European Human Rights Advocacy Centre

EHRAC submission to the European Court of Human Rights' Standing Committee on the Rules of Court – Report on the Treatment of Classified Documents (31 January 2018)

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Introduction

1. This is a submission by the European Human Rights Advocacy centre (EHRAC) to the European Court of Human Rights' Standing Committee on the Rules of Court in response to its Report on the treatment of classified documents published on 31 January 2018.

2. EHRAC's submission responds primarily to the Standing Committee's proposal to add a new Court Rule dealing with the treatment of classified documents. In order to provide some context to this issue, our submission includes an analysis of the extent to which governments' claims as to the secrecy or confidentiality of documents is a problematic feature of the process of litigating cases, and whether the Court's 'toolkit' of means to respond is adequate to ensure compliance with the adversarial principle and the principle of the equality of arms. In our view these issues are inextricably linked to the question of the treatment of classified documents, and we trust that the information we provide and the submissions we make will be of assistance to the Standing Committee.

3. We draw in particular on our experience of litigating European Court cases from the Russian Federation, Georgia, Azerbaijan, Armenia and Ukraine since 2003 (see below) and on the general practice of the Court and the decisions it has made relevant to these questions. That experience leads us to emphasise the central importance, from the victims' perspective, of obtaining disclosure as an element of the redress sought and in establishing what has happened, especially as regards enforced disappearances and cases involving the state's use of lethal force. We view disclosure as a pivotal factor in realising the right of access to information, and as a key component of the right to truth.

4. In summary, we would welcome the introduction of a new Court rule which further emphasises the duty of parties to co-operate with the Court, in particular, by setting out an explicit obligation as regards any information which it claims to be secret or confidential, (i) to submit such documents to the Court, and (ii) to provide 'full and detailed grounds' justifying the treatment of such documents as being secret. The reasons given for claiming confidentiality should be subjected to strict scrutiny by the Court, and it is an important feature that the Court will draw adverse inferences where a party falls short of the proposed new procedures.

About the European Human Rights Advocacy Centre

5. Established in 2003, EHRAC is an independent human rights legal centre based at Middlesex University in London. We jointly litigate human rights cases from the Russian Federation, Georgia, Azerbaijan, Armenia and Ukraine, together with local NGO partners, before the European Court of Human Rights and other international mechanisms. EHRAC has partnership status with the Council of Europe. Our NGO partners include Memorial (Russia), the Georgian Young Lawyers' Association, the Ukrainian Helsinki Human Rights Union and the Regional Centre for Human Rights (Ukraine).

6. To date, EHRAC has litigated more than 300 cases (from the five countries), and has secured more than 130 judgments at the European Court, including: *Isayeva v Russia* (2005), *Khashiyev and Akayeva v Russia* (2005), *Isayeva, Yusupova & Bazayeva v Russia* (2005), *Fadeyeva v Russia* (2005), *Bitiyeva and X v Russia* (2007), *Alikhadzhiyeva v Russia* (2007), *Magomadov and Magomadov v Russia* (2007), *Musayev and others v Russia* (2007), *Ryabikin v Russia* (2008), *Zolotukhin v Russia* (2009), *Kiladze v Georgia* (2010); *Abuyeva v Russia* (2010), *Tsintsabadze v Georgia* (2011), *Esmukhambetov v Russia* (2011), *Karpacheva and Karpachev v Russia* (2011), *Kakabadze and Others v Georgia* (2012), *Oleksandr Volkov v Ukraine* (2013), *Ageyevy v Russia* (2013), *Gamtsemlidze v Georgia* (2014), *Bekauri and Others v Georgia* (2015), *Sargsyan v Azerbaijan* (2015*), Roman Zakharov v Russia* (2015), *Dzidzava v Russia* (2016), *Frumkin v Russia* (2016), *Rasul Jafarov v Azerbaijan* (2016), *Tagayeva and others v Russia* (2017), *Jugheli and others v Georgia* (2017), *Orlov and others v Russia* (2017) and *Merabishvili v Georgia* (2017).

Overriding purpose of the Report

7. We note that the purpose of the Standing Committee's Report is to 'create a proper mechanism for guaranteeing the parties, and in particular the Governments, adequate protection of confidential (sensitive/secret/classified) documents produced by them at the request of the Court' (para. 1).

8. At the outset, we would observe that in our experience in litigating cases before the Court there are frequently considerable problems with non-disclosure by respondent governments, in that documents which are, or are highly likely to be, pertinent to the case at hand are not disclosed to the Court, in circumstances in which the non- disclosure is not adequately justified by the respondent government (if at all), and indeed which frequently cannot be objectively justified. We are not aware of a particular recurrent problem as regards the protection of confidential documents which are disclosed to the Court[1] (which is identified as the main aim of the Report, but the extent of any such problem is not explicitly explained in the Report). If, however, the broader aim of the proposals set out in the Report is to improve disclosure (by providing greater reassurance as to the protection of the confidentiality of the documents disclosed) then we can see the logic in such an objective.

The problems relating to non-disclosure

9. In this section, we seek to outline a number of different problems arising as regards non-disclosure (which are reflected in a large number of our own cases). We make three primary observations about respondent governments' non-disclosure:

   (a) That claims of confidentiality by governments are made in a very wide range of situations;

[1] We note, however, that it clearly was a significant problem in the extraordinary rendition cases, such as *Al Nashiri v Poland*, No. 28761/11, 24 July 2014.

(b) That non-disclosure also arises in situations where respondent governments claim not to be in possession of certain documents; and

(c) That non-disclosure can be significantly detrimental to the Court's ability to adjudicate on cases before it.

These three points are further amplified in the following sections.[2]

That claims of confidentiality by governments are made in a very wide range of situations

10. The focus of the Standing Committee Report (para. 1) is on confidential documents – those which are 'sensitive', 'secret' or 'classified'. These are very broad categories lacking any common definition, which leaves a wide discretion to the authorities to decide which documents fall within these categories. In practice, governments have made claims of 'confidentiality' or similar over important documents, in a very wide range of circumstances.

11. It is not unusual for governments to refuse to disclose documentation on the basis that it is said to be 'classified'. For example in *Janowiec and others* v *Russia*,[3] which concerned the investigation of the murder of more than 21,000 Polish soldiers and officials by the Soviet secret police in 1940, the Russian Government refused to disclose a copy of the decision made in 2004 to discontinue the investigation, on the basis that it was classified under domestic law. In the inter-state case brought by Georgia against Russia relating to the detention and collective expulsion of Georgian nationals in 2006, the respondent Government refused to disclose to the Court two government circulars which were said to be classified (*Georgia v Russia (I)*[4]).

12. However, a far broader range of documents are also routinely claimed to be confidential in some way. These notably include all manner of documents contained in criminal investigation files, as well as medical records relating to detainees (see, e.g., *Nevmerzhitsky v Ukraine*[5]) and prison regulations (see, e.g., *Davydov and others v Ukraine*[6]).

13. It is also evident from the Court's caselaw that governments will raise claims of confidentiality without sufficiently justifying or explaining their position. For example, in the extraordinary rendition case of *Al Nashiri v Poland*,[7] the Court explicitly acknowledged that the Government might wish to invoke grounds of national security as regards some of the documentation relevant to the case, but it emphasised that 'no national-security related arguments have ever been invoked by the Government in response to the Court's evidential requests and none of the requested documents have

[2] In the interests of brevity, we have provided a few examples of the situations which we refer to in this submission – we do not seek here to provide a comprehensive analysis.
[3] No. 55508/07, 21 October 2013.
[4] No. 13255/07, 3 July 2014.
[5] No. 54825/00, 5 April 2005.
[6] No. 17674/02, 1 July 2010.
[7] No. 28761/11, 24 July 2014.

materialised' (para. 368).

That non-disclosure also arises in situations where respondent governments claim not to be in possession of certain documents

14. The point here is that a significant problem of non-disclosure can arise not because respondent governments cite reasons of secrecy or confidentiality as such, but simply because disclosure of key documents does not happen, and no explanation, or no adequate explanation, for non-disclosure is provided. In our experience, this often arises as regards CCTV evidence, which could be extremely important to the resolution of a case. The cases which follow illustrate this problem.

15. *Enukidze and Girgvliani* v *Georgia*[8] concerned the abduction and death of the applicants' son at the hands of Ministry of Interior officials: the Court identified myriad failings in the investigation of the case, and was highly critical of the Government because of its failure to submit the complete case files, including crucial CCTV images. Its partial and selective disclosure of CCTV evidence was highlighted by the Court which found that the Government had failed to justify it.[9] The Court said:

> 'Of particular concern is the failure to submit all the images showing the passage of cars on the Tbilisi-Kojori road during the whole period between 2.00 and 3.00 a.m. In the eyes of the Court the submission of that particular item of evidence in its entirety was relevant for the examination of the complaint under Article 2 of the Convention, as it could have corroborated or, on the contrary, refuted the applicants' allegation that O.M.-ov had left the Café Chardin to join his colleagues from the Ministry of the Interior in severely ill-treating and killing their son. The Government failed to justify that omission in their written observations and remained silent even after the applicants had explicitly reproached them on that account during the public hearing on 27 April 2010'. (para. 301)

16. A key factual element in the case of *Merabishvili v Georgia*[10] was whether the applicant, the former Georgian Prime Minister and Minister of Interior, had been taken clandestinely from his cell one night to meet the Chief Public Prosecutor and the head of the Georgian Prison Service. The respondent Government repeatedly denied that this had ever happened. However, the Grand Chamber concluded that the event did indeed occur – and the question of the unavailability of CCTV film was central. The Government failed to disclose CCTV footage from the surveillance cameras in the prison and the Penitentiary Department building, which the Court noted 'could have conclusively proved or disproved the applicant's allegations' (para. 344). The Government claimed that the footage was automatically deleted after twenty-four hours, but the Court noted that neither the Minister of Prisons nor the head of the general inspectorate of the Ministry of Prisons had been aware of such a policy when speaking about the case.

[8] No. 25091/07, 26 April 2011
[9] See, in particular, paras 292-302
[10] No. 72508/13, 28 November 2017.

17. In the pending case of *Babayeva v Azerbaijan*,[11] which concerns the death of a prison inmate, the authorities have acknowledged that the prison had operational CCTV cameras inside the prison at the time of the applicant's brother's death. However, no CCTV film has been disclosed as it is claimed (without any evidential basis) that the CCTV evidence had been destroyed by prisoners during a prison riot.

That non-disclosure can be significantly detrimental to the Court's ability to adjudicate on cases before it.

18. There is no question that non-disclosure may have, and does have, a significant impact on cases. In *Esmukhambetov v Russia*, a case concerning the deaths of the applicants' relatives caused by an air strike (referred to further below), the Court acknowledged the insurmountable difficulties it faced as a consequence of the state's non-cooperation:

> [I]ts ability to assess the circumstances surrounding the deaths of the relevant applicants' relatives, including the legal or regulatory framework in place, the planning and control of the operation in question and the actions of the federal servicemen who actually administered the force, is severely hampered by the manifest unwillingness of the respondent Government to cooperate with the Court in the present case and their failure to submit any documents or information regarding the events under consideration.[12]

19. In the extraordinary rendition case of *Al Nashiri v Poland*,[13] the Court commented on the very serious difficulties it had faced in elucidating the facts, which had been *'compounded by the Polish Government's failure to cooperate with the Court in its examination of the case', and as a result of which the Court's establishment of the facts was 'to a great extent based on circumstantial evidence'* (para. 400).

20. Furthermore, non-disclosure frequently relates to fundamental facets of the case, such as the extent of the state's use of lethal force in the case of *Tagayeva and Others v Russia*,[14] concerning hostage-taking at a school in Beslan in 2004. There, the testimony of General Tikhonov, the commander of the FSB Special Services Centre, who was in charge of the security forces' operation to storm the school, was not disclosed. This prevented any proper assessment by the Court of the authorities' means of weaponry used in the storming of the school. The Court was therefore forced to attempt to assess the case 'in the absence of first-hand explanations from the person who had been *de facto* in charge of the use of force during the operation' (para. 605). The respondent Government was criticised by the Court in *Ahmet Özkan v Turkey*,[15] concerning a military raid on the village of Ormaniçi in 1993, for its *'passive attitude in producing documents that were in their possession and which were unquestionably of fundamental importance for elucidating disputed facts…'.*

[11] No. 33184/16, communicated on 8 June 2017.
[12] No. 23445/03, 29 March 2011, para. 142
[13] No. 28761/11, 24 July 2014.
[14] No. 26562/07, 13 April 2017.
[15] No. 21689/93, 6 April 2004, para. 481.

Non-disclosure due to the confidentiality of Inter-State proceedings

21. Another aspect of non-disclosure has occurred, in our experience, in the context of inter-state proceedings. We are currently litigating a number of individual applications arising from the ongoing situation in eastern Ukraine, which is also the subject of several pending inter-state applications, brought by Ukraine against Russia. When the respondent Governments have been required by the Court to respond to the claims made in the individual applications, the Governments have referred to their pleadings (and documents) submitted in the course of the inter-state proceedings, without spelling out their arguments and without providing disclosure of the documents in question. When we then requested from the Court the disclosure of the inter-state pleadings (and documents), our requests were initially rejected by the Court on the basis that the pleadings in the inter-state cases had been declared to be confidential. Only when we pressed the Court further, explaining that it was simply not possible for us to plead on the applicants' behalf in response, did the Court then require that the respondent Governments should set out their arguments in full (and provide any documents relied on) in the course of the individual applications. In our submission, in view of the apparent uncertainty as to the Court's practice in this area, it is suggested that this issue should be reviewed, and, if necessary, the Court Rules be amended.

Cases relating to serious human rights violations committed by the Russian security forces in the North Caucasus region

22. This group of cases has been singled out here, because they have involved routine levels of non-cooperation by the Russian Federation (as is acknowledged by the Standing Committee Report (para. 8), with reference to the *Janowiec* case, para. 205).[16] For example, in the case of *Esmukhambetov and Others v. Russia*,[17] concerning the bombing of Kogi village, the Government refused to disclose any documents whatsoever in the criminal investigation file, arguing that they were classified, or to provide the Court with an outline of the investigatory steps taken. As a result, the Court found such a "manifest lack of cooperation" to be "unacceptable".[18] This is but one example of a general problem. Indeed, the Russian government's failure to disclose relevant case documents in the Chechen cases have become legion, so much so, that the Court has had cause to make the assumption (where at least some documentation has been provided) that the materials made available to it have been selected so as to demonstrate to the maximum extent possible the effectiveness of the investigation in question.[19]

23. It is acknowledged that in these circumstances, the Court may take steps to mitigate the consequences of the non-disclosure, by imposing the burden of proof on the state – both

[16] See further: P. Leach, "The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights", [2008] EHRLR 732–761, 743 et seq; P. Leach, "Egregious human rights violations in Chechnya: appraising the pursuit of justice", in L. Mälksoo & W. Benedek (eds), *Russia and the European Court of Human Rights: the Strasbourg effect*, Cambridge University Press, 2017, pp. 255-294.
[17] No. 23445/03, 29 March 2011
[18] Ibid., para. 119.
[19] See, for example, *Tsechoyev v. Russia*, No. 39358/05, 15 March 2011, para. 146.

as regards injuries to, or the death of, individuals held in state custody, and also in respect of situations where individuals are found injured or dead in an *area* within the exclusive control of the state.[20] Furthermore, the Court may draw inferences from non-disclosure "in respect of the well-founded nature of the applicants' allegations", as it did, for example, in *Kadirova and Others v. Russia*[21] in which the applicants complained that two of their relatives had been taken away by Russian soldiers during a "sweeping up" operation in the village of Serzhen-Yurt in Chechnya, in November 2001. Taking account of the Government's refusal to provide a copy of the investigation file, and its inability to provide any other plausible explanation, the Court drew inferences from the Government's conduct and found that the two women had been arrested by servicemen. As there had been no news of them for more than ten years, they were to be presumed dead, for which the state was held to be responsible.

24. As Helen Keller and Corina Heri have noted, such developments concerning the assessment of evidence were the consequence of a "history of Government failure" to cooperate with the Court in establishing the facts in disappearance cases.[22] Olga Chernishova and Nina Vajić have discerned in the Chechen cases a "new level of non-cooperation" by the respondent state.[23] Keller and Heri have little doubt as to the justification for the Court's transfer of the burden of proof:

> A shift in the burden of proof is … very necessary in these instances, which often entail insurmountable difficulties of proof for applicants, compounded by state behaviour.[24]

25. It is EHRAC's view that steps taken by the Court (as outlined above) to mitigate against non-disclosure are important, but they are not always sufficient in order to comply with the adversarial principle and the principle of the equality of arms, or to achieve a full and fair resolution of the case in issue (including the provision of critical information to the applicants). Keller and Heri have acknowledged the limitations of the Court's approach: where states maintain a "wall of silence," the Court cannot "fully compensate" for a state's failure to collect evidence.[25]

The North Caucasus cases – non-disclosure of documents relating to an ongoing investigation

[20] As regards the latter, see for example *Inderbiyeva v. Russia* No. 56765/08, 23 March 2012.
[21] No. 5432/07, 27 March 2012.
[22] Helen Keller and Corina Heri, "Enforced Disappearances and the European Court of Human Rights", Journal of International Criminal Justice (2014) 12(4), p. 735, at pp. 739–40.
[23] N. Vajić and O. Chernishova, "The Court's Evolving Response to the States' Failure to Cooperate," in Dean Spielmann, Marialena Tsirli, and Panayotis Voyatzis (eds.), *La Convention européenne des droits de l'homme, un instrument vivant: Mélanges en l'honneur de Christos L. Rozakis [The European Convention on Human Rights, a Living Instrument: Essays in honour of Christos L. Rozakis]* (Bruylant, 2011), pp. 47–79, p. 62.
[24] Keller and Heri, "Enforced Disappearances," (n 22), p. 740.
[25] Ibid., p. 750. They therefore argue in favour of additional steps being taken by the Court, including the use of interim measures to protect applicants and witnesses, and in extremis, for Council of Europe membership rights to be suspended for persistent offenders.

26. The Standing Committee Report (para. 8) acknowledges (by reference to the *Janowiec* case, para. 205) the particular problem in the North Caucasus cases that the respondent Government frequently refuses to disclose documents contained in an ongoing criminal investigation file, because disclosure is said to be precluded by the Code of Criminal Procedure. Such arguments have rightly been rejected by the Court, as the Code of Criminal Procedure does not contain an absolute prohibition of disclosure – instead, it sets out the procedure for disclosure.

27. However, we consider it is essential to emphasise two further points about this problem. Firstly, the fact that the Court's position rejecting these arguments has been clear and consistent for several years, has not stopped the respondent Government from continuing to advance them as purported justification for non-disclosure in further cases. It has done so again, for example, in the pending case of *Estemirova v Russia* (No. 42705/11), concerning the abduction and murder of the human rights defender, Natalia Estemirova. Furthermore, in that case, a limited degree of access to the criminal case-file was granted to one of the applicant's Russian lawyers, but only on the condition that he was subject to a 'non-disclosure agreement', preventing him from disclosing such documents. This is another common problematic feature of the North Caucasus cases.

28. Secondly, it is important to emphasise that it is very common in such cases that the criminal investigation remains nominally open for long periods (often several years) or that such proceedings are repeatedly closed and re-opened, during which time few, if any, effective investigatory measures are in fact carried out.[26] The effect of such a practice is therefore to continue to deny disclosure to the applicants over periods of several years. In view of its prevalence, there can be no doubt that this practice is deliberately intended by the authorities to prevent disclosure.

The application of Article 38 in the North Caucasus cases

29. In spite of the continuing serious problems as regards the lack of disclosure of case documents by the Russian government in these cases, it has become the usual practice of the Court not to find a violation of the Article 38 duty to "furnish all necessary facilities" – in other words, to cooperate with the Court's examination of cases before it (see section III of the Standing Committee Report). The basis for this is that because the Court has been able to reach a finding that the state was responsible for the abduction in question, it was not therefore prevented "from examining the application."[27] However, it is suggested that that is not the appropriate test – Article 38 obliges states to furnish *all necessary facilities* to enable the Court's *effective conduct* of investigations of cases before it. Olga Chernishova and Nina Vajić have summarized the obligation on Convention states under Articles 34 and 38 in this way:

> The Court's ability to adjudicate effectively upon complaints about the alleged violations of human rights depends on two principal conditions: that the applicants are free to exercise their

[26] See also cases such as *Farmanyan and others v Armenia*, No. 15998/11, communicated 1 Sept 2015, pending judgment.
[27] See, for example, *Sultygov and Others v. Russia*, No. 42575/07 et al., 9 October 2014, paras. 471–5.

> right to bring the individual petitions to the Court and that, as the Court finds it necessary, the States should take *every step* to cooperate with the Court's investigation of the matter.[28] (emphasis added)

30. They also acknowledge the grave nature of the impact of non-disclosure:

> Whenever the examination of the documents in written proceedings becomes the only instrument for establishing the facts of the case, the non-cooperation of the government has particularly grave consequences for the Court's proper function.[29]

31. The Court's explanation of the purpose of Articles 34 and 38 would also seem to confirm that the obligations go further than requiring simply the Court's capability to examine an application:

> [A] failure by the respondent Government to comply with their procedural obligation under Article 34 of the Convention does not necessarily require that the alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition. The Contracting Party's procedural obligations under Articles 34 and 38 of the Convention must be enforced irrespective of the eventual outcome of the proceedings and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives.[30]

32. Given the serious evidential difficulties, and the fundamental problems that have persisted in the North Caucasus cases in establishing even the very basic facts (what happened, when and who was responsible),[31] it cannot be said that the Russian Government's routine failure to provide full disclosure enables the Court to carry out an effective conduct of investigations in these cases. A stricter application of Article 38 may assist the Court in breaking through the "wall of silence."

Specific comments on draft Rule 44F.

33. We consider that respondent governments' non-disclosure of documents and other information relevant to pending applications before the European Court is a serious problem, which can be significantly detrimental to the Court's capability to elucidate the facts (and provide information to the victims) and to assess whether the European Convention on Human Rights has been violated. Our starting point is that all documents on which parties rely should be disclosed, and that it should only be in very limited and exceptional circumstances that this basic rule is set aside.

34. It is not unusual for governments to fail to attempt to justify non-disclosure, and where reasons are given they frequently do not stand up to any truly objective scrutiny. In our view it is evident that in some situations respondent governments will deliberately decide not to disclose certain documents which would be likely to clarify relevant factual matters and/or

[28] Vajić and Chernishova, "The Court's Evolving Response," (n 23), p. 47. Note their use of the phrase "every step."
[29] *Ibid.*, p. 66.
[30] *Hilal Mammadov v. Azerbaijan*, No. 81553/12, 4 February 2016, para. 125.
[31] See, e.g., Leach, "The Chechen Conflict," (n 16), pp. 743–49.

weaken its case and/or strengthen the applicant's case.

35. Accordingly, we would welcome the introduction of a new Court rule which further emphasises the duty of parties to co-operate with the Court, in particular, by setting out an explicit obligation as regards any information which it claims to be secret or confidential, (i) to submit such documents to the Court, and (ii) to provide 'full and detailed grounds' justifying the treatment of such documents as being secret. We also consider the transmission of the application to the other party for comment to be an essential part of ensuring the fairness of the adversarial proceedings and the perception of such fairness.

36. Furthermore, we welcome the additional clarity that the Court will expressly be able to draw adverse inferences in circumstances set out in draft Rule 44F(4) and (5).

37. However, in light of the various, significant problems of non-disclosure which have been outlined in this submission, and in order to ensure that full trust in the Court is maintained, we consider it to be essential to add the following points:

(a) The question whether it is justified to treat documents as being 'classified' on grounds of national security, state secrecy or on any other grounds, must be subject to very strict and searching scrutiny by the Court. The test applied by the Court must involve the application of its own objective criteria, which are not subject to, or limited by, national standards. Therefore, the proposal that the word classified 'includes all security levels employed by national or international authorities' (para. 32 of the Standing Committee Report) is too broad – it should be made very clear that the term will *not* necessarily cover all security levels used by national or international authorities (as this will be subject to the Court's assessment). Furthermore, proposing that documents may be classified on the basis of national security or 'any equally compelling reason' is too broad and vaguely-defined.

(b) The provisions set out in draft rule 44F(4) and (5) to the effect that the Court can request that documents or summaries be transmitted to the applicant would be essential components of the Court's new powers of scrutiny and of ensuring the fairness of the proceedings. Accordingly, strong inferences should be drawn from failures to do so, since that is the only 'sanction' available to the Court (and this may also help deter governments from submitting 'ordinary' docs under the new mechanism in an attempt to avoid disclosure to the applicants). The Court's drawing of inferences should take account of all relevant factors, including: (i) the clarity and relative strength or weakness of the party's claims to confidentiality; (ii) the extent and likely impact of non-disclosure – for example, does the claim of confidentiality relate to documents or information which are central to the Court's assessment of the facts and/or the merits of the case; (iii) whether the claim of confidentiality is clearly out of step with the Court's prior practice and/or established caselaw in this area; and (iv) whether the party in question has previously made similar claims of confidentiality which have been rejected. We consider that there may be differences in the inferences to be drawn from a) the failure to give disclosure to the Court in the light of the new confidentiality protections provided, and b) the failure to provide redacted versions or summaries to the applicant where requested

to do so by the Court (either in the case where the documents are not deemed classified by the Court or they are and partial disclosure is required). In some situations, clearly unjustifiable claims of confidentiality, and/or the repeated practice of making such claims by states, should lead the Court to draw stronger or broader inferences as to the well- foundedness of the applicants' claims.

(c) We would also advocate the further strengthening of the Court's practice as regards the drawing of inferences, by adopting an additional Court Rule equivalent to those in force in the Inter-American system which permit the facts alleged to be accepted as being true if the state fails to respond (including, in this context, a failure to provide adequate disclosure).[32]

38. The notion that the Court could adjudicate on a case in which it has relied on 'classified' evidence which has not been disclosed to the other party, as set out in draft Rule 44F(6), is indeed a controversial proposal. However, we would acknowledge that such a practice need not necessarily be to the detriment of the applicant's case – it could result in the admission of evidence which could strengthen, or weaken, an applicant's case. For example, a number of the cases referred to in this submission relate to operations conducted by state security forces, in which documents relating to the planning and conduct of the operation were not disclosed. Had they been disclosed, the applicants' cases may have been strengthened – for example, because the authorities' failures in planning would have been more evident. In any event, we consider that this must be a truly exceptional procedure, applied only where it is 'strictly necessary for the proper administration of justice'. Furthermore, given that it involves a 'derogation' of the adversarial principle, we would propose that the Court's use of this procedure be subject to independent review on an annual basis by a suitably experienced and qualified person (for example, a former judge of the European Court) who is permitted to view all the documentation in any case in which it is applied (and to take evidence or submissions from any person or body as s/he considers fit), and that the report of the independent reviewer is published on the Court's website.

39. We note that draft Rule 44F(4) envisages the Court's assessment of documents submitted under the rule in 'an *ex parte* and *in camera* procedure'. It is not clear whether this refers to a procedure in addition to the written process envisaged by draft Rule 44F(2). For the avoidance of doubt, we would be opposed to any additional '*ex parte*' application process. It is also not clear whether or how the parties would be informed about any decisions made by the Court on disclosure and the reasons for such decisions (beyond any references in the judgment). We would propose that the Court should inform the parties not only of any

[32] Article 38 of the Rules of Procedure of the Inter-American Commission on Human Rights provides: 'The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the period set by the Commission under the provisions of Article 37 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion'. See also Article 41 of the Rules of Procedure of the Inter-American Court of Human Rights. See further: Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Report: *Member states' duty to co-operate with the European Court of Human Rights*, Doc. 11183, 9 February 2007, para. 91; P. Leach, C. Paraskeva & G. Uzelac, "International Human Rights & Fact- Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights", London Metropolitan University, February 2009, p. 63.

requests for non-disclosure, but also about any decisions made.

An applicant's concomitant right to claim confidentiality

40. The Report acknowledges (para. 35) that it will usually be states which make claims as to the secrecy of documents, but it does also accept that applicants may 'wish to submit information which they consider cannot be disclosed to the other party'. This is an important point. The current wording of draft Rule 44F(2) would allow applicants to rely on 'any equally compelling reason' (equally compelling to issues of national security) – but this wording should be amended to enable applicants to claim confidentiality where, for example, there is serious intimidation. One extremely difficult problem which we have encountered in our practice, albeit relatively rarely, is the situation where a key witness has been the subject of threats or intimidation by state agents and as a result they are too scared to give evidence. In our view, in such exceptional circumstances, it ought to be possible for such evidence to be submitted to the Court on a confidential basis, and for the provisions of draft Rule 44F to apply. There are likely to be other situations, in addition to cases of intimidation, where applicants may reasonably wish to seek confidentiality for information or documents to be submitted, and the wording of the new rule should allow for this. We acknowledge that, as with state claims to confidentiality, the application of draft Rule 44F(6) in such circumstances will be a rare occurrence.

Conclusion

41. In summary, we are broadly supportive of the proposed draft rule on the basis that:

(i) it sets out a new clear and specific obligation to disclose to the Court any information which is claimed to be confidential; and
(ii) such claims must be fully reasoned and those reasons will be subjected to strict scrutiny by the Court; and
(iii) that the Court will draw adverse inferences where a party falls short of the new procedures.

Thus, the Court's new practice should result in a higher level of disclosure (of documents which governments have previously refused to disclose), failing which, there will be clearer and more definitive consequences if a party unjustifiably seeks to rely on claims of secrecy in refusing to provide disclosure.