An Interview with Jeremy Sarkin,* Chair-Rapporteur of the United Nations Working Group on Enforced and Involuntary Disappearances, on the Joint Study on Global Practices in Relation to Secret Detention

On 26 January 2010, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, the Working Group on Enforced or Involuntary Disappearances, and the Working Group on Arbitrary Detention released a joint study on global practices in relation to secret detention in the context of countering terrorism.[1] The following interview with Jeremy Sarkin, Chair-Rapporteur of the United Nations Working Group on Enforced and Involuntary Disappearances, is based on the joint study.

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1. Why was the Joint Study undertaken?

While there have been some investigations and enquiries in the recent past on issues related to secret detention, such as the issue of extraordinary renditions in Europe, all these enquiries were limited in scope. The joint Secret Detention Study was global in nature and is an attempt to give a general overview of secret detention in the context of counter-terrorism in all regions of the world.

There were four mandates involved in the study: the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while

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[1] Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances. A/HRC/13/42, 26 January 2010.

countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced and Involuntary Disappearances.

I was involved in the study as I was mandated by the Working Group on Enforced or Involuntary Disappearances to represent it on the study. The Working Group decided to participate pursuant to Human Rights Council Resolution 7/12 which asked it to consider the question of impunity in the light of the relevant provisions of the Declaration on the Protection of All Persons from Enforced Disappearances, and the set of principles for the protection and promotion of human rights through action to combat impunity.

The 222-page secret detention study report lists a total of 63 States alleged to have been involved in the practice. Some are mentioned in the context of a historical analysis of secret detention practices before 11 September 2001, but most in connection with secret detention and related activities—including so-called 'proxy detention', 'rendition' or 'extraordinary rendition'. While a questionnaire was sent to all Member States, only 44 responses were received.

Many individuals who have alleged that they were secretly detained are named in the report. Due to its global nature, the study is not exhaustive, but rather aims to highlight and illustrate the widespread practice of secret detention and related impunity.

The study demonstrates that the practice of secret detention is widespread and was reinvigorated by the so-called 'war on terror'. The study describes the international legal framework applicable to secret detention, provides an historical overview of the use of secret detention, and addresses the use of secret detention in the context of the global 'war on terror' in the post 11 September 2001 era. It examines the comprehensive and coordinated system of the secret detention of persons suspected of terrorism, involving not only US authorities, but also other States in almost all regions of the world. An objective of the study is to illustrate, in concrete terms, what it means to be secretly detained, how secret detention in the context of counter-terrorism can facilitate the practice of torture or ill treatment, and how secret detention has left a life-lasting mark on the victims as well as on their families. The study offers new elements, conceptual and factual, in the documentation and analysis of the practice of secret detention in the context of counter-terrorism, and makes concrete recommendations to bring this practice to an end.

2. What does it mean to be secretly detained?

A person is kept in secret detention if State authorities acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the State, or in any other situation where the action or omission of the detaining person is attributable to the State, deprive persons of their liberty; where the person is not permitted any contact with the outside world and when the detaining or otherwise competent authority denies, refuses to confirm or deny or actively conceals the fact that the person is deprived of his/her liberty and hidden from the outside world, including, for example, family, independent lawyers

or non-governmental organizations, or refuses to provide or actively conceals information about the fate or whereabouts of the detainee.

Secret detention does not require deprivation of liberty in a secret place of detention. Secret detention may transpire in a place that is not an officially recognised place of detention, or in an officially recognised place of detention, but in a hidden section or wing that is itself not officially recognised.

Whether detention is secret or not is determined by its incommunicado character and by the fact that State authorities do not disclose the place of detention or information about the fate of the detainee. Any detention facility may fall within the scope of the present study. It can be a prison, police station, governmental building, military base or camp, but also, for example, a private residence, hotel, car, ship or plane.

Incommunicado detention, where the detainees may only have contact with their captors, guards or other inmates, would also amount to secret detention if the International Committee of the Red Cross (ICRC) is granted access by the authorities, but is not permitted to register the case; or, if it is allowed to register the case, is not permitted by the State to, or does not, for whatever reason, notify the next of kin of the detainee on his or her whereabouts. In other words, access by ICRC alone, without it being able to notify others of the persons' whereabouts, would not be sufficient to qualify the deprivation of liberty as not being secret. However, it is understood that ICRC, in principle, would not accept access to a detention facility without the possibility of exercising its mandate, which includes notification of the family about the whereabouts and fate of the detainee. If ICRC access is granted within a week, it was deemed sufficient to leave the case outside the scope of the study. ICRC access to certain detainees may only be exceptionally and temporarily restricted for reasons of imperative military necessity in an armed conflict.

3. How does secret detention violate international law?

Secret detention is irreconcilable with international human rights law and international humanitarian law. It amounts to a human rights violation that cannot be justified under any circumstances, including during states of emergency. Secret detention violates the right to liberty and security of the person and the prohibition of arbitrary arrest or detention.

Secret detainees are typically deprived of their right to a fair trial when State authorities do not intend to charge or try them. Even if detainees are criminally charged, the secrecy and insecurity caused by the denial of contact to the outside world and the fact that family members have no knowledge of their whereabouts and fate violate the presumption of innocence and are conducive to confessions obtained under torture or other forms of ill treatment. At the same time, secret detention amounts to an enforced disappearance. Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, which defines enforced disappearance, does not require intent to put the person concerned outside the protection of the law as a defining element, but rather refers to it as an objective consequence of the denial, refusal or concealment of the whereabouts and fate of the

person. The International Convention, in its article 17, paragraph 1, explicitly prohibits secret detention.

The Working Group on Enforced or Involuntary Disappearances confirmed in its General Comment on Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance that, 'under no circumstances, including states of war or public emergency, can any State interest be invoked to justify or legitimise secret centres or places of detention which, by definition, would violate the Declaration, without exception.'[2] In this context states of emergency, international wars and the fight against terrorism, often framed in vaguely defined legal provisions, constitute an 'enabling environment' for secret detention.

As in the past, extraordinary powers are today conferred on authorities, including armed forces, law enforcement bodies and/or intelligence agencies, under states of emergency or global war paradigms either with or without very restricted control mechanisms by parliaments or judicial bodies. This renders many, or even all, of the safeguards contained in criminal law and required by international human rights law ineffective. In some States, protracted States of emergency and broadly defined conflicts against vaguely conceived enemies have tended to turn exceptional, temporary rules into the norm.

If resorted to in a widespread or systematic manner, secret detention may even reach the threshold of a crime against humanity where it is systematic and widespread. Every instance of secret detention is by definition incommunicado detention. It may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment, and may in itself constitute such treatment. The suffering caused to family members of a secretly detained person may also amount to torture or other form of ill treatment.

Such practice also invokes State responsibility on the basis of its level of involvement and complicity with such practice. A State would thus also be responsible when it was aware of the risk of torture and ill treatment, or ought to have been aware of the risk, inherently associated with the establishment or operation of such a facility or a given transfer to the facility, and did not take reasonable steps to prevent it; or when the State has received claims that someone had been subjected to torture or other ill treatment, or an enforced disappearance, or otherwise received information suggesting that such acts may have taken place but failed to have the claims impartially investigated. A transferring State could also be internationally responsible under general rules of attribution of State responsibility for internationally wrongful acts.

It is not only States whose authorities keep the detainee in secret custody that are internationally responsible for violations of international human rights law. A State is complicit in the secret detention of a person where it, for example, asks another State to secretly detain a person; knowingly takes advantage of the situation by sending questions to the State that has detained a person; or holds persons shortly in secret detention before handing them over to another State where such persons will be placed in secret detention for a longer period. Furthermore, the practice of 'proxy

[2] UN Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the UN General Assembly, UN Doc. A/Res/47/133, 18 December 1992.

detention' by a State in circumstances where there is a risk of torture in the hands of the receiving State could amount to a violation of the State's obligation under customary international law on *non-refoulement* – that is, not to transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. The Declaration on the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance state that the principle of *non-refoulement* applies to the risk of enforced disappearances.

Secret detention affects not only those who have been so detained. The generalised fear of secret detention tends to effectively result in limiting the exercise of a large number of human rights and fundamental freedoms, including freedom of expression and freedom of association. This fear often goes hand in hand with the intimidation of witnesses, victims and their families. Moreover, independent judiciaries and secret detention can hardly coexist.

4. What does it mean to be extraordinarily rendered?

Rendition can occur for various purposes, including the transfer of a person from one country to another to face justice. Extraordinary rendition is the transfer of a person to another country to avoid a criminal charge or for the purpose of interrogation outside of a specific jurisdiction. It seeks to bypass the legal system and the safeguards that exist in a specific place. Where it occurs the person may face a substantial risk of being subjected to torture and other cruel, inhuman and degrading treatment in contravention of the principle of *non-refoulement*. In some cases, persons have been rendered to other countries precisely to circumvent the prohibition of torture and 'rough' treatment. Practices such as 'hosting' secret detention sites or providing proxy detention have, however, been supplemented by numerous other facets of complicity, including authorizing the landing of airplanes for refuelling, short-term deprivation of liberty before handing over the 'suspect', the covering up of kidnappings, and so on. Thus, as noted above, a state that participates in extraordinary rendition can be complicit in the secret detention of a person in certain circumstances. Thus, where it has asked another State to secretly detain a person; where it sends questions, or receives information from the detaining State; where it has participated in the arrest; and/or transfer when it knew that the person may be placed in secret detention; or fails to take steps where information revealed that there were secret detentions occurring on its territory, it may be deemed complicit.

While such practices were believed to occur only in non-democratic and authoritarian States, which was the practice largely before 2001, after the events of 9/11 even very democratic countries became involved in these practices. The first half of the first decade of the twenty-first century saw a serious undermining of the very fabric of international human rights law and the rule of law which has had a further negative effect as other countries have begun to replicate some of these practices.

5. What prevention and enforcement mechanisms exist when a State violates international law by employing secret detention practices?

The processes to prevent and enforce State compliance against the use of secret detentions are limited. States of emergency, international wars and the fight against terrorism enable secret detention. Extraordinary powers are today conferred on authorities, including armed forces, law enforcement bodies and/or intelligence agencies, under states of emergency or global war paradigms either with or without very restricted control mechanisms by parliaments or judicial bodies. This thus renders many, or even all, of the safeguards contained in criminal law and required by international human rights law ineffective. In some States, protracted periods of emergency and broadly defined conflicts against vaguely conceived enemies have tended to turn exceptional, temporary rules into the norm. In many contexts, intelligence agencies operate in a legal vacuum with no law, or no publicly available law, governing their actions. Although intelligence bodies are not authorised by legislation to detain persons, they do so many times, sometimes for prolonged periods. In such situations, there are either no oversight and accountability mechanisms at all, or they are severely restricted, with limited powers, and hence ineffective. Secret detention has relied on systems of trans-border (regional or global) cooperation. This means that, in many instances, foreign security forces may operate freely in the territory of other States. It also leads to the mutual exchange of intelligence information between States, followed by its use for the purpose of detaining or trying the person before tribunals, the proceedings of which do not comply with international norms, often with reference to State secrets, making it impossible to verify how the information was obtained.

But in practice, little exists to prevent and enforce State compliance with prohibitions on secret detention even though it is clear that secret detentions are prohibited in international law. Certainly, one of the major limitations of the international human rights system has been its general inability to enforce international human rights standards. While States have the primary task of protecting human rights, they have been the major perpetrator of human rights violations. At the same time, it is these States that determined what international law is and what mechanisms should exist to measure whether they have complied with their obligations under international law. As a result, while a few institutions have been created at international level, these bodies largely cannot enforce compliance, and have largely not been allowed to permit individuals or other non-State actors to complain to them about what violations States have committed. The international community has largely relied upon voluntary compliance to ensure that States adhere to their human rights and other obligations. Obviously, voluntary compliance has limitations. Thus, this has not been a very effective means to ensure the obedience of States in this regard.

Nevertheless, the world has seen an explosion of international and regional courts and tribunals. The twentieth century saw a dramatic growth in the number of such courts, although there are several examples from the nineteenth century, and even prior to that. This growth is especially true over the last 20 years or so. In fact, the world has had altogether more than 43 international or regional courts of which at least 16 are still functioning. Together with these international institutions another 82 entities and mechanisms, referred to as ‘Quasi-Judicial, Implementation Control and other Dispute

Settlement Bodies' are at work. Thus, about 125 international institutions have been developed at the international and regional levels alone.

Many of the newer institutions are criminal courts used to hold individuals accountable. Holding a State legally responsible for human rights claims is still a difficult matter, despite the availability of a variety of bodies to deal with such matters, such as the International Court of Justice (ICJ) and various UN bodies. Crucially, the ICJ is available only to States and the decisions of UN mechanisms are not enforceable.

As there are few places to go to enforce human rights compliance, it is not surprising that regional human rights systems have come to the fore. Regional systems above all others have grown most noticeably over the last sixty years and most dramatically in the twenty-first century.

However, State compliance remains a problem. Some therefore have called for a world court on human rights. Regardless, much more ought to be done at domestic level to prevent the practice of secret detention. Institutions at international, regional and sub-regional level can play their part as well.

6. How, if at all, do accounts of persons who are/were secretly detained vary from that of the detaining State? Do victims of secret detention receive some form of compensation, redress or reparation?

For this study much information was collected from a variety of sources including interviews with former detainees, lawyers representing detainees, family members of those detained, other witnesses and officials from various countries around the world. It also analysed flight records, as well as various published material.

The stories told to us for the study by persons secretly detained are very similar. The most disturbing consequence of secret detention is the complete arbitrariness of the situation, together with the uncertainty surrounding the duration of the secret detention, and the feeling that there is no way the individual can regain control of his or her life.

The practice of secret detention has 'stolen' years of the lives of the victims and has left indelible traces in their existences. According to the information collected, most victims have never received any form of reparation, including rehabilitation or compensation. The injustice done by secretly detaining somebody is prolonged and replicated all too frequently once the victims are released, because the State concerned may try to avoid any disclosure about the fact that secret detention is practiced on its territory. In almost no recent cases has there been any judicial investigation into allegations of secret detention, and practically no one has been brought to justice. Victims have almost never received any rehabilitation or compensation. Such a serious human rights violation therefore deserves appropriate action and condemnation. It is essential that victims of secret detention be provided with judicial remedies and reparation in accordance with international norms. These

international standards recognise the right of victims to adequate, effective and prompt reparation that should be proportionate to the gravity of the violations and the harm suffered. As families of disappeared persons have been recognised as victims under international law, they should also benefit from rehabilitation and compensation.

7. How can secret detention facilitate the practice of torture or inhuman and degrading treatment?

Based on the interviews with former detainees conducted for the study, 20 out of 24 persons were subjected to torture or ill treatment. A large number of secret detainees were subjected to torture or ill treatment. In general, most victims were blindfolded, hooded, shackled and beaten during their detention or interrogation, or forced to wear diapers during their transfers from one place to another. In some cases, victims were hung from the ceiling, and were subjected to electric shocks and rape. Other victims were held in solitary confinement for prolonged periods of time, in complete darkness and with very loud music playing constantly. Another victim was stripped, photographed and raped. While the report does not include any specific cases of victims who died while in secret detention, there are several reports of people who died in secret detention.

One secret detainee told me about how he was regularly subjected to torture and other ill treatment by his captors. He described to me how he was hit on parts of his body. He was beaten in the buttocks and in the back with wood. He was beaten with metal chains and with a gun butt. Water was poured into his nose to give him a sense of drowning. His back was burned with a searing hot metal can. His own urine was poured into his mouth and nose. He was doused with gasoline and threatened that he would be burnt alive. Both of his forearms were hammered with a metal hammer leaving him for a long time incapable of the menial work that he was required to do for his captors.

The link between secret detention and torture and other forms of ill treatment is twofold: secret detention as such may constitute torture or cruel, inhuman and degrading treatment; and secret detention may be used to facilitate torture or cruel, inhuman and degrading treatment. The practice of secret detention, as reflected by the cases covered in the study, confirmed that incommunicado detention, including secret detention, facilitates the commission of acts of torture. Secret detention as such may constitute torture or ill treatment for the direct victims as well as for their families. The very purpose of secret detention is to facilitate and, ultimately, cover up torture and inhuman and degrading treatment used either to obtain information or to silence people. While in some cases elaborate rules are put in place authorizing ‘enhanced’ techniques that violate international standards of human rights and humanitarian law, most of the time secret detention has been used as a kind of defence shield to avoid any scrutiny and control, making it impossible to learn about treatment and conditions during detention. Secret detention not only violates the prohibition against torture and other forms of ill treatment with regard to the victim of secret detention; but the suffering caused to family members of a disappeared person may also amount to

torture or other forms of ill treatment. Secret detention also violates the right to family in the International Covenant on Civil and Political Rights.

Crucially, efforts to counter terrorism should not be used as an excuse to justify cruel and inhumane treatment and subvert the right to justice and due process. When countries employed secret detentions, they undermined the very values they claimed to be fighting to maintain and the degree of impunity that accompanied such violations remains a serious challenge for the international community.

8. What justifications have States provided for the use of secret detention? Are these justifications valid?

In the past, particularly in the 1970s and 1980s, some Governments justified practices of secret detention, among other exceptional measures, referring to the national security doctrine, which provided fertile ground for the creation of a repressive system by the military in which, in the name of security, human rights and fundamental freedoms were violated on a massive scale, and the rule of law and the democratic system damaged. Governments adopted legislation concentrating all powers in the executive branch, including decisions on detentions, their form and place. The legislation itself was in most cases extremely broad, and had vague definitions of terrorism-related crimes. The practice of secret detention was also facilitated by the introduction of states of emergency, followed by repeated renewals or extensions and, in some cases, by straightforward perpetuations. States of emergency gave more powers to the military and provided room for discretion in the repressive measures against terrorism. Today no State justifies or admits the use of secret detention as policy. However the practice of secret detention in the context of countering terrorism is widespread. The evidence gathered clearly shows that many States still use secret detention, although they do not often admit to it. They use secret detention over concerns relating to national security—often perceived or presented as unprecedented emergencies or threats. Secret detention is illegal regardless of the purpose and regardless of when it occurs. Its use is a violation of both international human rights law and international humanitarian law.

9. Is it feasible to enforce the illegality of secret detention if it is so widely practiced?

Such a serious human rights violation deserves appropriate action and condemnation. Steps ought to be taken to curb the resort to secret detention and the unlawful treatment or punishment of detainees in the context of counter-terrorism. It is feasible to enforce the illegality of secret detention if States take a number of steps to prevent it.

In all States, secret detention should be explicitly prohibited, along with all other forms of unofficial detention. Detention records should be kept, including in times of armed conflict, as required by the Geneva Conventions, and should include the number of detainees, their nationality and the legal basis on which they are being held, whether as prisoners of war or civilian internees. Internal inspections and

independent mechanisms should have timely access to all places where persons are deprived of their liberty for monitoring purposes, at all times. In times of armed conflict, the location of all detention facilities should be disclosed to the International Committee of the Red Cross.

Safeguards for persons deprived of their liberty should be fully respected. No undue restrictions on these safeguards under counter-terrorism or emergency legislation are permissible. In particular, effective *habeas corpus* reviews by independent judicial bodies are central to ensuring respect for the right to personal liberty. Domestic legislative frameworks should therefore not allow for any exceptions from *habeas corpus*, operating independently of the detaining authority and from the place and form of deprivation of liberty. The study shows that judicial bodies can play a crucial role in protecting people against secret detention. The law should foresee penalties for officials who refuse to disclose relevant information during *habeas corpus* proceedings.

All steps necessary to ensure that the immediate families of those detained are informed of their relatives' capture, location, legal status and condition of health should be taken in a timely manner.

Any action by intelligence services should be governed by law, which in turn should be in conformity with international norms. To ensure accountability in intelligence cooperation, truly independent intelligence review and oversight mechanisms should be established and enhanced. Such mechanisms should have access to all information, including sensitive information. They should be mandated to undertake reviews and investigate upon their initiative, and to make public reports.

Institutions strictly independent of those that have allegedly been involved in secret detention should promptly investigate any allegations of secret detention and extraordinary rendition. Those individuals found to have participated in secretly detaining persons and 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 to the gravity of the acts perpetrated.

The status of all pending investigations into allegations of ill treatment and torture of detainees and detainee deaths in custody should be made public. No evidence or information obtained by torture or cruel, inhuman and degrading treatment should be used in any proceedings.

Transfers or the facilitation of transfers, from one State to the custody of authorities of another State must be carried out under judicial supervision and in line with international standards. The principle of *non-refoulement* of persons to countries where they would be at risk of torture or other inhuman, cruel or degrading treatment should be honoured.

Victims of secret detention should be provided with judicial remedies and reparation in accordance with relevant international norms, which recognise the right of victims to adequate, effective and prompt reparation proportionate to the gravity of the violations and the harm suffered. Given that families of disappeared persons have

been recognised as victims under international law, they should also benefit from rehabilitation and compensation.

States should ratify and implement the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Given that the Optional Protocol to the Convention against Torture requires the setting up of monitoring systems covering all situations of deprivation of liberty, adhering to this international instrument adds a layer of protection. States should ratify the Optional Protocol and create independent national preventive mechanisms that are in compliance with the Paris Principles, and ratify the International Convention for the Protection of All Persons from Enforced Disappearance. Other regional systems may wish to replicate the system put in place through the Inter-American Convention on Forced Disappearance of Persons.

Governments have an obligation to protect their citizens abroad and provide consular protection to ensure that foreign States comply with their obligations under international law, including international human rights law.

Under international human rights law, States have the obligation to provide witness protection, which is also a precondition for combating secret detention effectively.

Thus, it is feasible to end the practice of secret detention if steps are taken by States to do so. Investigations where the practice is alleged to have occurred must be undertaken independently and those involved brought to justice. Providing sufficient reparations to those who suffered as secret detainees will also assist in preventing the practice in the future.