



INSTITUTE OF MODERN POLITICS

Headquarters: 1000 Sofia, 52 Aksakov Street, floor 3, t. (+359 2) 988-53-86

e-mail: imp@europe.com; pressoffice@modernpolitics.org

www.modernpolitics.org

SPECIAL REPORT

ON ACTS OF THE GOVERNMENT AND THE SECURITY SERVICES IN BULGARIA WHICH THREATEN OR OPENLY VIOLATE CITIZENS' FUNDAMENTAL RIGHTS AND FREEDOMS

In the period from July 2009 until now, in response to the fair public expectations, Bulgaria's Government, and the Ministry of the Interior (MoI) bodies and the security services in particular have demonstrated zeal to actively combat organised crime and corruption.

The question about the extent to which these efforts have been effective from the point of view of the real percentage of crimes detected and the collection of evidence admissible before the court remains outside the scope of this Special Report. Its findings and conclusions focus on the **escalation of alarming acts of the Bulgarian authorities which erode, and even openly violate, Bulgarian citizens' fundamental rights and freedoms under the pretext that this is part of the fight against crime and corruption.** The Institute of Modern Politics already repeatedly brought many of these to the attention of the Bulgarian authorities in 2010 through its regular monitoring reports addressed to Parliament and Government which were widely covered in the mass media in Bulgaria. Unfortunately, the authorities have so far failed to take into account the findings, specific recommendations and legislative proposals aimed at overcoming the violations identified.

That is why, not only in our capacity of an independent civil organisation operating for public benefit but also as European

Union citizens, we are turning to the European Commission as the guardian of the European Treaties and the European Parliament as the highest forum directly elected by the European citizens based on:

- **Article 6 of the Treaty on European Union** which attributes to the Charter of Fundamental Rights of the European Union the same legal force as the one of the Treaties; proclaims that the European Union is joining the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF) and announces the rights and freedoms *"as they result from the constitutional traditions common to the Member States, as general principles of Community law"*;

- **Items 1 and 2 of Commission Decision 2006/929/EC** of 13 December 2006 establishing a mechanism of cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime which expressly state that the principle of rule of law is fundamental to the EU and that *"the administrative and judicial decisions and practices of all Member States fully respect the rule of law"*;

- **Item 5 of the recommendations contained in the fourth Annual Report from the Commission to the European Parliament on Progress in Bulgaria under the Cooperation and Verification Mechanism (July 2010)** namely: *"Pursue the reform of police in order to create a competent criminal police force able to apply best practices of other Member States."*

We would hereby like to draw the attention of the European Institutions to acts and practices of the Government and of the MoI and the security services in particular, which cause serious concern from the point of view of the human rights situation in Bulgaria as an EU Member State. We call upon you to take appropriate measures, including:

a) To check the compliance of the Bulgarian special intelligence means legislation with the European human rights protection standards and especially the practice of its application to the extent to which the facts adduced in the Report below make it obvious that the existing legislative guarantees do not work effectively;

b) Under the *Mechanism of Cooperation and Verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime*, special attention needs to be paid to the activities of the MoI and the security services in Bulgaria from the point of view of the observance of the citizens' rights and freedoms guaranteed by the Charter of Fundamental Rights of the EU and the ECPHRFF monitoring more specifically:

- the existence of a series of acts of impunity and lack of effective investigation in cases of police violence;
- malpractices and excessive use of special intelligence means which do not stem from measures for combating terrorism and are disproportionate to the needs of the fight against crime; which are not necessary in a democratic society and infringe upon the inviolability of private life and home and the secrecy of citizens' correspondence and communications guaranteed by the Charter of Fundamental Rights of the EU, the EUPHRFF and the Bulgarian constitutional legal order;
- disproportionate interference of the security services in the freedom of expression and the exercise of citizens' fundamental political rights;
- violation of the right to a fair trial, the right to defence and the presumption of innocence through preliminary convictions expressed by the Minister of the Interior and other members of the Government without a real conviction having been issued and even without an indictment filed;
- violation of the right to a fair trial by means of inadmissible psychological and propagandic pressure on the courts.

I. Excessive and uncontrolled use of special intelligence means and lack of sufficient guarantees for the inviolability of the citizens' private life, home and correspondence.

The facts:

a) Amendments to the law dealt away with the independent body controlling the use of special intelligence means (SIMs)¹. At present, the control function is assigned to a parliamentary sub-committee made up of Members of Parliament, i.e. political figures. There is no legislative mechanism for follow-up control by the courts on the use of SIMs and no obligation of the MoI and the security services to inform the citizens against whom

¹ This has been done with the Amendment Bill to the Special Intelligence Means Act No. 954-01-24 put forward on 29 September 2009 and adopted in October 2009, published in the State Gazette, issue 88 of 6 November 2009.

SIMs have been employed but no criminal acts committed by them have been found.

b) Amendments to the Electronic Communications Act have granted the MoI and the security services extended access to traffic data from the Internet and citizens' telephone communications without sufficient guarantees against abuse².

c) There is no transparency about the exact amount of the budget means allocated in the budget of the MoI and the security services for the use of SIMs.

d) In a series of public statements, Prime Minister Boiko Borisov has announced that the use of SIMs against government ministers and administration officials at all levels is justified as a preventive control measure regardless of their citizens' rights. Here are examples of such statements:

- 6 January 2011, *The Standart* newspaper: "Each of the high echelons of power will be tapped periodically and is tapped and no one should be surprised about this... I am suspicious and would like to have control over each government minister. The services must listen in. It is not necessary to tap a minister when the minister has been dismissed but while the minister is still in office. No one is to be surprised about listening in. There are no personal rights of ministers and deputy ministers - they should know that we are listening";
- 6 January 2011, *The 24 Hours* daily citing Borisov's words on the national television channel bTV: "I am a suspicious person and would like to have control... There are no personal rights for ministers and deputy ministers, for agency directors..."

e) In an open National Assembly plenary session (... .. 2010) broadcast live on the national television BNT1, Deputy Prime Minister and Minister of the Interior Tsvetan Tsvetanov read out verbatim the stenographic record of conversations between medical doctors from the hospital in Gorna Oryahovitsa tapped by SIMs as a reaction to medical doctors' public protest against police arbitrariness and unauthorised and humiliating acts of the police.

f) The mass media have disseminated records from telephone conversations pointing that the Prime Minister and members of the high-level administration, including the Minister of the Interior and the Customs Agency Director, discuss protection over private companies, suspension of customs and police inspections and others. On 27 January 2011, Customs Agency Director Vanio Tanov announced before a parliamentary committee and the media that he had information and documents about unauthorised MoI action against his son, including tapping, surveillance and even preparation for a set-up with drugs.

² Amendment Bill to the Electronic Communications Act adopted on 17 February 2009.

g) In a series of statements in the media, former State Agency for National Security (SANS) staff member Rosen Milenov, who left the SANS in the end of 2010, blew the whistle that the MoI and the security services had, in the past year, created the unlawful practice to fabricate anonymous signals so that they could be used as grounds for tapping the telephone conversations of political opponents of those in power and journalists.

h) Official information of the Bulgarian Prosecutor's Office disclosed on 31 January 2011 makes it obvious that part of the SIMs records leaked in public and referred to in item f) above has been "filtered" against the law and has not been sent in its entirety by the MoI to the prosecutor's office which had filed a request for the needs of pre-trial proceedings initiated.

i) On 3 February 2011, the Sub-Committee passed an opinion finding a series of abuses of the use of SIMs on the part of the MoI and the security services.

Assessment:

On "a & "i":

A significant reduction in the guarantees against authorities' abuse of SIMs to the detriment of the citizens' rights and freedoms. Excessive use of SIMs contrary to the criteria of proportionality and necessity in a democratic society:

➤ One of the first legislative initiatives of the newly elected governing majority of GERB and the extreme nationalist and xenophobic party "Ataka" has been to close down the National Office for Control of the Use of Special Intelligence Means (the Office). This body was set up in 2008 as an independent government institution elected by the Parliament and not subordinate to the Government. It was created in implementation of the prescripts of the European Court of Human Rights in Strasbourg which had passed a judgment against Bulgaria on the account of the lack of control and sufficient guarantees for citizens' rights in the use of SIMs³. Instead, control was assigned to a parliamentary sub-committee consisting of MPs from all parliamentary groups on a parity principle. Leaving aside the question why those in government decided that this was one of the most urgent legislative measures to be taken in the very beginning of their mandate in office, the **Institute of Modern Politics** emphasises the negative consequences of this

³ Judgment of 28 February 2008 in the case Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria.

legislative change. Namely - **the guarantees against authorities' abuse of SIMs to the detriment of citizens' rights and freedoms have been seriously reduced.** The Office, which was closed down, had the status of an independent body which, in its control activities, was not subordinate either to the executive or the legislature, or the political parties in the Parliament, which was a guarantee for objectivity and effectiveness of the control exercised. It was provided that the body would have its independent and appropriate administrative and expert capacity, including budget independence. The legislative amendments voted have significantly lowered the institutional rank of the control body - instead of an independent government body, a parliamentary sub-committee (not even a standing committee!) was assigned this type of control. It consists of MPs, i.e. political figures.

All this demonstrates that the sub-committee does not have the necessary institutional, budgetary and political independence. Without questioning the need for parliamentary control over the use of SIMs as well, we emphasise that, in the Bulgarian context, it could only be additional and not the only mechanism of control over this highly sensitive area from the point of view of citizens' rights. The lack of an independent control body which is separate from the political powers in the Parliament and the Government, and the MoI respectively, raises reasonable concerns about the objectivity and effectiveness of the control exercised. This causes even greater concerns in view of the insufficient reforms of the MoI and the security services in Bulgaria and the chronic shortage of civil and parliamentary control over them.

It should also be emphasised that, in the period 2009 - 2010, after the closing down of the independent Office and its replacement with a parliamentary sub-committee, no systematic and comprehensive control over the use of SIMs was exercised in practice because the sub-committee does not have the necessary administrative capacity and resources. The ineffectiveness of this control mechanism is evidenced even by the fact that the parliamentary sub-committee must notify the Minister of the Interior in advance about each of its inspections in the MoI services responsible for the use of SIMs.

➤ At the same time, there are sufficient grounds to believe that the use of SIMs in Bulgaria is excessive and fails to meet the criteria of proportionality and necessity in a democratic society in accordance with the criteria established in the case law of the Court in Strasbourg. According to official information published by the Supreme Court of Cassation on February 7, 2011 the number of used SIMs during 2010 is 3 times

higher in comparison with 2008, and in the same time the number of SIMs used as proof in criminal proceedings decreased significantly - 2008: 5988 SIMs, only 908 used in courts proceedings; 2010: 15 946 SIMs, only 1918 used in court proceedings. Proof of this assessment is also to be found in the official statements of:

- Prosecutor General Boris Velchev of 18 December 2010 in whose opinion:

*"There is definitely too much tapping and I will state my arguments. Given the volume of the so called SIMs, their effectiveness continues to be too low. This means that there is too much tapping and too few results."*⁴

- Chair of the Parliamentary Sub-committee for control over the use of SIMs Yavor Notev according to whom:

*"Yet, the total number of SIMs used is alarming. It cannot be hidden or manipulated. We had a report for last year indicating about 10,000 SIMs... The expectations for this year (2010) are that the absolute number of SIMs will grow and, instead of 10,000, it will probably reach 11-12 thousand."*⁵

It must be expressly emphasised that the sharp rise in the employment of SIMs in Bulgaria is not prompted by measures of combating terrorism which, in certain circumstances, could justify such a bad practice, but is made in the course of the routine work of the MoI and the security services in relation to combating crime. This infringes upon the rights and freedoms of a wide range of citizens who do not engage in criminal activities but whose communications are tracked by the MoI and the security services in relation to investigations of suspects, yet without the existence of reliable legal and practical guarantees against the abuse of their personal data and information.

Moreover, the mass employment of SIMs as the main method of investigation is forbidden under the Bulgarian legislation in harmony with the European rights protection standards⁶. They may

⁴ Interview of the Prosecutor General Boris Velchev for the national Darrik Radio station, 18 December 2010.

⁵ Interview of the Chair of the Parliamentary Sub-committee for control over the use of SIMs Yavor Notev for the electronic media Mediapool.bg, 7 January 2011.

⁶ Special Intelligence Means Act: "Article 3. (1) Special intelligence means shall be used in cases when this is necessary to prevent and detect grave crimes under the Criminal Procedure Code when the information needed cannot be collected in any other manner." and "Article 4. Pursuant to this law, special intelligence means may also be used with respect to activities related to the protection of national security."

only be used when the information necessary for the investigation cannot be acquired through the other investigative methods and when this is necessary to prevent and detect grave crimes or for activities related to the national security. A chronic problem in the practice of the Bulgarian MoI and the security services which escalated alarmingly in 2010 is the circumvention of this legislative prohibition and the mass use of SIMs, moreover as the main method of investigation.⁷ We once again emphasise that this leads to unjustified disproportionate restriction of the rights and freedoms of many citizens whose communications are intercepted and tracked in relation to the investigation of suspects. In addition to its unlawful nature, this practice can hardly be defined as "necessary in a democratic society" from the point of view of the ECPHRFF rights protection standards.

► Serious information and conclusions about the abuse on the part of the MoI and the security services are contained in the opinion of the Parliamentary Sub-committee for control and monitoring the use of SIMs of 3 February 2011 the more important of which are:

- *A wrongful practice is established in the application of SIMs.*

- *The decisions found in their application lead to a decrease in the guarantees for lawful use, storage and destruction of the information collected through SIMs.*

- *The information acquired through SIMs is not used only in the course of pre-trial proceedings as laid down by the law.*

- *The operational staff have been provided, without any grounds for this to be found in the law, with the possibility to assess the information and filter the flow to the investigation bodies.*

- *The protection against information leaks is insufficient in practice and does not guarantee its safeguarding and the protection of citizens' rights.*

- *It is necessary to distinguish between the procedures and rules for the employment of SIMs with respect to criminal activities, on the one hand, and the protection of the national security, on the other hand. The lack of such a distinction creates prerequisites for the use of information acquired through SIMs for political purposes.*

⁷ This is also the assessment of the Prosecutor General and the Chair of the Parliamentary Sub-committee for control over the use of SIMs expressed in their public statements - BTA of 13 January 2011, Mediapool.bg of 7 January 2011 and others.

➤ Along with this, the information available shows that almost 100% of the requests submitted by the MoI and the security services to the district courts have been granted. This raises concerns that the judicial control has been brought down to a simple formality which threatens the citizens' rights. Also in this vein is the reasoned assessment of Mihail Ekimdzhiev, Chair of the Management Board of the Association for European Integration and Human Rights.⁸

➤ There is no legislative obligation of the MoI and the security services to notify the citizens against whom SIMs have been used but no criminal activities have been detected. This way, citizens are deprived not only of information about acts of the authorities which have restricted their constitutional rights but also of guarantees that the information collected has been destroyed in accordance with the statutory procedure as well as of the legal possibility to seek compensation. At present, the parliamentary sub-committee can only check whether SIMs have been used against a person upon this person's personal initiative. It must be emphasised, however, that even this halfway guarantee is not sufficiently effective because the sub-committee, as its members admit, does not have the necessary capacity to exercise control if there are numerous such requests from citizens.

➤ The information collected through SIMs which has unduly become known publicly in the past months has demonstrated clearly that the guarantees for the protection of personal data collected in this way are not sufficiently reliable. This causes doubts about the readiness of the responsible institutions to implement the requirements of Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. Bulgaria has not implemented this Framework Decision in its domestic legislation, yet even though the deadline for this elapsed on 27 November 2010. It must be guaranteed by law, as well as at the operational level, that the Bulgarian police services collect personal data only for lawful purposes and that security has been set against unlawful changes, unauthorised disclosure or access, etc. In accordance with Article 25 of the Framework Decision, it must be guaranteed that one or more bodies fully independent in the exercise of their functions will control the application of the minimum guarantees for the citizens' personal inviolability set by the act referred to above.

⁸ Mihail Ekimdzhiev (17 January 2011), "The Court's Responsibility for Tapping Scandals", Legal World magazine.

On "b":

The amendments to the Electronic Communications Act voted for in February 2010 made it easier for the MoI and the security services to access traffic data about the citizens' telephone and Internet communications without setting reliable guarantees against abuse. Despite the legislative requirement for preliminary judicial control, this control is circumvented in practice.

The amendments lay down that traffic data may be provided to the MoI and the prosecutor's office when this is necessary to detect and investigate grave crimes (i.e. punishable by more than 5 years of imprisonment) and computer crimes. A preliminary permission issued by a regional judge is necessary to track and identify the source, target, date, time and type of connection as well as the device by which it is effected. In practice, however, the ambiguous legislative text which sets out that *"for the purposes of criminal proceedings the data are provided to the court and the pre-trial proceedings bodies in accordance with the terms and procedure under the Criminal Procedure Code"* has been used by the prosecutor's office, the MoI and the security services to circumvent the judicial control. Evidence of this is also the special written instructions issued by the Prosecutor General which instruct prosecutors to require information directly of telephone operators and Internet providers without a permission from a judge. This way, according to the official information released upon the request of The Dnevnik national daily, every third check about who communicated with whom over the Internet and by telephone in Bulgaria is carried out without a judge's permission. More than 10,000 private communications were tracked by the services and the prosecutor's office in the first 7 months in which the new rules in the Electronic Communications Act have been in force. Along with this, The Dnevnik newspaper made enquiries in several regional courts in the larger cities in the country about the requests for access to traffic data submitted and granted in the period 10 May - 1 December 2010. The situation is as follows⁹:

- Sofia - 4,357 requested, 3,393 granted;
- Plovdiv - 1,179 requested, 1,005 granted;
- Varna - 204 requested, 364 granted (more than 1 permission was given for 1 request);
- Burgas - 310 requested, 307 granted;

⁹ The information from the regional courts is published in the Dnevnik newspaper, 21 January 2011.

- Ruse - 221 requested, 210 granted;
- Stara Zagora - 752 requested, 743 granted.

This official information (which, moreover, covers only some of the regional courts in the country) raises a number of questions.

First, one cannot but notice the large number of telephone and Internet communications tracked. It can hardly be justified that this corresponds to the real needs of the fight against crime and corruption whose most objective expression is the number of pre-trial proceedings initiated and the indictments filed with courts.

Second, the direct access of the prosecutor's office, the MoI and the security services without a judge's permission (based on the Prosecutor General's instructions referred to above) to information about the telephone conversations held and the Internet communications encroaches in an inadmissible way on the personal inviolability and the secrecy of correspondence of the Bulgarian citizens because:

- The Constitution expressly prohibits the encroachment not only on the secrecy of correspondence but also "of other communications as well" (Article 34). The same text sets out that this can take place under two conditions only: there must be a permission from the judiciary and it must be necessary to detect or prevent a grave crime. The Constitution also provides for the inviolability of privacy - Article 32. It is not only what but also with whom the citizens talk on the telephone or over the Internet that is protected constitutionally. These rights are also guaranteed by Article 7 of the Charter of Fundamental Rights of the EU and Article 8 ECPHRRF.

- The constitutional protection "of other communications as well," even when interpreted most restrictively, encompasses Internet communications - i.e. a judge's permission is an obligatory condition for access to traffic data.

- Third, the print-outs of conversations held over mobile phones are not simply of a technical nature. The data they contain - whom the conversations were held with - albeit failing to disclose the content of the conversations themselves, make it possible to draw up conclusions about the circle of people one is in contact with, the frequency of these contacts, etc. This is part of private life and the secrecy of correspondence whose inviolability is protected constitutionally.

On "c":

There is no transparency about the amount of budget means used by the MoI and the security services for SIMs. The budget expenditure is "hidden" in other more general budget line items (for example "operational technical resources"). According to the assessment of a number of independent experts and of the parliamentary opposition, including MPs from the standing committees which exercise parliamentary control over the MoI and the State Agency for National Security, the analysis of the 2011 state budget shows that a total of BGN 100 million have been allocated for such purposes. At the same time, Minister of the Interior Tsvetanov claims before the mass media that the amount is "about BGN 20 million." The lack of transparency about the budget expenditure causes concerns, at least for three reasons:

- because it allows the MoI and the security services to speculate with the volume of funding for such activities;
- because it infringes upon the citizens' (and taxpayers') right to access to public information about the public funds used by the government institutions;
- because it violates the principle of accountability in the work of public institutions and, hence, prevents the civil and parliamentary control over the MoI and the security services to check the effectiveness in the use of these funds.

On "d":

Prime Minister Boiko Borisov's public statements cited raise serious concerns. Had they been made by a party leader or another public figure, their anti-constitutional spirit, albeit with many qualifications, could have been treated as part of the democratic discussion in the society. In this case, however, the statements are made by the leader of the executive - the Bulgarian Prime Minister. They are not a simple symptom of the misunderstanding and/or complete disregard for the principle of rule of law and the supremacy of human rights which are fundamental to the European Union and Bulgaria's constitutional order. These official statements of the Bulgarian Prime Minister repeated several times encourage arbitrariness and culture of disregard for the fundamental rights and freedoms by the law enforcement bodies; they encourage ill-intentioned staff members of these bodies; they instil the feeling in the public that the MoI and the security services can encroach upon their rights and

freedoms regardless of the constitutional and legislative guarantees but for political purposes. From a more general perspective, they erode the society's democratic legal awareness. Such statements coming from a high-ranking public official are a very alarming precedent for a society like the Bulgarian one where the memory of the fear instilled by the repressive machine of the totalitarian secret services which resorted to such practices of mass surveillance, tapping and restriction of the rights of certain categories of citizens is still alive.

As it is pointed out in the Judgment of the European Court of Human Rights in Strasbourg of 28 February 2008 in the case Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria¹⁰, the mere fact of the existence of a system of secret surveillance which allows for the post and telecommunications of all people to be controlled potentially "without their ever knowing this unless there has been either some indiscretion or subsequent notification, it directly affects all users or potential users of the postal and telecommunication services in that country" and may be treated as a violation of the rights and freedoms. And what is left for the rights of the other citizens when the Prime Minister himself announces publicly that government and administration officials are tapped preventively and regardless of their personal rights!

On "e":

The Sofia City Prosecutor's Office announced on 1 February 2011 that, in its opinion, there were no violations of the procedure for employment of SIMs. Regardless of the fact that this act of the prosecutor's office is not final and is being challenged, the **Institute of Modern Politics** emphasises that the very public disclosure of conversations recorded through SIMs in a plenary session of the National Assembly broadcast live on national television constitutes a violation of the inviolability of the privacy, correspondence and other communications guaranteed by the Bulgarian Constitution, the Charter of Fundamental Rights of the EU and the ECPHRFF. In the case under discussion, the issue whether the information disclosed by the Minister of the Interior has been duly declassified is completely irrelevant from the point of view of the rights protection standards. Pursuant to Article 34 of the Constitution of the Republic of Bulgaria, the freedom and secrecy of correspondence and other communications are inviolable. An encroachment upon this

¹⁰ And in other cases as well; for example: Klass and Others v. Germany, Malone v. the United Kingdom, Weber and Saravia v. Germany.

constitutional rule is admissible only in the event of two cumulative prerequisites: a) there must be permission from the judiciary; and b) when this is necessary to detect or prevent grave crimes. In the case concerned, none of the prerequisites is in place. *First*, there is no permission from the court to violate the secrecy of these citizens' telephone conversations¹¹. The fact that the content of the conversations has been declassified with a prosecutor's permission cannot remove the constitutional prohibition for their public disclosure if the constitutional prerequisites referred to above are not in place. *Second*, the disclosure of these conversations before the National Assembly and the public as a whole cannot in any way be interpreted as an act which is necessary to detect or prevent a grave crime as required by the Constitution. In this sense, Minister of the Interior Tsvetan Tsvetanov's acts violate in an unprecedented way the constitutionally protected secrecy of the citizens' correspondence and communications and, in a more general perspective, the principle of rule of law and the supremacy of the rights and freedoms that are fundamental to the European Union.

In addition, it must also be noted that, pursuant to the Bulgarian Penal Code, the very use of information from SIMs for purposes other than those set, i.e. not to protect the national security or for the purposes of criminal proceedings, is a punishable act:

Penal Code: Article 145 - A person who uses information collected through special intelligence means not for its purpose to protect the national security or for the purposes of criminal proceedings shall be punished with imprisonment for up to three years and a fine of up to BGN 500.

The claims of the prosecutor's office that the disclosure of the conversations recorded before the National Assembly and the public has been necessary on the account of "the public tension that has arisen" do not have a legal nature and cannot be based on the existing Bulgarian legislation.

On "f", "g" and "h":

Leaving aside the content of the SIMs records disseminated with tapped conversations of the Prime Minister, the Customs Agency

¹¹ This can be seen from the letter of the President of the Supreme Court of Cassation Lazar Gruev, outgoing No. 1 of 5 January 2011 which states that the action related to the declassification and public disclosure of the content of the SIMs has taken place without the participation of a judge.

Director and the Minister of Finance¹², which is not within the scope of this Special Report, we express concerns on the following account:

- There are sufficient indications of abuse and unauthorised employment of SIMs by the Bulgarian MoI and the security services contrary to the existing Bulgarian legislation and in violation of the European rights protections standards.
- The fact that such pieces of information have been "leaked" in public shows in itself that there is a systematic problem with the protection of classified information in Bulgaria by the MoI and the security services.
- The necessary steps to check the signals of former SANS staff member and whistleblower Rosen Milenov concerning unlawful practices in the MoI and the security services are not taken while, instead, the authorities exert pressure on him and representatives of the parliamentary majority announce that charges will be pressed against him.

A serious signal of a similar abuse of SIMS is also the data and documents disclosed by Customs Agency Director Vanio Tanov about the tapping and surveillance of his son and the drug "set-up" prepared by the MoI in order to press charges.

¹² The records' authenticity has been confirmed by an independent expert examination in the LIPSADON (Laboratoire independent de police scientifique) laboratory in Paris.

II. Cases of police violence and lack of efficient mechanisms to investigate them objectively. Violation of the right to a fair trial.

The facts:

a) A rise in the number of accidents in the work of police bodies related to doubts about unjustified use of force, unnecessary use of fire arms, use of auxiliary devices against people with respect to whom there are no justified assumption that they may pose a threat to the order bodies, unneeded encroachment on honour and dignity in the event of detention.

Thus, for example, only out of the cases which have found media reverberation, the following merit note:

- During the unlawful search in the home of the Mustafovs on 23 July 2010, force and auxiliary devices were used as a result of which family members suffered physical and psychological damages from the unlawful action of the police officers - a fact evidenced with medical certificates as well. Yet, according to the inspection of the MoI Inspectorate, the only deficiency in the police officers' work is their failure to draw up protocols and reports on the account of which the police officers were imposed one of the lightest punishments - warning in written. The Kardzhali Regional Prosecutor's Office terminated the proceedings with the finding that there is no information about a crime committed and bases its reasons entirely on the police officers' testimony.

- Borislav Gutsanov, Chair of the Varna Municipal Council, was arrested in August 2010, during the night, by masked police officers armed with submachine guns while his two underage children watched without the urgency requirements set in the law being in place.

- The death of Mariyan Ivanov who was shot by a police officer during an arrest attempt in Pleven on 23 July 2010.

- Unlawful detention and beating of Stefan Bofirov on 6 November 2010 in Plovdiv with the purpose of extorting self-confession.

- The arrest of Stanislava Dimitrova and another three persons on 27 July 2010 vociferously covered in the media. The MoI Press Centre disseminated video footage of Dimitrova prostrated on the pavement, obviously a small and lean young woman, pointing to evident disproportionality of the force used. The reasons whereby the court lifts the remand measure of arrest emphasise: *"In the case, there is a highly inconsistent conduct of the pre-trial proceedings bodies with regard to what the crime is, if there is a crime and who committed it because more than 24 hours after the detention of the accused party Dimitrova neither the prosecutor's office nor the pre-trial proceedings bodies had any idea why they were detaining her."*

- The scandalous way in which former Minister of Defence Nikolai Tsonev was arrested on 1 April 2010 when the use of auxiliary devices

was accompanied by humiliating remarks by the prosecutor declaring him a "criminal" who was to "fall on his knees." The video footage was released publicly by the MoI Press Centre.

- Scandalous video recording released by the MoI of the arrest of Vasil Mihailov (brother of a prosecutor against whom criminal proceedings are taking place) which films and shows the media how the detainee, even though he does not resist at all, is taken away from his home half-naked in his underwear.

- In the end of July 2010, the media disseminated information about police arbitrariness and violence against 27-year old Nikolai Stoyanov in the region of Otmanli, Burgas Municipality.

- On 15 August 2010, a family from the village of Voluyak in the region of Sofia filed a complaint of police of violence. It is claimed that police officers beat two men but another two women and a 5-year old girl also suffered damages.

- Citizens' complaints that, on 21 August 2010, a police officer unlawfully and without having been provoked struck fist blows in the Rafet Bekir's face in a production company in Pleven.

- Claims that on 24 September, in Targovishte, two police officers with a third one watching performed a flagrant act of physical fight and humiliated a 67-year old retiree - Hamdi Salim.

b) Ineffective investigation of the cases of police violence and a policy of tolerating police arbitrariness.

- In the very first month after assuming office, the Minister of the Interior appealed with the court that the police officers on trial for the murder of Angel Chorata Dimitrov be acquitted.

- Four days after the incident described in littera "a" when police officers burst in the night into the Mustafovs' home in Kardzhali, the Minister of the Interior justified their action before the National Assembly before the end of the examination into the case and, in this way, placed its objectivity in doubt.

- The Prosecutor's Office in Pleven terminated the proceedings for Mariyan Ivanov's death with the conclusion that the police officers had not committed a crime during his arrest and the firing of the deadly shot even though the person injured had been unarmed while the police officers taking part in his arrest had had a significant superiority in numbers.

c) A series of statements of the Prime Minister and the Minister of the Interior which exercise psychological and propagandist pressure on the court, as for example:

- Prime Minister Borisov's statement that the amendment of the remand measures imposed on the Killers group was a provocation to the state by the court or that arrests are the best anti-crisis measure.

- Statements of the Minister of the Interior on specific cases that every European court would have issued harsher sentences or that 5% of the judges in Bulgaria are corrupt;

- Statements of the Minister of the Interior on the account of amended remand measures in which he blames the court for connections to organised crime, creation of a corruption environment and hampering the Government's work. (Most of the examples are listed in a letter of the Union of Judges in Bulgaria to the European Association of Judges accessible at <http://www.judgesbg.org/?m=2&id2=76>)

Assessment:

On "a":

In the period 2009 - 2010 there was an alarming rise in police violence and arbitrariness.

According to data from the Report of the Bulgarian Helsinki Committee¹³ on Human Rights in 2009, police violence was used in one quarter of the arrests in Bulgaria and, in the December 2010 issue of the Obektiv magazine, issue 183, the organisation Chair Krasimir Kanev says the following in summary of the situation for the past year:

"Complaints from people who have personally suffered from police violence in different parts of the country are on the rise."

Supreme Bar Council President Daniela Dokovska stated in an interview before the media after receiving the annual Person-of-the-Year award for her contribution to human rights¹⁴:

"It seems that the police and the prosecutor's office in Bulgaria are fighting for ratings and that is why they are so vociferous. The police is demonstrating power instead of professional skills. The prosecutor's office is becoming ever more uncritical of the police."

The existence of a chronic problem with police violence can also be seen in the record number of judgments against Bulgaria issued by the Court in Strasbourg in 2010 - a total of 11 and in 5 of them loss of human life is involved.

Furthermore, on 26 January 2011, the Parliamentary Assembly of the Council of Europe passed Resolution 1787 (2011) which sets out that the Parliamentary Assembly examines as a priority

¹³ A right protection organisation specialised in civil control over instances of police violence.

¹⁴ The 24 Hours daily, 29 December 2010.

"major structural problems concerning cases in which extremely worrying delays in implementation [of the judgments of the Court in Strasbourg] have arisen" in nine of the 47 Member States - Bulgaria, Greece, Italy, Moldova, Poland, Romania, the Russian Federation, Turkey and Ukraine. Bulgaria is placed on the list with three problem areas of failure to implement the judgments of the Court of Human Rights, including deaths and violence against people under the responsibility of law enforcement officials and lack of effective investigation of these cases. It also points out that Bulgaria needs to take measures to avoid future deaths or violence on the part of law enforcement officials.

On "b":

Along with the rise of police violence, the fact that such cases are not investigated effectively while the police and the Minister of the Interior personally openly tend to justify the police action even when the respective inspections have not been completed yet raises special concerns. A typical example in 2010 became the case described above of police violence exerted on the Mustafovs in Kardzhali. During the hearings in Parliament on the case, the Minister of the Interior qualified the police officers' action as lawful before the inspection was even completed. It also became clear that during the inspection itself, which was underway at the time, a fundamental European rights protection standard was not applied, namely that when a citizen complains about ill-treatment by the police and there are visible indications of physical or another damage immediately after the person has been in police custody which is supported by medical documents as well, then the police bodies must present convincing evidence that the victim's injuries and medical condition either are not the result of their action or they are the result of the lawful use of force which can be confirmed. A number of judgments of the European Court of Human Rights are in this vein among which are *Tomasi v. France*, *Ribitsch v. Austria*, *Aksoy v. Turkey*. Later, the Regional Prosecutor's Office in Kardzhali, also disregarding these European standards, refused to initiate pre-trial proceedings in the case.

The non-isolated character of the above cases of lack of effective investigation of police arbitrariness is confirmed by Resolution of the Committee of Ministers of the Council of Europe 107 of 2007 concerning the judgments of the European Court of Human Rights in the case of *Velikova v. Bulgaria* and

seven other cases of police violence against Bulgaria. The Resolution, which Bulgaria has not implemented yet, along with other measures, insists on guaranteeing the independence of investigations regarding allegations of ill-treatment inflicted by the police, and in particular ensuring the impartiality of the investigation organs in charge with this kind of cases.

On "c":

The series of statements of high-ranking executive officials in relation to judicial acts, the issuance of "convictions" in media statements and the public unproven claims of corruption can be assessed as a flagrant interference and unauthorised influence on the court which threatens the judges' independence and, hence, the citizens' right to a fair trial.

This assessment is also confirmed by reputed rights protection activists, for example Supreme Bar Council President Daniela Dokovska who, in the interview quoted above after the receipt of the annual Person-of-the-Year award given out for contribution to human rights of 29 December 2010, further emphasises that:

"We are witnesses to a paradoxical lack of an idea about the separation of powers. Representatives of the executive deliver convictions, instruct the court, undermine the trust in justice. This is how the foundations of the state are eroded. The cases you are asking me about aim, in fact, at a propagandist effect. I have taken part in quite a few such trials - the accusers' enthusiasm in them is much stronger than the evidence. I would like to believe that the enormous pressure on the independent Bulgarian court will not crush its forces of resistance. Otherwise, the Bulgarian citizens stand no chance."

The pressure on the judiciary exerted by the Government has become the reason why, on 22 July 2010, the Union of Judges in Bulgaria turned to the Council of Europe bodies with a request for an assessment of the independence of the court in Bulgaria:

"What public benefit does the general information announced yesterday by Minister Tsvetanov that 5% of the magistrates are connected with crime bring? It does not offer public calm and it fails to assist in exposing the corrupt ones; it only undermines the trust in the court's work and causes undeserved inconvenience and insult to the honest judges."

III. Action of the security services restricting the freedom of conscience and the freedom of expression.

The facts:

Upon an anonymous signal, Parliament President Tsetska Tsacheva brought matters to the attention of the State Agency for National Security (SANS) to check a civil collection of signatures of 597,152 Bulgarian citizens¹⁵ collected upon the initiative of an opposition party (Order, Law, Justice) under the terms and procedure of the Citizens' Direct Participation in Government and Local Self-Government Act. The collection of signatures demands that a national referendum for a new constitution be held. The inspection carried out by the SANS covers 1,850 citizens selected, as the SANS claims, randomly. A total of 757 citizens' homes were visited by SANS staff in several Bulgarian cities - Sofia, Burgas, Vratsa, Vidin, Gabrovo and Yambol. According to the results of these actions as they were disclosed, more than 400 of the citizens interrogated denied that they had ever taken part in the collection of signatures and that they had affixed their personal data and signatures and 290 of them certified this in documents upon the request of SANS staff. These discrepancies, insignificant in number given the total number of participants in the collection, do not affect its validity because, pursuant to the existing Bulgarian legislation, 500,000 signatures are needed for a referendum to be scheduled. Still, the authorities are using the results of the inspection to declare the whole collection "falsified" and "invalid."

Assessment:

The SANS is a special security service whose statutory mandate is related to combating terrorism, organised crime and preventing anti-constitutional activities. The performance of an inspection by this service of a civil collection of signatures whereby, in a peaceful manner, the citizens are making demands of the authorities is disproportionate and unnecessary in a democratic society. Moreover, there are sufficient other mechanisms to verify the authenticity of the personal data in a collection of signatures which do not threaten the freedom of conscience and expression the way the involvement of the security services does.

¹⁵ According to data from the organisers - the party Order, Law, Justice.

The following action of the SANS causes special concerns:

- The inspection is carried out upon an anonymous signal which is forbidden by the Bulgarian law.

- It is outside the competence of the SANS expressly provided for in Article 4 of the SANS Act to carry out inspections of civil collections of signatures which, in a peaceful manner, make demands of the authorities or exercise the right to a civil initiative for a referendum. The claims of SANS Director Tsvetelin Yovchev before the media that, despite the anonymity of the signal, it contained information about anti-constitutional activities are ungrounded and unproven. This is so because the Bulgarian Constitution expressly forbids that the freedom of expression be restricted unless there are appeals "for a forceful change in the constitutional order, committing crimes, sparking hostilities or violence against the person" (Article 39, para 2). The citizens' participation with their expression of their will in a collection of signatures to convene a referendum is part of the freedom of conscience and expression. Even the existence of a certain number of false data and fake signatures in such a collection may, in no case, be treated as an attempt at a "forceful change in the constitutional order," i.e. an anti-constitutional act which could justify the interference of the SANS in the case. The firm case-law of the Court in Strasbourg is also in this vein. Along with this, it must be emphasised that the invalidity of the signatures of some citizens or the possible violations committed by the organisers of the collection may, in no way, affect the expression of the will or be grounds to restrict the rights of all other citizens who, in manifestation of their political conviction, freedom of conscience and expression, have taken part in the collection.

- Victims claim that SANS officers visited their homes and did not carry out an ordinary inspection for compliance of the personal data recorded in the said collection. The claims are that the SANS staff asked questions about political convictions, affiliation with political parties and the reasons for taking part in a collection of signatures requesting a national referendum for a new constitution. In other words, there are clear indications that it is possible that SANS officers interfered inadmissibly in the area of their political rights and freedoms, including the freedom of conscience and the freedom of expression.

- These complaints have not been investigated effectively either by the prosecutor's office or the

Ombudsman. Moreover, adducing highly unconvincing reasons from a legal point of view, the Ombudsman is refusing expressly to initiate an examination of the case based on a signal submitted by the Bulgarian citizen Hristina Hristova in her personal capacity. As a reason for the refusal, it is pointed out that the citizen is also the chair of a political party, NDSV (member of the Alliance of Liberals and Democrats in the European Parliament) and, hence, there are no grounds for the signal to be checked because the Ombudsman only reviews signals filed by natural persons. Such a claim is groundless not least because of the express wording of the original text that Hristina Hristova is submitting it "as a citizen" (i.e. as a natural person).

The Institute of Modern Politics emphasises that such action of a special security service constitutes an instance of abuse of power and restriction of the citizens' political rights and freedoms, including the freedom of conscience and the freedom of expression. Yet even more alarming is the fact that, in this way, a security service becomes a participant in the political struggle between those in power and the opposition despite the explicit legislative requirement that the service be de-politicised, that it comply with the principle of political neutrality and perform its activities in strict observance of the Constitution and the international agreements respecting the human rights and fundamental freedoms¹⁶.

At the same time, the inaction of the prosecutor's office and an out-of-court rights protection body such as the Ombudsman threatens in itself the citizens' rights and freedoms and poses the question about the political neutrality and independence of these bodies from the Government.

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Sofia, Bulgaria

¹⁶ Article 3, para 1, items 1, 2 and 6 SANS Act.



Institute of Modern Politics (IMP) is an independent policy institute, a public benefit non-profit, non-partisan foundation which brings together individuals who share a deep interest in good governance and human rights issues. Members of IMP Board of Governors and experts involved in IMP's activities encompass a diverse range of backgrounds and professions including academics, policy-makers, former MPs, the media, NGOs, legal practitioners, political science researchers.

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