



THE AIRE CENTRE
Advice on Individual Rights in Europe



annual regional
**RULE OF
LAW FORUM**
for south east europe

Tenth Annual Regional Rule of Law Forum for South East Europe

Balancing Data Protection with Transparent Justice:
The European Legal Framework

Report



UK Government



Introduction

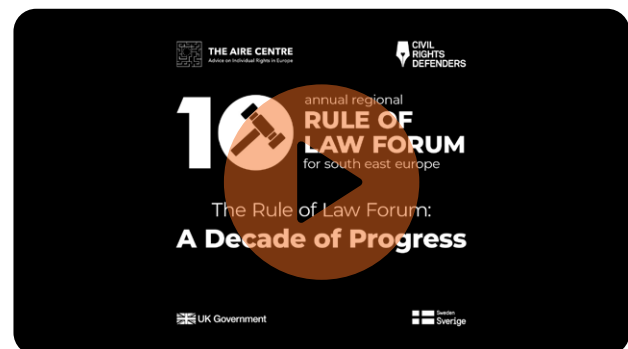
➤ What is the Rule of Law Forum for South East Europe?

The Forum brings together European Court of Human Rights (ECtHR) judges, presidents and judges of the region's supreme and constitutional courts, presidents of judicial councils, representatives of judicial training institutes, government agents before the Strasbourg Court, representatives of non-governmental organisations (NGOs), and prominent legal experts in the field. The Forum's organisers and attendees work to promote the implementation of the European Convention on Human Rights (ECHR) across South East Europe, inspire regional cooperation in strengthening the rule of law and respect for human rights, and assist the countries of South East Europe in the European Union (EU) integration process.

The Forum is the result of a longstanding partnership between the AIRE Centre's Western Balkans Programme and Civil Rights Defenders, and this year's Forum held a special significance as it celebrated the Regional Rule of Law Forum's tenth anniversary. The Forum is also indebted to the continued and vital

cooperation of the European Court of Human Rights, which renders our work infinitely more informed and engaging. Finally, we must thank the Forum's supporters and their continued commitment to the principles of the rule of law and human rights: the UK Government, and the Government of Sweden.

Join us on a journey through time, and watch the highlights video of the decade of progress of the Rule of Law Forum!



► The 2023 Forum: Balancing Data Protection with Transparent Justice

In 2023, the Tenth Annual Rule of Law Forum focused on the emerging issues in respect of data protection and transparent justice. Both these themes, and their interaction with each other, are becoming increasingly topical, as technology continues to transform how crimes are investigated and prosecuted, and how judicial proceedings are conducted

and recorded. Discussions centred around the protection of Article 8 ECHR, the right to respect for private and family life, in the context of judicial proceedings, taking into account the requirements of the right to a fair trial under Article 6 ECHR and the right to freedom of expression under Article 10 ECHR.

► Forum Speakers and Panellists

The Forum benefited from the presence of members of Europe and the region's highest judicial institutions, including the President of the Constitutional Court of Bosnia and Herzegovina, Valerija Galić. International judges who led the discussions included:

- **Marko Bošnjak** – Vice-President of the ECtHR
- **Arnfinn Bårdsen** – ECtHR Judge Elected in Respect of Norway, Section President
- **Jovan Ilievski** – ECtHR Judge Elected in Respect of North Macedonia
- **Darian Pavli** – ECtHR Judge Elected in Respect of Albania
- **Erik Wennerström** – ECtHR Judge Elected in Respect of Sweden
- **Faris Vehabović** – ECtHR Judge Elected in Respect of Bosnia and Herzegovina
- **Ivana Jelić** – ECtHR Judge Elected in Respect of Montenegro
- **Davor Derenčinović** – ECtHR Judge Elected in Respect of Croatia
- **Tim Eicke** – ECtHR Judge Elected in Respect of the United Kingdom
- **Ledi Bianku** – Former ECtHR Judge and Judge at the Constitutional Court of Bosnia and Herzegovina

► The 2023 Forum Guide

This year's Forum was accompanied by a guide for the judiciary and legal practitioners. The first part of the guide aims to provide practical guidance on the novel human rights issues that arise in respect of data protection and privacy of information in the context of judicial proceedings. The publication addresses in detail the case law of the ECtHR, with a focus on Articles, 6, 8 and 10 ECHR, as well as considering the position under EU law, which the ECtHR has referred to in its case law. Part two of the guide contains summaries of ECtHR and Court of Justice of the European Union (CJEU) case law identified as most relevant to the Convention rights discussed in part one.

While the guide will be referenced throughout this report, it can be found in its entirety [here](#).



➡ Opening Remarks to the Forum

The Forum began with opening remarks from the Forum founders **Biljana Braithwaite** and **Goran Miletić**. The speeches considered the growth of the Rule of Law Forum over the past ten years and thanked the many contributors and participants from past Forums, as well as considering the timely nature of the Forum's topic in an era where technology and data are increasingly present.

The opening speeches of **Valerija Galić**, President of the Constitutional Court of Bosnia and Herzegovina, **Julian Reilly**, British

Ambassador to Bosnia and Herzegovina, and **Helena Lagerlöf**, Swedish Ambassador to Bosnia and Herzegovina, built upon this and broadened the scope of the issues. Observations included how the right to privacy and how transparent justice may conflict but can also be mutually empowering; how developments in technology inevitably bring new risks to society, to individuals and to the rule of law; and the value in regional cooperation in improving the quality of human rights protections and the rule of law.



Evolving technology continues to provide both opportunities and challenges in the context of judicial proceedings. The use of innovative investigative measures such as surveillance and interception of electronic communication clearly demonstrate that the wealth of evidence courts and prosecutors have before them and information which can be collected through such methods, has the potential to galvanise efforts to prevent and punish serious organised crime. Steps however have to be taken in compliance with Convention rights and with the need to ensure fairness and trust in the judicial system. The judiciary is central in navigating those concerns, ensuring sufficient safeguards are in place whilst also recognising the significant advantages that such evidence can bring.

Biljana Braithwaite



The Forum has consistently served as a source of inspiration and motivation for all participants, myself included. Its impact is above the mere exchange of ideas; it ignites a collective passion that is empowering our shared commitment to advancing the principles of justice and human rights. This year's topic is especially vital. The balance between data protection and transparency in judicial proceedings is a matter of great importance, deeply rooted in the principles of the rule of law and democracy. It also significantly influences the preservation of citizens' trust in the judiciary, which is particularly crucial at a time when trust in both democracy and the judicial system in our region is declining.

Goran Miletić

➤ Keynote speech: Judge Marko Bošnjak, Vice-President of the European Court of Human Rights

Judge Bošnjak's keynote speech provided an excellent introduction to the varied situations where the need to protect private information and data must be carefully balanced with the importance of transparent justice. Judge Bošnjak identified two categories of cases: firstly, where the judicial system relies on personal data and renders this data public and secondly, where the justice system itself creates personal data which is then mobilised by the media.

Judge Bošnjak analysed these two categories through the lens of four key cases from the ECtHR. In respect of the first category, he considered *B. and P. v. the United Kingdom*, *L.L. v. France* and *Vicent del Campo v. Spain*. Through these cases, amongst other points, Judge Bošnjak highlighted how the structure

of the ECtHR's reasoning and the key principles of interpretation of the ECHR remain the same in many contexts. For instance, the approach that the ECtHR takes to the question of the proportionality of an interference with Article 8 is complementary to the Court's approach when considering interferences with Article 6 and the need to balance Article 6 with other rights and interests. In respect of the second category, Judge Bošnjak explained that the Grand Chamber case of *Hurbain v. Belgium* concerning the 'right to be forgotten' and digital press archives, demonstrated the balance to be drawn between the right to be informed under Article 10 and the protection of private information under Article 8.

Judge Bošnjak also underlined that the ECtHR is subsidiary to the national courts and that:



National judges are the first instance Strasbourg judges in that they are called to examine the real-life cases by employing the tools the Court has developed. In doing so they share an important part of responsibility that the Strasbourg judges are expected to bear. Attending the Rule of Law Forum for South East Europe for the first time, I am really pleased to see the high level of exchanges between the participants. Obviously they are enriched by things they hear at the Forum, and they bring them home and implement them in their daily lives. This is how the European Convention on Human Rights lives in practice. Rights guaranteed by the Convention are not theoretical and illusory; rather they are practical and effective.

Marko Bošnjak

Panel discussions and working groups

➡ Panel Discussion No. 1: What is private information and personal data? The protection of private information during the investigative phase of proceedings

- **Moderator: Judge Arnfinn Bårdsen**
- **Panellists: Judge Jovan Ilievski, Judge Darian Pavli, Judge Erik Wennerström**

As was discussed by **Judge Ilievski**, the control of personal information and data about oneself, and thus data protection, is protected by Article 8 ECHR. This can apply to data both in the public and private domain. In the collection of evidence, and then its subsequent use in proceedings, **Judge Bårdsen** identified that there is a tension between (a) the need to protect society against crime, (b) the need

to protect the private life of those subject to investigation and (c) the need to ensure a fair trial. In respect of secret surveillance, **Judge Pavli** addressed the recent cases of *Big Brother Watch v. the United Kingdom* and *Centrum för rättvisa v. Sweden*, where the Court's Grand Chamber elaborated on the ECHR principles to be applied to bulk data interception, and in particular the importance of legislative safeguards. The investigative stage of proceedings can also raise issues where data obtained by public bodies is shared with third parties: both in the domestic context and where data is shared between states. The

recently communicated cases of *A.L. v. France* and *E.J. v. France*, where the applicants were prosecuted in the United Kingdom on the basis of evidence obtained from the infiltration of EncroChat encrypted communication software by the French authorities will be particularly pertinent to these issues.

Data obtained in breach of Article 8 may subsequently be used in judicial proceedings, for instance as evidence, which may engage the right to a fair trial under Article 6. **Judge Wennerström** discussed how the central question under Article 6 is whether the trial is fair as a whole. This often turns on whether there are sufficient safeguards, for instance whether the evidence can be challenged and whether it is the only piece of evidence.

He emphasised that the Court will see no automatic link between the question of a fair trial and the prior question of whether there has been a breach of Article 8 in the collection of the evidence.

The Forum Guide – for more information on:

- ▶ The protections afforded to private life by the ECHR, see pages 17-24, 38-42.
- ▶ Convention 108 and 108+ and the Budapest Convention, see pages 24-27.
- ▶ Special investigative measures and the impact on Article 8, see pages 43-59.
- ▶ The engagement of Article 6 where evidence obtained in breach of the Article 8 is used in proceedings, see pages 59-63.



➡ Panel Discussion No. 2: Publication of information during judicial proceedings; The right to be forgotten

- ➔ **Moderator: Judge Marko Bošnjak**
- ➔ **Panellists: Judge Faris Vehabović, Judge Ivana Jelić, Judge Davor Derenčinović,**

The second panel first discussed the publication of information before, during, and after judicial proceedings, and the application of Articles 8, 6 and 10 in this context.

In this context, the right to a public hearing and public judgments under Article 6 will be particularly relevant. **Judge Jelić** highlighted how the Court has recognised the public interest in the public nature of court proceedings, however, the publicity of proceedings can conflict with the protection of personal data and a balance must be drawn. For instance, the need to protect private life can justify *in camera* hearings for child residence

proceedings. **Judge Jelić** emphasised how national courts must approach the question on a case by case basis to determine whether the exclusion of the public from a certain part of the proceedings is justified. The publication of information during judicial proceedings can also raise issues in respect of the presumption of innocence. **Judge Derenčinović** discussed how the presumption of innocence can be jeopardised by statements made by state officials, including the police, about the trial. Judges also have a responsibility, for instance, in their choice of words and language, not to violate the presumption.

The publication of information on judicial proceedings, can also raise questions in respect of the 'right to be forgotten', derived from Article 8, which was discussed by **Judge Vehabović**. As technology and society's use of technology progresses the right to be forgotten is of ever-increasing importance to

individuals. The removal of material from press internet archives and the tensions between Articles 8 and 10, were addressed in the Grand Chamber judgment of *Hurbain v Belgium*. **Judge Vehabović** considered potential issues with the 'right to be forgotten' if it is abused, for instance with respect to public figures, and reiterated the importance of the factors identified in *Hurbain*.

The Forum Guide –for more information on:

- ▶ The right to a public hearing and Article 6(1), see pages 71-75.
- ▶ The right to the public pronouncement of judgments and Article 6(1), see pages 77-86.
- ▶ The presumption of innocence and Article 6(2), see pages 65-71.
- ▶ The developing case law on the 'right to be forgotten', see pages 87-112.



➡ Working group 1: Judicial proceedings, privacy and Article 8 ECHR

→ **Moderator: Judge Ivana Jelić**

Reported on by: Mirsad Ćeman, Vice-president, Constitutional Court of Bosnia and Herzegovina; **Zorana Jadrijevic Mladar**, Agent, Office of the Agent of Serbia before ECHR

This working group discussed the standards of Article 8 and Article 6 in respect of the publicity of courts' judgments; the transparency of the courts and of the prosecutors' office; and the right of citizens to an independent judiciary and the obligation on the judiciary to be independent. There was a focus on the anonymisation and redaction of judgments

and the different approaches that can be adopted, including partial or full anonymisation of judgments. Concerns were also raised as to

the impact of full anonymisation of judgments on judicial transparency and the public's trust in the judiciary.



➡ Working group 2: Fair trial guarantees in judicial proceedings and Article 6 ECHR

→ **Moderator: Judge Ledi Bianku**

Reported on by: **Tijana Badnjar**, Judge, Basic Court of Podgorica; **Milan Bajić**, Senior Legal Advisor for Harmonization of Court Practice, Supreme Court of Serbia

This working group discussed the use of evidence obtained using secret surveillance methods in criminal proceedings. Discussions focused on evidence obtained from EncroChat by the French authorities, which has been provided to authorities in the region. One



issue raised was the non-disclosure by the French authorities, for reasons of national security, as to how the evidence was obtained. Suggestions were made as to the principles

that can be deployed by the national courts in their reasoning when considering the reliability of the evidence.

► Working group 3: NGO Discussion – How can the judiciary protect private information without compromising transparency?

→ **Moderator: John Stauffer, Legal Director and Deputy Executive Director, Civil Rights Defenders**

Reported on by: Sanja Radivojevic, Belgrade Center for Human Rights Senior Legal Adviser; and **Art Vula**, Project Coordinator, Youth Initiative for Human Rights Kosovo

The working group, made up of participants from NGOs, noted that it is often difficult for the public or members of NGOs to obtain information on first or second instance proceedings or judgments. It was also noted that there were issues in respect of the anonymisation of judgments. For instance, due to poor anonymisation technology and

when decisions concerning public officials are anonymised despite the public interest in the case. Too much redaction can also make it impossible to understand the reasoning of the decision.

Recommendations for change were considered, including: a clear online system for publishing judgments and information on proceeding; greater transparency in disciplinary proceedings against judges and other legal professionals; comprehensive training programmes on data protection law for the judiciary; clear guidelines for judges on transparency and accountability; and holding judges individually accountable for personal data law violations during proceedings.



➡ Panel Discussion No. 3: A look ahead – issues on the horizon in Strasbourg

→ **Moderator: Judge Ledi Bianku**

→ **Panellists: Judge Arnfinn Bårdsen and Judge Tim Eicke**

The purpose of the final panel was to take stock of the conversations and issues discussed at the Forum, but also to look forward at how these issues may progress. **Judge Bianku** opened the discussion by recognising that the topics discussed address issues which are not only being faced by courts across the region, but also by courts across Europe and by the ECtHR. **Judge Bårdsen** highlighted how as technology continues to develop rapidly, it will be important to consider the prior case law of the ECtHR in respect of emerging technology and the methodology of the Court in this respect, referring to, for instance, *Leander v. Sweden*, *S. and Marper v. the United Kingdom* and *Big Brother Watch v. the United Kingdom*. These judgments demonstrate the importance of safeguards to protect both rights in the present and the potential future human rights breaches that the technology may lead to. However, as **Judge Bårdsen** highlighted with the rapid development of technology, including artificial intelligence, courts will have to consider whether the previous principles are sufficient. Likewise, in respect of evidence obtained from secret investigative measures, in particular evidence obtained from EncroChat, **Judge Eicke**

discussed the importance of considering the ECtHR's previous case law on targeted intercepts and bulk interception, but also questioned whether EncroChat evidence, which may have been obtained through the placing of malware on devices, will raise different questions to this case law. **Judge Eicke** emphasised that national courts play an important role in these cases, since they have access to more intelligence than the ECtHR. Further, there will be much that can be gained from reviewing the approaches taken by different national courts.

The panel also discussed the anonymisation and redaction of judgments. **Judge Eicke** discussed the different practices of the ECtHR and the CJEU in respect of anonymisation. He highlighted how there can be a conflict between the transparency and the right to access information on the one hand, and the right to respect to private life, and thus data protection, on the other. In respect of redaction of judgments, **Judge Eicke** emphasised the importance of there being some judicial supervision of evidence, even if this is not made public.

The Forum Guide –for more information on:

- ▶ Intercepted encrypted communications, see pages 47-49, 59, 62-63.
- ▶ Anonymisation and redaction of judgments, see pages 77-86.



Conclusions

Throughout the Forum, participants from across the region reflected with the ECtHR judges on the complex issues that arise in the context of data protection and judicial transparency.

Amongst other topics, participants discussed the protections provided by Article 8 and Article 6 in respect of special investigative measures; the balance between the requirement of a fair trial and the private life of those involved in proceedings; and the 'right to be forgotten' under Article 8 and the tension with the right to freedom of expression under Article 10.

These issues continue to be increasingly topical across Europe as ever-evolving technology transforms how we investigate and prosecute crimes, and how we conduct and record judicial proceedings. It was clear that these are issues that are not only common across the jurisdictions present at the Forum but are also topics that courts across the Council of Europe states, as well as the ECtHR, are considering. The importance of following the methodology of the Court was often highlighted, however, it was also clear that as technology continues to develop, so will the Court's case law.

A clear theme from the Forum was the role that national courts play in applying the ECHR. National courts are closer to the evidence, and it was often reiterated that the Strasbourg judges will often rely on their analysis. This further underlined the importance of judges at all levels being open to engaging with developing technology and the challenges, but also opportunities, that it can bring to judicial proceedings. It is hoped that the Forum will encourage the participants from across the region to continue to collaborate, and to learn from each other, as they work to embrace technological developments in a manner that upholds the rule of law and human rights.

The Forum concluded with a request for participants to contact the AIRE Centre and Civil Rights Defenders with any suggestions on how the Forum could be improved for future years. We are grateful to all those who participated to the Forum this year and would like to extend our thanks again for your attendance and contributions.

► List of cases referred to

- ▶ *A.L. v. France*, no. 44715/20; *E.J. v. France*, no. 47930/21, communicated
- ▶ *B. and P. v. the United Kingdom*, judgment of 24 April 2001, nos. 36337/97 and 35974/97
- ▶ *Big Brother Watch v. the United Kingdom*, judgment of 25 May 2021, nos. 58170/13, 62322/14, 24960/15
- ▶ *Centrum för rättvisa v. Sweden*, judgment of 25 May 2021, no. 35252/08
- ▶ *Hurbain v. Belgium*, Grand Chamber judgment of 4 July 2023, no. 57292/16
- ▶ *L.L. v. France*, judgment of 10 October 2006, no. 7508/02
- ▶ *Leander v. Sweden*, judgment of 26 March 1987, no. 9248/81
- ▶ *S. and Marper v. the United Kingdom*, Grand Chamber judgment of 4 December 2008, nos. 30562/04, 30566/04
- ▶ *Vicent Del Campo v. Spain*, judgment of 6 November 2018, no. 25527/13