JUAN MÉNDEZ

Juan Méndez is a lawyer who for decades has dedicated his career to the defense of human rights. As a result of his work representing political prisoners during the Argentine military regime, he was himself arrested and subjected to torture. A former member of *Human Rights Watch* and the *Inter-American Institute of Human Rights*, Méndez also headed the *Center for Civil and Human Rights* at the University of Notre Dame in Indiana, United States, and for three years was a member of the Inter-American Commission on Human Rights of the Organization of American States (OAS). In July 2004, he was appointed United Nations Special Advisor on the Prevention of Genocide, a position he held until recently. President of the *International Center for Transitional Justice*, he also serves on the boards of directors of the *Center for Justice and International Law, Global Rights* and the *Open Society Justice Initiative*, and is an advisor to the *Social Science Research Council's Conflict Prevention and Peace Forum* and the *American Bar Association Center for Human Rights*. He has lectured at Georgetown Law School, at the Johns Hopkins School of Advanced International Studies and at Oxford, and has received several human rights awards, among them the Monsignor Oscar A. Romero Award, presented in April 2000 by the University of Dayton for his leadership in service to human rights, and the Jeanne and Joseph Sullivan Award of the Heartland Alliance, in May 2003.

INTERVIEW WITH JUAN MÉNDEZ, PRESIDENT OF THE *INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE* (ICTJ)

By Glenda Mezarobba*

Since the end of the Second World War, more specifically in the past 30 to 40 years, various mechanisms have been developed and refined to deal with the legacy of violence perpetrated by authoritarian or totalitarian regimes, through what is conventionally called transitional justice. However, there are no studies to show definitively that these mechanisms contribute effectively to the quality of the democracy under construction, or that they constitute an effective means of achieving, for example, reconciliation. How, then, should each country act? What should be their priority?

International Law has come a long way and now at least we have a series of parameters. I wouldn't say they are strict formulas, rather objectives that States are obligated to meet, following the many decisions, for example, of the Inter-American Commission on Human Rights and other human rights organizations. The obligations under human rights treaties are now seen as creating or endorsing certain affirmative obligations concerning, for example, crimes against humanity. We now have a regulatory framework, which until recently was not so explicit. There are also national and social practices that we can learn from, but not necessarily copy. At the ICTJ, we believe that the purpose of the regulatory framework and the comparative studies is to understand, through a comprehensive and balanced focus, different mechanisms of transitional justice. Which doesn't mean that it is possible to choose between them. It is not legitimate for the State

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to say: we're not going to prosecute anybody, but we will offer reparations. Or to say: we will make a truth commission report, but we're not going to pay reparations to anyone. Each of these obligations of the State are independent from one another and each one must be fulfilled in good faith. We also recognize that each country, each society, needs to find its own way of implementing these mechanisms. It's not a matter of simply translating a law that was passed in South Africa and trying to apply it in Indonesia. There are principles that are universal and the State has an obligation to observe them, but the form, the method, can differ. We do not believe, for instance, that there is a strict sequence beginning with the need to prosecute and punish, followed by setting up a truth commission... Each country has to decide what to do and when, and in such a way that all the avenues are left open. So they don't say, for example, in advance: we will establish a truth commission that will last 10 years so that afterwards we cannot prosecute anyone criminally due to the statute of limitations. I believe that the principle of good faith needs to be applied here, and good faith is a legal concept: the sincere intent to do the maximum possible given the limitations you have. This is why different models exist. Neither can you say: we will pay reparations but we don't know who the victims are. The truth seeking processes sometimes have very practical consequences. From them, for example, emerges a way of conducting a census of the victims. In the case of Peru, for example, even the most exaggerated group underestimated the number of victims, which the truth commission found to be twice as high. What I mean to say with this is that, if they had begun by paying reparations, half the victims, who were unidentified, would have gone without. So here is an argument for having a sequence of different mechanisms, although it is important to have an approach that is at the same time holistic, comprehensive and balanced. Because if we only conducted criminal proceedings, justice would be incomplete and would be frustrating for the victims. I also believe that the other mechanisms of transitional justice help overcome what we call a breach of impunity. Sometimes, even with the best of intentions, we punish some crimes, but not all. So it is necessary to complement the judicial with the non-judicial, or even the administrative, as is the case with the reparations. This is the reason why we insist on this holistic and comprehensive approach.

What objectives should we bear in mind when adopting transitional justice mechanisms: should we seek reconciliation, for example, at any cost?

I think the ultimate objective ought to be the reconciliation of the opposing forces in each country. Not the reconciliation of torturers with their victims, for example, or between the perpetrators of human rights violations and their victims. There is always an underlying conflict, either the struggle against subversion or against terrorism, in which the violations are committed. If the conflict is such that there has been an historic confrontation between ideological or political factions, then reconciliation is a necessary objective. What has happened in Latin America specifically is that the term reconciliation has been misused, to justify the absence of justice, truth and reparation for victims and punishment for those

responsible. So, if reconciliation is used as a synonym for impunity, it is only logical that the victims and civil society at large take issue with the term reconciliation. Because it gives the word "reconciliation" to the enemy. Because what they want is not reconciliation, but impunity. It is necessary to condemn this and not to allow this interpretation of the word. I think that reconciliation is a fundamental objective of any transitional justice policy, since what we do not want is to reproduce the conflict. In this sense, everything we do – justice, truth, reparation – needs to be inspired by reconciliation, only real reconciliation, not the false reconciliation that has been used in Latin America as a smokescreen for impunity. The only way of achieving a serious and real reconciliation is through the mechanisms of justice, truth and reparation. Because reconciliation is not something that can be imposed by decree, nor can it be decided that nothing more will be done because we are reconciled. First, because the State does not have the right to forgive on behalf of the victims; each victim has the right to decide whether or not to forgive. And, second, the very least that could be done, in the sphere of reconciliation, would be to require from the perpetrators of human rights violations some form of conduct that contributes to the truth, some expression of regret or even an apology. In this sense, I disagree with some organizations in my country, Argentina, that, with very good reason, reject the word reconciliation and, thus, reject the very concept of reconciliation.

It has also become increasingly clear that time is a variable to be considered in the equation of transitional justice. Even when solutions are long in coming, do you think time can be an ally?

Yes. I believe that time is an ally, but you cannot place too much reliance on the idea that time will solve everything. In some countries where time has become an ally, such as Argentina and Chile, this does not mean that it wouldn't have been better to have done things earlier. What the cases of Argentina and Chile do illustrate very well is that our first instinct, when we began all this in the 80s, was mistaken. We were under the impression that if we didn't get everything done in the first six months, the opportunity would pass us by. We felt very sure about this. The reasoning was that if more than six months or a year elapsed, the pressures of other economic and social problems would cause us to forget. We also used to think that the democratic opportunity could be short-lived, and that the 'democratic springtime' could come to an abrupt end. It's now obvious that we underestimated two things: the societies, that truly wanted to be democratic; and the value of the idea of transitional justice and the idea that the victims needed to be respected and recognized. I think that the moral weight of the idea that human rights violations require a policy from the State in respect to the victims is something we discovered in practice, it's not something we knew in advance. It's not as if the idea is automatically disseminated to society as a whole, but it is because in Argentina and in Chile, and in other countries too, there was a very intelligent and very capable human rights movement that understood how, through moral gestures and practical political action, to transmit this agenda to society.

Do you think that countries not directly involved with the problem of transitional justice ought to contribute to these processes? What kind of contribution can they make?

Yes, I do. They can contribute primarily with funding. Particularly if the funds are earmarked for the civil society of each State. I think, for instance, that if a State in good faith creates a truth commission, like in Peru, and this commission will require funds, then it is important for the international community to help. In Peru, the commission was not entirely financed by international cooperation, as the government also made considerable investment, but without international cooperation the commission's work would have been far less effective. In the case of Liberia, the truth commission was financed completely by international cooperation, since the State of Liberia was in no financial condition. And this in itself is a problem. In cases like Liberia's, it is important that the State not think that since the international community is covering all the commission's expenses, the State does not need to do its part and accept its recommendations. Additionally, democratic and developed countries can help in a number other ways. For example, providing their intelligence files. Considering Central America, the files kept by the United States Department of State are far more complete than any you might find, for example, in Honduras, Nicaragua or El Salvador. And I think that these countries have an obligation to contribute with this. Cuba, for example, could contribute with important information on other countries from the Americas. If these countries are really interested in democracy, justice and the rule of law, they ought to contribute at the very least with this information. An example: when the so-called "Terror Files" were opened in Paraguay, details were discovered about the disappeared from Argentina. Finally, I think that developed countries should contribute with a clear policy that promotes the rule of law and the search for truth and justice. Some European donors have begun to realize that post-conflict reconstruction and the creation of a genuine rule of law cannot be done if it is based on forgetfulness, on the absence of memory and on impunity. So they have begun to insist that, if they are going to provide the funding to rebuild the judicial infrastructure, for example, in return the beneficiary country cannot refuse to prosecute cases of human rights violations simply because the crimes were committed in the past. Likewise, if we are going to help rebuild the police force, there needs to be some type of procedure in place to guarantee that officers who abused their power in the past do not remain within the police ranks.

Why are States in general so insensitive to the demands for truth, keeping their files secret?

We always hear talk of protecting sources and methods. This is the kind of karma used by intelligence services. But you have to understand that intelligence services can only operate in secrecy, so it'll never be in their interests to reveal their secrets. First of all, there is the problem of conception: why was this information gathered in first place? Second is the culture of secrecy. In recent decades, and increasingly

more so, the modern State has become ever more based on intelligence and secrecy, so there is an inertia about not releasing information. And, third, I think that States that possess this intelligence do not want to share it because they don't know whether they'll need their old sources in the future. These are explanations, but they are not justifications. They're just excuses. And I believe that this does nothing to promote the creation of democratic conditions. On the contrary, it promotes authoritarianism and a lack of democracy.

Argentina, which has shaken off its reputation as a pariah State and become a paradigm in the field of human rights, has been reopening trials against individuals accused of human rights violations during the military regime. How much do you think this decision can influence other countries in the region?

I'm not altogether sure. I think that Argentina has to keep on working, and working with more intelligence. There are currently a number of trials underway, there's a whole stack of cases, but everything is very chaotic. One judge opens one, another judge starts another. For example, you open one trial in a given jurisdiction against a torturer, for his activities in a given place, then you open another case against the same defendant for his activities in another detention center. The witnesses have to testify repeatedly in similar cases, which is exhausting and also raises security issues. We need to start thinking about a more rational policy, without violating the basic principles of an independent judiciary. The public prosecutors ought to coordinate the trials. That was how it was during the Alfonsín years. These cases accumulated into what were known as "megacauses". Right now everything is very chaotic, very disseminated, very dispersed. In addition to the Judicial Branch, the Public Prosecutor's Office also has a big responsibility. I think the Public Prosecutor's Office could – and I am not aware of any legal obstacle in Argentina, although this not how things are usually done – organize the trials nationally, rationalizing them and bringing them under the same set of rules, deciding what to emphasize at this time. If this is not done, what will emerge is the permanence of something extremely chaotic, extremely fragmented, running the risk that people will grow weary in the medium-term because they are not seeing any results. We have to exercise some patience.

From your experience as a human rights activist, an academic, a former member of the Inter-American Commission on Human Rights and a former UN special advisor, how do you imagine it will be possible to develop a more effective cooperation between these three sectors (civil society, academia and public institutions), particularly in countries of the Global South?

The fact that I've done all that doesn't mean I know the answer. I think a lot of effort is necessary to combine rigorous studies and academic reflection with the effective concrete action of civil society organizations. There are some very worthwhile experiences from which we can learn about these combinations. However, civil society organizations, on the one hand, need to professionalize

and be more rigorous, but without losing their passion or commitment. You need to recognize that it's not enough simply being convinced about the justness of the cause, you need to make things happen, and for that you need to know how to be convincing, and to be convincing you need a large dose of professionalism and rigor. And you learn this in the academic world. What you shouldn't learn in the academic world is the tendency to work in an ivory tower, to think the only thing that matters is reflection. I also think that academic rigor is different from the professional rigor of an NGO, for example. They feed off each other, but they are two different things. There are some good experiences that combine the two things, namely scientific or educational organizations that are geared towards strengthening civil society, such as the Inter-American Institute of Human Rights. This doesn't mean that everything it does is done well, but it is the only one I know of that for 30 years has been dedicated to human rights education, in order to strengthen them, and at the service of civil society. Perhaps deliberately it has renounced academic prestige and awarding titles to be able to do the job, over three decades, of training activists. And there is a whole tendency to recognize independent civil society organizations as actors in this process. Truly democratic countries are leading this tendency, enabling some doors to be opened at regional and international organizations, such as the United Nations and the OAS, that only a few years ago were closed to civil society. This creates more opportunities for civil society and also a responsibility to be independent, to not be manipulated by political forces or ideological inclinations. All this teaches us lessons about the true nature of democracy, about how it works on a day-to-day basis. And this in our countries, in Latin America, is very difficult. Because since political society is very weak, when there is a 'democratic springtime', civil society's best minds are absorbed by the State. In some countries, this has occurred more than in others. In Chile, for example, the majority of the people who worked with human rights, once the Pinochet dictatorship came to an end, moved to the State. It has been very difficult for Chile to refill the ranks of these organizations. They obviously have every right in the world to participate, and it is a very dignified participation, since they are democratic governments. But it left a gap. In Central America, not only did human rights groups become part of the State, but they did so in different political parties, opposing one another, and ended up taking the political struggle to the heart of the human rights movement. This has been a serious setback for the movement and for the possibility civil society has to do more to drive a demand for justice.