

“WE HAVE LOST A SENSE OF PURPOSE ABOUT ELIMINATING TORTURE”

• *Interview with Juan E. Méndez* •

By Vivian Calderoni and Oliver Hudson

Born in Argentina in 1944, Juan Méndez is well-known for his extensive experience in the defence of human rights in Argentina and around the world. He was held as a political prisoner for a year and a half during the military dictatorship in Argentina before going into exile in the United States of America in the late 1970s, where he lives today. He is a professor of human rights law at the American University – Washington College of Law.

Based on his experience and hard work to defend rights throughout his legal career, Juan Méndez was nominated in 2010 by civil society organisations – including Conectas Human Rights – for the position of Special Rapporteur of the United Nations Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. He served two terms as Special Rapporteur, the last one ending in 2016.

As Rapporteur, Méndez conducted visits to several countries to monitor and report cases of rights violations, especially those involving people deprived of liberty, and to encourage states to take measures to prevent torture. The approach of putting the victims of torture at the centre so they can demand not only reparation, but also their right to participate in the entire process was given considerable emphasis during his mandate.

Brazil was one of the last countries that Méndez visited as a rapporteur. This visit, in 2015, which Méndez describes as successful, was held almost simultaneously with that of the Subcommittee on the Prevention of Torture (SPT). On this occasion, he visited São Paulo, Brasília and three states in Brazil's north-eastern region: Sergipe, Maranhão and Alagoas (as

agreed upon with the SPT, which travelled to other states). "We did not have any problem visiting any of the places we asked to see", he affirmed in relation to the collaboration from and access to the prisons. However, his report on Brazil was critical in relation to the prison system. He denounced mistreatment – especially of persons belonging to racial, sexual, gender and other vulnerable groups – by police and prison officials and he made an important call for the country to strengthen its capacity to produce clear and relevant data on the incidence of cases of systematic rights violations.

In his interview with Sur, in addition to telling us about his experience as a special rapporteur, Méndez spoke of the limits and possibilities of his mandate and the current situation regarding torture, especially in the Latin American context. According to him, "we have lost a sense of purpose about eliminating torture unless it happens to people like us. So, getting to a complete eradication of torture has proven elusive".

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Conectas Human Rights • You have dedicated your life to the defence of human rights. Can you start by explaining what led you to the field of human rights and more specifically to the issue of torture?

Juan E. Méndez • I became a lawyer in Argentina in 1970, when there was great turmoil. I decided to dedicate a lot of my time to what we now call human rights matters – defending political prisoners, but also defending workers' rights, etc. Unfortunately, the turmoil became much worse during the early and mid-1970s with the very repressive elected government of Isabel Perón after the death of General Perón. I got trapped in that repression. I was arrested in 1975 and held under the "state of siege" without trial. I had chosen to leave the country rather than remain in custody, which was permitted by a clause in the Constitution if you were being held under the state of siege, but the military suspended that "right of option" clause when they took over in March of 1976. They suspended this right to choose to leave the country into exile, so I stayed another year in prison. In the meantime, they filled the jails with many political prisoners. Eventually, I was allowed to leave the country - literally escorted to a plane – and sent into exile. I had to live abroad for several years. During this time I was very concerned about my fellow inmates that I had left behind and also my many colleagues who disappeared because they defended political prisoners. Many other friends also disappeared. As soon as I got to the United States, I started trying to join the campaigns to highlight what was going on in Argentina. Not long after, I expanded my work to focus on Latin America more generally. Then, eventually I got very lucky – I was able to join human rights organisations in the United States and do this kind of work for a living.

Conectas • So it was your personal experience that led to your involvement in human rights?

J.M. • It was my personal experience, but also the experience of others. What happened to me happened because I was already very interested in campaigning for the rights of others.

Conectas • Could you talk about the process of being appointed a special rapporteur.

J.M. • The United Nations special rapporteurships are now called special procedures. They are also called “charter-based” as opposed to the treaty-based organs and mechanisms. The Special Rapporteurship on Torture is one of the oldest procedures, having been created in 1985. The only two more long-standing ones are the Working Group on Disappearances, which was the first one to be created, and the Special Rapporteur on Extrajudicial Executions. All three of them are still in place but there are now many more.

The Human Rights Council is the organ of the United Nations that creates and terminates special procedures, which are either country-specific or thematic, like torture. The Human Rights Council not only decides to begin a mandate, extend or terminate it, but also appoints persons to exercise the mandate: in the case of special rapporteurs, individual experts; in the case of working groups, five individual experts, each one of them from one of the voting blocs in the United Nations.

These selections are done in a fairly transparent and open way. The Human Rights Council announces that there is a vacancy and encourages nominations. You can be nominated by a state, by a non-governmental organisation (NGO), or you can even self-nominate. An advisory group to the president of the Council – formed of ambassadors who represent the five voting blocs – goes over all of the applications and nominations and decides – sometimes after interviewing – on a shortlist of three that is then proposed to the president. The president elects from that list and announces to the Council that such a person has been proposed or appointed as special rapporteur for the next three years. If there is no objection, then the appointment by the president stands. If there is an objection, there could be a vote, but generally, that doesn’t happen. Rather there would be a debate – about whether the choice of the president is the right one or not, but there is no vote. Either the president insists or they go back to square one and begin the process all over again. Not very often, but sometimes that means that the appointment is delayed by a few weeks or months and so the previous mandate is extended for whatever length of time is necessary.

Conectas • Were you nominated by Argentina or by an NGO?

J.M. • I was nominated by Conectas, Humanas and CELS. I am very honoured that I was nominated by those three organisations. The Argentine permanent mission in Geneva supported my nomination with enthusiasm.

Conectas • In order to give our readers a sense of the agenda of a special rapporteur, could you tell us what countries you visited during your mandate?

J.M. • I visited a total of 12 states. The 12 were Tunisia, Kyrgyzstan, Tajikistan, Georgia, Morocco and Western Sahara, Uruguay, Ghana, Mexico, Brazil, Mauritania, Sri Lanka and Gambia. We are somewhat restricted in how many we can visit. Firstly, because there is no

budget for more than two visits a year. The other problem is that because these are volunteer positions, we have to find the time to do a mission – they are very labour intensive and require a lot of time. The third reason is that you depend on being invited. I also did follow-up visits to some of the countries I visited. For example, I was allowed to do follow-up visits to Tunisia, Tajikistan, and to Ghana. Uruguay was in fact a follow-up visit because it had been visited by my predecessor a little earlier. I was unable to do follow-up visits to some countries, either because the visit had happened too late in my mandate – like Brazil, Mauritania and Sri Lanka – or because I was not allowed or not invited to do follow-up. This was the case for Morocco and Western Sahara, and Mexico. In the case of Mexico, we did a follow-up report, but it was based on research done without the benefit of a visit – by questionnaires, responses and bibliographic and journalistic research.

Conectas • Could you talk a little bit more about your experience in Brazil as a special rapporteur?

J.M. • I think the visit to Brazil was very successful. It was done in coordination with the Subcommittee on the Prevention of Torture that was going to visit in the same year. Because Brazil is such a large country, we decided to divide up the places we would visit. I visited Brasília, São Paulo and three states in the Northeast: Sergipe, Maranhão and Alagoas. We tried to visit a cross-section of detention centres, including a detention centre for girls in Brasília and another one for boys in São Paulo, and then we visited the women’s prison in São Paulo and men’s prisons in several different places, as well as at least one mental health hospital. I was given very broad and generous access. In all places, we had the cooperation of not only the federal government, but also the state government. We interviewed high level officials, as well as many NGOs and former victims of torture who were brought to our attention by the NGOs. They were very cooperative in the sense of actually travelling to where we could meet them. We focused on prison conditions first and foremost, but also on the prevalence of torture in interrogation and also what measures, if any, were being put into place to address questions of torture, including the *audiencia de custodia* [custodial audience], which had just started operating at the time of our visit.

Conectas • What are you most proud of achieving during your time as Special Rapporteur?

J.M. • I think my country visits were generally very fruitful. In countries like Mexico and Brazil, what we said was widely publicised. We were able to highlight the problems of torture and mistreatment and prison conditions in several countries and were heard by very high authorities in those countries on what needed to be done. Obviously, this was not the same in, for example, Gambia where the press was, at the time, heavily censored. Gambia was also the only country that really did not cooperate with us. They changed the terms of reference when we were already in country, and so our fact-finding was less successful there than in many of the other countries visited. Nonetheless, we did write a report on the basis of what we had learned, mostly through people who were already exiled because we spent some time in Senegal interviewing people who had fled from Gambia. The key is to write a good report that is solidly based on evidence and does

not make outlandish claims. If this report is picked up by civil society and the media in the country you are visiting, this can have an important impact in the fight against torture in each country. With the recent end of the dictatorship in The Gambia, the recommendations in my report now have a chance to be implemented.

I am also happy about having been able to write thematic reports, particularly because we decided on the topics or the themes that we were going to cover in consultation with people in different human rights organisations and other organisations that deal with torture in different forms. We published thematic reports on topics that were so important that the reports later have had a life of their own - for example, solitary confinement, the question of torture in health care settings, gender and torture, detention of children, and the need for a universal protocol for interviewing in criminal investigations.

Conectas • Would you highlight any good practice in the fight against torture that you came into contact with during your mandate?

J.M. • The case of Brazil, with the “*audiencia de custodia*” [custodial audience] is one example. In Mexico the Supreme Court has elaborated what they call a *Protocolo de Actuación* [Action Protocol] in cases of torture. It is a non-binding directive to lower courts on how to proceed if they get a complaint or if they come across prima facie evidence and decide ex officio to investigate whether torture has happened or not. Unfortunately, these are partial victories - initiatives going in the right direction, but not fully successful in ending torture.

The only country of all those that I visited, which was clearly making a clean break with torture, was Georgia. And it is kind of an anomaly in that sense, but a good one, because only a year and a half before I visited, there had been a change of government. The previous government was supposed to win the elections, but lost because within a month or so of the elections, a big scandal broke out about torture in the prisons of Georgia. The opposition campaigned saying that they would terminate that and won a surprise victory. The incoming government kept its promises and they did some extraordinary things. For example, in a few months, it had reduced the prison population to less than half of what it had been. And with that, as you can imagine, they have corrected a lot of problems of overcrowding. But not only that, they actually prosecuted something like 50 or so prison officials accused of torture and that has had an enormously positive effect on the practices that we saw in Georgia at the time. Now, I haven't been back and I hope that that progress is sustainable. I haven't heard that it is not. It is important to keep governments on their toes, making sure that practices like that don't return.

Conectas • Did you receive any criticisms from either states or civil society during your mandate and how did you respond?

J.M. • I reported to the Human Rights Council (HRC) once a year and once a year to the General Assembly. Some states occasionally complained, particularly at the HRC – either

about the report that we published after a visit, about a specific case where we processed a complaint and eventually found that the government had violated human rights, on our methodology for making such findings, and sometimes refuting our motivation. And sometimes we were criticised on the thematic reports as well – for example, on the gender report that included the rights of women and girls, but also of LGBTI persons. Several states intervened to say that I had ventured into areas where the international community had no agreement. They didn't quite say what that lack of agreement was, but you could tell that they were objecting to treating torture under a gender dimension not only about the equality of men and women, but also about the condition of discrimination against LGBTI persons.

I responded that the thematic reports are not supposed to be about something everyone agrees upon. They are precisely designed to generate discussions on what we should agree upon in the future. And also that my report had only taken two principles that are clearly agreed upon: one being the prohibition of torture and mistreatment, and the other one being the prohibition of discrimination. I had only put them together and highlighted how, in some countries, women and girls and LGBTI persons suffer more severely and more specifically from some forms of torture and mistreatment.

Conectas • What impact do you hope that your mandate has left on the fight against torture?

J.M. • Sir Nigel Rodley, who unfortunately passed away in January 2017, my immediate predecessor, Manfred Nowak, and the other two jurists, Kooijmans and van Boven who all occupied the position before me all left a very good trajectory of promotion of actions against torture, expanding the limits of the mandate and encouraging states to take more preventative action against torture.

I hope that my six years continue that direction. Perhaps the more significant aspect of this was my emphasis on putting the victims of torture at the centre of the approach and to insist, for example, that victims not only have the right to reparation and to rehabilitation as necessary, which are, of course, very important rights, but also to participate in the design of those programmes and to participate in the obligation to investigate, prosecute and possibly punish cases of torture. I also highlighted that solitary confinement is a form of mental torture, psychological torture. Although many organisations were already campaigning on this very significant issue I think I contributed to making it an international concern, rather than something that can be resolved in each country, within the domestic jurisdiction alone.

Conectas • What have been the advances and setbacks in the fight against torture in Latin America in the democratic period, and do they have global influence?

J.M. • The transition from dictatorships to democracy in all of our countries has renewed attention to the illegitimacy of the practices of those dictatorships, which have always included torture. So the fact that the public is much more self-conscious that these dictatorships were illegitimate for a variety of reasons, but among them, that they used torture against a political

enemy in a very systematic way, is obviously a big advantage. The fact that torture is not practised against political enemies in most of Latin America is a tribute to that transition and to the moral condemnation of torture that resulted from the transition.

Unfortunately, however, democracies have been disappointing at completely eradicating torture because they have not really reformed their police forces, their correctional institutions or their criminal justice practices more generally. Therefore, torture remains because there has not been enough attention to torture when it happens to poor people, members of marginalised communities and vulnerable people.

In addition, the democratic period has been characterised by the public's concern with criminality and insecurity. In that context, our societies begin to have a permissive attitude that, while torture may be bad, may be ugly, it keeps us safe and therefore, we'd rather look the other way and not criticise our police bodies when we know they torture. This is, of course, a generalisation. I am not saying that all people believe that or think that way, but it does seem to me that the prevailing mood of fear of crime – or fear of terrorism in other countries – conditions us to lose a sense of purpose about eliminating torture in our midst unless it happens to people like us. So, getting to a complete eradication of torture has proven elusive, to say the least, in Latin America.

Conectas • With this in mind, how should we react to Trump's recent comments that torture "absolutely works" and what impact do you think comments such as these have on the practice of torture in the US and in the wider world?

J.M. • I think this phenomenon of public relativism regarding the condemnation of torture is more universal. After 9/11 the preoccupation with terrorism, and in some countries with organised crime, has also caused the public to be less condemnatory than they used to be about some forms of torture. And even more worrisome is the popular culture that created this idea that how are you going to fight crime unless you break some rules? What we need to do is to continue to fight for hearts and minds - to show not only the moral and legal implications of mistreating people, but also address head on this argument that "torture works". We can show this rationally and demonstrate not only that it doesn't work because it gets a lot of false information but also because it results in unsafe convictions and judicial decisions that then need to be overturned. But more significantly it corrupts our institutions. It corrupts the judiciary, it corrupts the prosecutors' office, and it corrupts the police bodies and the investigative offices as well. We need to put a lot of pressure on our judicial systems to make judges, prosecutors and public defenders live up to their obligations to investigate, prosecute and punish torture, to examine any evidence of torture, to exclude evidence obtained under torture and to prevent people from being sent back to countries where they might be tortured.

Conectas • We are experiencing a moment of great change in the human rights movement. You have worked nationally and internationally in the defence of human rights, including

for organisations from both the South and the North. Is this North-South debate still relevant and if so, does it have specific resonance in the fight against torture?

J.M. • It is relevant in the sense that there has been much better coordination and complementary work between the organisations that dedicate their efforts to monitoring and denouncing violations. I think there is a lot better sense of equality between these organisations. I also feel that many organisations from the Global South are acquiring an international personality and they are becoming better known beyond their borders. But of course, this is a trajectory and not yet a final destination. More needs to happen for the international human rights movement to be truly a universal movement and one in which the distinction between North and South is less significant than it is now.

Conectas • Finally, we are very keen to know what your future plans are!

J.M. • I will continue to be a full-time professor of international law and, in particular, international human rights law as I was during my six years as special rapporteur. I have also been appointed to be a member of the selection committee to appoint judges in the special jurisdiction for peace and members of the truth commission under the Colombian peace process and that is going to take up a lot of my time in the next six to eight months.

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Interview conducted in March 2017

by Vivian Calderoni and Oliver Hudson (Conectas Human Rights).



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