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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson

**Framework principles for securing the accountability of public officials
for gross or systematic human rights violations committed in the course
of States-sanctioned counter-terrorism initiatives***

Summary

This is the second annual report submitted to the Human Rights Council by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson.

In chapter II of the report, the Special Rapporteur lists his key activities undertaken from 3 April 2012 to 9 January 2013. In the main report, contained in chapter III, the Special Rapporteur sets out framework principles for securing the right to truth and the principle of accountability for gross or systematic human rights violations committed by public officials while countering terrorism, and makes recommendations to States.

* Late submission.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1	3
II. Activities of the Special Rapporteur	2–13	3
III. Framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the course of States-sanctioned counter-terrorism initiatives	14–49	5
A. Introduction	14–21	5
B. The legal framework	22–43	8
C. Situations of pressing concern	44–49	17
IV. Conclusions and recommendations	50–53	19

I. Introduction

1. The present report is submitted to the Human Rights Council pursuant to Council resolution 19/19. In the report, the Special Rapporteur lists his key activities undertaken from 3 April 2012 to 9 January 2013 and focuses thematically on the principle of accountability for grave or systematic human rights violations while countering terrorism. The report highlights the failure to date of the international community to secure full accountability for the acts of certain sections of the United States' Central Intelligence Agency during the Presidency of George W. Bush ("the Bush-era CIA") in implementing a programme of torture, rendition and secret detention of terrorist suspects, as well as the acts of public officials in other States who colluded in that programme. It also sets out a series of framework principles for securing the right to truth and the principle of accountability for gross or systematic human rights violations committed by public officials while countering terrorism, and makes recommendations to States.

II. Activities of the Special Rapporteur

2. On 12 April 2012, the Special Rapporteur addressed the Subcommittee on Human Rights of the European Parliament in the context of a public hearing on secret rendition and detention practices: "How to protect human rights while countering terrorism?" He referred to the Special Procedures mandate holders' "Joint study on global practices in relation to secret detention in the context of countering terrorism"¹ explaining the findings of the study and drawing attention to the failure of certain European Union States to respond to letters seeking further information on allegations of their involvement in those practices.²

3. On 20 June 2012, the Special Rapporteur presented his report on the framework principles for securing the human rights of victims of terrorism (A/HRC/20/14) to the twentieth session of the Human Rights Council and held a press conference. On this occasion, he also participated as a panellist in a side event on the Human Rights Implications of the United States Targeted Killing Programme, co-organized by the American Civil Liberties Union, the Center for Constitutional Rights, the International Commission of Jurists and the International Federation for Human Rights.

4. On 27 June 2012, the Special Rapporteur participated as a panellist in a debate on the "Future of the Targeted Sanctions one year after splitting the 1267 Regime", hosted by the Permanent Mission of Germany in New York, with the Ombudsperson of the Al-Qaida Sanctions Committee, Kimberly Prost.

5. On 5 and 6 July 2012, the Special Rapporteur participated in the third regional expert symposium on fair trial and due process in the counter-terrorism context held in Brussels, Belgium, making an intervention related to the investigation and pretrial phase for persons suspected of terrorism offences, including administrative detention regimes and procedures for review.

¹ A/HRC/13/42, 19 February 2010, *Joint study on global practices in relation to secret detention in the context of countering terrorism*, undertaken by the Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism; on torture and other cruel, inhuman or degrading treatment or punishment and the Working Groups on Arbitrary Detention and Enforced and Involuntary Disappearances ("United Nations Joint Study on Secret Detention").

² See further paras. 44 and 53(a) below.

6. On 9 and 10 July 2012, the Special Rapporteur addressed a high-level conference on the rights of victims of terrorism, organized by the Global Counter-Terrorism Forum, in Madrid, Spain.
7. On 19 October 2012, the Special Rapporteur gave the keynote speech at the symposium “The Social Cost of National Security: Assessing the Impact of Global Counter-Terror Initiatives on Canadian Society” in Toronto, Canada. The conference was a partnership between the Canadian Civil Liberties Association and the Canadian Arab Institute and hosted by the International Human Rights Program at the University of Toronto.
8. On 2 November 2012, the Special Rapporteur presented his report to the sixty-seventh session of the General Assembly on the mandate of the Office of the Ombudsperson established by Security Council resolution 1904 (2009) (and amended by resolution 1989 (2011)) and its compatibility with international human rights norms, in which he assessed in particular its impact on the due process deficits inherent in the Council’s Al-Qaida sanctions regime.
9. On 7 November 2012, the Special Rapporteur took part in an experts’ meeting of the Global Counterterrorism Forum (GCTF) on the “Draft Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately After the Attack and in Criminal Proceedings” in Vienna, Austria.
10. On 4 December 2012, the Special Rapporteur participated in a side event to the presentation of his annual report to the General Assembly (A/67/396) co-organized by the Office of the High Commissioner for Human Rights (OHCHR) and the Permanent Mission of Germany in New York entitled “Targeted sanctions, human rights and due process – The future of the 1267/1989 Al-Qaida sanctions regime”. The Special Rapporteur also addressed a meeting with the 1267/1989 Al Qaida Sanctions Committee to explain his findings to all State representatives of the Security Council.
11. On 12 December 2012, the Special Rapporteur participated via video message in a panel discussion on the role of victims of terrorism in countering violent extremism organized by the United Nations Office on Drugs and Crime in Abu Dhabi, United Arab Emirates. The meeting was organized in cooperation with the Center of Excellence on Countering Violent Extremism. The panel discussion took place as a side event prior to the coordination meeting and the Ministerial conference of the GCTF held on 13 and 14 December 2012, respectively.
12. On 16 and 17 December 2012, the Special Rapporteur participated in the Counter-Terrorism Implementation Task Force (CTITF) Inter-Agency Coordination Meeting at Greentree, New York. The CTITF retreat is a continuation of regular gathering of 31 CTITF entities to take stock of ongoing activities and strategize on future initiatives.
13. On 18 December 2012, the Special Rapporteur participated in the CTITF Quarterly Briefing to Member States in New York, United States.

III. Framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the course of States-sanctioned counter-terrorism initiatives

A. Introduction

14. The Special Rapporteur considers that the attacks that were perpetrated on the territory of the United States on 11 September 2001 can properly be characterized as crimes against humanity. Soon after those attacks, and in response to them, the Government of President George W. Bush embarked upon a systematic campaign of internationally wrongful acts involving the secret detention, rendition and torture of terrorist suspects.³

15. On 17 September 2001 President Bush authorized the CIA to operate a secret detention programme which involved the establishment of clandestine detention facilities known as “black sites” on the territory of other States, with the collaboration of public officials in those States.⁴ At about the same time, he allegedly authorized the CIA to carry out “extraordinary renditions” (the secret transfers of prisoners outside any lawful process of extradition or expulsion) enabling them to be interrogated whilst in the formal custody of the public officials of other States, including States with a record of using torture.⁵ At the beginning of August 2002 the Justice Department's Office of Legal Counsel purported to authorize a range of physical and mental abuse of terrorist suspects known as “enhanced interrogation techniques”.⁶ The Bush administration has since publicly acknowledged the use of “waterboarding” on “high value detainees” on the personal authority of the President.⁷

16. In July 2006, the United Nations Committee Against Torture expressed concern at the apparent impunity enjoyed by the United States personnel involved in these practices and recommended that the involvement of public officials in acts of torture and other forms of inhuman and degrading treatment should be promptly and thoroughly investigated.⁸

17. Two days after his inauguration, on 22 January 2009, President Obama passed an executive order which prohibited the use of secret detention, banned the use of torture and other forms of serious abuse, and required all detainees to be treated in accordance with the

³ See Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/HRC/104, 4 January 2009, at paras. 38, 51 and 60.

⁴ Declaration of Marilyn A Dorn, Information Review Officer, CIA, 5 January 2007 available at http://www.aclu.org/pdfs/safefree/20070110/cia_dorn_declaration_items_1_29_61.pdf; Memo to DOJ Command Centre – Background Paper on CIA's Combined Use of Interrogation Techniques, 30 December 2004, available at [http://www.aclu.org/torturefoia/released/082409/olcreGlobalizing Torture, CIA Secret Detention and Extraordinary Renditionmand/2004olc97.pdf](http://www.aclu.org/torturefoia/released/082409/olcreGlobalizingTorture,CIA%20Secret%20Detention%20and%20Extraordinary%20Renditionmand/2004olc97.pdf).

⁵ *Globalizing Torture, CIA Secret Detention and Extraordinary Rendition*, Open Society Justice Initiative, 5 February 2013, p. 15 and footnotes thereto.

⁶ United States Justice Department, Office of Legal Counsel, Memorandum for Alberto Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 USC paras. 2340-2340A*, 1 August 2006; United States Justice Department, Office of Legal Counsel, Memorandum for John Rizzo, Acting CIA General Counsel, *Interrogation of an al Qaeda operative*, 1 August 2006, available at http://media.luxmedia.com/aclu/olc_08012002_bybee.pdf.

⁷ George W. Bush, *Decision Points*, 2010, at pp. 169-171.

⁸ Committee Against Torture, *Concluding Observations on the United States*, United Nations Document CAT/C/USA/CO/2, 25 July 2006, para. 25.

techniques authorized by the Army Field Manual.⁹ Thereafter, on 16 April 2009 the President authorized the release of a number of legal memoranda from the United States Justice Department's Office of Legal Counsel (OLC), purporting to justify as lawful the CIA use of "waterboarding" and other forms of torture.¹⁰ At a White House conference to mark his first 100 days in office President Obama unequivocally confirmed the view of the international community that "waterboarding" amounts to torture.¹¹

18. Despite this clear repudiation of the unlawful actions carried out by the Bush-era CIA, many of the facts remain classified, and no public official has so far been brought to justice in the United States. In August 2007, United States Attorney General Eric Holder announced that the Department of Justice would not prosecute any official who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel in connection with the interrogation of terrorist suspects.¹² In the view of the Special Rapporteur this comes close to an assertion of the "superior orders" defence, despite its prohibition under customary law¹³ and relevant international treaties.¹⁴

19. Whilst a number of States have made strenuous efforts to keep their involvement in the CIA programme hidden from public scrutiny, a considerable amount of reliable information is now available. Through the dedicated and persistent work of a small number of Parliamentarians¹⁵ and non-governmental organizations (NGOs)¹⁶ the facts have

⁹ Executive Order 13491, Ensuring Lawful Interrogations, 22 January 2009, available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

¹⁰ In 2005 Harold Koh (later the Legal Adviser to the State Department) described the central OLC memo on torture as "perhaps the most clearly erroneous legal opinion I have ever read", and as "a stain upon our law and our national reputation": <http://www.law.yale.edu/documents/pdf/KohTestimony.pdf>.

¹¹ See <http://www.guardian.co.uk/world/2009/apr/30/obama-waterboarding-mistake>.

¹² United States Justice Department, *Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees*, 30 June 2011, available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>.

¹³ As to prohibition in customary law, and its parameters, see Paola Gaeta, "The defence of Superior Orders: The Statute of the International Criminal Court versus customary international law", *European Journal of International Law*, Vol. 10 1999; Howard S. Levie, "The rise and fall of an internationally codified denial of the defense of superior orders", *Revue Internationale de Droit Militaire et de Droit de la Guerre*, Vo. 31, 1991; Charles Garraway, "Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied", *International Review of the Red Cross*, no. 836.

¹⁴ Charter of the International Military Tribunals (the Nuremberg Charter), Article 8; Rome Statute of the International Criminal Court, Article 33; the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by General Assembly Resolution 39/46, 10 December 1984 ("UNCAT"), Article 2(3); *United Nations Convention on Enforced Disappearances*, adopted by the General Assembly Resolution 60/177, 20 December 2006, ("United Nations Convention on Enforced Disappearances"), Article 6(2).

¹⁵ European Parliament ("EP") Resolution on the alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners, 2006/2200 (INI), 26 January 2006; Report of the Parliamentary Assembly of the Council of Europe ("CoE") Committee on Legal Affairs and Human Rights concerning alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member States, Doc. 10957, 12 June 2006, Rapporteur Dick Marty; European Parliament Report on the alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners, 2006/220 (INI), 30 January 2007, Rapporteur Giovanni Claudio Fava; ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007; EP Resolution on the alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners, 2006/2200 (INI), 14 February 2007; CoE Report by the Secretary General under Article 52 of the Convention on the question of secret detention and transport of detainees suspected of terrorist acts, SG/Inf (2006) 5, 28 February 2007; CoE Report on secret

gradually emerged over the past decade. This process of seeking the truth has gathered momentum in the past three years. Independent investigations have reliably established the complicity, to a greater or lesser degree, of the public officials of a large number of States in the CIA rendition programme.¹⁷ There is now credible evidence to show that CIA “black sites” were located on the territory of Lithuania, Morocco, Poland, Romania and Thailand¹⁸ and that the officials of at least 49 other States allowed their airspace or airports to be used for rendition flights.¹⁹

20. Despite the emergence of these facts, only one State has so far brought any public official to justice. On 4 November 2009 the Milan Criminal Tribunal convicted 22 CIA agents *in absentia*, including the Milan station chief, for their role in the abduction of Hassan Mustafa Osama Nasr, a dual Egyptian-Italian national in Milan on 17 February 2003, and his rendition to Cairo, where he was detained for 14 months and repeatedly tortured.²⁰ The CIA officials were sentenced to terms of imprisonment of between five, seven and nine years. Claims by the Italian Government to withhold relevant evidence were eventually rejected,²¹ and on 1 February 2013 convictions were returned in respect of the Italian agents involved in the abduction, including the former Director of the Italian Military Intelligence Service, SISMI, who was sentenced to 10 years imprisonment.²²

21. The prosecutions brought in the case of Hassan Mustafa Osama Nasr are a straightforward application of the relevant principles of international law that are binding on every Member State of the United Nations. It is therefore a matter of obvious regret that this remains the only instance in which the perpetrators of these crimes have been brought to justice.

detentions and unlawful inter-state transfers of detainees involving Council of Europe Member States, Doc. 11302 rev., 11 June 2007, Rapporteur Dick Marty; Report to the Lithuanian Government on the visit carried out by the European Committee for the Prevention of Torture in June 2010, CPT/Inf (2001) 17; EP Directorate-General for Internal Policies, The Results of Inquiries into the CIA's Programme of Extraordinary Rendition and Secret Prisons in European States in light of the New Legal Framework following the Lisbon Treaty, May 2012, PE 462.456; EP Committee on Foreign Affairs, Opinion on the Alleged Transportation and Illegal Detention of Prisoners in European Countries by the CIA, 6 July 2012, Rapporteur Sarah Ludford, AD/908016EN.doc; CoE, Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations, 7 September 2011, para 15 (“*Marty III*”); EP Report on the alleged transportation and illegal detention of prisoners in European countries by the CIA, D\908016EN.doc, Rapporteur Helene Flautre, (“*Flautre Report*”) at para. 3.2.

¹⁶ The Special Rapporteur commends the dedicated investigative work carried out by Reprieve, the Open Society Justice Initiative, Amnesty International, Human Rights Watch, the Helsinki Foundation, the International Commission of Jurists, the Association for the Prevention of Torture (APT) and the Redress Trust, amongst others.

¹⁷ As at the date of the present report, the most comprehensive, accurate and up-to-date review of the reliable public source material available is the Globalizing Torture report published by the Open Society Justice initiative on 5 February 2012.

¹⁸ *Globalizing Torture*, *op. cit.*, footnote 5, pp. 16, 90–92, 97–98, 99–102, 103–106 and 111–112.

¹⁹ *Globalizing Torture*, *op. cit.*, footnote 5.

²⁰ Tribunale di Milano, proc. num. 3553/2007, Sentenza n. 12428, 4 novembre 2009, / Tribunal of Milan, case n. 3553/2007, Judgement n. 12428, 4 November 2009.

²¹ Corte di Cassazione, Sentenza n. 46340, 19 Settembre 2012 - deposito del 29 November 2012, Supreme Court. Judgment n. 46340, 19 September 2012 - submitted on 29 November 2012, pp. 124 ff.

²² See <http://www.reuters.com/article/2013/02/12/us-italy-rendition-verdict-idUSBRE91B0OS20130212>.

B. The legal framework

1. Gross or systematic human rights violations

22. In the counter-terrorism context, the expression “gross or systematic human rights violations”²³ includes State-sanctioned torture in the course of (or for the purposes of) interrogation of terrorist suspects²⁴; the authorized and systematic infliction of inhuman and degrading treatment or punishment on terrorist suspects²⁵; the transfer of suspects into the custody of another State where there is known to be a real risk of torture²⁶; enforced disappearance of terrorist suspects,²⁷ including their temporary detention at unacknowledged secret detention sites,²⁸ and other acts of State that involve systematic human rights violations that are calculated to place human beings beyond the reach of the legal protection that international human rights law is designed to guarantee.²⁹

²³ There has been consensus for more than two decades that torture, enforced disappearance and prolonged arbitrary detention amount to gross human rights violations: see the conclusions of the Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Maastricht, 11-15 March 1992. SIM Special No. 12, p.17.

²⁴ As to the status of the prohibition against torture as a peremptory norm of customary international law, see International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija* (Judgment) 10 December 1996, (“*Furundzija*”), paras. 153 to 156; European Court of Human Rights, *Al-Adsani v. United Kingdom*, Judgment 21 November 2001, para. 61; *Ex parte Pinochet (No. 3)* [2000] 1 AC 147 at 198; see also *UNCAT, op. cit.*, footnote 14, which provides a definition of torture as prohibited by the peremptory norm (Article 1), and requires States to take effective legislative, administrative, judicial or other measures to prevent and punish acts of torture (Articles 2, 4, 7 and 12).

²⁵ *UNCAT, op. cit.*, footnote 14, Article 16; United Nations Doc. CAT/C/USA/CO/2, *op. cit.*, footnote 8, para. 25.

²⁶ See ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment 13 December 2012, (“*El-Masri*”), paras. 212 to 222, and the authorities there cited.

²⁷ As to the status of enforced disappearance as a gross human rights violation see United Nations *Declaration on the Protection of All Persons from Enforced Disappearance*, 18 December 1992, A/RES/47/133, (“*United Nations Declaration on Enforced Disappearance*”), Art. 1. See also *Inter-American Convention on Forced Disappearance of Persons*, adopted 9 June 1995 at 24th Regular Session of the Organization of American States (OAS) General Assembly, preamble; see also ECtHR, *Kurt v. Turkey*, Application No. 2426/94, Judgment 25 May 1998, (“*Kurt*”), para. 124, (characterizing enforced disappearance as “a most grave violation”); and Parliamentary Assembly of the Council of Europe, Resolution 1463 (2005), *Enforced Disappearances* (describing such action on the part of a State as “a very serious human rights violation on a par with torture and murder”).

²⁸ See *United Nations Joint Study on Secret Detention, op. cit.*, footnote 1, para. 28; *United Nations Declaration on Enforced Disappearance, op. cit.*, footnote 27, Article 2 which defines “enforced disappearance” as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law”.

²⁹ Observations on behalf of the High Commissioner for Human Rights to the ECtHR in *El-Masri, op. cit.*, footnote 26, Geneva, 11 March 2011, at para. 1. The Special Rapporteur wishes to acknowledge the work of Chile Eboe-Osuji, the Senior Legal Adviser to the High Commissioner for Human Rights, on the international recognition of the right to truth, upon which he has drawn for the purposes of the present report.

2. The right to truth in international human rights law

23. The principles of international law that govern accountability for such violations have two complementary dimensions. Put affirmatively, international law nowadays protects the legal right of the victim and of the public to know the truth.³⁰ The right to truth entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, including the identity of the perpetrator(s),³¹ the fate and whereabouts of the victim³² and, where appropriate, the process by which the alleged violation was officially authorized.³³ It also includes the right of the victim to adequate reparation³⁴ (of which the establishment of the truth is an indispensable part³⁵). The payment of monetary compensation without full public exposure of the truth is not sufficient to discharge this obligation.³⁶

24. The victim's right to truth has been expressly recognized in a number of international instruments negotiated under the auspices of the United Nations. Article 24(2) of the United Nations Convention on the Protection of All Persons from Enforced Disappearances provides that each victim "has the right to know the truth regarding the circumstances of the disappearance, the progress and results of the investigation and the fate of the disappeared person".³⁷ The United Nations 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 by the General Assembly on 16 December 2005, provide at paragraph 24 that victims should be entitled to "seek and obtain information" on the "causes and conditions pertaining to gross violations of international human rights law" and to "learn the truth in regard to these

³⁰ IACommHR, *Annual Report*, 1985-86, AS Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (26 September 1986) p. 193; IACtHR, *Myrna Mack Chang v. Guatemala*, Judgment of February 22, 2002 (Reparations and Costs), (Ser.C) No. 91 (2002), ("*Myrna Mack Chang*"), paras. 75 and 77; ECtHR, *El-Masri*, *op. cit.*, footnote 26, para. 191.

³¹ *El-Masri*, *op. cit.*, footnote 26, para. 183; OHCHR *Study on the Right to Truth*, United Nations Doc. E/CN.4/2006/91 (2006), para 39. See also Working Group on Enforced and Involuntary Disappearances, *General Comment on the Right to Truth*, United Nations Doc. A/HRC/16/48 (2011) para. 39: "The right to truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or whereabouts of the disappeared persons, and the circumstances of the disappearance, and the identity of the perpetrator(s)". See further paras. 27 to 31 below.

³² See footnote 31.

³³ United Nations *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*, General Assembly Resolution 60/147, 16 December 2005, Annex, ("*United Nations Basic Principles on Remedy and Reparation for Gross Human Rights and Humanitarian Law Violations*"), para. 24; see also IACommHR, *Annual Report*, 1985-86, AS Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (26 September 1986) p. 193; *Myrna Mack Chang*, *op. cit.*, footnote 30, paras. 75 and 77; *El-Masri*, *op. cit.*, footnote 26, para. 192.

³⁴ *United Nations Basic Principles on Remedy and Reparation for Gross Human Rights and Humanitarian Law Violations*, *op. cit.*, footnote 33, para. 3(d); *United Nations Joint Study on Secret Detention*, *op. cit.*, footnote 1, para. 292(h); ICC, *Decision Establishing the Principles and Procedures to be Applied to Reparations* delivered on 7 August 2012. See <http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf>.

³⁵ *Myrna Mack Chang*, *op. cit.*, footnote 30, paras. 75 and 77.

³⁶ Three States (Australia, Sweden and the United Kingdom) have so far paid substantial compensation to victims of secret detention, rendition and/or torture without acknowledging legal liability or establishing the facts: *Globalizing Torture*, *op. cit.*, footnote 5, pp. 66 to 67, 110 and 116 to 117.

³⁷ *United Nations Convention on Enforced Disappearances*, *op. cit.*, footnote 14, article 24(2).

violations”.³⁸ The Human Rights Council has similarly recognized “the importance of respecting and ensuring the right to truth so as to contribute to ending impunity”.³⁹ Statements to the same effect have been made by many of the United Nations' independent human rights mechanisms including the High Commissioner for Human Rights, the Committee Against Torture, and various Special Procedures mandate-holders.⁴⁰

25. The Inter-American Commission and Court of Human Rights have developed jurisprudence on the right to truth which is cast as a right jointly vested in the victim, his or her next of kin, and the whole of civil society. In one of its earliest decisions on the subject, the Commission observed that “[e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future”.⁴¹ In *Myrna Mack Chang v. Guatemala* the Court held that⁴² “the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations.”

26. The right to truth has been recognized by the African Commission on Human and Peoples' Rights as an aspect of the right to an effective remedy for a violation of the African Convention. In its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, the Commission held that the right to an effective remedy includes “access to the factual information concerning the violations”. Most recently and, for present purposes, most relevantly, the right to truth was expressly recognized by the European Court of Human Rights in connection with the former CIA programme of secret detention, “enhanced interrogation” and rendition, in the judgment of its Grand Chamber in *El-Masri v. the former Yugoslav Republic of Macedonia*.⁴³

3. The principle of accountability in international human rights law

27. On the other side of the equation, international law imposes corresponding obligations on States which can be conveniently gathered together under the rubric of the international law principle of accountability. This imposes specific duties on all three branches of government. The executive, the judiciary and parliamentary oversight bodies, as well as independent bodies entrusted with official responsibility for review of intelligence matters and/or the conduct of intelligence and law-enforcement agencies, each

³⁸ *United Nations Basic Principles on Remedy and Reparation for Gross Human Rights and Humanitarian Law Violations*, *op. cit.*, footnote 33, para. 24.

³⁹ Human Rights Council Resolutions 12/122 of 12 October 2009, para. 1, and 9/11 of 18 September 2007, para. 1.

⁴⁰ OHCHR, *Study on the Right to Truth*, *op. cit.*, footnote 31; *Right to the Truth*, United Nations Doc. A/HRC/5/7 (2007); Committee Against Torture, *Concluding Observations on Colombia*, United Nations Doc. CAT/C/COL/CO/4 (2010) para. 27; *Concluding Observations on El Salvador*, United Nations Doc. CAT/C/SLV/CO/2 (2009) para. 9; Working Group on Enforced and Involuntary Disappearances, *General Comment on the Right to the Truth*, *op. cit.*, footnote 31, para. 39; Special Rapporteur on Torture, *Mission to Paraguay*, A/HRC/7/3/Add.3 (2007) para. 82; Special Rapporteur on the promotion and protection of the right to freedom of expression, *Annual Report*, United Nations Doc. A/HRC/14/23 (2010) para. 24; Special Rapporteur on the independence of judges and lawyers, *Report to the General Assembly*, United Nations Doc. A/61/384 (2006) para. 16; Rapporteur of the Drafting Group of the Human Rights Council Advisory Committee, *Study on Best Practices on the Issue of Missing Persons*, United Nations Doc. A/HRC/4/CRP.2/Rev.1 (2010) paras 40 *et seq.*

⁴¹ IACCommHR, *Annual Report*, 1985-86, *op. cit.*, footnote 30, p. 193.

⁴² *Myrna Mack Chang*, paras. 75 and 77.

⁴³ *El-Masri*, *op. cit.*, footnote 6. See further paras. 32–35 below.

bear a share of the State's responsibility to secure the realization of the right to truth and the principle of accountability.⁴⁴

28. Where a plausible allegation is made that public officials have committed (or been complicit in the commission of) gross or systemic human rights violations, the executive authorities of the State(s) concerned are obliged under international law to carry out *proprio motu* an effective official investigation⁴⁵ which is begun promptly,⁴⁶ secures all relevant evidence,⁴⁷ and is capable of leading to the identification and, where appropriate, the punishment of the perpetrator(s) and those on whose authority the violations were committed.⁴⁸ Any deficiency in the investigation which undermines its ability to establish the identity of the persons responsible will risk falling foul of the requisite legal standard.⁴⁹ As the European Court of Human Rights has pointed out, in the absence of such an investigation "it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity".⁵⁰

29. The investigating authorities are obliged to allow victims, or (if deceased) their relatives, effective access to the investigative process,⁵¹ respecting their right to be informed and to participate⁵²; to disclose all relevant evidence and findings to the victims,

⁴⁴ See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including their oversight, A/HRC/14/46, ("Best Practice for Intelligence Oversight") 17 May 2010; see also observations of the High Commissioner for Human Rights in *El-Masri*, *op. cit.*, footnote 26, at para. 3.

⁴⁵ ECtHR, *El-Masri*, *op. cit.*, footnote 26, at paras. 182-185; *Assenov v. Bulgaria* Application no. 90/1997/874/1086, para 102; *Imakayeva v. Russia* Application no. 7615/02, paras.164-6; *Zontul v. Greece* Application no. 12294/07, para 95; IACtHR, *Case of the Plan de Sanchez Massacre v. Guatemala*, Judgment 9 November 2004 (Reparations and Costs), (Ser. C) No. 116 (2004), ("Plan de Sanchez"), para. 98; United Nations Human Rights Committee, *Herrera Rubio v. Colombia*, No. 161/1983, 02/11/87, CCPR/C/31/D/161/1983, para 10.5. See also *United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by General Assembly Resolution 55/89 of 4 December 2000 ("United Nations Principles on the Investigation of Torture"), and in particular Principles 2, 3a and 4; *United Nations Basic Principles on Remedy and Reparation for Gross Human Rights and Humanitarian Law Violations*, *op. cit.*, footnote 33, para. 3(b).

⁴⁶ There is no internationally agreed period of time before which an investigation must begin. However, the Committee Against Torture made clear in *Halimi-Nedzibi v. Austria*, CAT/C/11/D/8/1991 (para 13.5) that a delay of 15 months was excessive. See also *United Nations Joint Study on Secret Detention*, *op. cit.*, footnote 1, para. 292(e); *Marty III*, *op. cit.*, footnote 15, para. 15; and Asia Pacific Forum of National Human Rights Institutions Reference on Torture (2005), p. 129.

⁴⁷ For a list of mandatory investigative steps see ECtHR, *Gül v. Turkey*, no. 22676/93, paras. 89-90; also *Tanrıkulu v. Turkey*, no. 23763/94, para. 109; *Salman v. Turkey*, no. 21986/93, para. 106; *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, para. 162; *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, para. 113. See also *Marty III*, *op. cit.*, footnote 15, para 51.

⁴⁸ *El-Masri*, *op. cit.*, footnote 26, para. 182; *United Nations Joint Study on Secret Detention*, *op. cit.*, footnote 1, para. 292 (e); *Marty III*, *op. cit.*, footnote 26, para 51 (4.2) (3); ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* International Court of Justice 20 July 2012, <http://www.icj-cij.org/docket/files/144/17064.pdf>

⁴⁹ *El-Masri*, *op. cit.*, footnote 26, para. 183.

⁵⁰ *El-Masri*, *op. cit.*, footnote 26, para. 182.

⁵¹ *El-Masri*, *op. cit.*, footnote 26, para. 185.

⁵² ECtHR *Ognyanova and Choban v. Bulgaria*, Application No. 46317/99, para 107; IACtHR, *Plan de Sanchez*, *op. cit.*, footnote 45, para. 98; *United Nations Declaration on Enforced Disappearance*, *op. cit.*, footnote 28, Art. 13(4); United Nations Working Group on Enforced and Involuntary Disappearances, *General Comment on the Right to the Truth*, *op. cit.*, footnote 31, para. 3.

their relatives and the public⁵³ (subject only to legitimate national security limitations that are adjudged to be strictly necessary by an independent and impartial judicial or quasi-judicial tribunal)⁵⁴; and to protect the physical and moral integrity of victims and witnesses against reprisals and threats.⁵⁵

30. To meet the requirements of international law, such an investigative body must be genuinely independent of the officials implicated in the violations.⁵⁶ This implies not only a lack of hierarchical or institutional connection but also a practical independence.⁵⁷ Those potentially implicated should have no supervisory role, whether direct or indirect, over those conducting the investigation.⁵⁸ In all cases, investigators must approach their task with genuine impartiality and must not harbour preconceptions about the matter they are investigating or the identity of those responsible for any fatalities. They should be demonstrably free of undue influence.⁵⁹ The investigators must evaluate the evidence objectively and reach impartial conclusions.⁶⁰ The authorities “must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions”.⁶¹ The obligation to carry out an effective investigation imposes a duty to seek mutual legal assistance from other states, including those allegedly implicated in the violations, through diplomatic or judicial inquiries, the results of which should also be disclosed.⁶²

⁵³ *United Nations Joint Study on Secret Detention*, *op. cit.*, footnote 1, para. 292(f); ECtHR, *Kelly and Others v. United Kingdom*, Application No. 30054/96, Judgment 4 May 2001, para. 118; *Anguelova v. Bulgaria*, Application No. 38361/97, Judgment 13 June 2002, para. 140; IACtHR, *Plan de Sanchez*, *op. cit.*, footnote 45, para. 81; *Moiwana Community v. Suriname*, Judgment 15 June 2005, (Ser. C) No. 124, para. 205.

⁵⁴ See further paras. 38–43 below.

⁵⁵ United Nations General Assembly *Declaration on the Protection of All Persons from Enforced Disappearance*, Art. 13; Working Group on Enforced and Involuntary Disappearances, *General Comment on the Right to the Truth*, in *Annual Report of the Working Group*, United Nations Doc. A/HRC/16/48 (2011) para. 10; Inter-American Court of Human Rights, *Kawas-Fernandez v. Honduras*, Merits, Reparations and Costs, Judgment 3 April 2009, (Ser. C) No. 124, para. 205. The *United Nations Joint Study on Secret Detention*, *op. cit.*, footnote 1, para. 292(k), concluded that under international human rights law “States have the obligation to provide witness protection, which is also a precondition for combatting secret detention effectively”.

⁵⁶ ECtHR, *Güleç v. Turkey*, no. 21593/93, paras. 81–82; *Öğür v. Turkey*, no. 21594/93, paras. 91–92. The *United Nations Joint study on Secret Detention*, *op. cit.*, footnote 1, at para. 292(d), concluded that “[i]nstitutions strictly independent of those that have allegedly been involved in secret detention should promptly investigate any allegations of secret detention and extraordinary rendition”. See also *Marty III*, *op. cit.*, footnote 15, para. 55; and *Flautre Report*, *op. cit.*, footnote 15, para. 3.2.

⁵⁷ *Bati and Others v. Turkey*, no. 33097/96 and 57834/00, para. 135; *Ergi v. Turkey*, no. 23818/94, paras. 83–84.

⁵⁸ *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, para. 277.

⁵⁹ See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture, A Commentary*, pp. 531–532 (New York, Oxford University Press, 2008).

⁶⁰ *Finogenov and Others v. The Russian Federation*, nos. 18299/03 and 27311/03, paras. 272, 274.

⁶¹ *El-Masri*, *op. cit.*, footnote 26, para. 183.

⁶² IACtHR, *Goiburud and Others v. Paraguay*, Judgment 22 September 2006, (Ser. C) No. 153 (2006) para. 5; *United Nations Convention on Enforced Disappearances*, *op. cit.*, footnote 14, Article 14; *United Nations Basic Principles on Remedy and Reparation for Gross Human Rights and Humanitarian Law Violations*, *op. cit.*, footnote 33, para. 4; International Law Commission *Articles on the Responsibility of States for Internationally Wrongful Acts*, commended to the attention of Member States by General Assembly Resolutions 56/83 of 12 December 2001 and 69/35 of 2 December 2004, (“*ILC Articles on State Responsibility*”), Article 41(1).

31. In addition, there must be a sufficient element of public scrutiny of the investigation and its results so as to secure public accountability in both theory and practice.⁶³ This implies that the findings of the investigation must be made public,⁶⁴ subject to redactions authorized by an independent tribunal or other quasi-judicial body where this is found strictly necessary on grounds of national security, having regard to the principles set out at paragraphs 38 to 43 below.

4. The judgment of the European Court of Human Rights in *El-Masri v. the former Yugoslav Republic of Macedonia*

32. In its recent judgment in *El-Masri v. the former Yugoslav Republic of Macedonia*, the Grand Chamber of the European Court of Human Rights acknowledged the existence of right to truth (as such) for the first time in its jurisprudence, treating it as an aspect of the State's adjectival obligation under Article 3 of the European Convention on Human Rights to conduct an effective and independent official investigation into allegations of torture.⁶⁵ The case involved the arbitrary detention, rendition and torture of a German citizen who was arrested by officials as he tried to enter the former Yugoslav Republic of Macedonia.⁶⁶ After 23 days of incommunicado detention, he was then transferred to Skopje airport where he was severely beaten, stripped naked and anally penetrated with an object. He was then flown to Afghanistan where he was detained in a secret CIA "black site" known as the "Salt Pit" for over four months, during which time he was severely and repeatedly beaten. On 28 May 2004, he was flown to Albania, where he was left by the side of a road.⁶⁷

33. In formally acknowledging the right to truth, the Court underlined "the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public who had the right to know what had happened".⁶⁸ It went on:

The issue of "extraordinary rendition" attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the United Nations human rights bodies, the Council of Europe and the European Parliament. The latter revealed that some of the States concerned were not interested in seeing the truth come out.

34. The Court observed that, where allegations were made that were as grave as those in the *El-Masri* case, an effective investigation "may generally be regarded as essential in maintaining public confidence in [the authorities'] adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts". The investigation conducted by the authorities of the former Yugoslav Republic of Macedonia was found to have been insufficient to lead to "the identification and punishment of those responsible", thereby violating the former Yugoslav Republic of Macedonia's obligations under the Convention⁶⁹.

5. The principle against impunity in international human rights law

35. The Human Rights Council has repeatedly recognized that the right to truth and the principle of accountability are inextricably bound up with the expressed commitment of the

⁶³ *El-Masri, op. cit.*, footnote 26, para. 192.

⁶⁴ *Ibid.*, para. 191.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, paras 16–36.

⁶⁷ *Ibid.*, paras. 154–167.

⁶⁸ *Ibid.*, para. 191.

⁶⁹ *Ibid.*, paras. 192–193.

international community to end impunity for gross or systematic human violations. The guiding axiom of the United Nations Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity is the obligation on States “to ensure the inalienable right to know the truth about violations”.⁷⁰ If faithfully implemented, this cluster of rights and duties would by now have ensured accountability not only for those public officials who directly engaged in the secret detention, rendition and torture programme operated by the Bush-era CIA, but also for their superiors, and for any current or former high-ranking officials of State, who planned such strategies or who gave authorization for subordinate public officials to participate in them. The Special Rapporteur is gravely concerned that these norms have not been implemented in this context.

36. The international community’s expressed commitment to ending impunity is reflected in specific treaty obligations designed to cater for precisely this sort of systematic criminal conduct. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁷¹ and the more recent International Convention for the Protection of All Persons from Enforced Disappearance⁷² each require the signatory State to (a) enact domestic criminal law offences prohibiting the commission of acts amounting to torture⁷³ and enforced disappearance⁷⁴; (b) assume jurisdiction over such crimes when perpetrated by its own nationals abroad,⁷⁵ or on territory that falls within its jurisdiction⁷⁶, including any detention facility that is under the *de facto* control of its public officials (even if it is physically located on the territory of another State)⁷⁷; (c) conduct effective investigations into allegations that such crimes have been committed⁷⁸; and (c) where the evidence justifies it, to prosecute the offender or extradite him or her to another State to face prosecution.⁷⁹

37. The experience of the past decade, however, shows that there are various means by which the right to truth and the principle of accountability can be (and have been) frustrated, thereby perpetuating impunity for the public officials implicated in these crimes. These include (a) the grant of *de facto* or *de jure* immunities⁸⁰; (b) the officially authorized destruction of relevant evidence⁸¹; (c) executive obstruction of (or interference in)

⁷⁰ See *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, United Nations Doc. E/CN.4/2005/102/Add.1 (2005), (“*The United Nations Impunity Principles*”), noted with appreciation by the Human Rights Council in its Resolution 9/11 of 18 September 2008, preamble, and Resolution 12/12 of 12 October 2009, preamble, at Principles 1 and 4.

⁷¹ *UNCAT*, *op. cit.*, footnote 14.

⁷² *United Nations Convention on Enforced Disappearances*, *op. cit.*, footnote 14.

⁷³ *Ibid.*, Article 4.

⁷⁴ *Ibid.*, Article 14.

⁷⁵ *UNCAT*, *op. cit.*, footnote 14, Article 5(1)(b); *United Nations Convention on Enforced Disappearances*, *op. cit.*, footnote 14, Article 9(1)(b).

⁷⁶ *UNCAT*, *op. cit.*, footnote 14, Article 5(1)(a); *United Nations Convention on Enforced Disappearances*, *op. cit.*, footnote 14, Article 9(1)(a).

⁷⁷ ECtHR, *Al-Skeini v. United Kingdom*, Application No. 55721/107; Committee Against Torture, *Concluding Observations on the United States*, United Nations Doc. CAT/C/USA/CO/2, 25 July 2006, para. 24.

⁷⁸ *UNCAT*, *op. cit.*, footnote 14, Article 12; *United Nations Convention on Enforced Disappearances*, *op. cit.*, footnote 14, Article 12.

⁷⁹ *UNCAT*, *op. cit.*, footnote 14, *United Nations Convention on Enforced Disappearances*, *op. cit.*, footnote 14, Article 11(1).

⁸⁰ See para. 18 and footnote 12 above; CAT/C/USA/CO/2, *op. cit.*, footnote 8, para. 24.

⁸¹ A criminal investigation conducted by Assistant United States Attorney John Durham found that 92 videotapes depicting the ill treatment (including waterboarding) of “high value detainees” had been deliberately destroyed in November 2005 on the authority of Jose Rodriguez Jr., head of the CIA’s

independent investigations into past practices⁸²; (d) the assertion by the executive of unjustified claims for secrecy on grounds of national security or the maintenance of good foreign relations⁸³; (e) the suppression⁸⁴ or delayed publication⁸⁵ of reports of independent investigations whose findings might expose past official wrongdoing to public scrutiny; (f) executive inertia motivated by a desire to “draw a line” under the past⁸⁶; (g) more or less oblique invocation of the “superior orders” defence, despite its prohibition under customary law and relevant international treaties⁸⁷; and (h) excessive judicial deference to the executive on matters related to national security⁸⁸ or the maintenance of good foreign relations⁸⁹, with the effect of excluding the right of access to court, or unjustifiably restricting the exposure of the facts, often on the basis of highly dubious legal reasoning.⁹⁰ Approaches such as these are antithetical to securing accountability and if they are allowed to go unchallenged, a blanket of official impunity would be allowed to descend, cloaking official crimes from public scrutiny on the pretext of defending state secrets.

6. The invocation of national security and the State secrets doctrine

38. If the right to truth and the principle of accountability are to be secure in domestic law, the national judiciary must play its part. Judges of national courts and tribunals are equally bound by the State’s international law obligations, and are under a duty to ensure the unfettered right of access to court for the vindication of any cause of action arguably recognized under domestic law. Given the importance of the right to truth and the principle of accountability, the domestic judiciary is bound to subject executive claims of non-justiciability on national security grounds to the most penetrating scrutiny.⁹¹ Similar scrutiny must be directed to executive claims to exemption from normal rules of disclosure in legal proceedings.⁹² As the Council of Europe Guidelines on Eradicating Impunity for Serious Human Rights violations point out, the need for public accountability follows from the fact that the eradication of impunity is not only a matter of justice for the victims, but

Directorate of Operations, despite their relevance to ongoing investigations. No charges were brought. For details see <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/09/AR2010110904106.html>.

⁸² *El-Masri, op. cit.*, footnote 26, paras. 192 to 193; See also Adam Bodnar and Irmina Pacho, Domestic Investigation Into Participation of Polish Officials in the CIA Extraordinary Rendition Program and the State Responsibility under the European Convention on Human Rights, Polish Yearbook of International Law, 2011 (“*Bodnar and Pacho*”).

⁸³ *R (Binyamin Mohamed) v. Foreign Secretary (No. 2) [2009] 1 WLR 2653* (“*Binyamin Mohamed*”); *El-Masri, op. cit.*, footnote 26, para. 191.

⁸⁴ *Bodnar and Pacho, op. cit.*, footnote 82.

⁸⁵ See paras. 45–50 below.

⁸⁶ The Council of Europe Committee of Ministers *Guidelines on Eradicating Impunity for serious human rights violations*, 30 March 2011, point out “impunity is caused or facilitated notably by the lack of diligent reaction of institutions or State agents to serious human rights violations”.

⁸⁷ See para. 18 and footnotes 13 and 14 above.

⁸⁸ *El-Masri, op. cit.*, footnote 26, para. 191.

⁸⁹ *R (Al Rawi) v. Secretary of State for Foreign and Commonwealth Affairs (United Nations High Commissioner for Refugees intervening)*, [2006] EWCA Civ 1279.

⁹⁰ See, for example, the statement issued by the Special Rapporteur on 12 April 2012 concerning the decision of United States District Court of Columbia to refuse a freedom of information request for information concerning the involvement of United Kingdom public officials in the CIA rendition programme on the plainly erroneous basis that the applicant (the United Kingdom’s all-party Parliamentary Group on Extraordinary Rendition) is an emanation of Government: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12053&LangID=E>.

⁹¹ *El-Masri, op. cit.*, footnote 26, paras. 191–193.

⁹² *Binyamin Mohamed, op. cit.*, footnote 83.

also operates “as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the justice system”.⁹³

39. Legitimate national security considerations do not include governmental interests and activities that constitute grave crimes under international human rights law, let alone policies that are precisely calculated to evade the operation of human rights law.⁹⁴ The European Court of Human Rights in the *El-Masri* case noted that an unjustifiably broad interpretation of State secret privilege had been asserted by the United States Government in proceedings before United States courts in that case, and that the same approach had led the authorities of the former Yugoslav Republic of Macedonia to hide the truth.⁹⁵ In the context of the secret detention, rendition and torture programme of the Bush-era CIA, the Court rightly concluded that the concept of State secrets “has often been invoked to obstruct the search for the truth”.⁹⁶

40. This phenomenon, which constitutes a serious abuse of public power, has a long pedigree in South America, where national security claims have frequently been advanced in an attempt to prevent judicial scrutiny of systematic human rights violations. Based on its extensive experience of dealing with such claims, the Inter-American Court of Human Rights has developed a robust response, holding that “public bodies cannot shield themselves behind the protective cloak of official secrets to avoid or obstruct the investigation of illegal acts ascribed to members of its own bodies”.⁹⁷ The Court has held that in such cases claims to avoid disclosure on the grounds of national security “may be considered an attempt to privilege the ‘clandestinity’ of the Executive branch and to perpetuate impunity”.⁹⁸

41. The Special Rapporteur recalls the well-settled principle that allegations of State-sanctioned systematic human rights violations in the counter-terrorism context must be subjected to penetrating scrutiny by independent judicial, quasi-judicial and/or parliamentary oversight mechanisms that have unfettered access to all classified information.⁹⁹ Any claim to withhold publication of evidence on national security grounds

⁹³ Council of Europe *Guidelines on Eradicating Impunity*, *op. cit.*, footnote 86.

⁹⁴ Observations on behalf of the High Commissioner for Human Rights to the ECtHR in *El-Masri*, *op. cit.*, footnote 26, Geneva, 11 March 2011, at para. 38. A particularly egregious illustration of this is the practice of the Military Commissions in Guantanamo Bay to treat evidence confirming the torture of “high-value detainees” by the CIA as “classified information” on the spurious ground that the accused, having been subjected to waterboarding and other forms of torture, are thereby privy to information about classified CIA interrogation techniques which they cannot be permitted to reveal, in any proceeding open to the public, even to the extent of preventing their attorneys from providing the accused with Government classified materials about the ill-treatment to which they were subjected. See *e.g. United States v. Mohammad*, Appellate Exhibit 013AA, Amended Protective Order #1 (To Prevent Against Disclosure of National Security Information), ¶¶ 2g(4)-(5), dtd Feb. 9, 2013, “observations and experiences of an accused with respect to” their treatment by the CIA remains classified, such as details of their capture, information that would tend to reveal the foreign countries involved, the names and identifies of the persons involved, the enhanced interrogation techniques applied, and any descriptions of the confinement conditions. This absurdist and amoral legal analysis carries the implication that the use of torture by public officials is *ipso facto* privileged from public disclosure.

⁹⁵ *El-Masri*, *op. cit.*, footnote 26, paras. 191 to 193.

⁹⁶ *Ibid.*

⁹⁷ Myrna Mack Chang, *op. cit.*, footnote 30, para. 181.

⁹⁸ *Ibid.*

⁹⁹ *United Nations Joint Study on Secret Detention*, *op. cit.*, footnote 1, para. 292(d); *Marty III*, *op. cit.*, footnote 15; *Flautre Report*, *op. cit.*, footnote 15, para. 3; *Best Practice for Intelligence Oversight*, *op. cit.*, footnote 44, para. 15; *United Nations Manual on the Effective Investigation and Documentation*

must be determined by a body that is independent of the executive, following an adversarial procedure with such adaptations as may be strictly necessary to ensure effective independent oversight without unjustifiably imperiling legitimate national security interests.¹⁰⁰ Where such claims are advanced there should be a strong presumption in favour of disclosure,¹⁰¹ and any procedure adopted must, as a minimum, ensure that the essential gist of the classified information is disclosed to the victim or his family, and made public.¹⁰²

42. The Special Rapporteur commends as a model the approach adopted by the Canadian authorities (and by the investigating judge Justice Dennis O'Connor) in the *Maheer Arar Inquiry*¹⁰³ into the rendition and torture of a Canadian citizen pursuant to the Bush-era CIA's counter-terrorism programme. In that case, the judge was provided with all documentation, irrespective of the possible national security claims that arose; the Canadian Government highlighted the passages it considered to be classified; the judge determined the claim on the merits; and his determination was potentially amenable to judicial review. Making full use of these powers, Justice O'Connor concluded that the Royal Canadian Mounted Police had provided "inaccurate and unfairly prejudicial" information to the FBI, which led to Mr. Arar's detention at JFK airport in New York, and his subsequent transfer to via Jordan to the Syrian Arab Republic, where he was imprisoned for 10 months and subjected to repeated acts of torture including beatings with cables, and being threatened with torture by electric shocks.¹⁰⁴

43. In his final report, Justice O'Connor made a series of important recommendations about the need for an integrated intelligence oversight and accountability mechanism in Canada. He also concluded that the success of the inquiry in getting at the facts was a direct consequence of his powers to compel production of evidence and the attendance of witnesses, and to assess the competing interests of national security and public accountability for himself.

C. Situations of pressing concern

44. In February 2010, four special procedures mandate holders presented the United Nations joint study on secret detention while countering terrorism to the Human Rights Council.¹⁰⁵ After the report was presented, and in order to follow up its findings and recommendations, the authors wrote to all States identified in the report seeking their response to the concerns it had highlighted. The Special Rapporteur notes with concern that a significant number of States simply failed to respond. The Special Rapporteur calls on all

of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Professional Training, Series No. 8, Rev. 1 (2004) ("*Istanbul Protocol*"), <http://www.unhchr.ch/pdf.8istprot.pdf>, paras 80 and 108(a).

¹⁰⁰ *Marty III*, *op. cit.*, footnote 15, paras. 13.3, 51(4) and 56.

¹⁰¹ *Report of Events Relating to Maher Arar*, [Reference], p. 277.

¹⁰² *United Nations Basic Principles on Remedy and Reparation for Gross Human Rights and Humanitarian Law Violations*, *op. cit.*, footnote 33, paras. 22(a) to (d); *Istanbul Protocol*, *op. cit.*, footnote 99, para. 82; ECtHR, *A. and Others v. United Kingdom*, application No. 3455/05, Judgment at paras. 218 to 220; Case T-85/09 *Yassin Abdullah Kadi v. European Commission*, General Court (Seventh Chamber), 30 September 2010 [2011] CMLR 24, paras. 173 to 174; *Home Secretary v. AF* (No. 3) [2010] AC 289.

¹⁰³ *Report of Events Relating to Maher Arar*, , pp. 283-284.

¹⁰⁴ In light of the findings of the *Maheer Arar Inquiry* the Prime Minister of Canada issued a formal apology made a payment of \$10.5 million in compensation to Mr. Arar.

¹⁰⁵ *United Nations Joint Study on Secret Detention*, *op. cit.*, footnote 1.

States that have so far failed to provide substantive responses to the inquiries made by the joint mandate-holders to do so without further delay.

45. In March 2009, the United States Senate Select Committee on Intelligence began a comprehensive investigation into the CIA's secret detention and interrogation programme, chaired by Senator Dianne Feinstein. The Special Rapporteur commends the United States for establishing an independent parliamentary which has reportedly had unrestricted access to classified information. On 1 December 2011, Senator Feinstein announced that the Committee was close to the completion of the comprehensive review, and the report was approved by the Committee the same month.¹⁰⁶

46. The Special Rapporteur calls on the United States to release the full Senate Select Committee report as soon as possible, subject only to the specific redaction of such particulars as are considered by the Select Committee itself to be strictly necessary to safeguard legitimate national security interests or the physical safety of persons identified in the report.

47. On 6 July 2010, the Prime Minister of the United Kingdom announced an independent inquiry by members of the Privy Council (a body made up mainly of senior serving or retired politicians of distinction and senior judges), under the Chairmanship of Sir Peter Gibson, a retired judge with experience on national security issues. The Gibson Inquiry was set up in order to consider whether, and to what extent, the United Kingdom Government and its security and intelligence agencies were involved in, or aware of, the improper treatment or rendition of detainees held by other countries in counter terrorism operations outside the United Kingdom.

48. The terms of reference for the Gibson Inquiry were published on 6 July 2011 and a protocol was subsequently issued which governed its procedures. The inquiry lacked the power to compel the attendance of witnesses or the production of documents. Nor did it have any power to request the production of evidence from other States, or their personnel. Moreover, under the protocol established for the inquiry, the final decision as to whether any document or finding could be released to the public was vested in the Cabinet Secretary (a senior civil servant). As a result, the detainees, their lawyers and the NGOs who were supporting them, withdrew their cooperation.¹⁰⁷ Thereafter, the Special Rapporteur, acting together with the Special Rapporteur on torture, engaged the United Kingdom in correspondence about the powers, terms of reference and protocol for the Gibson Inquiry.¹⁰⁸ On 18 January 2012, the Justice Secretary announced there was no prospect of the Gibson Inquiry being able to start in the foreseeable future and the Government had therefore decided to terminate it. He indicated, however, that the inquiry would provide an interim report, which was delivered to the Prime Minister on 27 June 2012. Despite Government assurances of transparency, the interim report has not so far published and the Government has given no public explanation for the delay.

49. The Special Rapporteur calls upon the United Kingdom to publish the interim report of the Gibson Inquiry without further delay, subject only to such redactions as are considered by the independent inquiry team itself to be strictly necessary to safeguard legitimate national security interests or the physical safety of persons identified in the

¹⁰⁶ S8130, Congressional Report – Senate, 1 December 2011, p. 52.

¹⁰⁷ Joint letter addressed to the Detainee Inquiry, 3 August 2011. Available from www.amnesty.org/en/library/asset/EUR45/010/2011/en/daf5cd13-dea8-47d2-99d2-6628b963f511/eur450102011en.pdf.

¹⁰⁸ Joint letter from the Special Rapporteurs to the Permanent Representative of the United Kingdom to the United Nations Office and other International Organisations in Geneva, dated 11 November 2011; Reply from the Permanent Representative, dated 13 January 2012.

report. He further invites the United Kingdom to make a public statement setting out a timetable for the start of the proposed judge-led inquiry, indicating what its powers and terms of reference will be. The Special Rapporteur recommends that the shortcomings in the terms of reference for, and the powers of, the Gibson Inquiry should be remedied in the resumed inquiry, and commends to the attention of the United Kingdom the principles laid down in the present report, and in the report of the Special Rapporteur on torture on best practice for commissions of inquiry into allegations of this nature.¹⁰⁹

IV. Conclusions and recommendations

50. The Special Rapporteur accordingly endorses and *strongly urges* all Member States of the United Nations to accept and implement the recommendation made to the Human Rights Council in February 2010 by the United Nations Joint study on global practices in relation to secret detention in the context of countering terrorism, that:

Those individuals found to have participated in secretly detaining persons and in any unlawful acts perpetrated during such detention, including their superiors if they have ordered, encouraged or consented to secret detentions, should be prosecuted without delay and, where found guilty, given sentences commensurate with the gravity of the acts perpetrated.¹¹⁰

51. The Special Rapporteur *welcomes* the decision of the CTITF Working Group on Protecting Human Rights while Countering Terrorism to establish a series of regional workshops aimed at strengthening the capacity of Member States to secure the right to truth and the principle of accountability for human rights violations in the counter-terrorism context, and calls upon Member States to support this initiative.

52. The Special Rapporteur *calls upon* all Member States, and in particular those States credibly alleged to have facilitated the use of their airspace and landing facilities for CIA rendition flights, to review their domestic law and practice, including a review of the investigations, if any, that have so far been conducted by their national authorities, in order to bring them into conformity with the principles described in the present report.

53. In addition, the Special Rapporteur:

(a) *Calls upon* those States that have so far failed to provide substantive responses to the inquiries made by the joint mandate-holders by way of follow-up to the United Nations Joint Study on Secret Detention to do so without further delay;

(b) *Calls upon* the Governments of Lithuania, Morocco, Poland, Romania and Thailand urgently to establish (or where applicable, to re-open) effective independent judicial or quasi-judicial inquiries into credible allegations that secret CIA “black sites” were established on their territories; to identify any public officials who may have authorized or collaborated in the establishment or operation of these

¹⁰⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, to the United Nations Human Rights Council, 18 January 2012, A/HRC/19/61.

¹¹⁰ See to the same effect, *United Nations Basic Principles on Remedy and Reparation for Gross Human Rights and Humanitarian Law Violations*, *op. cit.*, footnote 33, para. 4; and *Flautre Report*, *op. cit.*, footnote 15, para. 5. See also ICCPR, Human Rights Committee General Comment No. 31, CCPR.C.21/Rev.1/Add.13, 26 May 2004, at para. 18.

facilities; to publish the findings of such inquiries; and to hold the relevant officials publicly accountable for their actions;

(c) *Calls upon* the Government of the United States to publish without delay, and to the fullest extent possible, in accordance with the principles set out in the present report, the Senate Select Committee on Intelligence report into the CIA's secret detention and interrogation programme;

(d) *Calls upon* the Government of the United Kingdom to publish without further delay, and to the fullest extent possible, the interim report of the Gibson Inquiry; invites the United Kingdom to make a public statement indicating a timetable for the proposed judge-led inquiry, indicating what its terms of reference and powers will be; and recommends that the resumed inquiry has the powers and responsibilities outlined the present report.
