THE AIRE CENTRE
Advice on Individual Rights in Europe

AMNESTY INTERNATIONAL

International Commission of Jurists

OMCT
SOS-Torture Network

REDRESS
Ending Torture. Seeking Justice for Survivors

5 APRIL 2018

JOINT NGO RESPONSE TO THE STANDING COMMITTEE ON THE RULES OF COURT'S REPORT ON THE TREATMENT OF CLASSIFIED DOCUMENTS

The AIRE Centre, Amnesty International, the International Commission of Jurists, REDRESS and the World Organisation Against Torture (OMCT) welcome the opportunity provided by the Standing Committee on the Rules of Court to comment on its proposal to amend the Court's Rules of Procedure by introducing a new Rule 44F.

In this submission we address and outline our strong objections to both the general proposition made by the Standing Committee on the Rules of Court, namely to adopt a mechanism whereby this Court could receive and rely on or otherwise take into consideration information not disclosed to the applicant and his or her representative of choice[1], and to the specific draft Rule 44F.

[1] In this submission we will be using terms such as "undisclosed material", "undisclosed information", "confidential material", "confidential information", "classified material", "classified information", or "secret evidence" interchangeably to describe the type of information covered by the Standing Committee's proposal.

Also, while it is not entirely clear whether the Standing Committee proposes to limit Rule 44F to the receipt of classified material, as opposed to also allowing for secret proceedings where representations and arguments based on such classified material could be received or heard by the Court, for the avoidance of doubt we will address such closed proceedings below and outline our equally strong objections to them.

Furthermore, while we oppose *any* procedure that would allow for secret evidence to be relied on or otherwise taken into consideration before *any* court, with or without the presence of Special Advocates, to deprive a person of his or her human rights, or in a manner that could limit accountability or deprive access to an effective remedy for violations of human rights, the purpose of the present submission is not to set out all arguments against secret evidence (with or without special advocates) in all settings, but to focus on the specific issues raised by the adoption of a mechanism of the type envisaged by the Standing Committee. Therefore, the focus of the present submission is the use of secret evidence in proceedings related to claims of human rights violations, rather than other kinds of judicial proceedings, be it criminal or civil. We will argue that recourse to secrecy is all the more unacceptable when it comes to such 'human rights proceedings'.

I.- STANDING COMMITTEE'S PROPOSAL ON THE TREATMENT OF CLASSIFIED DOCUMENTS

The undersigned organisations urge the Court not to adopt any procedure that would allow a case before it to be decided in whole or in part relying on or otherwise taking into consideration information, including representations and arguments, that has not been disclosed to the applicant and his or her representative of choice. We consider that relying on or otherwise taking into consideration secret information would be fundamentally incompatible with the right to an effective remedy for allegations of human rights violations. We contend that the same holds true for the receipt of representations and arguments in the absence of the other party and his or her representative of choice, whether or not they are made in the presence of a so-called "Special Advocate". The right to an effective remedy for claims of human rights violations incorporates the right of access to a fair procedure and the right of victims and the public to the truth about human rights violations, including serious violations such as torture, enforced disappearances and extra-judicial executions or other unlawful killings. In particular, we contend that the applicant victim's interest in disclosure of evidence regarding violations of Convention rights always outweighs any purported national security or other similar public interests in its non-disclosure. While *other* types of information may possibly be concealed in order to protect concrete, genuinely legitimate and compelling national security or other similar public interests, such information must never be *relied on or otherwise taken into consideration* in any way in proceedings and decisions on claims of human rights violations.

More generally, we submit that the victims' and the public's confidence and trust in the impartiality of this Court and the integrity of its proceedings would be severely undermined if a Respondent state was allowed to submit secret information to answer claims relating to human rights violations, including secret detention, torture and a number of other

circumstances where secrecy already plays a significant part in attempts to shield the state's responsibility, and subsequently have the Court rely on or otherwise take into consideration such secret material to decide on the state's responsibility for human rights violations. The victims and the public's trust and confidence in the Convention system as a whole would likewise be significantly jeopardised.

Furthermore, the political context surrounding the ongoing reform of the European Convention system, with a range of proposals and statements that have been made with a view to increase member states' influence and pressure on the Court, only adds to the risks of having such new procedures being perceived as further evidence of an erosion of fundamental human rights principles, such as the right to access an effective judicial remedy for human rights violations, that have for a long time been the cornerstone of the European human rights protection framework.

Finally, if a regional human rights court, and all the more so when it is one with the global influence of the European Court of Human Rights, were to establish a practice of requesting or otherwise receiving, accepting and relying on or otherwise taking into consideration undisclosed information to decide on claims of human rights violations, including in (but not limited to) cases where state secrets are intrinsically linked to the contested practices themselves, this would very likely open the floodgates for the generalisation of secret evidence and proceedings across the Council of Europe member states and beyond. The Court's adoption of such a practice would thus pose an existential threat to open justice, effective human rights remedies and access to the truth in countless jurisdictions. The damage for human rights caused by such a ripple effect would be considerable, and potentially irreversible.

A.- RIGHT TO AN EFFECTIVE REMEDY FOR HUMAN RIGHTS VIOLATIONS

When it comes to effective remedies at national level, this Court's case law has repeatedly made clear, under Article 13 ECHR including in relation to other Convention rights such as Articles 2, 3, 5 and 8, that for a remedy to violations of Convention rights to be *effective*, it "must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions of the authorities of the respondent state"[2]. Thus, the level of procedural guarantees provided by the remedy in question is directly relevant when determining whether the remedy is "effective". Applied to arguable claims under Article 3 ECHR, for instance, this Court has considered that the notion of 'effective remedy' entailed, among other things, a thorough and effective investigation capable of leading to the identification of those responsible and "including effective access for the complainant to the investigatory procedure"[3]. This Court has further recalled on numerous occasions that "the requirements of Article 13 are broader than a Contracting State's obligation under Articles 3 and 5 to conduct an effective

[2] *El-Masri v the Former Yugoslav Republic of Macedonia*, Application No 39630/09, para 255; *Al-Nashiri v Poland*, Application No 28761/11, para 546 ; *Husayn (Abu Zubaydah) v Poland*, Application No 7511/13, para 540 ; *Nasr and Ghali v Italy*, Application No 44883/09, para 331.
[3] *El-Masri v the Former Yugoslav Republic of Macedonia*, op cit., para 255; *Al-Nashiri v Poland*, op cit., para 547 ; *Husayn (Abu Zubaydah) v Poland*, op cit., para 541 ; *Nasr and Ghali v Italy*, op cit., para 331.

investigation".[4]

Applying these established principles on effective remedies to this Court, we submit that "effective access" to this Court's proceedings would not be provided should the applicant and his or her representative of choice not be granted access to all information possibly disclosing evidence of a violation of Convention rights or otherwise being material to an arguable claim of such a violation.

It is also worth noting that, under the International Covenant on Civil and Political Rights (which is binding on all state parties to the ECHR), the importance of preserving the right to an effective remedy in all circumstances, including in cases raising national security considerations, is such that it has been recognized by the UN Human Rights Committee as equally applying in situations of emergency: "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective".[5] In addition to underscoring that procedural adjustments that would deny a victim access to an effective remedy can never be justified in any circumstances, the necessary consequence of this statement is that *without a valid derogation* in a state of emergency States have little if any flexibility to introduce any "adjustments to the practical functioning of its procedures governing judicial or other remedies".[6]

We note that, in practice, state secrecy is generally sought in circumstances where secrecy inherently forms an essential part in the commission and subsequent concealment of gross human rights violations, including torture, enforced disappearance, secret detention, extrajudicial executions or other unlawful killings. Since state secrecy and invocation of national security are intimately connected with the practice of such violations, it is precisely in these very circumstances where the Respondent states will most likely seek to hide information from the applicant and the public's knowledge.[7] This is further demonstrated notably by the Court's cases dealing with violations of Article 38 ECHR.[8] At

---

[4] *El-Masri v the Former Yugoslav Republic of Macedonia*, op cit., para 256; *Al-Nashiri v Poland*, op cit., para 548 ; *Husayn (Abu Zubaydah) v Poland*, op cit., para 542 ; *Nasr and Ghali v Italy*, op cit., para 332.
[5] UN Human Rights Committee, *States of Emergency (Article 4) - General Comment 29*, CCPR/C/21/Rev.1/Add.11, para 14.
[6] UN Human Rights Committee, *States of Emergency (Article 4) - General Comment 29*, op cit., para 14.
[7] See, *inter alia*, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, and Working Group on Enforced and Involuntary Disappearances, *UN Joint Study on global practices in relation to secret detention in the context of countering terrorism*, UN Doc A/HRC13/42, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf, para 289.
[8] See, *inter alia*, *Al-Nashiri v Poland*, op cit., para 376; *Husayn (Abu Zubaydah) v Poland*, op cit., para 369; *Janowiec and Others v Russia*, Applications Nos 55508/07 and 29520/09, para 216; *Khamidkariyev v. Russia*, Application No 42332/14, para 107; *Nizomkhon Dzhurayev v. Russia*, Application No 31890/11, para 164;

the core of these cases lies one of the fundamental elements of the right to an effective remedy, namely the right of the applicant, and the public, to the truth about what happened.

Allowing secrecy and the taking into consideration of undisclosed information would inevitably defeat the very foundations of the right to an effective remedy for human rights violations and the very purpose of the right to truth. Moreover, the more egregious a human rights violation is, the more likely it is that the state will seek to withhold relevant information that may disclose evidence of such a violation, the more the right to the truth will become central in ensuring an effective remedy under article 13 ECHR. This logic is in line with this Court's case-law about the scope of the right to an effective remedy, and it is a logic that is contrary to permitting a state not to disclose to the applicant information relevant to a claim of human rights violation,[9] as well as to any reliance by that state and the Court on such undisclosed evidence.

B.- RIGHT TO THE TRUTH ABOUT HUMAN RIGHTS VIOLATIONS

As this Court has recognized, the right to truth has two components, that of the alleged victim or victims, as well as that of the other victims of similar state conduct and the broader public.[10]

The individual and collective dimensions of the right to truth have likewise been recognized by the UN General Assembly,'[11] the UN Human Rights Council,[12] the UN Working Group on Enforced Disappearances,[13] in the UN *Updated Set of Principles for the Promotion of Protection of Human Rights through Action to Combat Impunity*,[14] and by

---

Benzer and Others v. Turkey, Application No 23502/06, para 161; for other types of situations, see *Bucur et Toma v Romania*, Application No 40238/02, para 72.

[9] See also, Parliamentary Assembly of the Council of Europe (PACE), *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Resolution 1838(2011), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18033&lang=en, para 4; Parliamentary Assembly of the Council of Europe (PACE), *National security and access to information*, Resolution 1954(2013), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20190&lang=en, paras 6, 9.5.3 and 9.6.

[10] See *El-Masri v the Former Yugoslav Republic of Macedonia*, op cit., para 191; *Al-Nashiri v Poland*, op cit., para 495; *Husayn (Abu Zubaydah) v Poland*, op cit., para 489. See also, *Husayn (Abu Zubaydah) v Poland,* op cit, *Written submissions on behalf of Amnesty International and the International Commission of Jurists*, available at https://www.amnesty.org/en/documents/EUR37/007/2013/en/

[11] UN General Assembly, *Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims*, A/RES/65/196.

[12] Inter alia, UN Human Rights Council, *Right to truth*, A/HRC/RES/9/11; UN Human Rights Council, *Right to truth*, A/HRC/RES/12; UN Human Rights Council, *Right to truth,* A/HRC/RES/21/7. In 2011, the UN Human Rights Council established a special procedure on the promotion of truth, justice, reparations and guarantees of non-recurrence: Resolution 18/7 of 29 September 2011.

[13] UN Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances,* paragraph 4: "(…) the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation. No legitimate aim, or exceptional circumstances, may be invoked by the State to restrict this right […] In this regard, the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives", available at http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf

[14] *UN Updated Set of Principles for the Promotion of Protection of Human Rights through Action to Combat*

the Inter-American Court of Human Rights, whose jurisprudence holds that the right to truth is triggered by the violation of the right to access to justice, remedy and information, under Articles 1(1), 8(1), 25, and 13 of the American Convention.[15] The International Convention for the Protection of All Persons from Enforced Disappearance also enshrines the victims' right to the truth.[16]

The same approach has been endorsed by the Council of Europe Committee of Ministers in its *Guidelines on Eradicating impunity for serious human rights violations*.[17] The Guidelines recommend that "States [...] should publicly condemn serious human rights' violations",[18] and that they should provide "information to the public concerning violations and the authorities' response to these violations".[19] Furthermore, the right to reparation, as recognised in the Guidelines, requires public disclosure of the truth regarding serious violations of human rights as an essential element of measures of satisfaction and guarantees of non-repetition.[20] This reflects the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and of Serious Violations of International Humanitarian Law as part of the content of the obligation of reparation in its forms of satisfaction[21] and

---

Impunity, UN Doc. E/CN.4/2005/102/Add.1, Principle 2: "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations", available at http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx

[15] *Contreras et al. v. El Salvador* (Merits, Reparations and Costs), C No. 232, paras 173, 26 and 170: "the right to know the truth has the necessary effect that, in a democratic society, the truth is known about the facts of grave human rights violations. This is a fair expectation that the state must satisfy, on the one hand by the obligation to investigate human rights violations and, on the other, by the public dissemination of the results of the criminal and investigative proceedings". See also, *Familia Barrios v. Venezuela* (Merits, Reparations and Costs), C No. 237, para 291; *Gelman v. Uruguay* (Merits and Reparations), C No. 221, para 243. *Radilla-Pacheco v Mexico*, C No. 209, paras 180, 212, 313 and 334; *Fleury y otros v. Haiti* (Merits and Reparations), C No. 236; *Gelman v. Uruguay*, op cit, para 256; *Gomes Lund y otros (Guerrilha do Araguaia) v. Brazil*, C No. 219, paras 200 and 257; *Caracazo v. Venezuela*, C No. 95, paras 117, 118.

[16] International Convention for the Protection of All Persons from Enforced Disappearance also enshrines the victims' right to the truth, Article 24(2).

[17] See *Guidelines on Eradicating impunity for serious human rights violations,* Article VI, available at https://rm.coe.int/16805cd111. The Guidelines stress that "States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system", Article I.3. Also, "impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims" (*ibid*, Preamble).

[18] *Ibid.*, Article III.2.

[19] *Ibid.*, Article III.3.

[20] *Ibid.*, Article XVI.

[21] *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by the UN General Assembly resolution A/RES/60/147, Principle 22(b), (e), (g) and (h) (satisfaction) : « Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;[...] Public apology, including acknowledgement of the facts and acceptance of responsibility; [...] Commemorations and tributes to the victims; Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels", available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement; see also UN Committee against Torture (CAT), General Comment No 3: Implementation of article 14 by States parties, UN Doc. CAT/C/GC/3, para 16.

guarantees of non-repetition,[22] as well as access to information.[23]

While the victims' right to truth is closely linked to requirements for an effective investigation, involving the victim and subject to public scrutiny, under Article 2[24], 3[25] or 5 ECHR, we submit that such a right is also a central aspect of the "broader"[26] right to an effective remedy under article 13 ECHR, "which includes a right of access to relevant information about alleged violations, both for the persons concerned and for the general public"[27].

It follows from the above that the withholding of any information pertaining to violations of Convention rights, including gross human rights violations such as torture, secret or otherwise arbitrary detention, enforced disappearance, extra-judicial executions and other unlawful killings, on grounds of national security or other similar public interests can never be compatible with the applicant victim's or, in general, the public's right to the truth.

C.- INFORMATION POSSIBLY DISCLOSING EVIDENCE OF HUMAN RIGHTS VIOLATIONS MUST NEVER BE CLASSIFIED OR OTHERWISE HELD SECRET

We submit that for a state to be permitted to present or for this Court to rely on or otherwise take into consideration classified or otherwise undisclosed or secret evidence, or representations and argument, in order to decide on violations of Convention rights, including gross human rights violations such as torture or enforced disappearance, would be fundamentally inconsistent with the right to an effective remedy, including the right to the truth about human rights violations as affirmed by the Grand Chamber in El-Masri.[28] In this case, the Grand Chamber found that "[t]he concept of 'State secrets' has often been invoked to obstruct the search for the truth".[29]

The UN Committee against Torture has likewise clearly reaffirmed that: "States parties shall also make readily available to the victims all evidence concerning acts of torture or ill-treatment upon the request of victims, their legal counsel, or a judge [...] States parties to the Convention have an obligation to ensure that the right to redress is effective. Specific obstacles that impede the enjoyment of the right to redress and prevent effective

---

[22] *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, op cit., Principle 23 (non-repetition)

[23] *Ibid.*, Principle 24: "(...) Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations".

[24] *Association « 21 December 1989 » and Others v Romania*, Applications Nos 33810/07 and 18817/08, para 144.

[25] *El-Masri v the Former Yugoslav Republic of Macedonia*, op cit., para 193.

[26] *El-Masri v the Former Yugoslav Republic of Macedonia*, op cit., para 256; *Al-Nashiri v Poland*, op cit., para 548; *Husayn (Abu Zubaydah) v Poland*, op cit., para 542; *Nasr and Ghali v Italy*, op cit., para 332.

[27] See *El-Masri v the Former Yugoslav Republic of Macedonia*, op cit., Joint Concurring opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, para 4.

[28] See also, *Bucur et Toma v Romania*, App. No 40238/02, para 115.

[29] *El-Masri v the former Yugoslav Republic of Macedonia*, op cit., § 191.

implementation of article 14 include, but are not limited to: [...] state secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress [...] The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims".[30] Similarly, the Inter-American Court of Human Rights has referred to fundamental problems arising from State authorities seeking protection in mechanisms such as State secrets or confidentiality of information in cases of human rights violations.[31]

We also draw this Court's attention to the resolution of the Parliamentary Assembly of the Council of Europe of 6 October 2011, in which it declared that "information concerning the responsibility of state agents who have committed serious human rights violations, such as murder, enforced disappearance, torture or abduction, does not deserve to be protected as secret. Such information should not be shielded from judicial or parliamentary scrutiny under the guise of 'state secrecy'".[32] Furthermore, the European Parliament, in its resolution of 11 September 2012, declared that it "recalls, however, that in no circumstance does state secrecy take priority over inalienable fundamental rights and that therefore arguments based on state secrecy can never be employed to limit states' legal obligations to investigate serious human rights violations".[33]

We also highlight that the *Global Principles on National Security and the Right to Information* ("the Tshwane Principles),[34] welcomed by the Parliamentary Assembly of the Council of Europe in its resolution 1954(2013) as "based on existing standards and good practices of States and international institutions",[35] stress that "there is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security' [and that] such information may not be withheld on national security grounds in any circumstances [and that] information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for

---

[30] UN Committee against Torture, General Comment no 3, op cit., paras 30, 38 and 42.
[31] See Inter-American Court of Human Rights, *Gomes Lund (Guerrilha do Araguaia") v Brazil*, op cit., paras 202, 215 and 230.
[32] Parliamentary Assembly of the Council of Europe (PACE), *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Resolution 1838(2011), op cit., para 4. See also Parliamentary Assembly of the Council of Europe (PACE), *National security and access to information*, Resolution 1954(2013), op cit., paras 6, 9.5.3 and 9.6.
[33] See European Parliament resolution, *Alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report* (2012/2033(INI)), para 3, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0309%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN.
[34] *Global Principles on National Security and the Right to Information ("the Tshwane Principles)*, available at http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles. The principles were adopted on 12 June 2013 by 22 organizations and academic centres in consultation with more than 500 experts from more than 70 countries. They give guidance to governments, legislative and regulatory bodies, public authorities, policy makers, the courts, other oversight bodies, and civil society on issues surrounding national security and the right to information.
[35] Parliamentary Assembly of the Council of Europe (PACE), *National security and access to information*, Resolution 1954(2013), op cit., para 7.

the violations or deprive a victim of access to an effective remedy".[36] The principles have been reflected in the resolution of the Parliamentary Assembly[37] which also stressed that "information about serious violations of human rights or humanitarian law should not be withheld on national security grounds in any circumstances".[38] The Parliamentary Assembly has expressed its support for the Tshwane Principles and called "on the competent authorities of all Member States of the Council of Europe to take them into account in modernising their legislation and practice concerning access to information".[39]

We submit that, on the basis of international human rights law and standards, including at the European level, the doctrine of state secrets cannot be resorted to by a State to impede any investigations, prosecution or trial of crimes under international law involving violations of Convention rights, or proceedings before this Court. Allowing such impediment would defeat the right to an effective remedy for human rights violations, and be antithetical to and inconsistent with the right to truth both in its individual and societal dimensions.

D.- SECRET EVIDENCE MUST NEVER BE RELIED ON OR OTHERWISE TAKEN INTO CONSIDERATION IN HUMAN RIGHTS PROCEEDINGS

As previously mentioned, while withholding information possibly disclosing evidence of human rights violations can never stem from *legitimate* national security or other similar public concerns, other types of information may, in very limited and strictly circumscribed circumstances, including after careful judicial scrutiny, be withheld in order to protect concrete, genuinely legitimate and compelling national security or other similar public interests. However, in such cases, *none* of the information that has been withheld from the applicant and his or her representative of choice can ever be relied on or taken into consideration in any way by either the Respondent state or this Court. Doing otherwise would defeat the very objective of ensuring a fair procedure guaranteeing an effective remedy, and equality of arms between the parties.[40]

In addition, barring the applicant from challenging or otherwise commenting on information known only to the Respondent state and this Court would in any event

---

[36] *Global Principles on National Security and the Right to Information ("the Tshwane Principles)*, op cit., Principles 10(A)(1) and 10(A)(2).
[37] Parliamentary Assembly of the Council of Europe (PACE), *National security and access to information*, Resolution 1954(2013), op cit., para 9.5.3.
[38] *Ibid.*, para 9.6.
[39] *Ibid.*, para 8; as well as Parliamentary Assembly of the Council of Europe (PACE), *National security and access to information*, Recommendation 2024(2013), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20194, para 1.3.
[40] See, *inter alia*, UN Human Rights Committee, *Article 14: Right to equality before courts and tribunals and to a fair trial*, General Comment 32, CCPR/C/GC/32, para 13: "The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party". Also, it is worth noting that article 14 of the International Covenant on Civil and Political Rights, which equally binds all state parties to the ECHR, does not contain any provision allowing a government to rely on or otherwise take into consideration secret evidence, nor the exclusion litigants and their counsel of choice from the proceedings for any reason or any period of time. There is also no mentioning of such restrictions in the aforementioned UN Human Rights Committee's General Comment 32 on the right to equality before courts and tribunals and to a fair trial (Article 14 ICCPR).

fundamentally undermine the probative value of any such information.

Also, notwithstanding any actual prejudice arising from such unequal treatment, the similarly important *appearance* of the fair, impartial and independent administration of justice,[41] together with the related public confidence in this Court and the Convention system, would be seriously if not, overtime, irremediably undermined. As previously mentioned, at a time where many state parties to the Convention are voicing increasing disquiet with some of this Court's jurisprudence, as well as with its methods of work and interpretation of Convention rights, and are constantly seeking ways to play a bigger role in these regards, the risks to the credibility of the Convention system resulting from having applicants being unable to challenge information seen, and possibly relied on or otherwise taken into consideration, not only by the Respondent state but also by this Court are all the more severe.

It is worth noting that the fact that undisclosed information was *not* relied on or otherwise taken into consideration has played an important role in decisions of this Court relating to the compliance with the requirements of a fair trial.[42] Regarding the right to equality of arms and adversarial process, both of whom constituting fundamental elements derived from the more general right to a fair trial, we submit that these elements should be considered to be of particular importance to ensure that the right to a remedy for human rights violations is genuinely *effective*, all the more so when it comes to gross human rights violations such as the ones where secrecy is most often a constitutive or otherwise subsequent component.

Notwithstanding this Court's case-law regarding possible counterbalancing measures aimed at preserving the right to a fair trial, we wish to emphasise the very specific nature of this Court's role and proceedings, both of which make the requirements for a fair procedure and effective remedy all the more stringent. This Court indeed adjudicates claims of human rights violations and is ultimately tasked with safeguarding applicants' human rights where states have allegedly failed to secure them at national level. Moreover, this Court's proceedings impact on the integrity and credibility of the Convention system, and with it the European and international human rights protection framework in general.

Finally, we wish to once again emphasize that any adoption by this Court of a procedure whereas secret evidence could be relied on or otherwise taken into consideration to adjudicate claims of human rights violations could be taken as a signal by state parties to the Convention, regardless of whatever deficiencies may exist in their domestic judicial systems, that such procedures may validly be deployed at the national level. Furthermore, based on our experience in researching and advocating for human rights in countries around the world, given its global influence any such action by this Court would be very likely to have negative consequences for victims of human rights violations and other

---

[41] See, *inter alia*, *A.B. v. Slovakia*, Application No 41784/98, paras 55-56; *Öcalan v. Turkey*, Application No 46221/99, para 140. See also, UN Human Rights Committee, *Article 14: Right to equality before courts and tribunals and to a fair trial*, General Comment 32, op.cit., para 21.
[42] See *Jasper v United Kingdom*, Application no 27052/95, para 55; *Užukauskas v. Lithuania*, Application no 16965/04, paras 45-51; *Edwards and Lewis v United Kingdom*, Application no 39647/98 and 40461/98, paras 46-48.

abuses both within and beyond the Council of Europe region.

E.- SECRET PROCEEDINGS WITH OR WITHOUT SPECIAL ADVOCATES

It is not entirely clear from the Standing Committee's "Report on the treatment of classified documents" whether it proposes to limit its proposal to the receipt and analysis of classified material and not also include secret *representations or arguments* made by the Respondent state including on the basis of such classified material, either in writing or during hearings from which the applicant and his or her representative of choice would be excluded ("closed hearings").[43]

For the avoidance of doubt, we consider such secret proceedings unacceptable, for similar reasons to those described above. Also, the presence or absence of so-called "Special Advocates", as known in the UK, would not meaningfully redress in any way the fundamental flaws of a procedure where the Respondent state would be allowed to make secret representations and arguments, including relating to claims of torture, enforced disappearance and other serious human rights violations. Indeed, a Special Advocate is not the representative of choice of the affected individual and, due to various restrictions, they are not in a position to effectively represent that individual, including by way of a genuine possibility to properly advise him or her and get adequate instructions from him or her. Their presence would not in any way alter the fundamentally secret character of the information from the point of view of the applicant and the wider public. The UK system of closed material procedure, and its related use of Special Advocates, has been widely criticized in the United Kingdom[44], including by Special Advocates themselves[45] and the UK Parliament's Joint Committee on Human Rights,[46] and it would be particularly problematic for a regional human rights court tasked with deciding on claims of human rights violations, including claims of involvement in or other responsibility in relation to human rights violations such as torture or enforced disappearance by the state invoking

---

[43] As will be developed later in this submission, while Rule 44F(4) refers to the Court's "ex parte" assessment of the nature of the submitted documents, it is not entirely clear from the Standing Committee's comments on its wording whether that would necessarily entail the presence of the party submitting the information. It is also not apparent from this provision whether or not proceedings without the presence of the applicant and his or her representative of choice could be held on the substance and merits of the undisclosed information.

[44] For a detailed criticism about this system and its expansion across the UK judicial system, see, *inter alia*, Amnesty International , *Left in the Dark: The Use of Secret Evidence in the United Kingdom*, AI Index EUR 45/014/2012, 13 October 2012, available at https://www.amnesty.org/en/documents/EUR45/014/2012/en/ ; see also Amnesty International UK, *Response to the Justice and Security Green Paper*, January 2012, available at http://webarchive.nationalarchives.gov.uk/20140911100700/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/54_Amnesty%20International%20UK.pdf as well as the responses from the other civil society organisations Justice, Liberty and the Committee on the Administration of Justice, available at http://webarchive.nationalarchives.gov.uk/20140911100336/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation

[45] See Justice and Security Green Paper, *Response to Consultation from Special Advocates*, 16 December 2011, available at http://webarchive.nationalarchives.gov.uk/20140911100522/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf

[46] See UK House of Commons and House of Lords - Joint Committee on Human Rights, *The Justice and Security Green Paper*, Twenty-fourth Report on Session 2010-2012, paras 81-86, available at https://publications.parliament.uk/pa/jt201012/jtselect/jtrights/286/286.pdf

the secret evidence, to be considering the adoption of similar closed procedures.[47]

II.- STANDING COMMITTEE'S PROPOSED RULE 44F ON TREATMENT OF CLASSIFIED DOCUMENTS

In addition to our fundamental objection to such mechanisms, outlined above, the undersigned organisations have significant concerns regarding the proposed wording of Rule 44F.

Therefore, should the Standing Committee nevertheless decide to proceed with the adoption of a provision on the treatment of classified documents, we submit those concerns below, following the structure of Rule 44F.

Overall, we are concerned at the fact that this Rule does not explicitly exclude from its application information possibly disclosing evidence of human rights violations, as well as at the possibility to take into consideration information not disclosed to the other party. We are further concerned at Rule 44F's vague wording and overbroad criteria, at the deference afforded to the party submitting the information, and at the fact that Rule 44F does not clearly exclude the holding of proceedings where applicants and their representative of choice would be denied access.

RULE 44F(1) - LACK OF CLARITY REGARDING THE TYPE OF "DOCUMENTS" AND PROCEDURE SUBJECT TO RULE 44F

It is not entirely clear, in light of Rule 44F(1), Rule 44F(3) and Rule 44F(4), whether the proposed mechanism would solely cover the submission of classified[48] *documents*, as opposed to the submission of classified written or possibly oral *representations or arguments* based on or otherwise referring to such classified documents. Indeed, neither Rule 44F(1) nor Rule 44F(3) clearly set out what type of "documents" it is referring to. Rule 44F(1) indicates that this term "includes" any information or material, thus appearing to provide only an illustrative list of possible "documents" covered by Rule 44F. Also, Rule 44F(1) does not provide any clarity as to what "information" or "material" actually refers to. In particular, it is not entirely clear whether such information or material could include written or possibly oral *pleadings* submitted by the party as part of the

---

[47] See, *Al-Nashiri v Poland*, Application No 28761/11, *Written Supplementary Submissions on behalf of Amnesty International and the International Commission of Jurists*, Section D, available at: https://www.amnesty.org/en/documents/EUR37/003/2013/en/ . While this Court has found closed procedures not to be necessarily in contravention with the Convention in cases such as *A and Other v United Kingdom*, Application No 3455/05; *Othman (Abu Qatada) v United Kingdom*, Application No 8139/09; *I.R. and G.T. v United Kingdom (dec.)*, Applications Nos 14876/12 and 63339/12, *Kennedy v United Kingdom*, Application No 26839/05, and *Regner v the Czech Republic*, Application No 35289/11, and while we do not agree with this Court's conclusions in these regards given our general opposition to such procedures, these cases do not in any event deal with a substantive claim of involvement in or other responsibility in relation to human rights violations such as torture or enforced disappearance by the state invoking the secret evidence, cases which will undoubtedly form a large part of the cases where the application of the proposed Rule 44F will be sought by the Respondent State. These cases are therefore of limited significance to the questions at stake in relation to the Standing Committee's proposal.

[48] In order to avoid confusion in terms, we are using the term "classified" as this is the one used in Rule 44F.

proceedings before this Court, including pleadings based on or referring to classified documents of the types mentioned in Rule 44F(1).

Rule 44F(3) does not provide any further clarifications, since it only refers to "documents" as vaguely defined in Rule 44F(1). Also, while Rule 44F(4) indicates that the *nature* of the submitted documents would be assessed by this Court in an "ex parte" procedure, it does not clearly indicate whether the party submitting the information would be present, and in any event it does not explicitly exclude the holding of proceedings where classified representations or arguments on the *substance and merits* of the information contained in these documents would be heard or otherwise received in the absence of that other party and his or her representative of choice.

This has severely adverse consequences, since Rule 44F fails to explicitly and expressly reject the ability of a party to argue and rely on or otherwise take into consideration information not disclosed to the opposing party during a written or oral procedure from which the other party and his or her representative of choice would be excluded.

For this and the other reasons explained earlier in this submission, we recommend that Rule 44F(1) clearly excludes the submission of any classified representations or arguments to this Court, be it in written form or by way of a classified hearing, including classified representations or arguments based on the classified documents submitted by that party to this Court.

RULE 44F(2) - OVERBROAD GROUNDS FOR AN APPLICATION UNDER RULE 44F

Rule 44F(2) indicates that this Rule could be invoked each time a party considers the documents "raise issues of national security or (…) any equally compelling reasons". We submit that such grounds are very vague and overbroad. Not only has "national security" often been acknowledged to be invoked by states for an extremely large and ever growing set of circumstances, but the absence of any further qualifying elements in Rule 44F(2) which would seek to clearly circumscribe those grounds to what is strictly necessary to protect concrete, genuinely legitimate and compelling national security interests constitutes a critical flaw in the proposed mechanism, one which could result in very adverse consequences for the other party, the broader public, as well as the integrity of the Convention system.

Indeed, under Rule 44F(2), a party, which will most often if not always be the Respondent state (as acknowledged by the Standing Committee in its comments on the wording of Rule 44F(2)), would have an incentive to "overclassify" the type of information it would be submitting under this Rule. Indeed, the submission of documents under Rule 44F allows a party to have this Court see all the submitted information (including where there is no legitimate reason whatsoever to consider the information to be or remain classified) while enabling the party to refuse to have any of the submitted information be disclosed to the other party. Whether or not the Court subsequently decides to *rely on or otherwise take into consideration* the submitted information, it will in any event have *seen* it while the other party has not, and it will obviously not be able to "*un-see*" any parts of such information. Therefore, by such a mechanism the party submitting the information purported to be classified - almost always the Respondent state whose involvement in

human rights violations is at stake - will be effectively given the command of the *content* of what the Court *sees* and of what the other party and the public *cannot see*.

In addition, this mechanism is likely to lead to undermining of the case for a violation of Article 38 ECHR. The Respondent states will indeed be in a position to argue that, by the very fact of submitting the information to this Court, even if it refuses its disclosure notwithstanding a Court's subsequent request, it has complied with Rule 44F and thus satisfied the requirements under Article 38 ECHR. Moreover, based on the arguably very vague threshold set in Rule 44F(2), they will likely argue that what they have submitted did indeed "raise issues of national security" and that therefore they have complied with the mechanism provided by Rule 44F as well as the requirement to "furnish all necessary facilities" in line with Article 38 ECHR. We do not submit that this would necessarily constitute a valid interpretation of the spirit, if not the letter, of Rule 44F. However, we consider that this is a clear risk inherent in mechanisms on the treatment of classified information, one which is not addressed or in any way sufficiently mitigated by the wording and requirements of Rule 44F both at the "submission stage" (Rule 44F(2)) and at the "treatment stage" (Rule 44F(4) to 44F(6), please see below).

While the Standing Committee explains in its comments on the wording that they are purported to indicate that "the Court will not accept confidentiality lightly", thus attempting to implicitly set a high threshold, the addition of the terms "any equally compelling reasons" do not meaningfully tackle the inherent overbroad nature of what "raises issues of national security" could or would possibly entail. This raises a further serious concern, since the overbroad criterion in Rule 44F(2) could then result in having this Court apply too low a threshold when applying Rule 44F(4)(b).

For these reasons, we recommend that Rule 44F clearly circumscribes the type of information that can be submitted to what is strictly necessary to protect concrete, genuinely legitimate and compelling national security interests.

RULE 44F(3) - LACK OF CLARITY REGARDING THE TYPE OF "DOCUMENTS" AND PROCEDURE SUBJECT TO RULE 44F

As previously mentioned, Rule 44F(3) does not in any meaningful way clarify the definition of what could be considered a "document", and therefore suffers from flaws similar to those in Rule 44F(1).

For this and the other reasons explained earlier in this submission, we recommend that Rule 44F(3) clearly excludes the submission of any classified representations or arguments to this Court, be it in written form or by way of a classified hearing, including classified representations or arguments based on the classified documents submitted by that party to this Court.

RULE 44F(4) - LACK OF CLARITY REGARDING THE TYPE OF "DOCUMENTS" AND PROCEDURE SUBJECT TO RULE 44F

As previously mentioned, while Rule 44F(4) refers to an "ex parte" assessment by the Court of the *nature* of the submitted documents, it does not clearly indicate whether the party submitting the information would be present, and in any event it does explicitly prohibit this Court to resort to secret procedures such as proceedings where classified representations or arguments on the *substance and merits* of the submitted information would be heard or otherwise received in the absence of the other party and his or her representative of choice. This is a very serious flaw in the way the mechanism under Rule 44F could be applied. Indeed, as argued earlier in this submission, a closed procedure where one party would be allowed to make secret representations, with or without the presence of Special Advocates, including with a view to defeat a claim of human rights violations it is alleged to have been involved in, would be in clear violation of the right of victims to access an effective remedy as well as the individual and societal aspects of the right to truth.

For this and the other reasons explained earlier in this submission, we recommend that Rule 44F(4) clearly excludes the submission of any classified representations or arguments to this Court, be it in written form or by way of a classified hearing, including classified representations or arguments based on the classified documents submitted by that party to this Court.

RULE 44F(4)(A) - INSUFFICIENT SAFEGUARDS PERTAINING TO THE RELEVANCE OF SUBMITTED DOCUMENTS

Under this provision, only the Court is in a position to assess the relevance of submitted documents. While there might be circumstances where the relevance or lack thereof is sufficiently manifest to allow for a straightforward assessment without further input, there will often be situations where this does need to be tested. In particular, the other party will need to have access to such documents to be able to challenge, argue in support of or otherwise comment on its very relevance to the case. What may prima facie not appear to be relevant information to this Court could later transpire to be information which, in a certain context, can actually be relevant to the applicant's claim of human rights violation.

In addition, even if the Court decides to send the documents back to the party who submitted them, in application of Rule 44F(4)(a), it cannot "un-see" what it has received and while such information may not necessarily be relevant to the particular facts at issue, it can nevertheless carry some other significance and possibly influence the Court's treatment of the case. A party could for instance abuse this provision by sending information which, while not directly relevant to the specific case, can nevertheless exert some indirect influence on this Court. This is problematic whether or not such abuses take place, since the *appearance* of independence and impartiality will possibly already have been affected. Such risks are further compounded by the fact that Rule 44F(4)(a) does not explicitly bar this Court from *relying on or otherwise taking into consideration* such information.

We therefore recommend that Rule 44F(4)(a) is amended to allow for the other party to access and comment on the relevance of such information, and should it then be decided by this Court that the submitted information is not relevant, then that provision should make clear that the information is excluded from the case file and that neither the party who submitted the information nor this Court can rely on it or otherwise take it into consideration.

RULE 44F(4)(B) - LACK OF EXCLUSION OF ANY INFORMATION POSSIBLY DISCLOSING HUMAN RIGHTS VIOLATIONS, OVERBROAD DISCRETIONARY POWERS LEFT TO THIS COURT

This provision suffers from multiple critical flaws.

Firstly, as already mentioned, it does not set any clear standard as to what could be deemed by this Court to be classified, other than the vague and overbroad criteria contained in Rule 44F(2).

Secondly, and most fundamentally, it does not explicitly exclude from a classified treatment, let alone *compel* this Court to exclude from such treatment, *any information possibly disclosing evidence of human rights violations*.

Thirdly, it provides overbroad discretionary powers to this Court to decide what to do with information it deems of a classified nature. It indeed merely indicates that the Court "may ask" the party to submit redacted or summarised information to the other party. Therefore, not only is this Court not compelled to make such a request, but there is no indication whatsoever as to what it would do should it decide not to make such a request. It is worth noting that even the CJEU's Rule 105(6) does not leave such wide discretionary powers to the Luxembourg Court. Rule 105(6) indeed indicates that the CJEU "*shall* make a *reasoned* order specifying the procedures to be adopted [...]" (emphasis added).

Fourthly, this provision does not set any particular criteria restricting the nature, type, amount or level of permitted redaction, or indeed the extent of permitted summarisation. It does not even provide the already limited restrictions contained in the CJEU Rule 105(6) ("(...) containing the essential content thereof and enabling the other main party, to the greatest extent possible, to make its views known"). All Rule 44F does is to refer to the undefined notion of "unsatisfactory" redaction or summarisation in Rule 44F(5). This is clearly insufficient to effectively ensure that only information that is strictly necessary to protect concrete, genuinely legitimate and compelling national security interests, of which information possibly disclosing evidence of human rights violations can never form a part, is redacted.

Fifthly, there is no substantive distinction made, let alone criteria to make such distinctions, between the two proposed options, namely redactions and a summary. We submit that redaction is and should be the only possible option available. Indeed, not only the content of the information can be relevant to a case, but also, for instance, the format or medium containing the information. Only a redacted version of an original document can provide this necessary contextual information. Also, a redacted document will provide

important indications, such as the amount and level of redaction made, something which in and of itself can be useful for the other party to see and comment on. A mere summary does not show this type of meta-information, and furthermore does not provide the other party with sufficient indication as to the level and extent of the summarisation. We also see no valid reasons for favouring summarisation over redaction of original documents. Should the Standing Committee nevertheless decide to keep the option of a summary open in Rule 44F(4)(b), then it should at the very least introduce clear criteria to distinguish the two options. In particular, it should provide a clear and unequivocal indication that summarisation would only be admitted where redactions are demonstrably impossible. It should also indicate that such summaries can only be resorted to as a last resort in truly exceptional circumstances, with the reasons for it being provided to the other party with the possibility to comment, and must contain the most extensive and comprehensive information possible, including so as to enable to the greatest extent that other party to challenge or otherwise meaningfully comment on it.

Sixthly, this provision does not compel the party concerned to actually accede to the Court's request. The only "sanction" it faces for not properly complying with the Court's request is contained in Rule 44F(5) which, as explained below, is woefully inadequate.

Seventhly, this provision does not explicitly make clear that the redacted information or the information not contained in the summary *must be excluded* from the case file, and that neither the party submitting the information nor this Court can *rely on or otherwise take into consideration* any parts of the redacted information or information not included in the summary provided to the other party.

All these flaws are compounded by the fact that all submitted information, including what would eventually be redacted or excluded from the summary, will in any event have been *seen* by this Court. This is true whether or not the other party gets access to the un-redacted or summarised information. Such consequence necessarily resulting from the very fact of adopting a mechanism on the treatment of classified information renders the need to have the strongest and clearest possible safeguards in place all the more essential. Failing that would render the whole mechanism even more problematic in terms of the right to access an effective remedy for human rights violations, including the victims' and public's right to the truth.

For these reasons, we recommend that Rule 44F(4)(b) should at the very least be thoroughly amended in line with the aforementioned observations. Notably, it should explain what could be deemed to be "classified" and explicitly compel this Court to exclude from this definition and subsequent classified treatment any information possibly disclosing evidence of human rights violations; provide that the Court has to ensure the transmission of the documents to the other party in any case where it has decided the information not to be of a classified nature; provide that the Court will determine what redactions are permitted on the basis of clear and narrowly circumscribed criteria, thus ensuring that such redactions are limited to what is strictly necessary to protect concrete, genuinely legitimate and compelling national security interests, of which information possibly disclosing evidence of human rights violations can never from a part; provide that the Court will make a reasoned and non-classified decision on that matter; exclude references to the possibility of summaries; specify that any undisclosed information is ipso

facto excluded from the case-file and that neither the party submitting the information nor this Court can rely on or otherwise take into consideration any parts of any undisclosed information.

RULE 44F(4)(C) - LACK OF A REFERENCE TO INFORMATION POSSIBLY DISCLOSING HUMAN RIGHTS VIOLATIONS, OVERBROAD DISCRETIONARY POWERS LEFT TO THIS COURT, INADEQUATE CONSEQUENCES IN CASE OF REFUSAL

This provisions also suffers from multiple critical flaws.

Firstly, it fails to explicitly indicate a critically important example of situations where documents can never be considered to be legitimately classified, namely *any information possibly disclosing evidence of human rights violations*. As explained earlier, the public interest, and in particular the applicant victim's interest in the disclosure of such information, overrides other public interests claimed by the party submitting the information. In particular, there can be no *concrete*, *genuinely legitimate* and *compelling* national security or other similar public interests in withholding such information from the applicant victim. It is therefore critically important, including for the integrity and credibility of this Court and the Convention system as a whole, to have a clear and unequivocal statement, leaving no discretionary power, be inserted in this provision so as to effectively shield any information possibly disclosing evidence of human rights violations from any assessment as to whether they could be deemed to be legitimately classified. Also, as previously mentioned, whatever mechanism this Court will adopt in its Rules of Court will very likely have significant consequences at domestic level across the Council of Europe region, and beyond. The Standing Committee therefore needs to adopt the strongest and clearest safeguards possible, nothing less. Discretionary powers left to this Court on such sensitive matters for the protection of human rights, including access to an effective remedy and the right to truth, will translate into discretionary powers of an equal or possibly even broader nature in countless domestic courts, including courts which will not be applying the same diligence and level of scrutiny as this Court would.

Secondly, by stating that the Court merely "may ask" the party for authorisation to transmit information it considers *not* to be of a classified nature negates any idea of an open and transparent judicial process. In addition, not only is this Court not being compelled by this provision to ensure that the documents are transmitted to the other party, but there is no indication whatsoever as to what it would do should it decide not to make such a request. We submit that this provision should clearly state that where this Court considers the documents not to be of a classified nature, which must always be the case concerning information possibly disclosing evidence of human rights violations, it must ensure their transmission to the other party.

Thirdly, and very importantly, this provision fails to attach any meaningful consequences to the party's refusal to disclose information this Court considers not to be of a classified nature. Notably, it provides for significantly weaker safeguards than the ones contained in CJEU's Rule 105(4). What Rule 44F(4)(c) does, in addition to once again leaving the Court with wide discretionary powers to decide what it would do ("may ask", in contrast

with CJEU's Rule 105(4) stating that the Court "shall ask"), is to provide that party with the choice to redact non-classified information, to summarise non-classified information, or indeed to do nothing about it and keep secret the entire non-classified information (unlike CJEU's Rule 105(4) which states that *all* the information or material must be communicated) . What this provision does in addition is to refrain from compelling this party and the Court *not* to rely on or otherwise take into consideration the undisclosed non-classified information. It is again worth noting in this latter regard that this provision fails to even match the requirement of CJEU's Rule 105(4) which states that "[i]f the first party objects to such communication within a period prescribed by the President, or fails to reply by the end of that period, that information or material shall not be taken into account in the determination of the case and shall be returned to that party".

We submit that Rule 44F(4)(c) should instead ensure that in case of refusal to transmit any non-classified information, that information is excluded from the case file and neither the party who submitted the information nor this Court can rely on it or otherwise take it into consideration. Failing to introduce these essential safeguards would strike an existential blow to human rights protection as well as to the integrity and credibility of the Convention system.

Once again, it is already extremely problematic that the party can use the mechanism of Rule 44F to essentially show the Court any information while preventing the other party from seeing it, allowing a party and this Court to rely on or otherwise take into consideration undisclosed information, including non-classified information, would only further impair the very essence of the right to an effective remedy and the right to the truth.

For these reasons, we recommend that Rule 44F(4)(c) should at the very least be thoroughly amended in line with the aforementioned observations. Notably, it should explicitly compel this Court to consider *not* to be of a classified nature and therefore exclude from subsequent classified treatment any information possibly disclosing evidence of human rights violations; provide that the Court has to ensure the transmission to the other party of all documents containing information it considers not to be of a classified nature, including all information possibly disclosing evidence of human rights violations; specify that any undisclosed information is ipso facto excluded from the case-file and that neither the party submitting the information nor this Court can rely on or otherwise take into consideration any parts of any undisclosed information.

RULE 44F(5) - ABSENCE OF ADEQUATE SANCTIONS FOR THE PARTY'S LACK OF COOPERATION

We wish to re-emphasise in connection with this provision that the refusal of the concerned party to disclose to the other party any information requested by this Court, be it a redacted version of a document this Court considers to be containing legitimately classified information (as mentioned earlier we consider that summaries are not adequate) or information this Court considers not to be of a classified nature, must only have one consequence: the exclusion of the undisclosed information from the case-file and the impossibility for that party and the Court to rely on it or otherwise take it into consideration in any way.

As regards situations where the redactions of classified information are considered by this Court to have been made in an unsatisfactory way (as previously mentioned, we believe summaries would be inadequate and therefore always unsatisfactory), this provision should clearly indicate that *adverse* inferences *will* be drawn by this Court.

In addition, it would be important to provide indications as to what would be considered "unsatisfactory". Examples should include situations where information the Court considers not to be of a classified nature have been redacted, or, in case the possibility of providing summaries is maintained, these summaries are not providing the other party with the most extensive and comprehensive information possible, including so as to enable it to the greatest extent to challenge or otherwise meaningfully comment on it.

We therefore recommend that Rule 44F(5) should at the very least be thoroughly amended in line with the aforementioned observations. Notably, it should specify that any undisclosed information will be ipso facto excluded from the case-file and that neither the party submitting the information nor this Court can rely on or otherwise take into consideration any parts of any undisclosed information; provide that the Court will draw adverse inferences from any lack of compliance with its directions by the party submitting the information, including but not limited to the unjustified withholding of information such as any information possibly disclosing evidence of human rights violations.

RULE 44F(6) - EXISTENTIAL THREAT TO THE RIGHT TO AN EFFECTIVE REMEDY AND THE RIGHT TO THE TRUTH

For all the reasons explained in this submission, we strongly oppose the adoption of Rule 44F(6).

Furthermore, we wish to emphasize that this provision neglects a fundamental element: it is precisely when information is "essential" in order for this Court to examine a case that the need for this information to be transmitted to the other party is the most pressing. Also, by saying that there can be circumstances where it "is strictly necessary for the proper administration of justice" to take into account secret evidence considered "essential" to examine a claim of human rights violations, including violations such as torture, enforced disappearance and unlawful killings, Rule 44F(6) is effectively turning upside down the right to an effective remedy, including the right of anyone who alleges to have been victim of a human rights violation to have access to a fair procedure in which his or her claim can be adjudicated and addressed in a proper way and with a meaningful result, as well as the applicant victim, other victims' and the broader public's right to the truth. It is moreover striking that by referring to the possibility to "take into account" such undisclosed information, this Court would likely, since it deems this information to be "essential", base its decision solely or to a decisive degree on secret evidence. While we would oppose the taking into consideration of secret evidence even to a lesser degree, we submit that, a fortiori, for this Court to base its decision "solely or to a decisive degree" on secret evidence would constitute an all the more severe affront to the right to an effective remedy for human rights violations, including fair procedure, and the right to truth, in addition to running counter to multiple cases decided by this Court.

As we recommended earlier, Rule 44F must instead explicitly make clear that no information this Court considers to be legitimately classified, of which information possibly disclosing evidence of human rights violations can never form a part, can be taken into account or otherwise relied on by the party submitting it *or by this Court*. Anything less that this will not only be antithetical to the right to an effective remedy and the right to truth, it will also provide a strong incentive to state parties to refuse the transmission of information to the other party, including information critical for the examination of the case, and effectively empty articles 34 and 38 ECHR of any meaning.

Furthermore, and in any event, this provision's failure to explicitly exclude information possibly disclosing evidence of human rights violations further demonstrates its fatally flawed character.

We therefore recommend Rule 44F(6) to be deleted.

The AIRE Centre

Amnesty International

International Commission of Jurists

REDRESS

World Organisation Against Torture (OMCT)