EUROsimA 2024

European Court of Human Rights

Study Guide

Bucur and Toma v. Romania

European Court of Human Rights Study Guide

European Union Simulation in Ankara (EUROsimA) 2024

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Table of Contents

I. LETTERS

A. Letter from the Secretary-General

Esteemed participants,

I would like to welcome you all to EUROsimA 2024. My name is Alkım Özkazanç, and I am a third-year Political Science and Public Administration student at the Middle East Technical University. This year, I will be serving as the Secretary-General of this esteemed conference during its 20th annual session. EUROsimA has always held a special place for me since my first participation in the conference back in 2019; thus, being able to contribute to such a valuable session simply fills me with pride and excitement. An incredible amount of hard work has been dedicated to this conference, so I am confident that EUROsimA 2024 will not break the tradition and satisfy its participants as perhaps the most academically qualified Model European Union (MEU) simulation in Türkiye.

Our academic team, consisting of competent students who come from different departments and universities yet are definitely united by a strong team spirit, is the reason why I have been able to make the claim that stands just a few lines above. The Under-Secretaries-General and the Academic Assistants have been working hard for the last few months to produce a conference that is rich in content and educatory. I would like to thank every member of the academic team for their commitment.

Moreover, I would like to especially thank our Director-General, Miss Deren Ertan, whose support and company I can never disregard. I am quite grateful for her motivation, diligence, and solidarity, all of which she has exercised to an excellent degree. Seeing her and her team's efforts assures me that EUROsimA 2024 is going to be an unforgettable experience for all participants. Thus, I would like to thank every member of the organisation team for their commitment as well.

The European Court of Human Rights is not a body of the European Union, yet the values it safeguards are the very values on which the European Union stand. Thus, the participants of this committee would have a delightful time learning about those fundamental values while trying to decide on the fate of the case with zeal. At this point I would like to thank our Co-Under-Secretaries-General Miss Işıl Beyza Bala and Miss İdil Erdoğan for the disciplined efforts they have invested in this moot court. They are both 4th grade Law students yet they have done an excellent job in cautiously preparing the committee without omitting any detail; they deserve a great amount of admiration for that.

I strongly advise the participants to read the study guides in detail in order to get a firm understanding of the agenda item and to fully immerse themselves in their committees. Only through that immersion could one get a full taste of the committee and accumulate good memories. After this short piece of advice, I would like to once again welcome you all to EUROsimA 2024, hoping that it will be a remarkable experience for you.

Kind Regards,
Alkım Özkazanç
Secretary-General of EUROsimA 2024

B. Letters from the Co-Under Secretaries General

Distinguished Participants,

I would wholeheartedly like to welcome you all to the 20th annual session of the EUROsimA. My name is Işıl Beyza Bala, and as a law student in my senior year at Ankara University, it is a great pleasure of mine to serve you as the Co-Under-Secretary-General for the European Court of Human Rights.

This year, the European Court of Human Rights (ECHR) will be simulated for the second time at EUROsimA, and I feel honored to start this tradition after 2018. At this year's rendition, we will be witnessing the simulation of *Bucur and Toma v. Romania* which presents a delicate balance between freedom of expression and national security concerns.

In this case, Constantin Bucur's actions raised significant legal questions regarding the disclosure of state secrets in the interest of exposing irregularities within the Romanian Intelligence Service (SRI). As judges and advocates of the European Court of Human Rights, you are tasked with grappling with complex issues such as the definition of "state secrets", the limitations on freedom of expression in the name of national security, and the balance between the right to information and safeguarding national interests.

It was utmost my honor to work with such a dedicated and passionate Academic Team and before concluding my words, I have to extend my sincerest gratitude firstly to my honorable teammate Ms. İdil Erdoğan with whom I have enjoyed preparing this remarkable case, and our Secretary-General Mr. Alkım Özkazanç, who has given me the opportunity to be a part of this year's EUROsimA. I would also like to thank our Director-General Ms. Deren Ertan and her dedicated Organisation Team who have gone above and beyond to make this conference a reality.

Please do not hesitate to contact us via **bala@eurosima.org** and **erdogan@eurosima.org** in case you have any questions regarding the committee.

Yours sincerely,

Işıl Beyza Bala

Co-Under-Secretary-General for the European Court of Human Rights

Dear participants,

I am beyond excited to welcome you all to the 20th annual session of EUROsimA. My name is İdil Erdoğan and I am a senior law student at Başkent University. This year for the second time we proudly represent the European Court of Human Rights in which I will be serving as a Co-Under-Secretary-General.

The moot court will try to enlighten the case of *Bucur and Toma v. Romania,* a case that raised many questions on public security and states power over individual rights. Public safety and public security are important factors when dealing with human rights because they can be reasons for interference. We hope the guide and the material we provide will be sufficient for you to seek legal remedies for the questions that this case raises.

I would like to conclude my letter by thanking our outstanding Academic Team, it was a great honor working with each and every one of them. I would like to express my gratitude to my exceptional teammate Ms. Işıl Beyza Bala for her dedication and the remarkable work she put out for our moot court. I would also like to thank our Secretary-General Alkım Özkazanç for keeping us organized, giving us feedback, and providing us with the opportunity to be a part of this team. Also, a special thanks to out Director-General Ms Deren Ertan, and her team for organizing the event to every detail and their great work.

Please do not hesitate to contact us via **bala@eurosima.org** and **erdogan@eurosima.org** in case you have any questions regarding the committee.

Kind Regards,
İdil Erdoğan
Co-Under-Secretary-General for the European Court of Human Rights

II. INTRODUCTION

A. Brief Historical Context of International Human Rights Law

The emergence of the predecessors of international human rights law dates back to the 17th century, to the work of Dutch scholar Hugo Grotius (Buergenthal, Shelton, and Stewart 2009, 3). However, international human rights law as it is understood today should be traced back to the early 20th century, a period which, particularly during the two world wars, bore witness to some of the most heinous violations humanity had confronted up until that point.

Towards the end of the Second World War, the atrocities committed by the Nazi regime in Germany were already well known in international quarters, particularly among the Jewish community. The United Kingdom's Prime Minister Winston Churchill and President of the United States Franklin Roosevelt, who harbored a special interest in the promotion of human rights worldwide, led initiatives such as the **Moscow Declaration on Atrocities** in November 1943 to prepare the ground for a new global regime of human rights (CVCE.eu 2015). It was hoped that the end of the war would bring about new norms and new understandings which would reshape international relations and make human rights a prioritised agenda item. A major breakthrough in this regard came with the publication of the **Universal Declaration of Human Rights (UDHR)**, adopted at the United Nations General Assembly meeting on 10 December 1948 (United Nations n.d.). It was in this context that the **Council of Europe** and the subsequent **European Convention on Human Rights** emerged as key institutional arrangements that would both establish and safeguard this envisioned international regime of human rights.

B. European Convention on Human Rights

After the Second World War had devastated the entirety of Europe, the victorious powers sought to find a way to improve collaboration within the continent. In this regard, one of the

projects that was realised was the **Council of Europe** (CoE, the Council)[1], which was established on 5 May 1949 by 10 European member states. The Council was composed of two organs, including the **Committee of Foreign Ministers** and the **Consultative Assembly** (the Assembly), which consisted of the member States' representatives of the national parliaments (Robertson 1965, 27).

The goal of the CoE was the promotion of "common European values, standards, and institutions" (Ministry of Foreign Affairs of the Republic of Türkiye n.d.). In other words, the founders wanted to create mutual norms and disperse them across a newly resurgent Europe. One of these norms was the definition and preservation of **human rights**, which had become quite relevant due to the mass public awareness created by the war crimes of Axis countries such as Nazi Germany and the Japanese Empire. As a manifestation of this, Pierre-Henri Teitgen, a French statesman, made a speech to the Consultative Assembly in August 1949 and he specified an international court within the Council of Europe as "perhaps a special need" (Robertson 1961, 56).

Acting with this consideration in mind, the founders of the CoE created the **European Convention on Human Rights** (hereafter referred to as the "**Convention**") on November 4th, 1950 (Ministry of Foreign Affairs of the Republic of Türkiye n.d.). Although a regional arrangement that placed the human rights of citizens of solely European countries under protection, the Convention quickly became a trailblazer in the process of promoting human rights on an international scale.

The European Convention on Human Rights can be described as the "first real human rights treaty" due to the unique features that distinguished the Convention from its counterparts,

[1] The Council of Europe and the European Union share the same fundamental values – human rights, democracy and the rule of law – but are separate entities which perform different, yet complementary, roles.

particularly from the Universal Declaration of Human Rights (UDHR). Although personal and political rights were already guaranteed by the UDHR, the Declaration was not legally binding on the States. It was a proclamation, not a treaty. However, the Convention, in addition to being a treaty, was not merely pointing to an ideal, but it sought to translate that ideal into practical reality. Accordingly, the **European Commission of Human Rights**, and the **European Court of Human Rights** were established as the Convention's enforcement bodies in 1954 and 1959 respectively. The next chapter will elaborate on the Court and its functions.

III. THE EUROPEAN COURT OF HUMAN RIGHTS

A. Introduction

The European Convention on Human Rights and Fundamental Freedoms (the Convention) was signed in late 1950 and entered into force on 3 September 1953 (Myjer 2007, 5). With the ratification of the Convention, states undertook to secure a variety of political and civil rights of individuals within their jurisdiction (Bates 2010, 2). Since promising alone cannot be deemed enough for protecting the rights to protect the rights of individuals, the Convention introduced the European Court of Human Rights (the Court, ECHR) as an institution that will enable it to secure the rights outlined in the Convention. In this respect, the European Court of Human Rights was established in 1959 and is located in France. The Court essentially rules on individual or state applications alleging violations of civil and political rights that were laid forth in the Convention (International Justice Resource Center n.d.).

Before the Convention was adopted, there were different opinions on whether a European Court of Human Rights should be created at all. The majority of the States did not support the proposal to create a court with compulsory jurisdiction. A compromise solution was reached, which provides that the Court has jurisdiction only if the State concerned has recognised it by a declaration to that effect, or otherwise consented to it (Hart 2010, 539).

The European Convention on Human Rights has undergone various revisions over the years, which was made possible through the adoption of additional protocols: it now includes 11 additional protocols. On November 1, 1998, **Protocol No.11 to the Convention** entered into force. This one is especially notable since it enabled individuals to submit applications to the court (Hart 2010, 544). Anyone, whether an individual, a non-governmental organisation, or a group of individuals, who believes that their rights enshrined in the Convention or Protocols have been violated has the right to file an application before the Court through an individual application. Although the majority of the applications are lodged by individuals, a State can also submit to the Court against another State Party to the Convention; this is called an **inter-state application** (The ECHR in 50 questions 2021). However, it should be emphasised that individual applications make up most of the cases filed in the archive at present.

States Parties, which is the name given to countries that have fully ratified the Convention, promise to fulfil the obligation to protect the rights in the Convention for not just their citizens but also foreigners (European Court of Human Rights 2021). The rights secured by the Convention are the **right to life**, **the right to a fair hearing**, **the right to respect for private and family life**, **freedom of expression**, **freedom of thought**, **conscience, and religion**, and **the protection of property**. Some prohibitions include the following: torture and inhuman or degrading treatment or punishment, slavery and forced labour, the death penalty, arbitrary and unlawful detention, and discrimination in the enjoyment of rights and freedoms.

In addition to laying down a catalogue of civil and political rights and freedoms, the Convention sets up a mechanism for the enforcement of the obligations that are entered into force by the Contracting States. Three institutions are entrusted with this responsibility: the **European Commission of Human Rights**, the **European Court of Human Rights**, and the **Committee of Ministers of the Council of Europe**, the latter organ is composed of the Ministers of Foreign Affairs of the Member States or their representatives (Myjer 2007, 5).

Figure 1: The European Court of Human Rights in Strasbourg, France (Candice Imbert, title unknown, n.d., European Court of Human Rights)

B. Structure

The European Court of Human Rights consists of 47 judges, which is the same number as that of the States Parties to the Convention (Myjer 2007). Each State proposes three candidates, and the **Parliamentary Assembly** (formerly known as the Consultative Assembly) **of the Council of Europe** selects the judges for a nine-year term from among those candidates; a judge's term cannot be renewed (Myjer 2007). Although the selection of the judges is done in the name of the states, they do not represent their governments and are totally independent. In fact, they cannot engage in any sort of activity that can undermine their independence and impartiality. This is underlined by the oath taken before one takes up office: the judge in question shall make the following solemn declaration: "*I swear*" – or "*I solemnly declare*" – "*that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations*." (Registry 2023).

The court consists of five sections, or administrative entities, in which the Chambers and Committees are formed, and four different judicial formations. While deciding on the

composition of the sections, geographical and gender balances are taken into account to reflect the diversity among the legal and political systems of the Contracting Parties (Rules of Court, art. 25/2). Each section has its own judicial chamber consisting of the **President**, the **Vice-President**, and a number of judges.

As mentioned above, the judges of the court are allocated to four separate judicial formations (European Court of Human Rights n.d.a):

a) *Single judge:* The judge can only rule on the validity of the application based on the information applicant provides. The judge can only rule on inadmissibility decisions.

b) *Committee:* Consists of three judges. The judges can deliver judgments on the admissibility and merits of cases involving issues covered by well-developed case law. Their decisions are unanimous.

c) *Chamber:* Consists of seven judges. Judges rule on admissibility and merits for cases that cause problems and are unresolved. The decisions can be made by the majority and Chambers handle the great majority of the decisions of the court. Each chamber includes the Section President Judge and the "national judge" from the state that the application is filed against.

d) *The Grand Chamber:* Consists of seventeen judges. The Grand Chamber only hears a select number of cases that have been either referred to on appeal or dropped by a Chamber. These cases usually involve important or novel questions. Applications can never go directly to the Grand Chamber. After a decision is made at the Chamber, the parties may request a referral of the case, and the requests are accepted on an exceptional basis. A panel of judges decides whether the case needs consideration.

When it hears a case on referral, the judges that were previously a part of the chamber that first examined the case cannot be involved. Another way to the Grand Chamber

is when a case is relinquished by the Chamber. This may happen if the case raises a serious question or if the previous decisions are inconsistent. The Grand Chamber always includes the President and Vice-President of the Court, the five Section presidents, and the national judge.

Judges must withdraw if they previously took part in that case and will be replaced by another judge.

Figure 2: Grand Chamber hearing in the case of Duarte Agostinho and Others v. Portugal and 32 Others (Artist unknown, European Court of Human Rights, 2023)

C. Proceedings Before the Court

Any state or individual can bring the case to court if they claim to be a victim of a violation of the Convention. There are two types of applications to the court: **individual applications** and **inter-state applications**. When a state applies to the court against another state party, that is an inter-state application. Since the adoption of additional protocol no. 11, applications to the Court have been mostly made up of individual ones. Individual applications can be lodged by any person, group, company, or NGO (European Court of Human Rights 2021, 9).

Cases can only be brought against one or more states that have ratified the convention. Individuals can bring the case directly to the court without any assistance from a lawyer. However, once the application is confirmed to be admissible, individuals are required to be represented by a lawyer before the court. To ensure that everyone can access the court, there is no fee for application and individuals can request legal aid for the expenses the case might bring up. Any lawyer who can practice law in any of the party states can represent the applicant (European Court of Human Rights 2021, 7).

There are some requirements for a case to be declared admissible:

a) Necessary Documents

Firstly, the applicant should provide the court with the necessary information requested in the application form, which includes a summary of the case, a statement of the violations, and any relevant documents from national courts. The application form (or the Form) to the Court is available on the Court's Internet site and can be filled in two official languages of the Council of Europe (French and English) or in an official language of any Council of Europe member State (European Court of Human Rights. n.d.d). After filling out the application form, the form should be sent to the Court together with copies (but not the originals) of all the relevant documents (European Court of Human Rights. n.d.d).

b) Four Months Limit

The application should be submitted before the end of the mandatory four-month time limit. The four-month time limit starts from the date of the final domestic decision, meaning the exhaustion of domestic courts, as explained in the paragraph below. (European Court of Human Rights n.d.a).

c) Exhaustion of Domestic Remedies

The applicant can only apply to the European Court of Human Rights after the exhaustion of all domestic remedies. This means the claims should have been brought upon the highest court that the state can offer. This gives a chance for the states to redress the alleged violations before the Court gets involved. Secondly, the allegations should always be related to a violation of the Convention. The court cannot act on violations of rights that are not included in the European Convention on Human Rights (European Court of Human Rights n.d.a).

d) Victim Status of the Applicant

Lastly, the applicant should be a direct victim of the violation for their case to be admissible. In accordance with the ECHR, a person can claim to be a victim of a violation of their human rights if they have suffered or are at risk of suffering a real and significant harm because of a breach of the Convention by a state party. This harm can be either physical or moral, and it can be caused by an act or omission[2] of a state authority, such as a court, police, or government. In some cases, indirect victims can also apply to the court. For example, a relative can apply to the court if the actual victim has passed away (European Court of Human Rights n.d.a).

There are two main stages that the application goes through: the merits stage and the admissibility stage. Also, there are different stages of jurisdiction such as the following (European Court of Human Rights, n.d.c):

a) The application can go directly to a single judge formation and the judge can declare the case as inadmissible. This means that the application is clearly inadmissible from the beginning and this decision cannot be appealed against.

[2] a failure to fulfil a moral or legal obligation.

b) The applications might also be each assigned to a section and the president of that section designates a rapporteur. The rapporteur decides whether a Committee or a Chamber should see the case. The Committee can give a final decision or judgment but can also declare the case inadmissible or strike it out.

c) The cases assigned directly from a rapporteur or cases that were not declared inadmissible go to the Chamber. The Chamber can declare inadmissibility or make a judgment. The Chamber can also relinquish the case and make a referral to the Grand Chamber.

d) If the referral to the Grand Chamber gets accepted by a panel of judges, the case is heard at the Grand Chamber and the decision of the Grand Chamber is final.

Other than the applicant and the State that the case is filed against, third-party interveners can be authorized by the President to intervene in the case. They are entitled to attend public hearings and file pleadings. In some cases, the court can appoint experts to travel and investigate the case to clarify complications (Myjer 2007, 23).

Friendly settlement is when the parties settle their dispute and negotiate in a friendly way, which usually ends up with the alleged state paying damages to the victim. The Court encourages friendly settlement because it will save time and reduce the case files. The Court will hear the case if a friendly settlement cannot be reached. (Myjer 2007, 7)

States are also required to provide the court with the necessary documents. If they refuse to cooperate with the court, they would be found in violation of Article 38 of the Convention (obligating States to furnish all the necessary facilities to the Court).

D. Jurisdiction

A case can be finalized in two ways: with a **decision** or with a **judgment**. A decision is usually given by a single judge, a Committee, or a Chamber as it only concerns admissibility. A judgment, however, examines the admissibility and merits of the application.

a) Deliberations

When a case is declared admissible and referred to the Chamber or the Grand Chamber, the Court deliberates on the merits of the case. Deliberations are in private, and they shall remain a secret. Only the judges take part in deliberations. The Registrar and other officials of the Registry, whose assistance is deemed necessary, such as interpreters shall be present. If there are no special decisions made by the Court, no one else can take part in the deliberations (Rules of Court 2024, Rule 22).

b) Voting

After the deliberations, the president can request the judges to state their opinions about the case. The court's decisions are made with the majority of the judges present. If there is a tie, a fresh vote shall be taken and if that also ends up with a tie, the president gets to cast a vote. The decisions and judgments of the Chamber and the Grand Chamber are also made by the majority of the sitting judges. Abstentions are not allowed for final votes. The general rule for the votes is by a show of hands. The President may take a roll-call vote[3] in reverse order of precedence (Rules of Court 2024, Rule 23).

Judges may wish to draft an opinion concerning their votes, explaining why they voted with the majority or why they disagree with the majority of the judges. Within three months of delivery of the judgment of a Chamber, parties can request the case to be referred to the Grand Chamber

[3] A roll-call vote is when the judges vote "yea" or "nay" when his or her name is called and their votes are noted.

(Myjer 2010). The panel of the Grand Chamber, which consists of five judges, examines the requests in question. The Grand Chamber may decide to try the case or dismiss the case.

E. Effects of the Court's Judgement and Enforcement

The High Contracting Parties to the European Convention on Human Rights have committed themselves to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention and, in this respect, have undertaken to "abide by the final judgments of the Court in any case to which they are parties" according to article 46 paragraph 1 of the European Convention on Human Rights (Hart 2010, 542).

a) Interim Measures

When a Court receives an application, it may decide that the State should take certain measures. These measures are usually requests for the State to do something, such as not returning individuals if they are threatened with torture or death. These are called interim measures and almost all States follow these. No State has yet failed to follow the Court's requests (European Court of Human Rights 2021).

b) Committee of Ministers

Judgments are binding on the States if violations are found, and States are obligated to execute the requirements of the case. After the jurisdiction, cases are brought up to the Committee of Ministers of the Council of Europe. They monitor the execution of the judgments and ensure that the payments awarded by the court are delivered. According to Dothan (2011, 120), the Committee of Ministers is responsible for the enforcement of the judgments. If the government fulfilled the requirements of the judgment or if a friendly settlement was reached, the Committee adopts a resolution accepting the State's actions and declares that no further action is necessary beyond that. Otherwise, the committee asks the State to submit information on the

progress and puts the issue on the agenda. The Committee confers with the right department of the responsible country to decide how the judgment should be executed and how to prevent similar violations from happening. The Committee of Ministers' deliberations are confidential, but all the documents are open to the public. They have the power to threaten the party states with an end to their membership in the Council.

Inadmissibility decisions and judgments delivered by Committees or the Grand Chamber are final, and they cannot be appealed against. Chamber decisions and judgments can be referred to the Grand Chamber within 3 months of the delivery of the judgment (Registry 2022).

If a violation is found, the state responsible should prevent similar violations from happening in the future. If the violation is repeated the court may deliver new judgments against them. The States will have to amend their legislation in order to align it with the Convention. Over the past few years, the Court has developed a new procedure to carter with the concern of similar issues for many applications. These issues arise from the non-conformity of domestic law with the Convention. The Court now postpones similar cases that have been brought up, deals with one they call the "pilot case", and then calls on the State concerned to bring their domestic court in line with the Convention. They then proceed to dispose of other similar cases (European Court of Human Rights 2021, 11).

Figure 3: The Committee of Ministers oversees the execution of judgments (Candice Imbert, title unknown, Council of Europe, 2023)

IV. CORE CONCEPTS OF THE CASE

A. State Secrets[4]

"*I can't in good conscience allow the U.S. government to destroy privacy, internet freedom and basic liberties for people around the world with this massive surveillance machine they're secretly building.*" These words belong to Edward Snowden, who disclosed the U.S. governments' surveillance programs and led to ever-widening arguments regarding unauthorised disclosures[5] since 2013 (The Guardian 2013). Shortly after Snowden's unauthorised disclosure, Bradley Manning, a former intelligence analyst in the U.S. army, released thousands of pages of documents to WikiLeaks that shows there had been over 15,000

[4] State Secrets can be defined as information and documents so important that they can jeopardise a state's unity, sovereignty, constitutional order, internal and external security, and international relations when revealed (Kaya 2006, 33). According to the Romania Government Decision no. 585/2002, *State secret information is that information whose disclosure may result in serious damage to the national security and defense, and which, depending on the importance of the protected values (...)*(Article 4/2).

[5] Unauthorised disclosure means release of documents or information that is not allowed by state laws or regulations, any valid written agreements or contracts, or that does not comply with any lawful order (Law Insider n.d.a).

unrecorded civilian fatalities in Afghanistan and Iraq, and that the U.S. military had failed to look into claims of torture and mistreatment of detainees (Open Society Justice Initiative n.d.a.). These are a few examples of unauthorised disclosures that renewed awareness of national security concerns (Nasu 2015, 365). When it comes to state secrets, national security and the right to information of individuals, the relationship between these should be examined to avoid violation of rights and create a balance of interests.

On the one hand, in a democratic state, the right to information constitutes a basis for exercising the **right to expression** (Nasu 2015, 369). These freedoms, **freedom of expression** and the **freedom of information** as a component, are not only essential for human rights law, but for making the government responsive and accountable (Nasu 2015, 369). On the other hand, there are some information and documents so important that they can jeopardise a state's unity, sovereignty, constitutional order, internal and external security, and international relations when revealed (Kaya 2006, 33). These information and documents that can be described as "state secrets" and should be immunised from right to information for the sake of state's security. Even if this is the case, states may tend to expand the list of state secrets, or may define the related terms (national security, public interest etc.) in a very open-ended way which endangers the democratic society and its development. Therefore, it must be noted that democratic society and its progress should not be undermined by state security policies (Kaya 2006, 34).

B. Whistleblower

A whistleblower is a person who discloses confidential or classified information about an organisation without permission; these details are typically connected to misconduct or wrongdoing (Britannica 2024). A whistleblower usually works for the firm or agency where the misconduct is occurring; however, one does not have to be an "insider" to function as a

whistleblower (National Whistleblower Center n.d.a). The important point is not whether the one is an insider or not, but that if the person would not have disclosed the information, no one would have ever know about it (National Whistleblower Center n.d.a). Whistleblowers carry a vital importance in both the public and private sectors since they are the ones who expose unethical or illegal behaviour by a company or a public agency so that those responsible can be held accountable (Corporate Finance Institute n.d.a). However, whistleblowers frequently experience "*demotion, termination, blackballing, isolation, and humiliation*" (Gibbs 2020, 593). In addition to these, they are mostly subject to retaliatory actions. Therefore, by considering the whistleblowers' weak position, many polities have passed whistleblower-protection laws (Britannica 2024).

Protection for whistleblowers makes information disclosures possible even in cases when the person is at risk of retaliation from people in positions of authority. However, it should be noted that only a small number of nations have enacted comprehensive whistleblowing laws, which are vital for encouraging people to come forward without fear of negative consequences for their disclosures (Gibbs 2020, 593). For instance, according to the European Commission, whistleblowers are not equally or cohesively protected at the national or European level and they are therefore frequently discouraged from raising their concerns for fear of retaliation (European Commission n.d.a). In order to prevent this, on April 23, 2018, the European Commission presented a package of initiatives that included a proposal for a **Directive on the protection of persons reporting breaches of Union law (Directive 2019/137)** and a communication[6] outlining a comprehensive legal framework for whistleblower protection (European Commission n.d.b). On 23 October 2019, the directive was adopted, and it came into

[6]Brussels, 23.4.2018 COM (2018) 214 final, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, Strengthening whistleblower protection at EU level.

force on 16 December 2019. As of February 2023, the European Commission has referred 8 Member States (Czechia, Germany, Estonia, Spain, Italy, Luxembourg, Hungary and Poland) to the **European Court of Justice** due to their failure to communicate measures fully transposing the directive to their domestic law system (European Commission n.d.b).

C. Intelligence and Public Security

Intelligence can be defined as information with an added value. In order to understand the concept of intelligence analysis, its connection to information should be explored. Information is the raw form of knowledge; information is analyzed, compiled, and/or evaluated within the context of its source to produce intelligence. In simple terms, information is raw data and intelligence is data with significance. (United Nations Office on Drugs and Crime 2010, 1). Intelligence has had a crucial role on modern societies since it is an important pillar of the security systems. After the 9/11 attack in 2001, its significance increased and the strategies for surveillance took a different turn as the attack affected international politics.

Figure 4: 9/11 attack in New York City (Kelly Guenther, The New York Times/Redux, 2001)

It is important to the point out that the EU has started undertaking initiatives in the field of intelligence cooperation in order to deal with criminal acts such as international terrorism, organized crime, the proliferation of weapons of mass destruction and internet crimes (Bilgi 2016, 58). Continuing terrorist attacks seen in certain EU countries resulted in controversial debates and different responses regarding intelligence and surveillance strategies. These discussions have led to the reinforcement and the empowerment of intelligence and law enforcement agencies. Although those agencies safeguard security, it is important to underline that the strategies used for surveillance should not violate the fundamental rights of individuals. As PACE President Pedro Agramunt announced in 2016, *"Whatever we do to counter terrorism must be consistent with the values which unite us: human rights, democracy and the rule of law."* in order to clarify the main purpose the Assembly's initiative against terrorism.

Intelligence systems may vary across cultures since the perception of a threat can be interpreted differently. It can be said that intelligence is a dynamic concept, there is a political and cultural dimension of information-seeking and secrecy processing that states perform each on their own.

D. Lawful Interception

Generally speaking, recorded statements which are taken from a video, a tape or a voice recording, and other similar media can be one of the strongest types of evidence against a defendant in criminal cases (Schott 2003, 25). However, it should be strongly noted that these kinds of statements as evidence must be obtained in accordance in accordance with the law of the state at hand. Generally, in order for the interception to be lawful and to be used as evidence, it should be obtained following the procedure prescribed by that state, which may be to secure a court order or a warrant. However, there may be very special circumstances where the law does not require a warrant or court order before the interception. If there are no specific circumstances in the case, the necessary authorization must always be obtained, so the

interception must be in accordance with the law (Schott 2003, 25). Otherwise, it will not be possible to use the relevant interception records as evidence.[7]

Interception of people without lawful authorisation also constitutes a serious violation of the **right to respect for private and family life, home and correspondence** (Article 8 of the European Convention Human Rights). In this context, the wording of "correspondence" in this article essentially aims to enable the secrecy of communications throughout a broad spectrum of circumstances, such as i*nterception by various means and recording of personal or business-related conversations, for example by means of telephone tapping, even when carried out on the line of a third party* (European Court of Human Rights 2022). Consequently, to abstain from such violations and to enable the right to respect for private and family life, home and correspondence, the interception must have been legally authorised beforehand.

E. Concepts of Actus Reus and Mens Rea

These two key ideas in criminal law are essential for proving criminal responsibility. ***Mens rea*** refers to the offender's mental state at the time of the crime, whereas ***actus reus*** relates to the physical act of committing a crime.

The physical components of a crime are referred to as the *actus reus*, Latin for "guilty act." This covers any criminal behaviour, including acting and not acting (Cornell 2017). For instance, the physical act of shooting the victim constitutes the actus reus in a murder case. The prosecution must prove that the accused committed the actus reus for a person to be found guilty of a crime. The act of committing a crime alone, however, does not always establish criminal responsibility. The mental component of a crime, known as *mens rea*, must also be proven by the prosecution.

[7] For more information you can look at the doctrine of "The Fruits of the Poisonous Tree".

Mens rea describes the criminal's state of mind at the moment of the crime. This involves having the intent to commit a crime or knowing that they will. For instance, if someone intentionally shoots and kills someone, they have the necessary *mens rea* for murder (Cornell 2017). *Mens rea* can be used to prove criminal responsibility at several levels. The most frequent level is intent, or the offender's consciously held intention to conduct the act. Criminal culpability may also be established through recklessness, defined as a disregard for the possibility of harm, and negligence, defined as a failure to employ due care (Cornell 2017).

Actus reus is a legal term used in criminal law to describe the physical act or conduct that constitutes a crime. It refers to the external or observable elements of a crime, such as an action, omission, or possession of an illegal substance. To establish criminal liability, the prosecution must prove that the accused committed a prohibited act, or actus reus, and had the required mental state, or *mens rea*, at the time of the offense. For example, in a theft case, the *actus reus* would be the physical act of taking someone else's property without permission, while the *mens rea* would be the intention or knowledge of committing the theft. (ICLR 2021)

The specific *actus reus* required to establish criminal liability varies depending on the offense. In some cases, *actus reus* may involve a failure to act, such as failing to provide care to a dependent or a failure to report a crime. In such cases, the accused may be held liable for their inaction, which is considered a form of actus reus. The relationship between *actus reus* and *mens rea* is often described as the "guilty act" and the "guilty mind" working together.

The *actus reus* is the physical manifestation of the *mens rea*, which is the mental element of the crime. The level of *mens rea* required to establish criminal liability varies depending on the offense. The most common level is intent, which refers to the perpetrator's conscious desire to commit the crime. Recklessness, which refers to a disregard for the risk of harm, and

negligence, which refers to a failure to exercise reasonable care, can also be used to establish criminal liability.

Criminal responsibility may occasionally be proven in the absence of *mens rea*. These crimes are classified as strict liability offenses because the prosecution is not required to prove that the defendant was mentally competent at the time of the crime. The principles of actus reus and *mens rea* are crucial in determining criminal responsibility. For someone to be judged guilty of a crime, both requirements must be met.

IV. CASE BEFORE THE COURT (BUCUR AND TOMA v. ROMANIA)

A. Overview

On 11 November 2002, **Constantin Bucur**, **Mircea Toma**, and **Sorana Toma** lodged an application ("the Application") with the European Court of Human Rights under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In particular, Mr. Bucur alleged violations of his right to freedom of expression (Article 10 of the Convention) and his right to a fair trial (Article 6 of the Convention) as a result of his criminal conviction following the disclosure of information classified as "top secret". Mircea Toma and Sorana Toma considered that their right to respect for private life had been violated by the unlawful interception of their telephone conversations and the retention of the recordings by the **Romanian Intelligence Service** (***Serviciul Român de Informaţii***, "SRI") (Article 8 of the Convention). Applicants complained about the lack of an effective domestic remedy enabling them to complain of the disregard of their rights guaranteed by the above-mentioned articles (Article 13 of the Convention).

On 4 September 2007, the President of the Chamber of the Third Section decided that the Third Section will hear the admissibility and merits of the case. Following the withdrawal of Judge Corneliu Bîrsan for Romania (Rules of the Court, Article 28), the President of the Chamber appointed Ms Kristina Pardalos as *ad hoc* Judge (Article 26 § 4 of the Convention and 29 § 1 of Rules of the Court).

Figure 5: Interview with Mircea Toma (Euronews, 2012)

B. Facts of the Case

Background of the Case

1. In 1996, Constantin Bucur, the first Applicant who was born in 1952 and lives in Bucharest, worked in the telephone communication monitoring department in a military unit of the Romanian Intelligence Service (SRI) located in Bucharest.
2. The Second Applicant, Mircea Toma, who was born in 1952 and works at newspaper A.C, is the one of the persons whose conversations were allegedly intercepted by the SRI.
3. The Third Applicant, Sorona Toma, was born in 1985 and is the daughter of the Second Applicant, Mircea Toma.
4. Constantin Bucur (the First Applicant) realised a range of irregularities while he was working in the SRI: the identities of people being watched did not match the names of

the phone owners being tracked, and several records were written in pencil, so they had not been registered properly. In addition, following a series of high-profile cases particularly appearing in the press, a significant number of politicians, journalists, and businesspeople had all lately started to be wiretapped.

5. The First Applicant expressed that he had informed about these irregularities to his colleagues and his supervisor, the head of the surveillance department. However, upon the instruction of the unit commander, he was rebuked and was advised to drop his allegations, besides he was told that he had problems, the First Applicant said.
6. Following the above-mentioned persons' loss of interest in the matter, the First Applicant contacted MP, a member of the parliamentary committee responsible for overseeing the SRI. MP told him that the best way to make public the irregularities he had observed in the performance of his duties was to hold a press conference. According to MP, given the links between the committee chair and the director of the SRI, raising these irregularities before the committee of which he was a member would have no effect.
7. On 13 May 1996, the First Applicant held a press conference. In the presence of several members of the *România Mare* party and MP, he disclosed audio tapes and the irregularities in the activities of the SRI. The First Applicant justified the disclosure by the desire to ensure compliance with Romanian law, in particular the Constitution. He also stated that the information made public was not a State secret, but evidence of political policing carried out by the SRI at the behest of its director during the year of parliamentary and presidential elections. According to the First Applicant, wiretapping had benefited the ruling party and various political parties in their internal affairs.
8. One of the tapes that Constantin Bucur obtained and disclosed on 13 May 1996, included a recording of a phone call that took place on 12 April 1996, between the

Second Applicant and Third Applicant, who was a minor at that time. The tape consisted of a telephone conversation from the telephone set in their (Second and Third Applicants) house.

9. The press conference organised by the First Applicant aroused intense media attention nationally and internationally. Political and civil society organisations made numerous statements on the issue.

The Investigation of the SRI Oversight Parliamentary Committee

10. On 5 May 1996, the parliamentary committee responsible for overseeing the SRI appointed a special committee to investigate the First Applicant's allegations. The committee went to the SRI building to carry out an on-site inspection. According to the petitions submitted by the First Applicant to the District Military Court, the committee questioned the director of the SRI, and the director of the department responsible for the surveillance.
11. The ECHR was not informed about either the investigation or findings of the Committee.

Criminal Proceedings against Constantin Bucur

12. On 14 May 1996, the Military Public Prosecutor's Office attached to the High Court of Cassation and Justice of Romania took up the case on its own initiative.
13. On 20 May 1996, the First Applicant’s house was searched. The First Applicant also gave a statement to the Public Prosecutor in charge of the case on the same day.
14. On 27 May 1996, the First Applicant was assigned to the reserve army and, therefore, lost his status as a soldier.
15. On 31 July 1996, criminal proceedings were initiated against the First Applicant for offences under National Security Act No. 51/1991. The First Applicant was accused of

collecting and transferring information of a secret or confidential nature in the performance of his duties (Article 19 of the National Security Act). The First Applicant was also accused of disclosing and unlawfully using information regarding the private life, honour and reputation of persons (Article 21 of the National Security Act).

16. On 5 August 1996, the First Applicant was accused of theft, a crime under Articles 228 and 229 of the Criminal Code, for taking several audio cassettes from SRI's building.

Figure 6: The Romanian Intelligence Service's headquarters, SRI, in Bucharest. (SRI Facebook page, 2023)

17. During the investigation, the First Applicant requested the below measures to be taken: the questioning of the director of the SRI who claimed that the telephones mentioned by the First Applicant were not tapped and a request for the SRI to provide a copy of the applications sent to the Public Prosecutor's Office to obtain legal authorizations for surveillance and copies of the Public Prosecutor's Office warrants. With these requests for evidence, the First Applicant sought to show that the surveillance warrants were issued after the press conference of 13 May 1996. The Military Prosecutor in charge of the investigation rejected the First Applicant's requests without giving any reasons.

18. On an unspecified date, nine natural and legal persons (including the editorial staff of the newspaper A.C.) filed a complaint to the court against the SRI under Article 302 of the Criminal Code (violating the privacy of correspondence). These persons were the ones who alleged that their telephone conversations were intercepted without the authorization of the Public Prosecutor, so it was illegal. They learned that they had been intercepted from the audio tapes which were disclosed by Mr. Bucur.
19. On 23 October 1996, the Public Prosecutor decided to examine these complaints separately. It means that Mr. Bucur's case was not related to these nine persons' complaints, or the cases.
20. In the indictment dated 24 October 1996, the Military Prosecutor's Office issued an arrest warrant against the First Applicant. Mr. Bucur's case was referred to the Bucharest Military Court. The Bucharest Military Court declined jurisdiction and referred the case to the Regional Military Court (the Military Court).
21. According to the First Applicant, at the beginning of the trial, the President of the Military Court ("C.L.") said "I will make Bucur disappear" ("*O să-l rad pe Bucur"*). These words appeared in the 24 October 1997 edition of the newspaper *România Mare*.
22. During the proceedings before the courts, the First Applicant was represented by several lawyers who undertook in their written submissions not to disclose information classified as top secret under domestic law.
23. On 23 December 1996, the first hearing was held, and the First Applicant and the MP were heard before the Military Court.
24. At the public hearing on 7 February 1997, the Military Court heard eleven witnesses, including T.N., a member of the România Mare party who had attended the press conference of 13 May 1996, and eleven officers, colleagues and superiors of the First Applicant. During the hearing, the First Applicant requested that the case be referred to

the Military Prosecutor for further investigation. He also asked for confirmation that the authorization for wiretapping granted by the Public Prosecutor had been based on national security grounds. With this request, the First Applicant aimed to prove that the surveillance warrants or the authorization for wiretapping, if granted, was issued without solid grounds.

25. On 14 February 1997, the First Applicant's lawyer submitted a petition and argued that the hearing of the case could not be separated from the hearing of the nine criminal complaints submitted by the persons whose communications had been wiretapped by the SRI since that case could not be separated from the First Applicant's case with respect to the *actus reus* and the *mens rea* of the offence under question. On 21 February 1997, the demands in the petition were dismissed by the Military Court.

26. At a public hearing of the Military Court on 21 February 1997, the First Applicant requested, in particular, the following measures: the questioning of V.M. (the director of SRI at the time the phones were tapped) who allegedly told the press and before the parliamentary committee that the phones the First Applicant had referred to had not tapped; and the questioning of R.T. (the new director of the SRI), who told the media that he was aware of illegal wiretapping within the SRI. The First Applicant also requested the provision of the copies of the following documents: the surveillance warrants that had been issued by the Public Prosecutor, copies of the Public Prosecutor's Office records regarding the surveillance, requests sent to the Public Prosecutor to obtain documents from the files compiled following criminal complaints filed by nine persons whose communications were intercepted.

27. Moreover, the First Applicant requested the determination of whether allegedly illegal wiretaps had led to criminal proceedings against the persons concerned. The First Applicant intended to use this evidence to show that the prosecutorial authorizations

contained in the investigation file were issued after the surveillance and were not, in any event, based on State security grounds. The First Applicant decided **not to** file a complaint alleging forgery of official documents.

28. On March 14, 1997, the Military Court ruled that all the above-mentioned requests for evidence were irrelevant. The Court stated that the statements of V.M. and R.T. were irrelevant since statements made to the media could not be subject to judicial review. As to the documents that were requested by the First Applicant, the Court found that they contained highly confidential material irrelevant to the case, such as the determination of whether the wiretaps had led to criminal investigations or what the outcome of the nine criminal complaints had been. With regard to the Prosecutor's Office records regarding surveillance warrants and their records, the Court found that SRI's applications and the Prosecutor's Office warrants bore dates certified by the public authorities and that their authenticity could only be verified through the filing a complaint alleging forgery before the courts, which the First Applicant refused to initiate.

29. However, noting that this was the first case brought before the court in relation to articles 19 and 21 of National Security Act No. 51/1991, the Court accepted the submission of further evidence requested by the First Applicant: the submission of the warrants for the surveillance of the stations in question on the tapes made public at the press conference, the submission of the Organisational Regulations of the SRI Oversight Parliamentary Committee (so that the arrangements for recourse to this committee by interested parties could be established) and the submission of the minutes of the hearing held by the Committee on 15 May 1996 (for the purpose of comparison with the various statements made during the criminal investigation).

30. The Court also decided on its own initiative to take further evidence. It ordered the Prosecutor's Office to include in the case file the applications for surveillance warrants, the stenographic recordings of the meetings of Parliament and the law committees during the proceedings, and the transcripts of the hearings.

31. On 28 March 1997, the Court noted that the Prosecutor's Office had issued surveillance warrants for the stations in question on the tapes made public at the press conference following the application of SRI. As these documents were highly confidential, the Court placed them in a separate volume (Volume 9).

32. On 11 April 1997 and on 9 February 1998, the Court heard five witnesses including the Second Applicant, Mircea Toma.


SRI

RECUNOAȘTE

Figure 7: Captain Constantin Bucur in a news article about the case (www.luju.ro, artist unknown, 2017)

33. On 22 September 1998, the First Applicant submitted his written observations. He argued that he had not disregarded any value protected by criminal law and that the prerequisite for the punishment of an act under Criminal Law, namely the existence of a social danger, was not satisfied in the present case. In particular, he emphasised that the purpose of his action was to publicise the irregularities committed at the SRI to the

detriment of private individuals and, therefore to ensure respect for the rights guaranteed by the Constitution. Furthermore, the offence in Article 19 of Act No. 51/1991 requires intent to participate in acts threatening national security, whereas the First Applicant acted in good faith. The First Applicant also alleged a violation of his freedom of expression in the event of a criminal conviction. The objections were based, *inter alia*, on top-secret documents contained in Volume 9 of the file.

34. By the judgement of 20 October 1998, the Military Court sentenced the First Applicant to a suspended two-years in prison for the offences of **theft**, **unlawful collection and transmission of confidential information**, and **unlawful disclosure and use of data affecting a person's private life, honour and reputation**.
35. Upon the judgement of the Regional Military Court, it was appealed to the Military Court of Appeal.
36. By the judgement of June 14, 1999, the Military Court of Appeal upheld the decision of the order of the Regional Military Court.
37. Upon the dismissal of appeal, it was appealed to the High Court of Cassation and Justice.
38. On 13 May 2002, the High Court of Cassation and Justice dismissed the appeal and upheld the order of the Regional Military Court.

Interception of the Telephone Conversations of the Second and Third Applicants

39. One of the tapes received and made public by Constantin Bucur contained a recording of a telephone conversation between the Third Applicant (the Second Applicant's minor daughter) and the Second Applicant made on 12 April 1996, from a telephone set found in the Second and Third Applicants' homes (See paras. 2,3 and 8 above).
40. The Second Applicant, Mircea Toma, and some of his colleagues on the editorial staff of the newspaper A.C., lodged a criminal complaint alleging illegal interception of communications from telephones belonging to the newspaper. On 28 November 1996,

the editorial staff of the newspaper received a note stating that the interceptions in question were directed against a specific member of the editorial staff and had been carried out with the surveillance warrant of the public prosecutor.

41. On 11 April 1997, during the Military Court hearing of the criminal case against the First Applicant, the Second Applicant complained that the interception of his communications from the telephones in his home was unlawful. The Military Court took no action on the Second Applicant's complaints.

42. Despite several requests to the authorities, the Applicants were unable to obtain copies of various documents in the criminal file, in particular applications for surveillance warrants, or transcripts of telephone conversations, on account of their top-secret nature. However, on 29 May 2003, the Second Applicant and his lawyer, Ms Macovei, were shown some documents from the criminal file at the Military Court premises. The Second Applicant learned that the telephones in the editorial office of the A.C. newspaper and at his home had been tapped pursuant to a Prosecutor's warrant issued on 16 November 1995. This authorization was valid until 15 May 1996.

43. During the short period of time he was allowed to examine the file, the Second Applicant's lawyer hand-copied the SRI's application for a warrant to intercept Mr. Toma's telephone communications and the authorization issued by the Public Prosecutor for that purpose. From a reading of these copies, which were transmitted to the Court, it appeared that the application for the interception warrant was based on the fact that the SRI had information and evidence indicating that Mr. Toma was carrying out activities which constituted a threat to Romania's national security, but no further details of that information and evidence were given. No other grounds were given for the Prosecutor's authorization of 16 November 1995.

C. Claims of the Parties

Claims of the Applicants

1. The First Applicant alleged that the SRI wiretapped persons without being granted necessary authorisation.
2. The First Applicant alleged that surveillance warrants regarding the audio tapes that were made public were not issued in accordance with the law.
3. The First Applicant alleged that he did not disregard any rule of the law, and he exercised his right to expression while he was holding the press conference on 13 May 1996.
4. The First Applicant alleged that his freedom of expression which is enriched in Article 10 of the European Convention on Human Rights was violated by the Government of Romania.
5. The First Applicant alleged that he had lost his soldier status as a result of the retaliatory act, so it was unfair, and his damages should be compensated.
6. The First Applicant alleged that his right to fair trial which is enriched in Article 6 of the European Convention on Human Rights was violated by the Government of Romania.
7. The Second Applicant alleged that interception of the telephone conversation with his daughter, the Third Applicant, on April 12, 1996, was not based on a surveillance warrant issued according to the solid ground.
8. The Second Applicant and the Third Applicant alleged that since they had been wiretapped illegally, their rights to respect for private and family life that is enriched in Article 8 of the Convention was violated by the Government.

9. Applicants alleged that their rights to an effective remedy (Article 13 of the Convention) were violated by the Government since there was not an effective domestic remedy enabling them to complain of disregard of their rights guaranteed by the Convention.

Figure 8: SRI anti-terror brigade officer. (adevarul.ro, artist unknown, 2013)

Claims of the Government

1. The Government alleged that the SRI carried its duties under the law, and obtained surveillance warrants of the Public Prosecutor before wiretapping persons.
2. The Government alleged that Mr. Bucur disclosed some top-secret information and items, which are classified as state secrets.
3. The Government alleged that the disclosure of Mr. Bucur has led to the damages of national security.
4. The Government alleged that unauthorised disclosure of Mr. Bucur cannot be classified as "expression of his freedom of expression".
5. The Government alleged that the entire procedure before the National Courts proceeded according to the laws, and thus did not violate Article 6 (right to a fair trial) of the Convention.

6. The Government alleged that the Second and Third Applicants' telephone conversation was intercepted after obtaining the surveillance warrant. In this context, the Government also claimed that the prosecutor has the discretion to grant such an authorization, so a mere reason (national security concerns) can be the reason for the warrant.

D. Matters to be Addressed in the Judgment

1. Whether or not Article 6 of the European Convention on Human Rights had been violated,
2. Whether or not Article 8 of the European Convention on Human Rights had been violated,
3. Whether or not Article 10 of the European Convention on Human Rights had been violated,
4. Whether or not Article 13 of the European Convention on Human Rights had been violated,
5. Whether or not Mr. Bucur can be considered a whistleblower, and therefore become eligible for whistleblower protections,
6. Whether or not the information that Mr. Bucur had disclosed could be considered as state secrets,
7. Whether or not the information that Mr. Bucur had disclosed could be considered related to national security,
8. Whether or not Mr. Bucur had committed theft according to the Romanian Law,
9. Whether or not Mr. Bucur had transmitted confidential information according to the Romanian Law,
10. Whether or not Mr. Bucur's disclosure can be considered as unlawful disclosure according to the Romanian Law,
11. Whether or not the data that Mr. Bucur had disclosed violated a person's private life, honour, and reputation according to Romanian Law,
12. Whether or not Mr. Toma and his daughter's telephone conversation was wiretapped illegally by the SRI,

13. Whether or not the surveillance warrants were issued properly before the interception of several people in the case,

V. APPLICABLE LAW

A. European Convention on Human Rights

The following explanations for the Articles relevant to the case are cited from the European Court of Human Rights Registry's guides on each Article.

a) Article 6 of the Convention – Right to a fair trial

The Article 6 of The Convention on Human Rights reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

The Article establishes the right to a fair trial for individuals facing criminal or civil proceedings. It is one of the most fundamental provisions of the Convention, reflecting the importance of the rule of law and the right to access justice. The right to a fair trial includes a range of specific rights, such as the **right to be informed of the charges against a person**, the **right to a public hearing**, the **right to a lawyer**, the **right to have adequate time and facilities to prepare your defense**, the **right to examine witnesses**, and the **right to an impartial tribunal**.

The purpose of these rights is to ensure that individuals can effectively and fairly defend themselves against any accusations made against them. The right to a fair trial is a cornerstone of democratic societies and is essential for the protection of human rights. It ensures that individuals are not subject to arbitrary or unjust treatment by the state, and that they have a fair opportunity to present their case and defend themselves against any accusations. This is particularly important in criminal cases, where the stakes are high, and the consequences of a wrongful conviction can be severe.

The Court has developed a body of case law that clarifies the scope and content of the right to a fair trial and provides guidance to member states on how to ensure that this right is respected in practice. One of the key principles of the right to a fair trial is the right to an independent and

impartial tribunal. This means that judges and other decision-makers involved in the trial must be free from any external pressures or influences that could interfere with their ability to be impartial. The ECHR has emphasized that the appearance of impartiality is just as important as actual impartiality, as perceptions of bias can undermine public confidence in the fairness of the proceedings.

Another important aspect of the right to a fair trial is the right to a lawyer. This means that individuals facing criminal charges must be provided with legal representation, at public expense if necessary. The right to a lawyer is essential to ensuring that individuals can effectively defend themselves against the charges, and to make sure that the proceedings are conducted fairly and in accordance with the law.

The right to a fair trial also includes the right to a public hearing. This means that proceedings must generally be open to the public, barring certain limited exceptions. The purpose of this requirement is to ensure that justice is done not only in fact, but also in the eyes of the public. However, the ECHR has also recognized that there may be circumstances where it is necessary to limit public access to the proceedings.

In addition to these specific rights, the right to a fair trial also encompasses a broader principle of procedural fairness. This means that the proceedings must be conducted in a manner that is fair and impartial, and that respects the rights and dignity of all individuals involved. This includes the right to be treated with respect and dignity, the right to have access to all relevant evidence, and the right to have adequate time and facilities to prepare your defence.

Figure 9: Iustitia, Lady justice. (Tim Reckmann, flickr.com)

b) Article 8 of the Convention– Right to respect for private and family life

The Article 8 of The Convention on Human Rights reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The article encloses the right to respect for private and family life, home, and correspondence. There are four chapters to this article and the applicants must show that their complaint falls within at least one of these four chapters that are: private life, family life, home, and correspondence. The concepts such as *'private life'* and *'family life'* are broadly interpreted by the court.

According to the Article, Member States have positive and negative obligations to ensure that the rights are respected even as between private parties. Although the object of the Article is essentially that of protecting the individual against arbitrary interference by the public

authorities, it does limit the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

The principles applicable to assessing a State's positive and negative obligations under the Convention are similar. Consideration must be given to the fair balance that has to be struck between the competing interests of the individual and of the society; the aims mentioned in the second paragraph of the article are of a certain relevance in that regard.

In the case of a positive obligation, the Court considers whether the importance of the interest at stake requires the imposition of the measures sought by the applicant. Certain factors have been considered relevant for the assessment of the content of positive obligations on States. Some of them relate to the applicant. They concern the importance of the interests at stake; they also concern whether the "fundamental values" or "essential aspects" of private life are in contrast with the social reality, the law, and the coherence of the administration and legal practices within the domestic system.

Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question is whether the alleged obligation has been defined in a narrow and precise manner or a broad and indeterminate manner. Furthermore, the evaluation of Article 8 is influenced by the effect of a difference between societal norms and legal regulations on the applicant, with the consistency of administrative and legal procedures within the national system being a crucial aspect. As in the case of negative obligations, in implementing their positive obligations under Article 8, the States enjoy a certain margin of appreciation.

Afterward, the Court has confirmed that when assessing whether the measures were "necessary in a democratic society," it will evaluate whether the reasons provided to justify them were

relevant and sufficient in the context of the case, and whether the measures were proportionate to the legitimate goals pursued. The Court has further clarified this criterion, specifying that the concept of "necessity" under Article 8 requires that the intervention corresponds to an urgent societal requirement and remains proportional to the legitimate objective pursued. In determining whether an intervention was necessary, the Court will consider the creation afforded to the State authorities, but it is the responsibility of the respondent State to prove the existence of an urgent societal need justifying the intervention.

c) Article 10 of the Convention – Freedom of expression

The Article 10 of The Convention on Human Rights reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Article does not apply solely to certain types of information or ideas or forms of expression, particularly those of a political nature; it also includes artistic expression such as a painting, the production of a play, and information of a commercial nature. The Court has specified on numerous occasions that freedom of expression extends to the publication of photographs and even of photomontages.

Regarding types of behaviour, the Court makes a distinction between, firstly, objectionable actions carried out in the process of preparing a publication or broadcast, or protests aimed at obstructing activities opposed by the applicants, which may come under the scope of Article 10 of the Convention; and secondly, actions that violated domestic criminal law in a manner not linked to the exercise of freedom of expression.

Violation of freedom of expression under the Convention occurs if interference fails to meet the criteria outlined in the second paragraph of Article 10. It is crucial to establish whether the interference was "prescribed by law." Primarily, it falls upon national authorities, particularly the courts, to interpret domestic legislation. Unless the interpretation is arbitrary or clearly unreasonable, the Court's role is limited to determining whether the consequences of that interpretation align with the Convention.

The Court has ruled that a regulation cannot be considered a "law" unless it is formulated with enough clarity to allow individuals to govern their behaviour, and they must be able to anticipate to a reasonable extent, given the circumstances and the potential consequences of their actions, possibly with appropriate guidance. However, the Court has added that these consequences do not have to be entirely predictable, as experience has shown this to be unattainable. While certainty is preferable, it may lead to excessive inflexibility, and the law must be adaptable to evolving circumstances. Therefore, many laws inevitably use language that is somewhat vague, and their interpretation and application depend on practical considerations.

Figure 10: An illustration representing freedom of expression (Artist unknown, The Leaflet, 2023)

d) Article 13 of the Convention – Right to an effective remedy

The Article 13 of The Convention on Human Rights reads as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The purpose of Article 13 is to offer individuals a mechanism to seek redress at the national level for breaches of their Convention rights before resorting to the international process of lodging complaints with the Court. Essentially, Article 13 addresses grievances related to actual violations of Convention provisions.

By directly emphasizing the obligation of states to prioritize the protection of human rights within their own legal frameworks, this Article introduces an extra safeguard for individuals to genuinely exercise those rights. Should Article 13 not be fully implemented, individuals would consistently be compelled to bring complaints directly to the Court that ideally should have been addressed initially within the national legal system. This scenario risks undermining the

effective operation of the human rights protection scheme established by the Convention, both at the national and international levels.

Accordingly, the incomplete scrutiny of the existence and functioning of domestic remedies would weaken and render illusory the guarantees of Article 13, while the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. Thus, the principle of subsidiarity does not mean renouncing all supervision of the result obtained from using domestic remedies.

Therefore, an individual who has not utilized the relevant domestic remedies cannot invoke Article 13 independently or in conjunction with another article. Article 13 ensures the provision of an effective remedy before a national authority for anyone whose Convention rights and freedoms have been infringed. Interestingly, the term "grant" ("octroi") does not appear in the English version of Article 13, which states "everyone ... shall have an effective remedy." Consequently, Article 13 necessitates a domestic remedy before a "competent national authority" that can address the substance of a potentially valid complaint under the Convention and provide appropriate redress. Nonetheless, Contracting States are given a degree of flexibility in fulfilling their obligations under this provision. However, Article 13 does not mandate any specific form of remedy, considering the latitude afforded to Contracting States.

Article 13 does not extend to mandating the integration of the Convention into domestic legislation. However, all States parties have now incorporated the Convention into their domestic legal systems, rendering the Court's jurisprudence directly applicable. Article 13 does not assure an applicant the right to ensure the prosecution and conviction of a third party or a right to personal retaliation. The provisions of Article 13, along with other Convention provisions, are in the form of a guarantee rather than a mere expression of intent or practical

arrangement. This underscores the significance of the rule of law, a fundamental principle of a democratic society inherent in all Articles of the Convention.

Figure 11: Romanian Intelligence Service (SRI Facebook page, 2016)

B. Relevant International Law

a) Recommendation No. R (2000) 10 of the Committee of Ministers to Member States on codes of conduct for public officials

i) Article 11

Recommendation No. R (2000) Article 11 reads as follows:

''Having due regard for the right access to official information, the public official has a duty to treat appropriately, with all necessary confidentiality, all information and documents acquired by him or her in the course of, or as a result of, his or her employment.''

ii) Article 12 §§ 5 and 6

Recommendation No. R (2000) Article 12 paragraph 5 reads as follows:

''The public official should report to the competent authorities any evidence, allegation or suspicion of unlawful or criminal activity relating to the public service coming to his or her knowledge in course of, or arising from, his or her employment. The investigation of the reported facts shall be carried out by the competent authorities.''

Paragraph 6 reads as follows:

''The public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in good faith.''

b) Resolution 1729 (2010) Protection of "whistle-blowers"

Resolution 1729 (2010) Article 6 reads as follows:

''The Assembly invites all member states to review their legislation concerning the protection of whistle-blowers, keeping in mind the following guiding principles:

6.1. Whistle-blowing legislation should be comprehensive:

6.1.1. the definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies;

6.1.2. the legislation should therefore cover both public and private sector whistle-blowers, including members of the armed forces and special services, and

6.1.3. it should codify relevant issues in the following areas of law:

6.1.3.1. employment law – in particular protection against unfair dismissals and other forms of employment-related retaliation;

6.1.3.2. criminal law and procedure – in particular protection against criminal prosecution for defamation or breach of official or business secrecy, and protection of witnesses;

6.1.3.3. media law – in particular protection of journalistic sources;

6.1.3.4. specific anti-corruption measures such as those foreseen in the Council of Europe Civil Law Convention on Corruption (ETS No. 174).

6.2. Whistle-blowing legislation should focus on providing a safe alternative to silence.

6.2.1. It should give appropriate incentives to government and corporate decision makers to put into place internal whistle-blowing procedures that will ensure that:

6.2.1.1. disclosures pertaining to possible problems are properly investigated and relevant information reaches senior management in good time, bypassing the normal hierarchy, where necessary;

6.2.1.2. the identity of the whistle-blower is only disclosed with his or her consent, or in order to avert serious and imminent threats to the public interest.

6.2.2. This legislation should protect anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment).

6.2.3. Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.

6.2.4. Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.

6.2.5. Relevant legislation should afford bona fide whistle-blowers reliable protection against any form of retaliation through an enforcement mechanism to investigate the whistle-blower's complaint and seek corrective action from the employer, including interim relief pending a full hearing and appropriate financial compensation if the effects of the retaliatory measures cannot reasonably be undone.

6.2.6. It should also create a risk for those committing acts of retaliation by exposing them to counter-claims from the victimised whistle-blower which could have them removed from office or otherwise sanctioned.

6.2.7. Whistle-blowing schemes shall also provide for appropriate protection against accusations made in bad faith.

6.3. As regards the burden of proof, it shall be up to the employer to establish beyond reasonable doubt that any measures taken to the detriment of a whistle-blower were motivated by reasons other than the action of whistle-blowing.

6.4. The implementation and impact of relevant legislation on the effective protection of whistle-blowers should be monitored and evaluated at regular intervals by independent bodies.''

C. Relevant Domestic Law

a) National Security Act No. 51/1991 of Romania

i) Article 3

Law on the National Security of Romania Article 3 reads as follows:

''The following are considered threats to Romania's national security:

a) the projects and actions aiming at the suppression or at the prejudice of the sovereignty, unity, independence or indivisibility of the Romanian state;

b) the actions having as purpose, directly or indirectly, the provocation of a war against the country, or of a civil war, facilitating foreign military occupation, subjugation to a foreign power, or aiding a foreign power or organization to commit any of these deeds;

c) treason by helping the enemy;

d) the military or any other violent actions aiming at the weakening of the state power;

e) espionage, transference of state secrets to a foreign power or organization, or to their agents, illegal procurement and holding of state secret documents or data with a view to

transferring them to a foreign power or organization, or to their agents, or with any other end, unauthorized by law, as well as disclosure of state secrets, or negligence in their preserving;

f) undermining, sabotage or any other actions that have as purpose to remove by force the democratic institutions of the state or that gravely harm the fundamental rights and freedoms of Romanian citizens, or may damage the defence capacity, or other similar interests of the country, as well as the acts of destruction, degradation or bringing in an unusable state the structures necessary to the good development of social and economic life, or to the national defence;

g) the actions by which an attempt is made on the life, physical integrity or the health of the persons holding important positions in the state, or of the representatives of other states, or of international organizations, whose protection must be ensured during their sojourn in Romania, in accordance with the law, the treaties and agreements concluded, as well as with the international practice;

h) the initiation, organization, perpetration, or the supporting in any way of the totalitarian or extremist actions of a communist, fascist, iron guards, or of any other origin, of the racial, anti-Semitic, revisionist, separatist actions that can endanger in any way the unity and territorial integrity of Romania, as well as the instigation to deeds that can put in danger the order of the state governed by the rule of law;

i) the terrorist acts, as well as the initiation or the supporting in any way of any activities whose purpose is the perpetration of such deeds;

j) the attempts committed by any means upon a community; k) the stealing of armament, ammunition, explosive or radioactive, toxic or biological materials from the units authorized to hold them, smuggling with these materials, the manufacturing, holding, alienation, transport or their utilization in other conditions than those provided by the

law, as well as the illegal bearing of armament and ammunition, if by these deeds national security is exposed to danger;

l) the initiation or constitution of organizations or groups, adhering to them, or their supporting in any way, with a view to carrying out one of the activities mentioned under the paragraphs a) to k), as well as the carrying out in secrecy of such activities by organizations or groups constituted according to the law.''

ii) Article 4

Law on the National Security of Romania Article 4 reads as follows:

''The provisions under Article 3 cannot be interpreted or used with a view to limiting or forbidding the right to defend a legitimate cause, to express a protest or an ideological, political, religious or of another kind disagreement, guaranteed by the Constitution or laws.

No person can be prosecuted for the free expression of his/her political opinions, nor can he/she be the object of an interference in his/her private life, family, dwelling place, properties, correspondence or communications; no person can also be the object of some prejudices regarding his/her honour or reputation unless he/she perpetrates one of the deeds that, in accordance with the provisions of the present law, constitute a menace against the national security.''

iii) Article 10

Law on the National Security of Romania Article 10 reads as follows:

''The intelligence activity for the realization of the national security shall have the state secret character. The information from this field cannot be communicated but in the conditions of the present law.''

iv) Article 13

Law on the National Security of Romania Article 13 reads as follows:

‘‘The cases stipulated under Article 3 shall constitute a legal ground to request to the public prosecutor, in justified cases, and by observing the provisions of the Code of criminal procedure, the authorization for the effectuation of some acts, with the object of collecting information, consisting in: interception of communications, seeking of certain information, documents, or acts for the getting of which it is necessary the access in a place, to an object or the opening of an object; the taking over and restoring to its place of an object or document, its investigation, the drawing out of the information that they contain, as well as the recording, copying or getting of excerpts by any methods; the installation of objects, their maintenance and taking them from the places where they have been placed.

The application for authorization shall be expressed in writing, and it must include: date or indications from which to result the existence of one of menaces against the national security, stipulated under Article 3, for the prevention, finding or counteracting of which it is necessary the issue of the warrant; the classes of activities for the development of which the warrant must be issued; the identitiy of the person whose communicatios must be intercepted, if the person is known, or the identity of the person who holds the information, the documents, or the objects that must be obtained; if and when it is possible, the general description of the place where the authorized activities are to be accomplished; the validity duration of the requested warrant.

The authorization act should be issued at the request of the bodies having powers in the field of the national security, by the public prosecutors specially appointed by the General Public Prosecutor of Romania.

In the case that the public prosecutor ascertains that the application is justified, he shall issue a warrant that must contain: the approval for the classes of communications that may be intercepted, the classes of information, documents or objects that may be obtained; the identity of the person, if he/she is known, whose communications must be intercepted, or

who holds the data, information, documents or objects that must be obtained; the body empowered with its carrying out; the general description of the place where the warrant is to be carried out; the validity duration of the warrant.

The validity duration of the warrant can't exceed 6 months. In well-founded cases, the general public prosecutor can extend, at request, the duration of the warrant, without being possible to exceed 3 months, every time.

Any citizen who considers himself injured in an unjustified manner through the activities that constitute the object of the warrant provided under paragraphs 1 to 4 may lodge a complaint with the public prosecutor specially appointed, hierarchically superior to the public prosecutor who has issued the warrant.''

v) Article 16

Law on the National Security of Romania Article 16 reads as follows:

''The means for obtaining the information required by the national security must not endanger, by no means, the fundamental rights and freedoms of the citizens, the private life, their honour or reputation, or to subject them to unlawful restrictions.

Any person is protected by law against such interferences or prejudices. The culprits for the initiation, transfer or execution of such measures, without a legal reason, as well as for abusive application of the measures of prevention, discovery or counteracting of the menaces against the national security, shall be under civil, administrative or criminal responsibility, as the case may be. The citizen who considers himself injured in his rights or freedoms by the utilization of the means provided under paragraph 1 may inform any of the standing committees for the defence and ensuring of the public order, of the two chambers of the Parliament.''

vi) Article 19

Law on the National Security of Romania Article 19 reads as follows:

''The initiation, organization or the constitution on the territory of Romania of some informative structures that can cause damage to the national security, their supporting in any way or adhering to them, the holding, manufacturing or unlawful utilization of specific means for the intercepting of the communications, as well as the collecting and transfer of information of a secret or confidential nature, by any means, outside of the legal framework, shall constitute a criminal offence and it should be punished with imprisonment from 2 to 7 years, if the deed is not considered a more serious offence. The attempt should be punished.''

vii) Article 21

Law on the National Security of Romania Article 21 reads as follows:

''The information regarding the private life, the honour or reputation of the persons, incidentally known on the occasion of the getting the data necessary to the national security, may not be made public. The disclosure or the utilization, outside the legal framework, by the wage earners of the intelligence services, of information, of the data provided under paragraph 1, shall be considered an offence and should be punished with imprisonment from 2 to 7 years. The attempt shall be punished.''

b) Romanian Law on the Criminal Code Article 267

Criminal Code Article 267- Failure to notify the judicial bodies reads as follows:

''(1) The act of a public servant who, becoming aware of the perpetration of a offense provided for in the criminal laws in connection with the service where he/she works, fails to immediately notify the criminal prosecution authority, shall be punishable by no less than 3 months and no more than 3 years of imprisonment or by a fine.

(2) If the act is perpetrated out of negligence, the penalty shall consist of no less than 3 months and no more than 1 years of imprisonment or a fine.''

c) Law No. 14 Of 24 February 1992 Concerning the Organization and Functioning Of The Romanian Intelligence Service

i) Article 8

Law No. 14 Of 24 February 1992 Article 8 reads as follows:

''The Romanian Intelligence Service is authorized to hold and use appropriate means for obtaining, verifying, processing, and storing information regarding national security, under the law. For the relationship with electronic communications providers intended for the public, the National Center for Interception of Communications within the Romanian Intelligence Service is designated with the role of obtaining, processing, and storing information in the field of national security. At the request of the prosecution bodies, the Center ensures their direct and independent access to the technical systems for the execution of the technical supervision provided for in art. 138 138 para. ((1) lit. a) of the Code of Criminal Procedure.''

ii) Article 45

Law No. 14 Of 24 February 1992 Article 45 reads as follows:

''The internal documents of any kind of the Romanian Intelligence Service have a state secret character, are kept in its own archive and can only be consulted with the approval of the director, under the law. Documents, data and information of the Romanian Intelligence Service may become public only after the passage of a 40-year period from archiving. The Romanian Intelligence Service takes over to preserve and use the archive funds that concern the national security of the former intelligence bodies with competence on the territory of Romania. The archive funds of the former Department of State Security, which concern national security, cannot become public until after the passage of a period of 40 years since the adoption of this law.''

(Realitatea PLUS, 2021)

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