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To Honourable Madam Justice of the Brazilian Supreme Federal Court of Brazil
Justice ROSA WEBER, Rapporteur of the Direct Unconstitutionality Action (ADIN) No. 4,162

Ref.: **CONSTITUTIONALITY OF THE DIFFERENTIATED DISCIPLINARY REGIME IN BRAZIL**

Legal opinion letter. Juan E. Méndez is the United Nations Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 16/23¹.

This submission is drafted on a voluntary basis to the Brazilian Supreme Court in the case regarding the constitutionality of the Law 10792, which contemplates a differentiated disciplinary regime in an individual cell for up to 360 days, for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials

¹ Counsel of record for all parties have consented to the filing of this *amicus curiae* brief. **No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amicus or his counsel made a monetary contribution to this brief's preparation or submission.**

and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Pursuant to U.N. Human Rights Council resolution 16/23 (A/HRC/RES/16/23), Méndez acts under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of his mandate which enables him to seek, receive, examine, and act on information from numerous sources, including individuals, regarding issues and alleged cases concerning torture and other cruel, inhuman, or degrading treatment or punishment.

Professor Méndez is the author, with Marjory Wentworth, of *TAKING A STAND* (New York: Palgrave-MacMillan, October 2011), which examines the uses of arbitrary detention, torture, disappearances, rendition, and genocide in countries around the world.

He was Co-Chair of the Human Rights Institute of the International Bar Association, London in 2010 and 2011; and Special Advisor on Crime Prevention to the Prosecutor, International Criminal Court, The Hague from mid-2009 to late 2010. Until May 2009, Méndez was the President of the International Center for Transitional Justice (ICTJ). Concurrently, he was Kofi Annan's Special Advisor on the Prevention of Genocide (2004 to 2007). Between 2000 and 2003 he was a member of the Inter-American Commission on Human Rights of the Organization of American States, and its President in 2002. He directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999) and worked for Human Rights Watch (1982-1996).

He teaches human rights at American University in Washington D.C. and at Oxford University in the United Kingdom. He previously taught at Notre Dame Law School, Georgetown, and Johns Hopkins.

Honourable Madam Justice,

I, hereby, as the **Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment of the United National Human Rights Council (UNHRC)**, express my critical stance regarding the Differentiated Disciplinary Regime in Brazil (RDD, in its original acronym), whose constitutionality is currently being challenged in the present Direct Unconstitutionality Action by the Federal Council of the Bar Association of Brazil, representing the main issue in the present case before the Supreme Court.

Within the scope of my mandate, I have asserted that the use of solitary confinement should be abolished or, at least, be only accepted in very exceptional circumstances, as a last resort and for as short a time as possible. In all cases, however, the use of prolonged solitary confinement, its use as punishment, or its application – of any length - to persons with mental disabilities or juveniles should be prohibited. The reason for this is that solitary confinement can lead to severe pain and suffering that can amount to cruel, inhuman, and degrading treatment or punishment, or even torture. Furthermore, the use of solitary confinement increases the risk that acts of torture and other cruel, inhuman or degrading treatment or punishment will go undetected and unchallenged.

In accordance with the definition established in the Istanbul Statement on the Use and Effects of Solitary Confinement, I have defined solitary confinement as the physical and social isolation of individuals confined to their cells between twenty-two to twenty-four hours per day². The RDD in Brazil, which provides for the isolation of detained person in an individual cell for up to 360 days, without prejudice to extensions of similar length for new offences and up to one sixth of the prison term, constitutes solitary confinement. In fact, I have already expressed concern about this regime in my thematic report on solitary confinement that is attached to this letter³.

² UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 25.

³ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 24.

The RDD in Brazil may constitute a violation of Brazil's international obligation pursuant to the absolute prohibition of torture and cruel, inhuman and degrading treatment for various reasons. Accordingly, the RDD is a clear example of prolonged solitary confinement, it allows for the use of solitary confinement as punishment, and it allows for its application during pre-trial detention. In my experience, and as identified in my thematic report, these are all situations in which the use of solitary confinement can intensify the possible harm and negative psychological effect caused by isolation to levels that reach the threshold of cruel, inhuman, and degrading treatment, or even torture and, therefore, must be prohibited.

The RDD as prolonged solitary confinement

While the use of solitary confinement for short periods of time may be justified in certain circumstances, determined on a case-by-case basis, the use of prolonged or indefinite solitary confinement can never constitute a legitimate instrument of the State. Based on the conclusions of several scientific studies, I have defined prolonged solitary confinement as isolation that lasts for more than fifteen days.⁴ According to those studies, after fifteen days the adverse effects of isolation on the person's mental health are more acute and can be irreversible.⁵ Such harmful effects include psychotic disturbances, anxiety, depression, anger, perceptual distortions, paranoia and self-harm.⁶ Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.

Such concept, herein defended, that 15 days constitute the maximum limit for the use of solitary confinement is based on the scientific literature on this field, according to which, after this threshold, the harmful psychological effects of isolation

⁴ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 26.

⁵ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 26.

⁶ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 62.

become too intense, or even irreversible. This limit of 15 days is a proposal still open to debate with experts. Nevertheless, my main point is that the time limit for the use of solitary confinement must be considered in light of the risk of submitting the individual to torture or cruel, inhuman, or degrading treatment or punishment.

Based on the above considerations, I have concluded that prolonged solitary confinement always constitutes cruel, inhuman, and degrading treatment or even torture and must, therefore, be prohibited.⁷ In this sense, a law and practice like the one being reviewed in this case by the Supreme Court, which allows for an individual to be confined to a cell for a period of 360 days and, furthermore, permits extensions in the event of subsequent offenses up to one-sixth of the length of the sentence without judicial review, is in violation of Article 7 of the International Covenant on Civil and Political Rights, Articles 1 and 16 of the Convention against Torture, and Article 5 of the American Convention on Human Rights.

The Inter-American Court of Human Rights, whose binding jurisdiction was accepted by Brazil, has established that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being.”⁸ Likewise, Principle XXII(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas affirms that prolonged use of solitary confinement amounts to acts torture or cruel, inhuman, or degrading treatment or punishment.

Another issue likely to play a prominent role in the debate regarding the present “ADIN” is the lack of access to meaningful human contact within the prison, and contact with the outside world. Social interaction is a vital component of mental health of persons under confinement, especially those subjected to this regime for long periods of time, such as in the case of Brazil. In many jurisdictions, such as in

⁷ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 76.

⁸ *Velázquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Series C, No. 4, para. 156 (1988)

Brazil, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. The reduction in stimuli is not only quantitative but also qualitative. Meaningful contact with other people is typically reduced to a minimum. The available stimuli and the occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic.⁹

In my report above mentioned submitted to the United Nations Human Rights Council, I noted that the European Court of Human Rights recognized that: *“complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason”*.^{10 11}

Within prisons this contact could be with health professionals, prison guards or other prisoners. Contact with the outside world could include, for instance, visits, mail, and phone calls from legal counsel, family and friends, and access to reading material, television or radio.

Article 17 of the International Covenant on Civil and Political Rights grants prisoners the right to family and correspondence. Additionally, the Standard Minimum Rules for the Treatment of Prisoners provide for various external stimuli (Article 21 on exercise and sport; Articles 37-39 on contact with the outside world; Article 40 on books; Articles 41-42 on religion; Articles 71-76 on work; Article 77 on education and recreation; and Articles 79-81 on social relations and after-care).¹²

⁹ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 25.

¹⁰ *Ilaşcu and others v. Moldova and Russia*, Application No. 48787/99, European Court of Human Rights (2004), para. 432.

¹¹ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 55.

¹² UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 53.

The RDD and solitary confinement as punishment

In addition to its prolonged aspect, the RDD in Brazil provides for the use of solitary confinement as punishment or disciplinary measure in cases where the detained person has committed crimes while in custody. This constitutes another reason for concern that may implicate a violation of the prohibition of torture.

In my study, I have stated that solitary confinement, as a punitive measure, may never be justified for any reason due to the severe mental pain and suffering caused to the individual, regardless of the severity of the crime.¹³ Even in the event of a breach of prison rules and regulations, individuals should not be subjected to such measures as it inflicts suffering on the prisoner beyond what is necessary for a reasonable punishment, and is contrary to the objective of rehabilitation.¹⁴

In a similar way, Principle XXII(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas affirms that solitary confinement should be strictly prohibited in punishment cells. Member States of the Inter-American System, including Brazil, must take into consideration those Principles. This document, adopted by the Inter-American Commission on Human Rights, “sets up general principles, principles relating to conditions of deprivation of liberty and principles relating to the systems of deprivation of liberty, among which the following principles stand out: humane treatment, equality and non-discrimination, impartiality, personal liberty, legality and due process of law. It also presents a number of fundamental rights and guarantees recognized in international human rights treaties and the jurisprudence of the Inter-American system. It covers, in addition, several good practices, preventive measures and protection for persons deprived of liberty in various circumstances”¹⁵.

¹³ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 84.

¹⁴ UN. General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 72.

¹⁵ IACHR. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. OEA/Ser.L/V/II.131. Doc. 38. March 13th 2008. Approved by the Commission during its 131st

The Principle XXII(3) deals specifically with solitary confinement, as seen below:

“The law shall prohibit solitary confinement in punishment cells.

(...)

Solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution’s internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.

*In all cases, the disposition of solitary confinement shall be authorized by the competent authority and shall be subject to judicial control, since its prolonged, **inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment**”.*¹⁶ (Emphases added)

Furthermore, it is of particular concern that the RDD appears to provide insufficient due process guarantees for the application of these sanctions. In my report I have highlighted that the lack of due process standards places individuals at greater risk of additional acts of torture and ill treatment while in solitary confinement. Due process guarantees require that an individual have the ability to challenge the reasons and duration of solitary confinement.¹⁷

In this sense, I have emphasized the need for ensuring compliance with minimum procedural guarantees, both internal and external, in order to ensure respect for the inherent dignity of all persons deprived of liberty. A documented system of regular review of the justification for the imposition of solitary confinement should be in place, and must be carried out by an independent body, with participation and notice to the person detained and his or her lawyer, and should be duly

regular period of sessions. Presentation.

¹⁶ IACHR. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. OEA/Ser.L/V/II.131. Doc. 38. March 13th 2008. Approved by the Commission during its 131st regular period of sessions.

¹⁷ UN. General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraphs 92-98.

documented.¹⁸ In addition, detained persons held in solitary confinement must be afforded genuine opportunities to challenge before a court both the nature of their confinement and its underlying justification.¹⁹

Solitary Confinement and pre-trial detention

The RDD also raises concerns because it allows for the use of solitary confinement during pre-trial detention.²⁰ I have recommended States to take necessary steps to put an end to this practice.

Prolonged or indefinite isolation of individuals during pre-trial detention for preventive purposes may violate due process guarantees and, thus, cannot be justified. When isolation is used intentionally as a mean to pressure detainees to cooperate or extract a confession, such isolation has been found contrary to internationally recognized principles of human rights.²¹ In addition, the use of solitary confinement during pre-trial detention can elevate the risk of being subjected to other forms of torture and cruel, inhuman, and degrading treatment. Also, the United Nations Committee against Torture (“UNCAT”) has concluded that the use of solitary confinement should be abolished, especially in circumstances when isolation is used as a preventive measure during pre-trial detention.²²

¹⁸ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 95.

¹⁹ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 98.

²⁰ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 85.

²¹ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 85.

²² UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 31.

“Conclusions

The Special Rapporteur stresses that solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions. He finds solitary confinement to be contrary to one of the essential aims of the penitentiary system, which is to rehabilitate offenders and facilitate their reintegration into society. The Special Rapporteur defines prolonged solitary confinement as any period of solitary confinement in excess of 15 days.

Depending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture. In addition, the use of solitary confinement increases the risk that acts of torture and other cruel, inhuman or degrading treatment or punishment will go undetected and unchallenged.

Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is of the view that where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment...”²³

Finally, I reiterate two recommendations I had made in the final report addressed to all UN Member States, including Brazil:

- ***“The Special Rapporteur urges States to prohibit the imposition of solitary confinement as punishment — either as a part of a judicially imposed sentence or a disciplinary measure. He recommends that States develop and implement alternative disciplinary sanctions to avoid the use of solitary confinement.”***²⁴


²³ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraphs 79-81.

²⁴ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 84.

- ***“Indefinite solitary confinement should be abolished.”²⁵***

From Washington to Brasília,

June 20, 2013.



Juan E. Méndez

Special Rapporteur on torture and other cruel,
inhuman or degrading treatment or punishment

²⁵ UN General Assembly. Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268. August 5th, 2011. Paragraph 87.