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25th CONFERENCE OF EUROPEAN MINISTERS OF JUSTICE

Sofia (9-10 October 2003)

- **INTERNATIONAL CO-OPERATION IN THE FIGHT AGAINST INTERNATIONAL TERRORISM AND IMPLEMENTATION OF THE RELEVANT INSTRUMENTS OF THE COUNCIL OF EUROPE**

- **THE RESPONSE OF THE JUSTICE SYSTEM - CIVIL AND CRIMINAL - TO TERRORISM**

Report presented by the Minister of Justice of

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The Response of the Judiciary to Terrorism
- Criminal-Law and Civil-Law Dimensions -

Introduction

The topic to be addressed at the 25th Conference of European Ministers of Justice has been imposed by the new priorities underlying international action and the efforts of States after the tragic events of 11 September 2001.

The previous, 24th Conference of European Ministers of Justice which took place in Moscow, in October 2001, approved Resolution No. 1 on Combating Terrorism. Thereby, the Ministers of Justice of the Member States of the Council of Europe condemned the atrocious terrorist attacks committed in the United States and identified the steps to be undertaken by Member States and by the organisation to respond to the new challenges posed by terrorism.

Since 11 September, the threat of terrorism has become a major challenge to modern democracy and to the fundamental values of society. Moreover, it has gone global. Wherever they might be committed, acts of terrorism affect the interests of all of us, as they are aimed against the principles which form the very foundation of our countries: human rights, pluralistic democracy, and the rule of law. Terrorism is targeted at those values which our societies have cherished for centuries: the values of cultural, ethnic and religious diversity and tolerance. Citizens of states where this phenomenon is non-existing frequently find themselves among its victims. Moreover, there is a real threat that terrorists might use the territory of such countries to prepare for attacks in other countries.

It is unquestionable that the fight against terrorism must engage primarily the efforts of any State represented by its competent authorities. In that respect, the role of the Judiciary is crucial, as this is the branch of power called upon to protect the rights and legitimate interests of individuals, of legal entities and of the State from criminal assault in general, and in particular from assaults that undermine the fundamental freedoms and the democratic pillars of society.

Terrorism is a criminal offence, its perpetrators are criminals and should be treated as such in all circumstances. The steps undertaken by the Judiciary in response to that crime are based on, and predetermined by the legal instruments which govern the operation of the judicial system, *i.e.* the Constitution, the laws of the land and international law, and the mechanisms developed on their grounds. It is, therefore, essential to have in place an adequate legal and institutional framework which enables the efficient administration of justice in response to terrorism. The Judiciary must have at its disposal the required procedures and methods, so that it could duly prosecute terrorism and protect the rights and interests of its victims. The successful fulfilment of the tasks of the Judiciary in this area largely depends on the steps made by the law-makers, on its interaction with the competent Executive agencies, such as the police and the financial intelligence, and on the support provided by the civil society and the media.

A most effective way to counter terrorism is to duly implement and apply the international instruments and national legislation aimed at preventing and punishing terrorist acts and their financing and, finally, at bringing the perpetrators of those acts and their aiders and abettors to justice.

1. Legislation on the Prevention, Prosecution and Punishment of Terrorism and its Financing

a) Terrorist acts defined

The first precondition for the Judiciary to be efficient in providing protection from assaults by terrorists and in adequately prosecuting them, is to have a modern criminal-law definition of terrorist acts that should cover all possible forms of that crime. The criminalisation of terrorist and related acts has been a topical issue for the international community and for the individual States in the aftermath of the attacks of 11 September 2001. Those tragic events highlighted the need to reinforce international anti-terrorist cooperation and demonstrated how important it is to share a common legal, as well as political understanding of the nature of terrorism. In the context of international judicial cooperation, the need for a universal approach to the criminalisation of terrorism also derives from the requirement for double criminality that is central to the execution of requests for extradition and sometimes even of applications for legal assistance.

Defining terrorist acts and, especially, criminalising the deeds related thereto often evokes problems which might frustrate but not bar the finding out of a common approach to be followed by all countries. For example, one such issue is the criminalisation of incitement to terrorism and the so-called *apologie du terrorisme* (or public exoneration of terrorism) where a proper balance should be drawn between the prevention of acts of terrorism, on the one hand, and the freedom of expression, on the other hand.

A year after the unprecedented terrorist acts of 11 September 2001, the Republic of Bulgaria passed amendments to its Criminal Code that were designed to introduce a definition of terrorism and modern rules to punish terrorist acts, the financing of terrorism, the setting up, management of and participation in terrorist groups, the preparation to commit acts of terrorism, the open incitement to terrorism, and the threat to commit terrorist acts. In addition, the Law Amending and Supplementing the Criminal Code passed on 13 September 2002 governs the forfeiture of funds intended for the financing of terrorism and the confiscation of the property of perpetrators of terrorist offences and of anyone financing such perpetrators. During the drafting of those legislative amendments, the relevant provisions of a number of international instruments were taken into consideration, in particular the International Convention for the Suppression of the Financing of Terrorism, some texts of the Draft UN Comprehensive Convention to Counter International Terrorism, the Framework Decision of the Council of the European Union on Combating Terrorism, as well as the traditions of Bulgarian criminal law.

The efforts of individual countries to streamline their national counter-terrorism legislation must be supported by a corresponding international instrument that should provide for the co-ordinated criminalisation of those offences. The harmonisation of national laws and regulations on combating such transnational phenomena as terrorism is inevitably more efficient when it is based on multilateral legally binding instruments. It is our understanding that the co-ordinated criminalisation of terrorist acts would improve both the opportunities of the Judiciary to prosecute them successfully, and the conditions for inter-state judicial cooperation in this area.

It is noteworthy that even after the amendments made thereto, the European Convention on the Suppression of Terrorism still provides exclusively for an obligation to

"depoliticise" terrorist offences or, in other words, to eliminate any possibility to refuse the extradition of an individual solely on the ground that the offence committed qualifies as a political crime in the requested party. The provisions of the Convention do not introduce any obligation for the Parties thereto to criminalise those offences in their domestic legislation.

The issue of criminalising terrorism has been on the agenda of the United Nations for a long time already. It is within the framework of the UN that twelve sectoral conventions have been agreed on concerning the criminalisation of specific acts of terrorism (the Republic of Bulgaria is a party to all the twelve UN sectoral conventions) and discussions are under way on a comprehensive convention on the co-ordinated criminalisation of terrorism. While recognising the major part the United Nations is urged to play in the fight against this world-wide phenomenon, we are aware that a number of factors apparently prevent the desired progress from being attained at this stage of debates within the UN. Under these conditions, and given the particular importance and the pressing nature of the problem, we believe that the Council of Europe could initiate the drafting of an international instrument in this area and would have the potential necessary to fulfil such a task shortly. In this context, we should remind that the oldest political organisation in Europe has proven time and again its ability to unify the positions of its Member States on issues vital to mankind. Within the Council of Europe, the arrival at a common solution could hardly be obstructed by ideological disputes or any material discrepancies in the legal systems of the Member States, on the one hand, while, on the other hand, the organisation would be able to rely on its achievements with drafting the conventions against money laundering, corruption and computer crime. The work to fulfil this task would undoubtedly draw on the developments in the United Nations and the European Union in recent years. Indeed, the experience of the international community with drafting the Comprehensive Convention on Combating Corruption has hinted that if the problem were solved at the paneuropean level, that might contribute to finding a universal solution within the framework of the United Nations.

In the context of the above considerations, may we remind that in the beginning of 2003, the parliamentarians from the Member States of the Council of Europe already voiced their belief that the drafting of a general counter-terrorism convention within the Council of Europe should be given attention, due account being taken of the work in progress within the United Nations (*cf.* Parliamentary Assembly Opinion No. 242 (2003) concerning the Draft Protocol amending the European Convention on the Suppression of Terrorism). During the deliberations on the Draft Protocol and on the Opinion of the Parliamentary Assembly within the Committee of Ministers, a number of delegations reiterated that idea (828th meeting, 13 February 2003). In addition, at the High-level Tripartite Meeting Plus held in February this year, the representatives of the Council of Europe, OSCE and the European Union also welcomed the initiative to possibly draft such a convention within the Council of Europe, so as to complement the instruments and the principles developed in this area by the UN and OSCE.

In addition to the definitions and the obligation to criminalise acts of terrorism, the future international instrument should also cover issues such as the criminal jurisdiction of the Contracting Parties, its own relationship with other relevant international treaties in force, extradition, legal assistance, the exchange of information, the application of special investigation techniques, the protection of witnesses and *pentiti*, the specialisation and training of individuals and bodies responsible for the prevention and prosecution of terrorism. All these issues are directly concerned with the capacity of judicial branches all

over Europe to combat terrorist acts, as well as with the possibilities for efficient legal cooperation among our countries.

Given the frequent link between terrorism, on the one hand, and organised crime, corruption, the trafficking in human beings, drugs trafficking, the trafficking in arms, money laundering, and computer crime, on the other hand, we should also mention the need to adopt adequate substantive rules to punish the above-mentioned offences. This task would be much eased by the existence of common standards for the criminalisation of those offences in the international instruments adopted within the Council of Europe and within the United Nations.

b) The financing of terrorism

The successful suppression of terrorism is conditional upon the cracking down on any possible sources for its financing. Terrorist organisations often receive financial and material support from people engaged in *prima facie* lawful activities. Unlike the process of money laundering, where funds obtained illegally are transformed into "legal" ones, in the case of financing terrorism "clean" money frequently turns into a resource for carrying on a most dangerous criminal activity.

The incrimination, in national law, of the offence of financing terrorist acts and organisations, and the adding of terrorism to the list of predicate offences in the context of money laundering is a major component of the legislative strive to suppress terrorism.

The shared understanding of how important the fight against the financing of terrorism is resulted in the adoption in 1999, within the framework of the United Nations, of the International Convention for the Suppression of the Financing of Terrorism. The events of 11 September 2001 also prompted some new and specific decisions in this area. The resolutions of the United Nations Security Council, the decisions enacted within the framework of the European Union, and the specific recommendations of the Financial Action Task Force (FATF) have given new impetus and orientation for legislative and organisational action to counter the financing of terrorism. That action should affect not only the competencies of police authorities and financial intelligence units, but also the powers of the investigative bodies, the prosecution offices and the courts.

The 2002 amendments to the Bulgarian Criminal Code, referred to earlier, introduced a special rule which makes it possible to punish the financing of terrorism, in conformity with the provisions of the UN Convention.

Nonetheless, the use of working mechanisms to prevent the financing of terrorism seems to be at least as important in the fight against terrorism as is criminal repression. In February 2003, a law was passed in Bulgaria which defined the measures to suppress the financing of terrorism, and provided for the organisation and supervision of their implementation, as well as for the administrative penalties for violations of those measures. The Law on Measures against the Financing of Terrorism was drafted in line with Resolution 1373 (2001) of the UN Security Council on international cooperation to combat threats to international peace and security caused by terrorist acts, and having due regard to Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. The purpose of the law is to enable the prevention and detection of acts by individuals, legal entities, groups and organisations that are intended to finance terrorism.

The measures envisaged in that Law are freezing of assets and other property, and a prohibition to provide financial assets, services or property.

The measures under the Law shall apply with respect to individuals and entities included in the list approved by the Council of Ministers. The list is adopted, modified or amended on a proposal from the Minister of Interior or from the Prosecutor General. Shall be put on the list any individuals and organisations which the UN Security Council has identified as linked with terrorism or on whom sanctions for terrorism have been imposed by virtue of a resolution of the UN Security Council, as well as any persons against whom the Bulgarian authorities have instituted criminal proceedings for terrorism or for crimes related to terrorism. Likewise, may be added to the list any person identified by the competent authorities of another country or of the European Union. The list must be published in the *State Gazette* and the persons concerned may appeal, before the Supreme Administrative Court, against the decision of the Council of Ministers whereby they are placed on the list.

Under the Law on Measures against the Financing of Terrorism, anyone who knows that certain operations or transactions are aimed at financing terrorism must forthwith notify that fact to the Minister of Interior. All banks and other reporting entities under the Law on Measures against Money Laundering must notify the Minister of Interior and the Bureau of Financial Intelligence, should any suspicion of the financing of terrorism arise. Those entities are also under an obligation to insert in their internal regulations criteria for the identification of suspicious operations, transactions and customers related to the financing of terrorism. The disclosure of such information cannot be prevented on grounds of official, bank or commercial secrecy. The competent authorities having received information under that Law, must keep confidential the identity of those who provided the information, and may only use those data for the purpose of the Law or to combat crime.

The Law on Measures against the Financing of Terrorism does not regulate the criminal suppression of terrorist acts. That law, however, puts in place a preventative administrative mechanism, thus building the conditions indispensable to detect the acts that might constitute terrorism-related offences. Therefore, it is expected to contribute substantially to the effective criminal prosecution of the offences in question, which should take place in conformity with the Criminal Code and the Code of Criminal Procedure.

The freezing and the subsequent forfeiture or confiscation of the funds used or intended for terrorist groups or for the commission of acts of terrorism is an important tool to deprive terrorists of the significant financial and material resources they need for their criminal undertakings. The legal provisions adopted to this end should not only regulate the possibility to forfeit or confiscate, but also provide for an efficient mechanism to implement those measures in practice. The successful forfeiture or confiscation of the funds of terrorists would depend exclusively on the capacity of criminal justice authorities to investigate the acts of terrorism and on the access of law enforcement to information about terrorists' assets. The setting up of working domestic legal mechanisms to forfeit the funds of terrorists would also contribute to compensating the individuals who have sustained damage as a result of terrorist acts, and their families.

c) Extradition and legal assistance

The existence of a modern national and international legal framework of extradition and legal assistance is particularly important for setting up the conditions required for the efficient prosecution of terrorism in general, and international terrorism in particular. Domestic laws and regulation on international judicial cooperation should match international standards or at least give priority to international treaties, so that internal legislation would not form an obstacle to the prosecution of terrorists.

The harmonisation of extradition procedures reduces the chances to abuse those discrepancies between the national legal systems which make it possible to avoid criminal prosecution. Terrorist acts must in all cases be on the list of extraditable offence or, if extradition is refused on any ground, the national authorities concerned should undertake the prosecution of the individuals suspected of terrorist activity.

In addition, the proper and timely execution of applications for legal assistance, including those for the seizure and transfer of evidence and for the tracing and identification of persons, are of paramount importance for the administration of justice in such cases.

A number of conventions have been adopted within the framework of the Council of Europe that regulate the conditions for extradition, legal assistance in criminal cases, the transfer of criminal proceedings, the recognition and enforcement of foreign judgments, and the transfer of sentenced persons. Especially after the amendments to the European Convention on the Suppression of Terrorism, those multilateral instruments now form a good basis to extend judicial cooperation also to the suppression of terrorism. The ratification of the conventions of the Council of Europe in the field of criminal law and the implementation of their standards in domestic legislation is of the essence now that an ever closer interaction is necessary between the judicial authorities throughout Europe to prosecute and punish terrorism.

Inspired by the understanding that after 11 September 2001 it is compelling to eliminate any extra-legal (political) barriers to judicial cooperation in combating terrorism, already at the end of that year - on 19 December 2001 - the Republic of Bulgaria withdrew the reservation it had made upon the ratification of the European Convention on the Suppression of Terrorism (under that reservation, Bulgaria had retained the right to refuse extradition for any of the offences listed in Article 1 if it deemed that offence political; the reservation was accompanied by a declaration that murder or the offences accompanied by murder would not be deemed political).

The adoption of the Protocol amending the European Convention on the Suppression of Terrorism formed part of the efforts to update the counter-terrorism instruments of the Council of Europe in the wake of the attacks of 11 September 2001. The draft protocol was prepared within the framework of the Multidisciplinary Group on International Action Against Terrorism (GMT) where Bulgaria constructively supported the proposed amendments to the 1977 Convention (our country was among those who even advocated the abolition of the possibility to formulate reservations to the Convention but no consensus was reached on that point within GMT). In the light of its consistent policy of combating terrorism and relying on wide international cooperation for the purpose of prosecuting and punishing terrorist acts, the Republic of Bulgaria signed the Protocol amending the European Convention on the Suppression of Terrorism in Strasbourg, on 15 May 2003, the very date when it was opened for signature during the 112th Regular

Meeting of the Committee of Ministers of the Council of Europe, and we intend to ratify the Protocol by the end of 2003. We are confident that the forthcoming entry into force of the amendments to the 1977 Convention, as enshrined in the Protocol, should materially improve the conditions for efficient cooperation among the judicial authorities in our countries with respect to extradition and legal assistance. Among the important amendments we would, *inter alia*, single out the one that enables non-Member States to accede to the Convention, the introduction of stricter requirements for the formulation and application of reservations to the Convention, and the setting up of a special body (a Conference of States Parties against Terrorism, or COSTER) in charge of monitoring the implementation of the Convention, reviewing the reservations and making proposals for the steps the organisation should take to enhance legal cooperation in suppressing terrorism. We therefore commend the GMT represented here by its Chair and Vice-Chair for its excellent work under short-time limits and pressure.

2. Training, specialisation, facilities and technical equipment, protection of investigators, prosecutors and judges

In order to be effective, the criminal prosecution of terrorism must be carried out by well trained and qualified investigators, prosecutors and judges who have at their disposal the required equipment and expertise. The fact that some of our countries have been less affected by terrorism does not imply that these States should not make any indispensable effort to provide their magistrates with appropriate training and specialisation. Given the nature of terrorism as a global threat, we all face the need to secure adequate facilities and technical equipment, training and specialisation for all judges, prosecutors and investigators.

More specifically, this means that special modules should be introduced in the curricula and training programmes for magistrates, so as to cover both national counter-terrorism legislation and the international instruments on judicial cooperation in this area.

Good knowledge of domestic legislation on the prevention and prosecution of terrorism, and of the case law of the courts in application of that legislation, is the first requirement for magistrates to be adequately prepared. Training must also provide specialised knowledge of banking and tax legislation and practices, as well as of information technology, as all that background is a must for proving such complex forms of offences as the financing of terrorism and terrorist acts directed at, or carried out through, information and telecommunications systems (*cyberterrorism*). Training should equally address the prosecution and sentencing of a number of other offences linked to the activities of terrorists, *e.g.* organised crime, corruption, money laundering, trafficking in human beings, computer crime.

It is beyond doubt that the training of magistrates should also tackle the issues of international judicial cooperation. This need ensues from the transnational nature of terrorism and from the obligation to punish the perpetrators of terrorist acts wherever those individuals might find themselves. In this sense, the training should focus on the enforcement of domestic legislation, as well as provide in-depth knowledge of the provisions and the effects of international criminal-law instruments, *viz.* the bilateral treaties and, in particular, the multilateral conventions on extradition, legal assistance, the recognition of foreign judgments and orders in criminal matters, and the transfer of criminal proceedings. It is only in this way that magistrates could attain the level and the

quality of awareness required for them to participate in judicial cooperation against international terrorism.

When specialised training programmes for magistrates are introduced that address the criminal prosecution of terrorism, the experience with training to prosecute other serious offences should be drawn upon, *e.g.* the involvement in organised crime syndicates.

Introducing specialised legislation should not necessarily imply a narrow-minded, formalistic specialisation of judges and prosecutors. Nevertheless, while in most countries such specialisation seems inadvisable, there is a clear need for specialised prosecutors and, mainly, specialised investigators. Such specialisation may take a variety of forms, *e.g.* specialisation of individual investigators and prosecutors, or specialisation of separate services and units within the Judiciary.

Terrorist acts tend to be prepared for a long time and in utmost conspiracy. The magistrates responsible for the criminal prosecution of terrorism must have at their disposal the funding and resources that are needed for the success of their work, in particular for gathering evidence, for the protection of *pentiti* and for preserving the secret of investigation.

Those officials or units should be endowed with relatively extensive powers, including access to any information and documents that might be helpful in proving the terrorist activity. To ensure the criminal prosecution of the financing of terrorism, the obstacles stemming from bank secrecy should be removed.

The provision of adequate know-how, facilities and equipment for the receipt and central storage of information is of key importance for the effective prevention and prosecution of terrorist activity.

The protection of magistrates in charge of investigating and prosecuting terrorism, and courtroom security should not be underestimated either. The provision of reliable physical protection to investigators, prosecutors and judges involved in criminal proceedings against terrorists is vital for their expected performance. Therefore, the laws should envisage special measures for the protection of magistrates and court houses, and the required financial and technical resources for the implementation of those measures should be earmarked.

3. The use of special investigation techniques

It is difficult to think of a successful suppression of terrorism without the use of special investigation techniques. The application of various forms of special surveillance methods, such as interception, videotaping, access to computer systems, on the one hand, and especially the use of under-cover agents, on the other hand, are crucial for the prevention and proving of terrorist offences and of their financing. The possibility to use special techniques in order to collect evidence for the prosecution of terrorism should be regulated explicitly in the domestic laws and regulations, while at the same time providing adequate guarantees for the protection of human rights and fundamental freedoms. Another issue in need of appropriate regulation is the interaction among the police, who are called upon to immediately apply those techniques, and the bodies of the Judiciary which authorise such application and then admit and cross-check the demonstrative evidentiary means prepared by the police. In Bulgaria, the use of special investigation techniques is covered by the Code of Criminal Procedure and the Law on Special Investigation Techniques. In May 2003, the Bulgarian Code of Criminal Procedure was amended so as to impose an obligation on all IT providers to assist the courts and the pre-trial authorities in the process of collecting and recording computer data by way of applying special investigation techniques, where such assistance is warranted by the detection of serious intentional crimes, including terrorism. The concept of under-cover officers is regulated by the Law on the Ministry of Interior.

Modern technologies offer vast opportunities for the use of special investigation techniques. In contemporary democratic societies, though, the application of such techniques is not only a matter of technology. It is a major goal of criminal procedure in any state governed by the rule of law to protect the citizens from arbitrariness on the part of the authorities and from unjustified interference with privacy, in violation of human rights, even if a crime as dangerous as terrorism is being investigated and proven. The use of special investigation techniques implies an inherent risk of abuse. This is simply due to the fact that, if such methods are to be efficient, they should be applied covertly. Covert application, in turn, entails insufficient transparency in terms of whether and how the procedure has been complied with, and lacking transparency frustrates civil control. Given all that, it is crucial to draw the right balance between public needs and public values.

The problems with the use of special investigation techniques and human rights, in the context of facilitating the prosecution of terrorist acts, are currently explored within the Committee of Experts on Special Investigation Techniques in Relation to Acts of Terrorism (PC-TI). The Committee has as its mission, *inter alia*, to discuss the possibility for drafting a legal instrument in this area. We expect the findings of PC-TI to provide clear guidelines for our further efforts to effectively apply special investigation techniques in the fight against terrorism.

4. Protection of witnesses and *pentiti*

Another precondition for the successful prosecution of terrorism is the introduction of effective measures for the protection of witnesses and *pentiti*. Those measures are not confined to the adoption of legislative rules but should also include the provision of sufficient resources to enforce those rules.

The measures provided for in national legislation and practice in this area may be divided into two groups: measures for the protection of witnesses and *pentiti*, and incentives for citizens to cooperate with the criminal justice system.

Reinforcing witness protection is certainly an important factor for the suppression of terrorism. It is unquestioned that in the course of criminal proceedings against terrorists we come across the greatest genuine danger for the lives of witnesses, their next-of-kin and close relations. The most wide-spread form of witness protection is to keep confidential a witness's identity (anonymous witnesses) and to provide physical security and protection. These forms of protection must be available both during the proceedings and after their end. It was exactly these two forms of witness protection that were introduced in the Bulgarian Code of Criminal Procedure in 1997. In countries availing of advanced telecommunications equipment, audio-visual connections could well be used to interview witnesses. Given the particular level of threat posed by terrorists and terrorist groups, however, the most efficient witness protection measure in such cases seems to be the change of identity, job or residence. Of course, the application of such a measure would require substantial financial resources, the introduction of a witness protection programme, the availability of specially trained officials and of services vested with matching powers. For many of our countries, it is quite difficult now to introduce the change of identity as a witness protection measure. That difficulty often results from objective circumstances, such as the small territory or population of some countries. Those problems warrant enhanced international cooperation to ensure the protection of witnesses in the fight against terrorism, both through the provision of expert and technical assistance to the countries in need, and through the conclusion of bilateral and multilateral mutual assistance agreements focused on the implementation of witness protection measures.

Similarly to the standard underlying the fight against organised crime and corruption, diversion from sentencing or sentencing based on mitigating circumstances (i.e. the imposition of lighter sentences on those accused persons who have contributed through their information to the prevention, detection and investigation of terrorist and related offences) could be an efficient tool to promote cooperation with the competent authorities. For example, the Bulgarian Criminal Code provides that no participant in an organised terrorist group shall be punished if he voluntarily surrenders to the authorities and reports on the group before the commission of the crime. Likewise, any participant in such a group who surrenders voluntarily and discloses any information he has about the group, thus substantially facilitating the detection and proving the committed offences, is sentenced based on mitigating circumstances.

The application of witness protection measures rekindles the issue of how we are to guarantee the protection of human rights and fundamental freedoms. The rules on and the implementation of those measures should be based on, and interfere to the least possible extent with, the well-established standards of criminal procedure and, *inter alia*, with the right of defence and the equality of arms.

Recommendation No. R (97) 13 of the Committee of Ministers concerning the intimidation of witnesses and the rights of the defence is still the instrument which guides our work in this area. At the same time, we are confident that the findings of the Committee of Experts on the Protection of Witnesses and *Pentiti* in Relation to Acts of Terrorism (PC-PW) will substantially further our efforts to set out specific standards for

the protection of witnesses in relation to the prosecution of terrorism, and to come up with new forms of international cooperation in this area.

5. Cooperation and interaction between judicial and executive authorities to prevent, detect and prosecute acts of terrorism

Of course, it is not really possible or necessary for magistrates to have all the knowledge required for the criminal prosecution of often complex terrorist activity. The responsibility to counter terrorism is not exclusively incumbent upon criminal justice authorities. Co-ordinated interaction among all competent government agencies involved in the fight against terrorism is a *sine qua non* for its efficiency. The criminal prosecution of terrorism, as carried out by the magistrates, should be assisted by the authorities having specialised competencies and resources which might be used to prevent, detect and prove the offences. These are primarily the specialised police services, the tax and customs authorities, the financial audit bodies, and the financial intelligence units.

The efficient prosecution of terrorism and, in particular, of its financing, requires that the interaction between the Judiciary and the Executive be deepened.

In Bulgaria, the interaction between magistrates and the non-judicial authorities is subject to the general rules set in the Code of Criminal Procedure and in the laws governing the operation of the respective bodies. The Code of Criminal Procedure proclaims the general obligation of all citizens and public officials to notify the pre-trial authorities of any committed criminal offence. Moreover, the laws regulating the workings of different controlling and supervisory authorities provide an obligation for those authorities to report to the public prosecution any suspected offence, *i.e.* they should essentially provide the data that form the legal ground to institute pre-trial proceedings. The specific forms and mechanisms of interaction between the bodies of the Judiciary (public prosecution and investigation) and the competent services in the executive branch are governed by agreements and memoranda of cooperation, as well as by instructions and guidelines issued by the competent ministers (*e.g.* the Minister of Interior and the Minister of Finance) and the heads of the bodies of the Judiciary (the Director of the National Investigation Service and the Prosecutor General).

The multi-disciplinary teams that bring together representatives of the police authorities, the financial intelligence, the tax administration, the investigation, the public prosecution, the court, *i.e*. experts from different fields, represent an indispensable form of interaction and cooperation to counter terrorism and its financing. Those teams may also involve experts from outside the Executive or the Judiciary.

6. The protection of human rights and the suppression of terrorism. The process against the perpetrators of acts of terrorism

The fight against terrorism and the enforcement of international anti-terrorism instruments should unfold in full compliance with international standards in the field of human rights and fundamental freedoms. It is exactly in the context of that fight, which is designed to ward off the encroachment upon our fundamental values, that the Member States of the Council of Europe must persistently abide by their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, and conform to the case law of the European Court of Human Rights. The fight of democracy against the fierce assaults against the very foundation of democratic life, is

subject, on the one hand, to the mandatory requirement to protect the public and its safety, and, on the other hand, to the need to protect human rights which form the core of any democratic state. Paradoxical as it might seem, the genuine threat to democracy lies in the response to terrorism, rather than in terrorism itself.

Whenever drafting and enforcing specific measures to suppress terrorism, we are fully aware that any step of ours should be made in full conformity with recognised values and, in particular, strictly respect human rights and fundamental freedoms. Any restrictions on human rights that might be imposed in the fight against terrorism must be accurately prescribed by law, really necessary and proportionate to the objectives of criminal prosecution.

The first ever judgment of the European Court on Human Rights of 1 July 1961 was handed down in a case relating to terrorism. Ironically enough, the applicant in that case was someone by the name of *Lawless*. While the European Court did not find a violation of the European Convention on Human Rights in that particular case, a careful scrutiny of the judgment would show that, in the view of the Court, not every act of the State undertaken in the name of suppressing terrorism may be justified as legitimate.

The measures which entail restrictions on human rights must be directed primarily towards the protection of state and public interests, as well as to the protection of the rights of citizens or other private interests. As required by the European Convention on Human Rights, such measures must be necessary for the existence of a democratic society and pursue specific objectives which are listed as *numerus clausus*: the protection of national security and public safety, the protection of public health and morals, the prevention of crime, to name but a few. In addition, the measures to prevent and punish acts of terrorism, which restrict fundamental rights, must be proportionate to the objective pursued.

The action taken against terrorism should be free from any discrimination. It should be directed exclusively against the terrorists and their accomplices, not against any national, ethnic or religious group as such. The response of the State to the threat of terrorism may result in some special legislative and administrative measures but should at all times remain free from arbitrariness. Such a response must be based on respect for human life and dignity, on the absolute prohibition of torture and inhuman treatment, on the prohibition to extradite a perpetrator to a country where he might face the death penalty, on the prohibition to enact and enforce criminal legislation retroactively.

Justice has a vital contribution to the protection of human rights when counter-terrorism measures are adopted and applied. Hence, all steps of the law enforcement authorities that may affect, in one way or another, the rights and freedoms of citizens, must be subject to judicial review. Such steps would be, in particular, those which interfere with the inviolability of privacy (including the application of special investigation techniques) and with property rights, as well as those that entail pre-trial arrest and detention.

Those accused of having committed acts of terrorism must be guaranteed the right to a fair trial. Justice in these cases should be administered by independent and impartial courts established by the Constitution and the laws of the land. The persons accused of acts of terrorism must unreservedly benefit from the presumption of innocence. Of course, in proceedings against terrorists some restrictions on the right of defence are possible and justified, especially as regards the access to a defence attorney, the access to

personal data, and the involvement of anonymous witnesses. Such restrictions, however, cannot violate the procedural rights of a defendant to an extent that undermines the fundamental principles of criminal procedure.

The need to respect the guarantees for a fair trial when the case is heard in *absentia* should be pointed out, as the domestic laws of some Member States of the Council of Europe provide for such an opportunity. Such procedure is compatible with the standards of the European Convention on Human Rights and, subject to specific conditions, might be effectively used to punish terrorists.

The imposition of effective and proportionate sentences on terrorists could not only deprive them of the possibility to commit other offences but can also deter potential terrorists. Sentencing by courts for acts of terrorism should be based on statutory sentencing rules. When determining the sentence, the court must always take into consideration the personality of the perpetrator and all other circumstances of the case which call for a proportionate sanction.

Terrorists are particularly dangerous criminals. Even in prison, they may continue to co-ordinate or assist with the commission of acts of terrorism. That potential threat makes it necessary to envisage additional restrictions when the sentence of imprisonment is served by terrorists. Those restrictions may entail in particular the monitoring of correspondence and the accommodation of sentenced terrorists in prisons or premises under reinforced supervision and with more severe security arrangements.

The fight against terrorism has its price. That price, however, could never amount to neglecting democracy, human rights and the rule of law. If we forget about those standards, terrorists would have hit their target. Terrorism must be given a firm and resolute response, yet one that is based on our values. This way, our resistance to the challenge called terrorism would be even stronger.

7. Compensation of victims of terrorism

Fairness and social solidarity require that the States do everything within their ambit to afford redress to the victims of terrorist acts.

The obligation of states to undertake specific measures along these lines is also proclaimed in international law. Let us remind that, within the Council of Europe, the European Convention on the Compensation of Victims of Violent Crimes was adopted in 1983. The International Convention on the Suppression of Terrorism adopted by the United Nations in 1989 urges the contracting parties to introduce mechanisms whereby the forfeited funds initially intended for terrorism could be used to make good the damage suffered by victims of terrorism and their families.

Likewise, the Guidelines of the Council of Europe on Human Rights and Terrorism (a document prepared by the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) and approved by the Committee of Ministers on 11 July 2002) suggest that, if there are not enough funds from other sources, *e.g.* the forfeited assets of the perpetrators, organisers or persons having financed acts of terrorism, the state must assist with the compensation of victims of terrorist acts having occurred in its territory. This clearly implies that special funds should be set up to compensate the victims of terrorism, and those funds should be financed from the Government Revenue. Such funds

already exist and operate in a number of European countries. For example, the Guarantee Fund for the Victims of Acts of Terrorism and Other Offences in France has among its key powers to determine the amount of and pay the compensation due for bodily injury, to determine the right to civil pension and the right to free medical services, to help access to the labour market. In urgent cases, the Fund may provide the victims of terrorist acts with psychical and physical support and assistance.

In some of our countries, though, economic and financial reasons make it very difficult to put such funds in place.

The States should therefore provide at least for adequate criminal-law and/or civil-law vehicles to remedy the persons affected by acts of terrorism. The provision of compensation to the victims of terrorism, therefore, largely depends on the smooth and efficient operation of the Judiciary.

The possibility to bring a civil action in the criminal proceedings would be a suitable approach to remedy the damage caused by terrorism. Bulgarian criminal procedure, for example, is familiar with that structure. Under the Bulgarian Code of Criminal Procedure, the victims and their successors, the institutions and the legal entities having sustained damage as a result of a criminal offence may bring, in the criminal proceedings and before the criminal court hearing the case, a civil action in damages, and may thus step into the criminal proceedings as civil plaintiffs. The civil claim in the criminal proceedings may be brought either against the defendant or against any other party that should be held liable under civil law for the damage caused by the crime. Such action, however, may not be brought in the criminal proceedings if the plaintiff has already brought it before a civil court. Where the criminal proceedings are discontinued, the civil claim will not be examined by the criminal court but may be brought separately before a civil court.

In the course of criminal proceedings, the courts may and should play an active part in protecting the interests of those affected by acts of terrorism. The Bulgarian Code of Criminal Procedure, for example, puts the court and the pre-trial authorities under an obligation to explain to any victim that he or she is entitled to bring a civil action to seek redress for the damage caused by the offence. At the request of the victim made at the pre-trial stage, the competent court of first instance should order the provision of collateral to secure the claim in line with the Code of Civil Procedure.

When this is a problem of justice, the compensation of victims of terrorism may also be addressed by civil courts. In that respect, due attention should be attached to the need for modern rules on those remedies in civil law (*e.g.* tort liability) and on those routes of civil procedure which are relevant to the resolution of that problem.

Conclusion

Efficient legislation and well prepared and trained investigators, prosecutors and judges are the primary preconditions for the successful suppression of terrorism.

A well-functioning Judiciary, which cooperates successfully with the competent law-enforcement authorities, may indeed have a very strong preventive role in the fight against terrorism. This is not only due to the fact that, through its sentencing functions,

the Judiciary would dissuade future terrorists from offending. As a matter of fact, through its overall operation in protecting the rights and legitimate interests of individuals and legal entities, the Judiciary reinforces the mainstay of the rule of law and respect for human rights - our most powerful weapons in the face of terrorism in the long run.

Moreover, the Judiciary forms the last barrier to phenomena such as corruption and organised crime which fuel terrorism.

Therefore, the Judiciary, together with law enforcement, is not merely involved in the prosecution and punishment of acts of terrorism. It is involved in uprooting the conditions conducive to the existence of that phenomenon. In addition, the adequate and successful response by the system of justice would win the support of the civil society and the media, and such support would greatly contribute to the efforts of the State to counter terrorism.

During the period after the 24th Conference of the European Ministers of Justice, the Council of Europe through its Multidisciplinary Group on International Action against Terrorism has registered significant progress in updating the existing counter-terrorism instruments, and has managed to delineate the future priorities for its work in this area. Some of the activities that the Committee of Ministers has identified as key ones in the fight against terrorism bear directly on the capacity of the system of justice to efficiently resist this phenomenon. The adoption of a comprehensive counter-terrorism convention would additionally foster our efforts along these lines. We are confident that work within the Council of Europe would contribute substantially to promoting the role of justice in our countries in combating terrorism, and would improve in great measure the conditions for efficient cooperation among judicial authorities in this field.