2. Guest Editorial: *A Voice of the European Court of Human Rights in Our 'Panoptical' Reality*

by Vera Rusinova

'Mass surveillance *per se* does not violate the Convention on the Protection of Human Rights and Fundamental Freedoms'. This citation is *not* taken from the *Weber and Saravia v. Germany* judgment issued by the European Court of Human Rights (ECtHR) a decade ago, just at the dawn of the development of technical capacities for the interception, storage and processing of 'big data'. Instead, it is a crosscutting theme of two judgments of this court's Chambers rendered in 2018: *Big Brother Watch and Others v. UK* and *Centrum för Rättvisa v. Sweden*. These judgments have been recently referred to the Grand Chamber, thus giving hope that the approach taken in respect of the launch of mass interception of communications and metadata may be revisited. The approach of the Chambers deserves critique from many perspectives.

It neglects a previous progressive development of the ECtHR's case law towards the application of a 'strict necessity' requirement in respect of governmental attempts to collect communications data, because the Chambers, *i.a.* refused to apply a 'reasonable' or, at least, an 'individual' suspicion standard. The Chambers also declared *post-factum* notification of persons targeted by surveillance to be unnecessary, and they relaxed previous requirements concerning the use of judicial (or other independent) authorization mechanisms.

Articulating its stance on the permissibility of collection of data, the ECtHR Chambers expressly referred to the 'margin of appreciation', that in reality camouflages not a lack, but rather a consensus of 'Big Brothers'; during the last decade many European states legalized their desire to collect as much information about individuals as is technically possible.

In *Big Brother Watch* the Chamber argued, that 'while anyone could potentially have their communications intercepted <...>, it is clear that the intelligence services are neither intercepting everyone's communications, nor exercising an unfettered discretion to intercept whatever communications they wish' (§ 337). This reference to self-restraint and the reliance on trust contradicts, to the core, the sense of the human rights concept.

In general, privacy oriented arguments in both judgments seem to be caught by a proportionality test, which has a predetermined conclusion in favor of the protection of security as a 'legitimate aim'. At the same time, this test exploits unproven links, as there is just a presumption that more information may pave the way for a better prediction of crimes. The current stage of computer science still does not allow the composition of adequate algorithms that are able to deal with a problem of thousands of false 'positives' and 'negatives'.

Are the conclusions reached so far what we really want to hear from the ECtHR when our society is rapidly moving towards a 'ubiquitous panopticon'? Even if states exclude their own citizens from the scope of the mass surveillance programs, these limits can be easily circumvented by means of international co-operation. This fact, taken together with an 'epistemic force' of the ECtHR position which transcends the borders of Council of Europe states, makes the voice of this court so crucial. It is obvious that it may be difficult for the Court to go against a consensus of 'Big Brothers', especially taking into account the skepticism of European states to implement judgments of international judicial bodies related to the restriction of governmental powers to use bulk interception of data. But can a comprehensively profiled individual still maintain his or her personal autonomy, which is a keystone of the Convention? Thus, the opinion of the Grand Chamber on the *Big Brother Watch* and *Centrum för Rättvisa* cases may very well be fateful.