



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Insertion of Rule 44F and Amendment of Rule 33 § 1 of the Rules of Court

Rule 44F – Treatment of highly sensitive documents

1. (a) In the present Rule the term “document” includes any information or material, whether in physical or electronic form, as well as parts of such a document. The terms “party” and “parties” shall mean:

(i) any Contracting Party;

(ii) the applicant (the person, non-governmental organisation or group of individuals) that lodged an application under Article 34 of the Convention.

(b) In the present Rule, references to “the Committee” shall mean a formation of three judges composed in accordance with Rule 44F § 4 for the purposes of considering a request under this Rule.

2. If, at any stage of the proceedings, a Contracting Party is of the opinion that disclosure of a document to a party or to the public would prejudice its national security interests or the applicant is of the opinion it would prejudice any other equally compelling interest that the applicant may have, upon the request of the party concerned such a document shall not be disclosed and the party concerned shall have the right to obtain resolution of the issue in accordance with this Rule. It is not required that the document in question be provided at the time the request is made.

3. This Rule also applies when a person who has been requested under Rule A1 of the Annex to the Rules (concerning investigations) to provide a document has refused to do so or has referred the matter to a party on the ground that disclosure would prejudice that party’s interests.

4. A request by a party under Rule 44F § 2 shall be assigned to the Committee, composed of judges not members of the Chamber responsible for determining the admissibility or the merits of the case; the Committee may identify and facilitate any steps considered necessary to provide the Chamber with appropriate information to continue its examination of the case under Rule 44F § 7.

5. If, in the opinion of a party, disclosure of a document would prejudice their interests, all reasonable steps will be taken by the party, acting in conjunction with the Chamber or the Committee, and any other party as the case may be and in light of their obligations under Article 38 of the Convention and Rule 44A, to seek to resolve the matter by cooperative means

and within a reasonable time. This may include any of the following steps (either alone or in combination):

- (a) the modification or clarification of the request mentioned in § 2 of the present Rule;
- (b) determination by the Chamber or the Committee regarding the relevance of the document sought;
- (c) an agreement on conditions under which assistance could be provided including, among other things, providing summaries or redactions of the document, placing limitations on disclosure, using in camera or ex parte proceedings or putting in place other protective measures;
- (d) an agreement on practical and procedural safeguards for the storage and consultation of the document in the Registry.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the party concerned considers that there are no means or conditions under which the document could be provided or disclosed without prejudice to its interests, it shall notify the Chamber or the Committee of the specific reasons for its opinion, unless a specific description of the reasons would itself prejudice those interests.

7. Thereafter, only if the Chamber considers that the document is essential in order for it to examine the case, it may:

- (a) where the Chamber has possession of the document in a form agreed to by the party, by way of derogation from the adversarial principle and confining itself to what in its view is strictly necessary for the proper administration of justice, take into account such document. In so doing the Chamber shall take into consideration the fact that the other party had no opportunity to comment on that document. When adopting its judgment or decision, the Chamber will have due regard to the sensitive nature of any document so considered;
- (b) in any other circumstances, the Chamber may draw such inferences as it deems appropriate.

RULE 33 § 1 – Public character of documents

1. All documents deposited with the Registry by the parties or by any third party in connection with an application, except: (a) those deposited within the framework of friendly-settlement negotiations as provided for in Rule 62 or (b) those submitted in connection with proceedings under Rule 44F shall be accessible to the public in accordance with arrangements determined by the Registrar, unless the President of the Chamber, for the reasons set out in paragraph 2 of this Rule decides otherwise, either of his or her own motion or at the request of a party or any other person concerned.

Commentary¹ (with an update on the latest amendments)

Introduction:

This new Rule 44 F is proposed after having considered the comments received from the Governments of a number of member States (in chronological order: Estonia, Bulgaria, Netherlands, Latvia, Czech Republic, Poland, Russian Federation, Norway, Sweden, UK, France and Italy) and the further comments submitted by the Council of Bars and Law Societies of Europe/Conseil des barreaux européens (CCBE), by practitioners familiar with the relevant issues through Piers Gardner, UK member of the CCBE Permanent Delegation to the European Court of Human Rights, by the "Institut de Formation en Droits de l'Homme du Barreau de Paris" (IDHBP), by several NGOs (The AIRE Centre, Amnesty International, International Commission of Jurists, REDRESS, World Organisation Against Torture (OMCT)), and also by the European Human Rights Advocacy Centre (EHRAC), supported by the Human Rights Centre "Memorial".

Further amendments were proposed after having considered the comments received from a number of member States during a second round of consultations (in alphabetical order: Armenia, Czech Republic, Estonia, France, Netherlands, Norway, Romania, Slovakia, Switzerland, Türkiye, and the United Kingdom) and the further comments submitted by the CCBE, the IDHBP and by several NGOs (Amnesty International, The AIRE Centre, the International Commission of Jurists, REDRESS and the World Organisation Against Torture (OMCT)) in a joint submission.

*The purpose of this new Rule is to establish a specific regime for the handling of highly sensitive documents which a State party considers require special treatment for reasons of **national security**, or which an applicant considers require special treatment for **other equally compelling reasons**. It aims to alleviate concerns that might prevent a party from submitting such documents to the Court and to enable the Court to find appropriate counterbalancing measures or to draw adverse inferences where such documents cannot be disclosed to another party or the public, should the information be necessary in order to conclude a given case.*

*The provision is inspired by the model provided by **Article 72 of the Rome Statute** and the practical experience gained before the International Criminal Court (ICC) under this and similar provisions, which must, however, be read within its specific framework of international criminal law (see e.g. Prosecutor v. Dominic Ongwen, *Decision in Response to an Article 72(4) Intervention*, ICC Trial Chamber IX, 01 June 2018 (corrected version 26 June 2018); Prosecutor v. Francis Kamiri Muthaura, Uhuru Muigai Kenyotta and Mohammed Hussein Ali, *Decision on the "Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings"*, ICC Pre-Trial Chamber II, 20 September 2011; Prosecutor v. Lubanga, *Situation in the Democratic Republic of Congo, Judgment on the appeal of the Prosecutor against the**

¹ The following commentary has been drafted by the Registry. It does not bind the Court.

decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008) as well as in the context of proceedings before the International Criminal Tribunal for the former Yugoslavia (see e.g. Prosecutor v. Blaskic, 29 October 1997, judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997).

*In relation to this new Rule the Court's case-law under **Article 6** of the Convention may be noted. The Court, in full possession of the information at hand, will by its judicial oversight under Rule 44F § 5 and especially by determining appropriate **counterbalancing-measures** ensure respect for the **adversarial principle**, even if disclosure to the other party or the public is not or only partially possible due to national security interests or other equally compelling reasons.*

*The final provision takes into account the further comments received during the second round of consultations, in order to **clarify its wording** and to **apprise the stakeholders**, as far as possible, of its practical application. Those amendments are explained below in respect of each paragraph of the new provision:*

Commentary on Rule 44F § 1:

The term "any Contracting Party" also includes a Contracting Party not the respondent in the proceedings in which the issue arises but which might consider it necessary to apply under this Rule in order to prevent the disclosure of a "document", which disclosure would prejudice its national security.

*The wording of Rule 44F § 1 (a) is deliberately kept broad, encompassing practically any kind of "information" in any form. While the final interpretation of the provision is, of course, left to the Court, it seems clear that the **broad wording** also encompasses written pleadings and witness statements.*

Commentary on Rule 44F § 2:

*This is a "gateway" provision, based *mutatis mutandis* on Article 72 § 1 of the Rome Statute. The term "disclosure" is different from "provision" or "communication" to the Court. The proposed Rule does not therefore create an exception to the duty of the parties to **cooperate fully with the Court** in the conduct of the proceedings, incumbent on them by virtue of Rule 44A.*

This Rule responds to some of the concerns raised by civil society. It permits States to invoke "national security" and applicants to invoke "any other equally compelling interest", which would appear to be a proportionate limitation. In respect of States, it is to be noted that it would ordinarily be in the State's own interest to submit "national security" information to the Court where it is evidence to support any justification advanced for the alleged interference with a Convention right and/or to avoid the Court drawing adverse inferences as a result of the failure/refusal to produce relevant evidence. The fact that the Rule enables such disclosure to a party or the public to be resolved by the Court in co-operation with the State is intended to facilitate States submitting such information to the Court.

The term “resolution of the issue” is formulated quite broadly as the matter can be solved in various ways in the context of the dialogue/negotiation between the party and the Court.

The second sentence of Rule 44F § 2 clarifies that the request does not have to be accompanied by the document in question.

Commentary on Rule 44F § 4:

*The aim of this provision is to ensure that at the beginning of the proceedings the judicial formation which sees the document (in full and unredacted form) is different from the formation which examines the application. This is a safeguard to ensure that the Chamber deciding on the admissibility or the merits of an application will in general only take into account for its decision or judgment such information as has also been disclosed to the parties before it according to the **adversarial principle**.*

With regard to the Committee’s competence, the provision intends to leave a certain margin to the Committee on how to proceed. One example of the Committee’s powers would be to redact the document in question together with the party concerned and to provide the Chamber seized of the case with the redacted version of the document (cf. Rule 44F § 5 (c)) with the assurance that it corresponds to the original document. Further clarifications were provided through an amendment of Rule 44F § 7 (see further below).

Commentary on Rule 44F § 5:

This provision is directly inspired by Article 72 § 5 of the Rome Statute.

*The main advantage of the provision is its great **flexibility** to find solutions adapted to the individual case and to allow the Court to take, in cooperation with the party concerned, measures appropriate to the individual situation. Insofar as questions might arise concerning the treatment of information possibly disclosing evidence of human rights violations or as to whether the Court will make a reasoned and non-classified decision or whether the parties or the Court could rely on undisclosed information, these points are to be determined with reference to the requirements of a fair trial. Reference may be made to the Court’s case-law concerning the admissibility of evidence under **Article 6 of the Convention**.*

Commentary on Rule 44F § 6:

This provision takes into account comments from member States which indicated that in some cases they would be prevented from giving specific reasons as this would itself prejudice their security interests.

Commentary on Rule 44F § 7:

*This provision is inspired by Article 72 § 7 of the Rome Statute. It is to be noted that under Article 72 § 7 the ICC **cannot order disclosure** in case the information resides solely with the State invoking the national security interest. This is to ensure that the State will not feel hindered by a potential (public) disclosure of its information to submit the information to the Court and to undergo the process of Rule 44F § 5.*

There might be situations, in which – as an exception from the adversarial principle – no or only partial disclosure can be made to a party. However, it is exactly the Court’s role under

Rule 44F § 5 to ensure that the **guarantees of a fair trial (such as those which the Court has elaborated from the perspective of Article 6 of the Convention)** are respected through its judicial oversight and especially by means of identifying as far as possible appropriate **counter-balancing measures**.

This provision has been clarified to the effect that the document or information finally submitted to the Chamber is not necessarily the same as the one initially submitted to the Committee during the proceedings under, in particular, Rule 44F § 4. The new wording intends to reassure stakeholders that the Committee will not pass on information submitted to it, except in the form agreed on following the proceedings under Rule 44F § 5. It is the very aim of the proceedings before the Committee under Rule 44F § 5 to find a means of submitting the relevant information to the Chamber and to **produce the necessary information for the Chamber** to decide on the admissibility and the merits of the case, **while excluding sensitive (parts of the) information**.

Commentary on the amendment of Rule 33 § 1

The new wording takes into account comments received to the effect that the Rule should explicitly contain a guarantee that the documents submitted to the Court while applying the proceedings under Rule 44F **are not accessible to the public** from the moment they are submitted to the Court unless the party concerned has consented under Rule 44F § 5.