrets, violation of the secrecy of letters and other consignments, unauthorized eavesdropping/phone tapping and recording, taking photographs, unauthorized disclosure of other documents, portraits or footage, unauthorized collection of personal data as well as criminal offenses against honor and reputation.

On the other hand, the reform of criminal legislation of many European countries in the last decade is characterized by, *inter alia*, the imposition of a large number of new criminal offenses (even the preparation of the individual actions

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<sup>5</sup> See: Milosavljević, Bogoljub, Popović, Dragoljub, *Ustavno pravo (Constitutional law, Third amended edition*, Belgrade, Faculty of Law on the Union University and the Public company Official Gazette, 2009, p. 155.

are incriminated as criminal offenses, e.g. in cases of terrorism), and the special measures aimed at disclosing and providing evidence of these offences. (These incriminations are most common in those areas where criminal justice is ineffective and where there is no use of existing incriminations, namely in combating organized crime, corruption, terrorism and other<sup>6</sup>).

Numerous international conventions which straightforwardly lay down new criminal offences and the measures for its suppression play a great role in the strong expansion of criminal legislation in this field. Some of these conventions are the following: the United Nations Convention against Transnational Organized Crime (so-called Palermo Convention)<sup>7</sup>, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (so-called Vienna Convention)<sup>8</sup>, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime<sup>9</sup>, Convention against Corruption<sup>10</sup>, Convention on Cybercrime<sup>11</sup>, Convention on action against trafficking in human beings<sup>12</sup>, Convention on the Suppression of Terrorism<sup>13</sup> etc.

At the same time, contemporary security threats (terrorism, organized crime, cyber crime) put special tasks before the police and security agencies which gives them the right to seek the extension of their competences necessary for their actions. In addition to the powers granted them by their national legislation, the police and security agencies use other measures provided for in the criminal procedure legislation, such as the operative infiltration into the criminal organizations (the engagement of an undercover agent<sup>14</sup> and simulated activities) or the in-

<sup>6</sup> See: Stojanović, Zoran, „Krivično pravo u doba krize / Criminal law in the time of crisis”, *Branič*, no 1-2, 2011, p. 33–34

<sup>7</sup> The United Nations Convention against Transnational Organized Crime (2000), UN General Assembly no. 55/25.

<sup>8</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

<sup>9</sup> Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), CETS No. 141.

<sup>10</sup> United Nations Convention against Corruption (2003), General Assembly Resolution no. 58/04; Criminal law convention on corruption (1999), CETS No. 173; Civil Law Convention on Corruption (1999), CETS No. 174.

<sup>11</sup> Convention on Cybercrime (2001), CETS No. 185 and the Additional Protocol to it.

<sup>12</sup> Council of Europe Convention on action against trafficking in human beings (2005), CETS No. 197.

<sup>13</sup> Council of Europe Convention on the Prevention of Terrorism (2005), CETS No. 196; European Convention on the Suppression of Terrorism (1977), CETS No. 090.

<sup>14</sup> In a ECHR case *Lüdi v. Switzerland*, Application 12433/86 and Judgment of 15 June 1992 the Court held that the use of an undercover agent did not affect private life within the me-

filtration as an addition to the measures involving the secret surveillance such as the surveillance of the communications, secret physical tracking and like. These measures have different names in criminal procedure justice in the different countries, such as: special investigative measures, special police investigative methods, undercover investigations, secret operations, measures involving secret surveillance, special investigative actions, special investigation techniques, special evidence collection actions, special evidentiary actions etc. In any case, these actions put temporary restrictions on the constitutional rights and freedoms of the citizens and they constitute a legal regulation of the special measures for combating and suppression of the most dangerous forms of criminality.

Special measures are used as an exception, that is, their use is limited only to the gravest forms of criminal activities, but even then only as *ultima ratio*, which means when the classic police and investigation methods yield no results. As a rule, special measures can only be used under the following conditions: “that they are explicitly foreseen by legal provisions (principle of legality); that milder measures for attaining the same goal are not existent (principle of subsidiarity); that related criminal offences are very grave (principle of proportionality); that they are based on the established existence of legally provided probability level (grounds for suspicion or grounded suspicion) to commit a criminal offence; that they are based on a relevant court decision; that the duration of these actions is precisely limited and; that the oversight is in place in respect of legality of these actions implementation”.<sup>15</sup>

These conditions are specified in the 2017 the Council of Europe Recommendation of the Committee of Ministers to member States on “special investigation techniques”. Namely, these special measures, that is, the special investigation techniques are defined to mean “techniques applied by the competent authorities in the context of criminal investigations for the purpose of preventing, detecting, investigating, prosecuting and suppressing serious crimes, aiming at gathering information in such a way as not to alert the target persons”.<sup>16</sup>

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aning of Article 8 ... The actions took place within the context of a deal relating to 5 kg of cocaine. The cantonal authorities, who had been warned by the German police, selected a sworn officer to infiltrate what they thought was a large network of traffickers intending to dispose of that quantity of drugs in Switzerland. The aim of the operation was to arrest the dealers when the drugs were handed over.

<sup>15</sup> In this regard see ECHR *Huvig v. France*, Application no. 11105/84 and Judgment of 24 April 1990; and ECHR *Kruslin v. France*, Application no. 11801/85, and Judgment of 24 April 1990.

<sup>16</sup> See: Committee of Ministers, *Recommendation of the Committee of Ministers to member States on “special investigation techniques” in relation to serious crimes including acts of terrorism*, CM/Rec(2017) 6.

Criminal procedure law in Bosnia and Herzegovina, that is, all four criminal procedure acts in Bosnia and Herzegovina provide for seven special investigative actions. These are as follows: surveillance and technical recording of telecommunications; access to the computer systems and computerized data processing; surveillance and technical recording of premises; covert following and technical recording of individuals and objects, transportation means and related objects; use of undercover investigators and informants; simulated and controlled purchase of objects and simulated bribery and supervised transport and delivery of objects. These offences are analyzed in separate chapters dedicated to the special investigation techniques.

### **Protection of the individual's private sphere**

A separate area within the right to privacy, which is particularly important for the police and security agencies, is the personal data protection. Namely, the work of all police and security agencies is based on data and information collection, processing and use. On the other hand, The use of new information technologies largely facilitates police action against different forms of criminality. The registration and the analysis of personal data, in particular, allows the police to crosscheck information and thus to expose networks the existence of which would remain obscure without resort to these tools. However, the uncontrolled use of personal data may constitute violations of the right to privacy of the individuals concerned. Therefore, the collection, the storage, and the use of personal data by the police should be carried out in accordance with international data protection principles and, in particular, be limited to the extent necessary for the performance of lawful, legitimate and specific purposes.<sup>17</sup> In order to avoid the abuses at all the stages of the collection, the storage and the use of personal data, such police activities must be guided by principles for the data protection and the protective measures during the whole course of such proceedings should be in place (Article 42 of the European Code of Police Ethics and the Commentary

<sup>17</sup> For instance, European Court of Human Rights in case of *Malone v. United Kingdom*, Application 8691/79 and Judgment of 2 August 1984 has found a violation of Article 8 of the European Convention. The case related to the police tapping the phone and “metering” of the telephone calls from a certain number where the European Court held that although the metering of the telephone calls was legal and constituted a standard practice, unlike the phone tapping, giving the list to the police without the relevant legal regulation or the relevant party's consent constituted the unjustified interference into the right to privacy. On this case please see: Gomien, Donna, *Kratak vodič kroz Evropsku konvenciju o ljudskim pravima / A short Guide into the European Convention on Human Rights, 3<sup>rd</sup> edition*, Sarajevo, the Council of Europe, 2005, p. 99



to Article 42).<sup>18</sup>

In this regard it is emphasized that the violation of the right to privacy is mostly made possible through the implementation of technical surveillance measures. One of the risks involved is that the data collected, for instance, through the implementation of the CCTV<sup>19</sup> can be made available to a third party.<sup>20</sup> Another risk is the possible abuse of so collected personal data in order to realize some material or other gain by means of blackmailing. In conducting security checks for the job seekers in the police and security agencies, personal data which are not necessary for that purpose are often collected. There are opinions that our current personal data protection legislation is not fully aligned with the requirements of the European standards in this area.

In this sense it is necessary to pay particular attention to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data adopted in 1981 and the Protocol to this Convention, as well as the Recommendation R(87)15 regulating the use of personal data in the police sector), adopted in 1987<sup>21</sup> by the Council of Europe. The police and security agencies are expected to observe certain data protection principles, and

<sup>18</sup> Also, the European Court of Human Rights in a case *Byukov v. Russia* (GC), Application 4378/02 and Judgment of 10 March 2009 emphasizes that the interference into the right to privacy is not in accordance with the law in sense of Article 8 paragraph 2 or European Convention on Human Rights when the authorities fail to provide safeguards in the procedure by which the interception was ordered and implemented. In particular, the legal discretion of the authorities to order the interception was not subject to any conditions, and the scope and the manner of its exercise were not defined

<sup>19</sup> “CCTV stands for a Closed-Circuit Television, and it constitutes a component of an integral system of the technical protection of the buildings and their role can be viewed through three basic functions: surveillance, recording and retraction. The essential parts of the Closed-Circuit Television are cameras, transmission channels, monitors and picture recording and reproduction devices”. Simić, Ružica, Bošković, Mićo, *Fizičko-tehnička zaštita objekata / Physical and technical protection of objects*, Belgrade, Bodex, 1995, p. 105

<sup>20</sup> A research conducted in the Netherlands in order to establish whether or not the operators engaged in the implementation of surveillance can give guaranties of the observance of the criteria set out in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (such as, e.g. prohibition of making copies of recordings without the necessary permission, keeping of the recorded data only for limited time period as necessary for the pursuit of the purposes underlying its implementation etc., suggests that these subjects carry out their activities in accordance with the national and international standards. See: Dubbeld, L., “Protecting the Personal Data in Camera Surveillance Practices”, *Surveillance and Society*, vol. 2, No. 4, 2004, p. 558.

<sup>21</sup> Council of Europe, Recommendation (Rec(87)15 regulating the use of personal data in the police sector).

to restrict the use of the collected data only to a degree necessary to achieve the legitimate aim involved.<sup>22</sup> On the other hand, the right of the public members to have the insight into their data in possession of these authorities should be defined. In addition to that, a system should be put in place to allow for some external authorities, independent from these, to supervise and control the process of collecting, keeping and use of such data.<sup>23</sup>

Police, and security agencies, even without the intention to collect personal information for the purposes of criminal investigations and national security, out of very nature of their work, come into possession of various information about private life of citizens and family relationships. Unauthorized disclosure of such data, as well as data from the records of these bodies, may inflict damage to the reputation and private interests of individuals. For this reason, these bodies need to keep such data confidential, and use it only for official purposes, that is, to carry out their lawful tasks. In addition to that, there is another limitation in the sense that the data collected for the purpose of certain investigations need to be destroyed upon its completion.

Protection of privacy lies at the root of the idea involving the establishment of the individual's freedom sphere. For that reason, it is often emphasized that "without the protection of their privacy, none can be truly free".<sup>24</sup> This is why the European Code of Police Ethics underlines that the police, in carrying out their activities, has always to bear in mind everyone's fundamental rights, such as the freedom of thought, conscience, religion, expression, peaceful assembly, movement and the peaceful enjoyment of possessions (Article 43)

### **Types and conditions for the implementation of the special investigative actions in Bosnia and Herzegovina**

Special investigative actions in their present capacity constitute a novice which is only in 2003 introduced to all four pieces of criminal procedure legislation in Bosnia and Herzegovina<sup>25</sup> through the provisions which are more or less in

<sup>22</sup> Council of Europe, *Guide on Article 8 of the Convention – Right to respect for private and family life*, European Court of Human Rights, 2018, p. 34.

<sup>23</sup> Pavlović, Gojko, *Bezbjednosna funkcija države i zaštita ljudskih prava, Doktorska disertacija / Security function of the state and human rights protection, Doctoral thesis*, Belgrade, the Faculty of Law, Union University, 2015, p. 177.

<sup>24</sup> Milosavljević, Bogoljub, Popović, Dragoljub, 2009, *op. cit.*, p. 155

<sup>25</sup> According to the constitutional set up of Bosnia and Herzegovina there are four criminal procedure codes in Bosnia and Herzegovina, two at the entity level, one of the Brčko District of Bosnia and Herzegovina and on at the level of Bosnia and Herzegovina: Criminal

force till the date. In some previous periods it was regulated in a fragmentary manner (in 1998 Criminal Procedure Code of the Federation of Bosnia and Herzegovina<sup>26</sup>, and that of Brčko District in 2000), and only some of these actions were foreseen. On the other hand, it should keep in mind that prior to the adoption of the mentioned criminal procedure norms which define the above actions, this topic was governed by some by-laws such as the “Binding Instruction on the Use of Certain Means and Methods in the Operative Work of the Public Security Agency”. However, the fact that such a complex matter is governed by a by-law instead of a law, often leads to the violation of the fundamental human rights and freedoms enshrined by the documents and legal instruments binding for the state and supposed to be implemented by the authorities.<sup>27</sup>

Special investigative actions are not only based on the use of certain techniques, but they also comprise the practical implementation of special means, actions and measures, which makes these actions specialized in their content, thus giving them a special operative dimension. These specialized actions are different from the standard or classical evidence producing actions, that is, the standard evidence collecting methods.<sup>28</sup> All four criminal procedure codes in

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Procedure Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina* No. 3/2003, 32/2003, 36/2003, 26/2004, 63/2004, 13/2005, 46/2005, 48/2005, 76/2006, 29/2007, 32/2007, 53/2007, 76/2007, 15/2008, 58/2008, 12/2009, 16/2009, 93/2009 and 72/2013; Criminal Procedure Code of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, no. 53/2012, 91/2017 and 66/2018; Criminal Procedure Code of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina* no. 35/2003, 37/2003, 56/2003, 78/2004, 28/2005, 55/2006, 27/2007, 53/2007, 9/2009, 12/2010, 8/2013 and 59/2014; Criminal Procedure Code of Brčko District of Bosnia and Herzegovina, *Official Gazette of the Brčko District of Bosnia and Herzegovina*, no. 33/2013 - consolidated and 27/2014.

<sup>26</sup> The special investigative actions were listed for the first time in 1998 Criminal Procedure Code of the Federation of Bosnia and Herzegovina, and their application is possible only if there is a “grounded suspicion”.

<sup>27</sup> See: Mitrović, Ljubinko, Gajić, Goran, *Posebne istražne radnje i pravo na privatnost / Special investigative actions and the right to privacy* published in Compilation of proceedings of the International scientific conference titled: Freedom, security: the right to privacy, Novi Sad-Beograd, Provincial Protector of Citizens – Ombudsman and the Institute of Criminology and Sociology Research, 2017.

<sup>28</sup> Kržalić, Armin, *Posebne istražne radnje: Normativna uređenost i osvrt na praktičnu primjenu / Special investigative actions: Normative regulation and comment on its practical implementation*, Sarajevo, Security Studies Center, 2016, p. 4.; It is important to emphasize when discussing the special investigative actions used by the police agencies in the course of criminal procedure to distinguish these actions from similar measures implemented by the Intelligence – Security Agency of Bosnia and Herzegovina for the protection of the interests of the state. In this sense the Law on Intelligence – Security Agency of Bosnia and Herze-

Bosnia and Herzegovina foresee the special investigative actions, as well as the specific measures by which the fundamental human rights and freedoms of the citizens can be temporarily restricted for the purposes involving the suppression of the complex forms of criminality.

Special investigative actions can only be applied to a suspect in respect of whom the *grounds for suspicion*<sup>29</sup> have been established that he has committed or has along with other persons taken part in committing or is participating in the commission of a criminal offence falling within the scope of a separate group of criminal offences or that s/he participates in the commitment of such an offence, or a suspect for whom there are *grounds for suspicion* that s/he, together with other persons, has participated or still participates in the commitment of the mentioned criminal offences. Related to a requirement for these measures to be authorized (ground for suspicion) it should be emphasized that it is not sufficient only to have certain operative findings without the checking of such information, or finding another evidence to corroborate it, in addition to taking the other actions in order to collect evidence of a certain criminal offence.<sup>30</sup>

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govina (ISA BiH) in Chapter VIII titled Collection of Information comprises the provisions related to the methods used by the ISA of Bosnia and Herzegovina within its general competences to collect information (e.g. measures involving the physical surveillance in public places, measures of physical surveillance in places which do not have public character). ISA BiH takes measures of secret collection of information that need to be authorized by Director-General of the Agency (when it is deemed to be necessary for the performance of its duties) and measures of secret information gathering subject to judicial authorization). Law On The State Investigation And Protection Agency and the Law on Police Officers of Bosnia and Herzegovina do not foresee such measures, that is, they take actions in the framework of the Criminal Procedure Code of Bosnia and Herzegovina. See: Pajević, Maid, *Savremene obavještajne teorije / Contemporary intelligence theories*, Mostar, High School "Logos centar", 2013, p. 344; Savov, I., "The collision of national Security and Privacy in the age of information technologies", *European Police Science and Research Bulletin*, Issue 15, Winter 2016/17, pp. 13-20.

<sup>29</sup> Pursuant to the Criminal Procedure Code of the Republic of Srpska "grounded suspicion" is a higher degree of suspicion based on collected evidence leading to the conclusion that a criminal offence may have been committed." According to the Criminal Procedure Code of the Republic of Serbia a "grounds for suspicion" is a set of facts which indirectly show that a certain person is the perpetrator of a criminal offence, while "grounded suspicion" is a set of facts that directly show that a certain person is the perpetrator of a criminal offence. Grounded suspicion (unlike the grounds for suspicion existence of which is necessary for the issuance of an order to undertake an investigation) represent is a higher degree of suspicion based on collected evidence leading to the conclusion that a criminal offence may have been committed .

<sup>30</sup> This position was taken by the judge for preliminary proceedings of the High Court in Belgrade, Special Division, in the ruling Pov. Po1 no. 157/13 of 08 April 2013 denying the motion

Another requirement for the authorization of the special investigative actions is related to impossibility of obtaining evidence in another way (consequently, if the evidence could have been collected using another method, that is, classical evidence collection actions, there would be no need for the implementation of these actions), which means that these actions are implemented in cases when the acquiring evidence in another manner, or their gathering would be significantly prolonged. According to the wording of the Law, these actions can be applied only in the following events: if evidence for criminal prosecution cannot be acquired in another manner, or its gathering would be disproportionately difficult. In order to secure that these actions are used only as an exception, in accordance with the principle of proportionality, in deciding on ordering and the duration of these actions, it should be particularly considered whether the same result could be achieved in a manner less restrictive to the citizens' rights.

Third, surveillance and technical recording of telecommunication as a separate investigative action<sup>31</sup> can be ordered against a person against whom there are grounds for suspicion that s/he will deliver to the perpetrator or will receive from the perpetrator of the relevant offenses information in relation to the offenses, or grounds for suspicion that the perpetrator uses a telecommunication device belonging to those persons. Since in these cases a person subject to surveillance and technical recording is not a criminal offence perpetrator, legal provisions for such a person to be subjected to surveillance should be set out cumulatively and should comprise grounds for suspicion that this person is conveying information to or from the perpetrator, but these information should only be related to the concrete criminal offence. The second reason for tapping and surveillance of a third person can only be found in situations when a criminal offence perpetrator uses the communication means (for instance, the mobile phone) owned by that third person.

The fourth requirement is extremely important for the enjoyment of the right of suspected persons to defense: investigation authorities cannot implement special investigative actions to conversations and other communication between the suspect and their lawyer.

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filed by the Prosecutor's Office for Organised Crime for an order to be issued for the use of covert interception and recording of the communication against a suspect for the above mentioned reasons. Cited according to: Radisavljević, M., Četković, P., Special investigative actions in prosecutorial investigation in Serbia, in: Jovanović, I., Petrović-Jovanović, A., (ur.), Prosecutorial investigation - regional criminal procedure legislation and experiences in application, Belgrade, OSCE Mission to Serbia, 2014, p. 168.

<sup>31</sup> Compare: Ninčić, Željko, "Communication surveillance as a process coercion measure", *Bezbjednost - Policija - Građani/ Security - Police - Citizens*, year X, no. 1-2, 2014.

The fifth requirement is related to the definition of criminal offences for which the special investigative actions can be lawfully ordered. Namely, the criminal procedure legislation in Bosnia and Herzegovina comprises the list the criminal offences in respect of which the special investigative actions can be endorsed. These are:

- a) criminal offences against the Republic of Srpska, that is, against the integrity of Bosnia and Herzegovina - Criminal Procedure Code of the Republic of Srpska / CPC RS and Criminal Procedure Code of Bosnia and Herzegovina / CPC BiH,
- b) criminal offences against humanity and values enshrined by international law - CPC RS and CPC BiH,
- c) criminal offences of terrorism CPC RS and CPC BiH, and
- d) criminal offences criminal offenses for which, pursuant to the Criminal Code, a prison sentence of three or more years may be pronounced - CPC BiH, CPC of the Federation of BiH, CPC BD BiH, that is, five or more years - CPC RS.

As much as the implementation of the special investigative actions is not raising concerns in case of the first three groups of criminal offences, the fourth group is subject to many discussions, since, as it is defined, the domain of special investigative actions is not restricted only to criminal offences of organized crime, but they can be applied to other criminal offences, some of which do not even include elements of any significant increase in societal danger for the safety of citizens. Namely, the analysis of the provisions of Criminal Procedure Code of Bosnia and Herzegovina clearly shows that as much as 80% of criminal offences defined in a special part of this Law can be used for special investigative actions. In this way, and by significantly expanding the scope of application of these actions, the most important reason or motive of the legislator for their introduction is lost, namely “combating the most difficult forms of organized crime”. It is quite clear that such legal solutions extend the application of special investigative measures, although they should not, to other offenses, not only those most severe, whereby the legislator must have taken into account all the sensitivity and complexity of the practical application of these actions, especially in relation to possible violations (abuses) and restrictions of the fundamental rights and freedoms of citizens.

A formal requirement for the authorization of the special investigative actions for the mentioned criminal offences is the existence of a written and a reasoned motion of the prosecutor, followed by a reasoned order to implement these measures issued by the preliminary procedure judge. Special investigative actions can only and exclusively be taken on the basis of the appropriate court decision (a written or oral order issued by the preliminary procedure judge where as a rule it should be a written order, while the oral order is only an exception). So, nobody else but the preliminary procedure judge<sup>32</sup> can issue an order for the implementation of a certain action or the certain actions (the court order contains the same data as those featured in the Prosecutor's motion as well as the advice as to whom the citizens can complain should they deem their rights and freedoms violated by the application of the special investigative actions<sup>33</sup>), with a clear reference to the type of required measure and the duration of the measure which should be referred to the police body (in some countries this power is transferred to the prosecution). In case of judge's disagreement with the prosecutor's motion (the prosecutor's motion includes: the data on the person, group or organization against which the measure is to be applied, the grounds for suspicion for the mentioned persons, group or the organization, the conditions and, the reference to the type of required measure and the extent and duration of the measure) no special investigative action will be ordered.

Exceptionally (the problems emerge when an exception becomes a rule), the preliminary proceedings judge can issue a verbal order in the following two situations: 1) if a written order cannot be received in due time and 2) if delay poses a risk. Besides that, the police bodies, if they want to continue with the implementation of a special investigation action should obtain a written order of the court within 24 hours following the issue of the verbal order.

The following requirement is related to the duration of the special investigative actions, which is very important from the practical aspect of its use, since these actions cannot be prolonged forever, so there must be temporary restriction involved in the application of these actions. According to the law these actions can last as follows:

<sup>32</sup> Mitrović, Ljubinko, Pavlović, Gojko, *Judicial oversight and control over the implementation of the special measures used by the security agencies*, In: Compilation of proceedings of the International conference titled: "Suppression of organized crime as a prerequisite of the rule of law", Vršac, Comparative Law Institute in Belgrade, 2016, p. 133-149.

<sup>33</sup> In addition to the internal control bodies or the professional standards units of the ministries of interior, the citizens can complain before the parliamentary petitions committees, the Human Rights Ombudsman of Bosnia and Herzegovina and higher court instances up to the Supreme Court of Bosnia and Herzegovina and the European Court of Human Rights.

- a) may last up to one month, while on account of particularly important reasons the duration of such measures may upon the properly reasoned motion of the prosecutor be prolonged for a term of another month,
- b) up to six months can last the measures involving:
  - surveillance and technical recording of telecommunications (phone tapping),
  - access to the computer systems and computerized data processing and
  - surveillance and technical recording of premises (wiretapping),
- c) up to three months can last the measures involving:
  - covert following and technical recording of individuals, transportation means and related objects
  - supervised transport and delivery of objects of criminal offense.
- d) simulated purchase of certain objects and simulated bribery (order is given one-time and on a case-to-case basis),
- e) time restriction for the use of undercover investigators and informants is not foreseen as it can seriously hinder its successful implementation.

If the prosecutor and the preliminary proceedings judge disagree as the extension of the time period of a special action duration, the decision of the judge is final and binding. By a written order issued *ex officio* the preliminary proceedings judge must suspend the execution of the undertaken special investigative actions if the reasons for previously ordering the measures have ceased to exist.

For confidentiality reasons, that is, the efficiency of the criminal procedure, the order of the preliminary proceeding judge and the prosecutor's motion have to be kept in a separate envelopes. Also, the procedural provisions oblige the prosecutor and the preliminary proceedings judge to compile or transcribe the records without making references to the personal data about the undercover investigator and informant, or in another appropriate way, the prosecutor and the preliminary proceedings judge must prevent unauthorized officials as well as the suspect and his defense attorney from establishing the identity of the undercover investigator and of informant. Should these persons appear at the main hearing as witnesses, the application of witness protection measures can be considered, along with anonymous witness account, or questioning by means of technical



audio and visual transfer devices allowing to the parties and to the lawyer to ask questions while absent from the room in which the witness is located.<sup>34</sup>

Ninth, the police bodies<sup>35</sup> implementing the special investigative actions have the obligation (they are bound), upon the completion of a certain action (or actions) to submit all information, data and materials (for instance, recordings, reports, objects) obtained through the application of the special investigative actions to submit it to the prosecutor.<sup>36</sup> In addition to these collected materials, these bodies are obligated to submit to the prosecutor a written report on all the taken actions (in this report the police bodies have to mention a person or the persons against which this action is taken, criminal offence for which this special investigative action is implemented, circumstances of this action, its duration, results achieved by its implementation and the indication of the official who has taken the action)<sup>37</sup>. In this way, the prosecutor has the opportunity to assess

<sup>34</sup> Sijerčić-Čolić, Hajrija, *Prikrivene istražne radnje u borbi protiv organiziranog kriminaliteta – primjer Bosne i Hercegovine / Covert investigation actions in combating the organized crime - case of Bosnia and Herzegovina* Compilation of papers of the Faculty of in Split, year 46, no. 4, 2009, p. 687-700.

<sup>35</sup> Implementation of special investigative actions is the duty of the police which is, as in case of some other evidence gathering actions, in the role of the court assisting body.

<sup>36</sup> Gluščić, S., “Posebne dokazne radnje / Special evidence collecting actions”, *Policija i sigurnost / Police and security*, Zagreb, year. 21, no 3, 2012, p. 555-573.

<sup>37</sup> According to the provisions of criminal procedure legislation in Bosnia and Herzegovina the method of implementation has not been provided for, that is, undertaking the special investigative actions by the law enforcement agencies and this is subject to their operative work. Police agencies determine the concrete details of the implementation of the special investigative actions by the relevant by-laws (guidelines, rules, instructions, manuals etc.) defining the concrete activities related to the direct implementation at the operative i.e. executive level. Mentioned by-laws set out the concrete methods of police officers actions related to the operative (executive) actions: selection of the appropriate special investigative action in every concrete case at hand depending on nature of the criminal offence committed, method of providing support to subjects in the implementation of the special investigative actions, preparatory actions (selection of the undercover investigator, briefing of the undercover investigator with their superior or the psychologist if necessary, familiarization with all relevant information and data related to a criminal group concerned), costs and the appropriate fees, and the final stage – analysis of the all undertaken activities with special emphasis to rectification of certain problems, shortcomings and like. It is particularly important to emphasize the role of the undercover investigator who in no case can take actions inciting another person to the perpetration of a criminal offence, that is, s/he cannot take any action that constitutes an intent to form or strengthen a decision to commit a criminal offence. This means that in selection of the undercover investigator due care should be taken that this person has passed the professional training for implementation of very complex, demanding and dangerous tasks, in particular in respect of the fact that intrusion into an organized criminal group means the entrance into a criminal zone where the members are expected to commit criminal

the method of implementation of the required special investigative actions, and, most importantly, respect of human rights and freedoms, or the overall police action in realization of the prosecutor's reasoned motion followed by the court order.<sup>38</sup> On the other hand, the prosecutor has an obligation to submit a written report on the actions taken to the preliminary proceedings judge, so that s/he may also be acquainted with the actual implementation of the action, in order to establish whether it was done according to its order and the framework set in it. All this would be a way to protect the person against whom a covert investigative action was ordered.

Furthermore, according to the explicit legal provision, destruction of material collected through the special investigative action must take place in certain cases. This happens for two reasons: First, if the prosecutor decides to refrain from prosecution, and second if the data and information obtained through the application of the these actions will not be needed for the criminal proceedings. The prosecutor has the duty to inform about it the preliminary proceedings judge under whose supervision the collected material has to be destroyed. On the other hand the preliminary proceedings judge has to make a separate record about it and to notify a person subject to undertaking of the actions, the reasons for their undertaking, with the information stating that the received material did not constitute sufficient grounds for criminal prosecution and was thereafter destroyed. According to the relevant legal provisions, person may request from the court a review of the legality of the order and of the method by which the order was enforced.<sup>39</sup>

Eleventh, the preliminary proceedings judge is obligated, without any delay, that is, as soon as any of the special investigative actions is taken, to inform a person against whom this action was taken stating in this information that a special investigative action was taken against him/her (in practice, this happens very rarely, so that the fact that somebody's phone was tapped remains unknown to this person). On the other hand, data and information collected during the implementation of the special investigative actions are kept as long as the court file.

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offences. See: Karović, S., "Posebne istražne radnje u krivičnom procesnom zakonodavstvu Bosne i Hercegovine / Special investigative actions in the legislation of Bosnia and Herzegovina", *Časopis Civitas, Civitas Magazine*, no. 4, 2012, p. 26.

<sup>38</sup> See: Mitrović, Ljubinko, *Policijsko pravo – pravo unutrašnjih poslova / Police law - internal affairs law*, Banja Luka, Defendologija Security, Sociology and Criminology Research Center, 2008, p. 5-45.

<sup>39</sup> Sijerčić-Čolić, Hajrija, 2009, *op.cit.*, str. 687-700.

There is a number of other important preconditions in criminal procedure law for implementation of the special investigative actions. For instance, according to the provisions of the criminal procedure law, information and data obtained as a result of the special investigative actions cannot be used as evidence if the criminal offence in respect of which these actions were applied is not explicitly listed in the list of offences in the part of the CPC related to the special investigative actions. These preconditions should also be listed in the court order, this is the reason why the court order and its framework constitute a *conditio sine qua non* in considerations related to the legality of the proceedings and evidence collecting activities. And finally, the court decision cannot be based on illegal evidence, as it cannot be based on evidence obtained owing to the implementation of illegally implemented special investigative actions.<sup>40</sup>

### Closing remarks

The Question that has arisen through this paper to which we have tried to give an answer is whether it is possible to achieve security at any level without denying human rights? In this regard, many standards established by numerous international and regional instruments on the basis of which security agencies carry out their activities have been identified. These standards contain principles and examples of good practice to be pursued and respected for the benefit of citizens. For the police and security agencies this imposes an obligation to respect the privacy and the freedom of citizens, as well as to protect them from possible violations.

Article 8 in paragraph 2 of the European Convention allows the possibility of restricting the right to respect for private and family life, home and correspondence. The temporary limitation of the right to privacy or some of its elements may be subject to legal restrictions imposed by the public authorities only if this is strictly necessary in a democratic society<sup>41</sup> for the protection of the interests of national security, public security, the economic well-being of the country, for prevention of disorder or crime, for the protection of human health or morals or the protection of the rights and freedoms of others. Nevertheless, every natural person has the right to the protection of the above rights in case of interference with them or their violation.

Despite the fact that there are real dangers of misuse of special investigative actions, from comparative law aspect, there is no example of a legal order which

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<sup>40</sup> Ibidem.

<sup>41</sup> For more details see: Council of Europe, 2018, *op. cit.*, p. 11.

does not foresee them. Provisions on special investigative actions undoubtedly increase the effectiveness of state authorities, but to the detriment of citizens' rights. These actions mostly infringe the right to privacy. Purposes deemed to acceptable as a justification for such infringement can be summarized to the needs to prevention and suppression of the most severe forms of criminal offenses. Also, when undertaking these actions, there must be established proportionality between the gravity of the particular criminal offense being investigated and the human right, or the freedom being reduced by the implementation of these actions.

Constitutional matter in Bosnia and Herzegovina includes the provisions on human rights and the organization of public authorities, that is, the bodies obliged to provide respect and protection of human rights. All of the constitutions in Bosnia and Herzegovina have more than a half of its total number of articles dedicated to human rights. Nevertheless, the analysis of these constitutional provisions leads to the conclusion that they contain a large number of protected rights, but some of the provisions are unclear and some rights guaranteed by the international treaties are not listed. For example, there are no special guarantees on the right to privacy, but this right is protected through some of its elements.

According to some opinions current positioning of special investigative actions within the criminal law in Bosnia and Herzegovina, in particular given the fact that sufficient justification for their use is the existence of grounds for suspicion as the lowest degree of probability, raises the question whether the use of these measures, which are supposed to be applied only in exceptional circumstances because of their potential to restrict human rights, is disproportionate within the course of a regular criminal procedure. It is, therefore, necessary for legislators, in their future harmonization of criminal procedure law, to raise the degree of probability from "grounds for suspicion" to "grounded suspicion" and allow for the use of these actions only in the latter case. In addition, the legitimate use of special investigative actions requires clear rules regarding all the circumstances in which they are approved and the ways how they are implemented.

In conclusion, it is necessary to underline, in respect to ever stronger requests for granting the extended powers to the police and security authorities, that this is an ancient dilemma, not nearly something that emerged in modern societies that needs to be resolved. This is a collision between the issues of order and issues of freedom, the realm of power sphere and the realm of freedom. Nowadays, this dilemma, i.e. the relationship cannot be regarded and solved independently

from already established principles involving the rule of law and human rights, but only in their framework.

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