

EVALUATION ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS IN ARGENTINA, IN THE CONTEXT OF THE SUBMISSION OF THE FIFTH PERIODIC REPORT TO THE HUMAN RIGHTS COMMITTEE, 117TH SESSION

Alternative report from the office of the Public General Defender of the City of Buenos Aires

Ciudad Autónoma de Buenos Aires, May 26th, 2016

Dear experts of the Human Rights Committee:

I am pleased to submit you, as Public General Defender of the City of Buenos Aires*, this alternative report, regarding the compliance of the Republic of Argentina with the International Covenant on Civil and Political Rights (hereinafter ICCPR, or the Covenant) in the area of the City of Buenos Aires, in relation to the report submitted by the Republic on May 19, 2015 (CCPR/C/ARG/5).

Presentation

1. The Republic of Argentina is a federal state, composed of 23 Provinces and the Autonomous City of Buenos Aires, each with self-government and jurisdiction powers. The city of Buenos Aires —that hosts almost 3 million inhabitants¹— has an autonomous status since 1996, according the National Constitution amendment of 1994. The amendment extended the legislation and jurisdiction powers, but limited them by law while the city continues to host the National Government², to ensure "*the interests of the State, while the city of Buenos Aires is the capital of the Nation*". This rule was approved at the end of the year 1995 (Law No. 24.588) and demarcated the limits of the City's autonomy.

* Horacio G. A. Corti was designed by Executive decision No. 82/14, with legislative consent adopted by resolution N ° 354/LCABA/13, of February 24th, 2014

¹ According to the 2010 National Census, the population living at the city of Buenos Aires is 2.890.151 persons and 1.150.732 households.

² Article 129 of National Constitution says "*the city of Buenos Aires will have a system of self-government, with faculties of law and jurisdiction, and its head of Government shall be elected directly by the people of the city. A law will guarantee the interests of the State, while the city of Buenos Aires is the nation's capital. In the framework of the provisions of this article, the National Congress will be convened to the inhabitants of the city of Buenos Aires so that, through representatives who choose to that effect, dictate the organizational status of their institutions.*"

2. The Judicial branch of the City is integrated by the Judicial Council, the Superior Tribunal of Justice, and the Public Ministry. The inferior courts are specialized in two subject matters: administrative and tributary litigation (CAYT), and Criminal and minor offenses (PCYF).

3. The Public Ministry is divided in three branches: office of the General Attorney, office of the General Defender, and office of the Child and Incapable Assistant. The office of the General Defender was created to guarantee the access to justice of all the inhabitants, especially those without economic resources, through legal representation at courts. The City's Constitution guarantees free legal representation for all people who need it, both in criminal or minor offenses cases and in administrative litigation against the Government. The Public Ministry has functional autonomy and self-sufficiency within the judiciary.

4. The main function of the office of the General Defender is to guarantee access to justice to people who need it, either in lawsuits against the City's Government — typically summary trials (called *amparos* in the Argentina)— to protect fundamental rights; and in the exercise of the right to defense and protection of due process of law in criminal or minor offense cases when the defendant have not designated a particular attorney.

5. The office of the General Defender, as a local government institution that defends human rights (NHRI), considers relevant to submit this alternative report to the Committee, for the next periodic revision on the Republic of Argentina which will take place at the 117th Session, in order to help the fully and comprehensively evaluation of the compliance with the International Covenant. Methodologically, as it was suggested by the Committee, we followed the evaluation scheme on the list of questions answered by the Government, although we will refer only to the issues at the sphere of competence of the General Defender of the city of Buenos Aires.

Update of the State's response to the list of issues

6. The Human Rights Committee adopted the list of issues prior to the submission of the fifth periodic report of Argentina (LoI) on April 28, 2014 (CCPR/C/ARG/QPR/5)³.

³ The procedure through the *List of Issues* - LoI - was adopted in the context of the procedure established in its 97^o first session, whereby, the response to this list of issues will constitute the report that the State party must be presented under article 40 of the Covenant.

According to this, the Republic of Argentina submitted its periodic report with the response to the list of issues on July 13th, 2015 (CCPR/C/ARG/5).

7. It has to be noted firstly that on December 10th, 2015, a new President took office, and then, several policies at the report were modified or interrupted. Because of this, it would be advisable that at the hearing prior to the adoption of the concluding observations, the Committee asked State on the validity of the policies informed.

8. In this alternative report we will make reference only to problematic issues that we observe in the city of Buenos Aires.

Right to life, prohibition of torture and other cruel, inhuman or degrading treatment or punishment (articles 3, 6 and 7)

9. Paragraph 9 of the list of issues refers to policies implemented to address the high incidence of torture and ill-treatment of persons deprived of liberty in both federal and provincial levels. Also, paragraph 8 requested information on the progress made in establishing a national mechanism for the prevention of torture at the federal level, as well as the creation of independent and well-founded provincial mechanisms.

10. It should be noted that the City of Buenos Aires has not implemented yet a local mechanism for the prevention of torture. Also, in respect to this issue, it concerns us the recent decision of the Government of the City to acquire Tasers guns for the security forces. The request for bids process was judicially questioned in Courts⁴, and it was initially suspended by a cautionary measure. However, at last, the Superior Court of the City (maximum judicial authority in the City) reversed and rejected the lawsuit. With the assistance of the General Defender, this decision was appealed to the Supreme Court of Justice of the Nation, but this Court decided not to intervene in the case which, in fact, confirmed the resolution of the higher court of the city.

11. We are concerned about the intention of the Government of the City to acquire these Tasers guns, and to do so without the prior enactment of a protocol of use. The City now has control over the Federal Police (there was an agreement on the transference signed between the National Government and the City Government on January 5, 2016⁵), one of the largest security forces in the country. Without the enactment of a

⁴ Expte 36.689/0, "Pisoni, Carlos and other c/GCBA s/amparo".

⁵ Agreement between the national Government and the autonomous city of Buenos Aires for the progressive transference of powers and functions of safety in all non-Federal subjects exercised in the city

protocol for use, the Tasers guns will probably lead to police abuse and to use it in lethal mode, as already pointed out the Human Rights Committee in its concluding observations on the United States in the year 2014 (CCPR/C/USA/CO/4) and of Portugal in 2012 (CCPR/C/PRT/CO/4).

12. On account of this, the Committee Against Torture has already pointed out that "*The Committee is concerned that the use of these weapons causes severe pain constituting a form of torture, and that in some cases it may even cause death...*" (CAT/C/PRT/CO/4 para. 14). And also on another occasion the same Committee Against Torture urged the State of Spain to consider abandoning its use by the effects it produces against persons (CAT/C/ESP/CO/5). Based on this standards, we understand that security forces should not have Tasers weapons, and in case they do so, there must be a prior enactment of a Protocol for minimum and appropriate use, and to ensure review against possible abuses.

Treatment of persons deprived of their liberty, independence of the judiciary and fair trials (articles 2, 9, 10 and 14)

(a) Police detentions

13. In the concluding observations for the prior review (CCPR/C/ARG/CO/4), the Committee, in its paragraph 15, expressed "*its concern at the subsistence of legislation giving the police the power to detain persons (including minors) whom they have not apprehended in the act of committing an offence, and to do so without a warrant or subsequent judicial review, for the sole stated purpose of verifying their identity, in violation of, inter alia, the principle of the presumption of innocence (articles 9 and 14 of the Covenant). The State party should take measures to withdraw the power of the police to detain persons when their detention is not related to the commission of an offence and is in violation of the principles set out in article 9 of the Covenant.*"

14. This issue was maintained on the list of issues for the present review (CCPR/C/ARG/QPR/5 para 12) where the Committee requested the State to clarify "*which legislative provisions give police the power to detain persons for the purpose of*

of Buenos Aires", signed by Mr. Mauricio Macri, the President of the Nation, and the head of City Government, Horacio Rodríguez Larreta January 5, 2016 , with the ratification by the legislature of the city by resolution 298/15 of the 18 January 2016.

verifying their identity and what judicial review procedures are available to determine the lawfulness of such detentions".

15. However, the State did not answer this question precisely. Instead, it referred to the power that gives the Criminal Procedural Code of the Nation and of the Provinces to arrest an "*alleged guilty*" defendant in situations of *flagrante delicto*. On the contrary, we understand that the Committee was requesting information about the power to stop people without any reason, just to verify their identity, that certain provincial procedure codes permit, and give rise to arbitrary acts and abuse from the security forces, based on discriminatory and stigmatizing profiles. These detentions violate the presumption of innocence and of non-discrimination.

16. We must add the City of Buenos Aires to the list of provinces that already had in their procedural codes this authorization, because the last interpretation of the code that the Superior Court of Justice made in case "Vera, Lucas Abel s / art. 85 CC ", decided 23th December, 2015⁶. In that precedent, the superior Court of the city, by majority, decided that the Federal Police implicitly has among its powers —to crime prevention and to ensure order and public safety— the faculty to request identification to any person, even without any suspicion of any crime or contravention. In addition, he understood that this "*affection to the right of circulation*" is different from an arrest.

17. The office of the General Defender of the city, through the campaign "*Had the police stopped you?*" identified an increment on police violence against stigmatized populations. Just after the judicial decision, there were several cases of institutional violence that were showed on social networks, which implied discriminatory and arbitrary detentions that constitute various forms of police harassment, based on prejudices and racist stereotypes, gender and class⁷.

18. The judicial decision was appealed to the National Supreme Court, but anyway, the security forces have used these powers immediately. Moreover, there is no protocol to

⁶ TSJ, Expte. n° 11835/15 "Ministerio Público —Fiscalía de Cámara Sur de la CABA— s/ queja por recurso de inconstitucionalidad denegado en: 'Vera, Lucas Abel s/ infr. art. 85, CC'", decision of 12/32/15.

⁷ One paradigmatic case on racist selectivity was the arrest of the journalist from the Government agency of news Telam, and a communicator member of the mapuche indigenous tribe, Carlos Catrileo, available at <https://youtu.be/pRZ4794hHzQ>. Another case was the arrest and seizure of workers as they leaving their workplace, in the neighborhood of Flores, <https://youtu.be/TqYj5zuCgJc>, where the police officers supported the last military dictatorship. Another one was the arrest with handcuffs to a community radio journalist, <https://youtu.be/70wv10BCJi4>; and also the detention to a reporter of the newspaper Pagina/12 while she was gathering information, published in the newspaper Página/12 of the 2016-05-03, available at <http://www.pagina12.com.ar/diario/sociedad/subnotas/298378-77574-2016-05-03.html>

“randomly” arrest persons in public, without a methodology to obtain and systematize data that allows the accountability.

(b) Mental health law

19. In paragraph 14 of the list of issues (CCPR/C/ARG/QPR/5), the Committee requested information on the steps taken to implement the National Mental Health Act No. 26.657, and on the measures taken to prevent and investigate the ill-treatment of detainees in psychiatric facilities. The State in its report stated that the Act was implemented by Executive Order No. 603/2013.

20. However, the Act was not implemented in the City of Buenos Aires. The National Act established as enforcement authority to the National Ministry of Health, and at the same time, it should be created a new independent, intersectional and interdisciplinary body, at the scope of the Public Ministry of the Judicial branch, denominated "Control Body". Its function is to promote and protect mental health patient's human rights (article 38 of the Act), and guarantee effective respect for the dignity and the legal capacity of persons with mental disorder. However this body was not created at the local level as far. This omission affects the right to any person involuntarily institutionalized to be legally assisted and represented from the same moment of institutionalization, and prevents the Office of the General Defender from exercising the powers established by the National Act.

(c) Access to legal assistance

21. Paragraph 16th of the list of issues (CCPR/C/ARG/QPR/5) request information about the access to legal assistance and medical care of detainees, both at federal and provincial levels. In the case of the city of Buenos Aires, there are two cases of affection of this right.

22. The first case occurs in relation to forced evictions in criminal trespass investigations. Article 335 of City's criminal procedure code states that "*in the case of land seizure, at any stage of the process and even before setting for trial, the Prosecutor or the judge, at the request of the injured party, may provisionally order the immediate reinstatement of the property ownership, when the invoked right was*

plausible. A bond may be set if it were considered necessary." Based on this rule, just with a single complaint about the seizure of housing, the public prosecutors requested the forced eviction, depriving the occupants their right to be heard. The occupants, in this way, cannot access to a technical defense from the beginning of the process. They only could do it once the prosecutor notified them the case, what occurs after the eviction. Statistically, the vast majority of cases are closed by the Prosecutor after the eviction, preventing the occupants to exercise its criminal defense at all⁸.

23. The second case involves an affectation to the right to be heard and to choose a competent counselor in the class action on the pollution of the Matanza-Riachuelo River. In particular, the especially affected persons are poor people who live in informal settlements in the City and who have to be relocated. The National Supreme Court, on July 8th, 2008 decided the case "Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios", Expte. M 1569 XL", and established —among other things— the eviction and relocation of many socially and economically marginalized families' houses, of people living in villages and slums located in the city of Buenos Aires. The Supreme Court did not include the active participation of affected persons, and established a particular *ad hoc* system for the execution of the sentence. Also, it was established the creation of a collective body —integrated with the Ombudsman and various NGOs— and it was delegated the execution to a first stage federal judges. These federal judges have denied the participation of the persons affected by the evictions and relocations, because they considered that the persons lack legal standing. Those persons were represented by the Office of the General Defender. In this way, the judges have deprived residents their right to participation in the relocation of housing process and also their right to choose a competent counselor⁹. The office of the General Defender of the city of Buenos Aires has participate alongside this people in local neighborhood's working groups. These sentences affect, in addition and in a very burdensome way, the right to access to a legal assistance in the proximity to the courts. The office of the General Defender guarantees the proximity of their lawyers to the persons, and the possibility of take care of all the necessary tasks in the context of the process. To overcome such a circumstance, we signed an agreement with the National office of the

⁸ See the report " the Right of Defense in the case of land seizure in the city of Buenos Aires: an empirical study", in Office of General Defender Review, no. 1, year 1, March 2011, available at <http://www.defensoria.jusbaires.gov.ar/attachments/article/2341/Revista%20Institucional%20MPD%20CABA.pdf> "

⁹ Among several decisions, see National Supreme Court of Justice, in the Expte. FSM 52000001/2013/14/1/kh1, "ACUMAR s / urbanization of villas y asentamientos", decided /02/16/16.

General Defender, which stated a joint action of both defenders (the Federal and local) as the only alternative to fully exercise our duties, although federal judges are still reluctant to allow such participation.

(d) Autonomy of the public defense

24. Paragraph 21st of the list of issues (CCPR/C/ARG/QPR/5), request the State to report the steps taken to ensure the full operational and budgetary independence of the offices of the public defender from the offices of the attorneys-general in all provinces of the State party. Also requested information on the steps taken to provide the offices of the public defender, at all levels of the State, with the necessary resources to provide effective service to persons who are placed under arrest from the time of their arrest onward.

25. In the City of Buenos Aires, the situation is the following. The Constitution of the City created a Public Ministry as part of the Judicial branch, defining it as an autonomous body with functional independence, composed of three distinct branches: Office of the Attorney General, Office of the General Defender, and Office of the Child and Incapable Assistant. The Public Ministry primary function is to promote the performance of Justice in defense of law and the general interest of society, guarantee the provision of Justice and seek the satisfaction of social interest.

26. In addition to the Courts in subject matters as Administrative law and Criminal and minor offenses law, there is a discussion on the transfer of other subject matters as criminal, civil, commercial, labor and family. Today, the causes of this matters in the city of Buenos Aires —that ordinarily are provincial jurisdiction— are set in National courts at the Federal Capital (which depend organically and economically from the Federal Government), as it was before the autonomy of the city. The transfer will involve the creation of these courts in the city of Buenos Aires.

27. The significant increment in the structure of the Buenos Aires judicial branch, generated by the mentioned transfer of courts, should enlarge the current structure of the Office of the General Defender in order to be able to fulfill its constitutional responsibilities and facilitate access to justice for the most disadvantaged persons. This aspect not only includes the creation of new defense offices that permit to guarantee the

provision of specialized and efficient public service to the various jurisdictions, but that it must also maintain budgetary and functional balance in relation to the rest of the structure of the public prosecutor's Office.

28. Right now, according to Transfer of Criminal Offenses Act N ° 26.702, the Office of the General Defender must face higher expenses to exercise its constitutional and legal duties, when the City of Buenos Aires accepts the transfer. The failure to comply with the conditions described above will deepen the current organic and budgetary structures imbalance between the office of the General Prosecutor and the Office of the General Defender.

29. It is important to point out, in that connection, that the budget for the year 2016 of the public prosecutor's Office amounts to the sum of \$1.028.451.251 (pesos a thousand twenty-eight million four hundred fifty and a thousand two hundred and fifty-one) while that of the general defense's Office reaches only the \$793.358.758 (pesos seven hundred ninety three million three hundred and eight thousand seven hundred fifty-eight). This budgetary difference has its correlate in the structures, as long as the Prosecutor Office have a total of 51 (fifty-one) public prosecutors who act before the first and second stage of two local subject matters courts, and the Defense Office is integrated by only 34 (thirty-four) public defenders who act to the same courts. This imbalance highlights the inequality of arms for the defense of civil and political rights of our assisted persons.

Freedom of opinion and expression and the right to privacy (articles 17 and 19)

30. In paragraph 23 of the list of issues prior to submission (CCPR/C/ARG/QPR/5) the Committee asked about measures to protect the safety of journalists in the exercise of their profession. The Government had informed (CCPR/C/ARG/5 number 200) that it had developed an action protocol for the security forces in connection with public demonstrations. Moreover, this protocol expressly states that law enforcement officials must respect, protect and safeguard the work of journalists; and that no one working as a journalist may be harassed, detained, moved or undergo any other restriction of their rights by the mere fact of exercising their profession during the conduct of public demonstrations. At the same time, according to the protocol police officers must refrain from taking any action to prevent the recording of images or the gathering of evidence

in such circumstances. According to the State, this protocol "*reflects the commitment of the National Government not to repress public demonstration or mobilizations*".

31. Unfortunately, the current Government killed the existing protocol and issued a new repressive protocol. The operating procedures do not guarantee neither the rights of journalists or of those who participate of public demonstrations. The new action protocol was issued February 17th 2016. According to the decision of the Ministry of Security, during public demonstrations some criminal offenses are likely to occur. Particularly, it is highly probable that traffic gets interrupted; this is viewed in a very negative way by the current government. Thus, in such cases, police officers must act immediately. First, law enforcements officials must identify those protestors that are interrupting traffic and proceed to force them to change their attitude. In every case a prosecutor must be notified. This actually means that any person involved in any public demonstrations will have to follow law enforcements orders and in no case demonstrations can occur in the streets if it means to block traffic altogether.

32. Regarding journalists, the protocol states that the police officers must ensure "an adequate zone" where journalists, communicators and crew members will be located. Moreover, it asserts the law enforcements officials involved of the security of every demonstration will take pictures and film the rally. This footage will be available in case is needed in any judicial procedure or to evaluate the performance of those officials involved in the security procedure.

33. This protocol is not consistent with international human rights standards. The United Nations Human Rights Council has reminded States that [they] "*have the responsibility, also in the context of peaceful demonstrations, to promote and protect human rights and prevent such rights are violated, and avoid, in particular extrajudicial, summary or arbitrary executions, arrests and arbitrary detentions, enforced disappearances and torture and other cruel, inhuman or degrading treatment, and calls upon the States to prevent at all times the abuse of criminal and civil procedures or to threaten with actions of this kind*" (A/HRC/25/L.20, 24 March 2014, paragraph 2). The existing protocol allows the criminalization of every demonstrator participating in a protest, in any circumstance, which is contrary to the statement made by the Human Rights Council.

34. Furthermore, the "*adequate zone*" where journalists must work from represents a clear violation of the right to freedom of expression and represents a clear restriction to journalists work. In this regard, the Human Rights Council has recognized "*the*

importance of documenting violations and abuses of human rights in the context of peaceful demonstration, and the role of NHRIs in human rights, civil society, including non-governmental organizations, journalists and other media professionals, internet users and advocates of rights can play in this respect " (A/HRC/25/L.20 (, 24 March 2014, paragraph 18).

35. One important thing to take into consideration is that most public demonstrations occur in the City of Buenos Aires, especially due to its importance being the Nation's Capital. The action protocol was enacted by the Federal Government, thus local states were required to ratify this decision. In this regard, the General Prosecutor of the city issued the decision 25/FG/16, March 31, 2016 by which it adopted some of the procedures established in the federal protocol. The local protocol states that for each demonstration you must request authorization from the Administration. Moreover, you any persons must wait to have this authorization in order to be able to protest. At the same time, the decision states that street occupation by protesters must be considered a a criminal offense. Thus, the police must act immediately.

36. The Special Rapporteur on the rights to freedom of peaceful assembly and Association, in relation to the right to peaceful assembly, asserts that said that "*participants should be able to use squares, roads and public streets for peaceful meetings, either static or in motion*", and - quoting the Inter-American Human Rights Commission- assets that "*State institutions have the duty to design plans and operating procedures to facilitate the exercise of the right of Assembly*" ", which may involve a rearrangement of the movement of pedestrians and vehicles in certain area." And added "*a meeting cause only a temporary obstruction of traffic, i.e. a temporary interference in the rights and activities of others*". (Special Rapporteur on the rights to freedom of peaceful assembly and Association, A/HRC/23/39, 24/04/13, paragraph 66)

37. As far as the need for authorization before protesting the special rapporteur clearly asserts that [no one] "*should be forced to have an authorization to gather peacefully*". And that "*the exercise of the right to freedom of peaceful assembly must be subject, at most, to a procedure of prior notification which obeys to the need that the State authorities facilitate the exercise of the right to peaceful assembly and take measures to protect security and public order and the rights and freedoms of theirs. ... The most notable exception of this principle is that of spontaneous peaceful meetings...*" also said that "*this notification should occur with a maximum of, for example, 48 hours prior to the meeting*". And that "*should be issued without delay a receipt proving that the*

notification has been presented in due time. If the organisers have not received any communication from the authority before the time that is being considered to point out the meeting, be taken that this does not present any problem". (Special Rapporteur on the rights to freedom of peaceful assembly and Association, A/HRC/23/39, 24/04/13, paragraphs 51, 52 and 58). The Protocol enacted by the Prosecutor of City of Buenos Aires specifies exactly the opposite of what was recommended by the Special Rapporteur.

38. For all this reasons, we can say that this Protocol is openly violates international human rights standards on the right to peaceful assembly and freedom of expression.

The Office of the General Defender understands that issues just present undermine the validity of the International Covenant on Civil and Political Rights in the city of Buenos Aires. Hoping that this information will be useful for expert members of the Human Rights Committee, I take this opportunity to greet them and express that the Office is available to expand any relevant information.

Horacio G. A. Corti
General Defender
CABA