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**Поощрение и защита всех прав человека, гражданских, политических, экономических, социальных и культурных прав, включая право на развитие**

# Доклад Рабочей группы по произвольным задержаниям о ее визите в Аргентину

## Записка секретариата

По приглашению правительства Рабочая группа по произвольным задержаниям посетила Аргентину с 8 по 18 мая 2017 года.

Секретариат имеет честь препроводить Совету по правам человека доклад об этом визите, в котором содержатся выводы, заключения и рекомендации Рабочей группы, касающиеся соответствующих институциональных и правовых рамок и лишения свободы в контексте системы уголовного правосудия, психосоциальных расстройств и миграции.

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# Report of the Working Group on Arbitrary Detention on its visit to Argentina from 8 to 18 May 2017*

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* Circulated in the language of submission and in Spanish only.

# I. Introduction

1. At the invitation of the Government, the Working Group on Arbitrary Detention visited Argentina from 8 to 18 May 2017. The Working Group was represented by Sètondji Roland Adjovi (Benin) and Elina Steinerte (Latvia, Vice-Chair) and accompanied by staff from the Office of the United Nations High Commissioner for Human Rights. At the outset of this report, the Working Group wishes to thank the United Nations Resident Coordinator and the country team in Argentina for their support and cooperation.

2. The Working Group extends its gratitude and appreciation to the Government of Argentina for inviting it to undertake this country visit and for its cooperation before, during and after the visit. The Working Group intends to continue the constructive dialogue with the Government on the issues set out in the present report.

3. The Working Group also recognizes the contribution of numerous stakeholders from civil society who shared their perspectives on the arbitrary deprivation of liberty in Argentina, particularly representatives from non-governmental organizations, indigenous communities, human rights defenders, lawyers, academics and parliamentarians, as well as individuals who had been or are currently deprived of their liberty and their relatives.

4. During its 10-day visit, the Working Group visited the City of Buenos Aires and the provinces of Buenos Aires, Chubut and Jujuy. The delegation met with officials from the Ministry of Foreign Affairs, the Ministry of Justice and Human Rights, including the Secretariat for Human Rights and Cultural Pluralism, the Ministry of Security, the National Migration Agency, the National Public Prosecutor's Office, the National Public Defender's Office, the Office of the National Ombudsperson, the National Penitentiary Attorney[1] and members of the legislature, as well as with various authorities in the City of Buenos Aires and the provinces of Buenos Aires, Chubut and Jujuy.

5. The Working Group visited 20 places of deprivation of liberty at both the federal and provincial levels, including penitentiary facilities, police stations, juvenile centres and mental health institutions (see annex I). It interviewed over 150 persons deprived of their liberty. Late during the mission, the Working Group was informed of alleged critical situations in the care of elderly persons but was not able to visit any relevant centres. The Working Group invites stakeholders to submit to it information relevant to the alleged arbitrary deprivation of liberty of elderly persons.

6. The Working Group received the cooperation of the authorities, including unimpeded access to the facilities and the ability to interview confidentially persons deprived of their liberty. It shared its preliminary findings with the Government on 18 May 2017.

7. The Working Group acknowledges the positive measures and good practices designed and introduced by the Government of Argentina in response to its preliminary findings and will reflect upon these in appropriate sections of the present report.

# II. Overview of the institutional and legal framework

## A. Constitutional and institutional frameworks

8. Argentina has a division of competencies between the federal Government, 23 provinces and the autonomous City of Buenos Aires, each with its own constitution and laws and executive, legislative and judicial authorities.

9. Article 75 of the Constitution of Argentina gives international human rights treaties precedence over national and provincial laws, providing for their direct application by the authorities and by domestic courts. It is thus the responsibility of the federal Government to ensure that its international legal obligations are complied with at all levels within the

[1] Also referred to as the Federal Penitentiary Ombudsperson.

territory of Argentina. The federal nature of the country should not become an obstacle to the effective enforcement of the international obligations undertaken by the country.

10. The judicial system is organized on the basis of federal and provincial courts, with federal courts having jurisdiction over federal offences. Judgments are made public. The accused is entitled to either a private defence counsel, or one appointed by the court, and has the right to submit exculpatory evidence and call witnesses for the defence. Criminal procedure is governed by provincial law and not federal legislation; as a result, it varies from one province to another.

11. Responsibility for enforcing the law and maintaining public security lies with various institutions. The federal police, the Gendarmería Nacional, and the coastguard service report to the Ministry of Justice, Security and Human Rights. Provincial police forces are administered by provincial executive bodies.

12. During its visit, the Working Group learned that no federal Ombudsperson[2] has been appointed since 2009. In 2010, the Deputy Ombudsperson took charge until 2013, when his mandate expired. Since then, the Under-Secretary-General of the Office of the Ombudsperson has been in charge for the interim, but without a mandate to exercise the full range of the functions of the Ombudsperson in terms of the promotion and protection of human rights. Federal law requires the appointment of the Ombudsperson to be made through a bicameral commission of the National Congress, which has yet to select a candidate.

13. Despite the fact that three shortlisted candidates for the post presented their proposals in November 2017, the appointment of the Ombudsperson is still pending. The Working Group notes that this situation has an adverse impact on the overall situation of human rights in Argentina. The Working Group strongly urges the Argentine authorities to appoint the Ombudsperson as a matter of priority.

14. During the meeting with the Federal Penitentiary Attorney, the Working Group, on the one hand, learned that the Office of the Penitentiary Attorney had faced a number of instances where it had been denied access to places of deprivation of liberty and in some instances, had had to resort to litigation to ensure unimpeded access. On the other hand, the Working Group was informed that no registered complaints concerning limitation of access to places of deprivation of liberty had been made by the Office of the Penitentiary Attorney to the Secretariat for Human Rights.

15. Such incidents, even if they are not of widespread character, have an adverse impact upon the ability of the Office of the Penitentiary Attorney to discharge its mandate effectively. The Working Group encourages the Office of the Penitentiary Attorney to register all instances of impeded access with the relevant institutions.

16. The Working Group commends the adoption on 7 January 2013 of Law 26827 on the national prevention mechanism system, following the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It also welcomes the appointment of members of the national preventive mechanism in December 2017, in accordance with articles 3 and 17 of the Optional Protocol.

17. While the Working Group understands that the City of Buenos Aires and the provinces of Chaco, Mendoza, Misiones, Rio Negro, Salta, Tucuman and Corrientes have designated their respective prevention mechanisms, other provinces have not done so, or are in the process of constituting them. The Working Group recalls that regular independent oversight over all places of deprivation of liberty plays a significant role in reducing instances of arbitrary detention. The Argentine authorities should increase their efforts to ensure functioning national prevention mechanisms in accordance with the provisions of the Optional Protocol at local (provincial) level.

18. The national preventive mechanism system must be comprised of entities at all levels that are fully independent of the executive, properly funded and able to discharge their mandate effectively by having unfettered access to a wide range of places of deprivation of liberty. The requisite authorities should enter into a constructive dialogue with the designated

[2] In Spanish, Defensor del Pueblo de la Nación.

national preventive mechanisms about the implementation of the present recommendations. However, the effective operation of national preventive mechanisms must not be construed as preventing other independent bodies, including civil society, from carrying out monitoring visits to a wide range of places of deprivation of liberty.

### B. International human rights obligations

19. Argentina is party to multiple international human rights instruments, namely the International Covenant on Civil and Political Rights (and its two Optional Protocols), the Convention Relating to the Status of Refugees (and its Optional Protocol), the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (and its Optional Protocol), the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child (and its two Optional Protocols), the Convention on the Rights of Persons with Disabilities and the International Covenant on Economic, Social and Cultural Rights.

20. The State is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity or the Convention relating to the Status of Stateless Persons. Furthermore, ratification by Argentina of the International Covenant on Civil and Political Rights was subject to the understanding that no inhabitant of the nation might be punished without a previous trial based on a law enacted before the act that gave rise to the process.[3]

21. Argentina is a member of the Organization of American States. In 1984, it ratified the American Convention on Human Rights and has accepted the jurisdiction of the Inter-American Court on Human Rights. In February 2017, however, the National Supreme Court of Justice of Argentina issued a ruling stating that the decisions of the Inter-American Court could not produce automatic annulation of national sentences issued by the Supreme Court.[4] The Working Group is concerned that such an interpretation negatively affects the fulfilment of the country's international obligations.

22. During the visit, the authorities expressed to the Working Group their commitment to consider aligning legislation with international human rights standards.

## III. Positive measures

23. The Working Group acknowledges and commends the four-year plan for the improvement of the justice system, "Justice 2020", launched by the Ministry of Justice and Human Rights in May 2016. The Programme features an important human rights component and is defined as a space for institutional and citizen dialogue with the objective of elaborating, implementing and evaluating policies to build, together with society, a justice system that generates socially relevant results and allows the fast resolution of conflicts. Justice 2020 aims to serve as a tool for achieving Sustainable Development Goal 16 of the 2030 Agenda for Sustainable Development through building strong and reliable institutions that guarantee peace and access to justice for all. The programme has seven thematic axes or areas of work: institutions, criminal justice, civil justice, access to justice, human rights, public management and justice and community.

24. Justice 2020 has already produced outcomes, such as the adoption of a law unifying the instruction and criminal procedures, and a law for the strengthening of the federal

[3] Article 18 of the Constitution.

[4] Response to the case of *Fontevecchia and D'Amico v. Argentina*, 29 November 2011 (No. 238), available from www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-ministerio-relaciones-exteriores-culto-informe-sentencia-dictada-caso-fontevecchia-damico-vs-argentina-corte-interamericana-derechos-humanos-fa17000003-2017-02-14/123456789-300-0007-1ots-eupmocsollaf.

criminal courts and "unipersonal" trials (trials presided over by a single judge without a jury). Further legal reforms are under way on the Code of Criminal Procedure, Civil Procedure and Commerce and on the law on international commercial arbitration.

# IV. Main findings

25. In determining whether the information provided, including from persons interviewed during the visit, raised issues regarding the arbitrary deprivation of liberty, the Working Group considered the five categories of arbitrary deprivation of liberty outlined in its methods of work (see A/HRC/36/38, para. 8).

## A. Deprivation of liberty in the context of the criminal justice system

### 1. Wide powers of the police to arrest

26. The Working Group learned of the wide powers of the police to deprive persons of liberty based on either the suspicion of the commission of a crime or for verification of identification. While the applicable legislation requires that the police do a rigorous assessment when deciding upon the need to arrest someone on the suspicion of the commission of a crime and strictly limits the duration of detention,[5] that is often not implemented in practice. The possibility of arresting someone on the basis of a suspicion of a crime being carried out is widely used in a discriminatory and subjective manner, namely towards those in situations of vulnerability, such as street children, members and leaders of indigenous communities, migrants, lesbian, gay, bisexual, transgender and intersex persons and others.

27. The Working Group observed the same in relation to the inherent powers of the police to "withhold" persons in order to carry out identity checks. The Working Group, however, notes that the existing legislation does not oblige every person to carry an identification document, which is at odds with the inherent powers of the police to request anyone to prove their identity.

28. In relation to the implementation of this police power, the Working Group was informed that the process of verifying identity would normally be very short, but could take up to 12 hours. However, the Working Group observed that while such instances of detention in practice can be as short as a few minutes, they can also be as long as overnight and even last over a whole weekend. Furthermore, such detention does not appear to be considered by the authorities as deprivation of liberty but rather only as "withholding of a person", which is among the necessary police powers, including for "population control". The Working Group recalls that the question of whether a particular situation constitutes deprivation of liberty is first and foremost a question of fact: if a person is unable to leave a place at will, the situation constitutes deprivation of liberty and all the safeguards that are applicable to guard against arbitrary detentions and possible ill-treatment must be enforced and compensation granted to those whose right to liberty has been violated.

29. While the Working Group welcomes the recent efforts of the authorities to introduce human rights training into the curriculum of police officers,[6] it shares the concern of the Human Rights Committee about this police practice and the regulation under which it is permitted.[7]

### 2. The excessive use of pretrial detention

30. According to National Law No. 24.390, promulgated on 21 November 1994, pretrial detention must be an exceptional measure. The application of such an exceptional measure

[5] See, for example, Autonomous City of Buenos Aires, Law 5688 and Santa Cruz Province, Law 3523, both adopted at the end of 2016.

[6] The Working Group was informed that in 2017, 16 human rights training for police agents took place in the province of Buenos Aires.

[7] See CCPR/C/ARG/CO/5, para 17.

must be determined in each case, after the consideration of relevant factors, such as the risk of absconding and the risk of interference with the investigation, as well as the complexity of the case. Depending on these factors, the prosecutor may request and the judge may impose a reasonable duration of pretrial detention, which in principle must not exceed two years and, in cases of multiple charges or due to their complex nature, three years.

31. The Working Group found that this legal framework is not reflected in the practice of the judiciary, which tends to grant most of the requests for pretrial detention. As a result, pretrial detainees constitute about 60 per cent of those detained within the criminal justice system in Argentina. In some institutions visited by the Working Group, that figure was even higher. For instance, at the time of the visit and according to the data provided by the officials of the institution, 75 per cent of the detainees in the women's federal penitentiary complex No. IV in Ezeiza were in pretrial detention.

32. Furthermore, the Working Group observed that the two-year limit for pretrial detention, which is an exceptionally long period in itself, was often exceeded and it encountered persons who had spent four to six years in pretrial detention. The Working Group was informed of other cases where individuals had allegedly spent as long as 10 or even 15 years in pretrial detention.

33. Moreover, while the separation of pretrial detainees and convicted persons is envisaged in law, the Working Group observed that separation was not implemented in many of the facilities visited, owing to lack of space, and that pretrial detainees were subjected to the same regime as those convicted. The Working Group was alarmed to learn that pretrial detainees are routinely required to follow the same regime imposed on sentenced persons. Such a transformation of the nature of pretrial detention into a de facto punishment without any conviction is in violation of article 10 (2) (a) of the International Covenant on Civil and Political Rights.

34. The Working Group is concerned about lengthy pretrial detention and the large percentage of pretrial detainees in the prison population, and notes that there is an urgent need to revise this practice in Argentina at both the federal and provincial levels. In that context, the Working Group joins the Human Rights Committee calling for Argentina to review the regulations governing pretrial detention.[8]

35. The Working Group notes the positive inroads made in provinces, such as Chubut, to curtail the excessive use of pretrial detention. It encourages the respective authorities to continue with their efforts. The Working Group also acknowledges the guidelines and instructions introduced by the General Prosecutor of the province of Jujuy in May 2017 to provincial prosecutors regarding the exceptionality of pretrial detention and the use of alternatives to detention. Furthermore, it welcomes the information provided by Argentina regarding recent legislative efforts at the federal level aimed at reducing delays in the appellate courts and, as a consequence, the duration of pretrial detention.[9] However, it is important that those legal frameworks are complied with to make the change effective.

### 3. Availability and application of alternatives to detention

36. The Working Group notes as positive that the legislation in Argentina, at both the federal level and in 13 provinces, provides for alternatives to detention for both pretrial and post-trial stages. [10] It also welcomes initiatives related to the implementation and federalization of measures on alternatives to detention, undertaken as part of the Justice 2020 programme. It encourages the efforts to review the system of pretrial detention in accordance with article 9 of the International Covenant on Civil and Political Rights.

[8] See CCPR/C/ARG/CO/5, paras 19–20.

[9] See Law 27.384 of 13 September 2017.

[10] The Working Group was informed that 13 provinces have joined the programme of assistance to persons under electronic surveillance, including San Juan, Jujuy, Mendoza, Tucumán, Salta, Tierra del Fuego, Santa Fe, Misiones, La Rioja and the Autonomous City of Buenos Aires. See resolutions 1379/15 and 86/16 of the Ministry of Justice and Human Rights.

37. While the instances of using alternatives to detention, such as electronic tagging, are slowly rising,[11] the high percentage of those in pretrial detention continues, which largely results from the very restrictive possibilities of using available alternatives to detention in practice. For example, the Working Group learned that in the province of Buenos Aires, the application of alternatives to detention since the amendments to law 11.922 on the Criminal Procedure Code were adopted is only possible in three instances: for persons over the age of 70; for pregnant and nursing mothers and women with childcare responsibilities; and for people with serious health conditions. These limited options for cases when alternatives to detention can be applied render the alternatives to detention ineffective in practice. Moreover, while the law does allow judges discretion to grant alternatives to detention in other exceptional cases, that discretion is very narrow and, in fact, extremely rarely used in practice.

38. During its visit to some police stations, the Working Group found that many female pretrial detainees had children staying with them, including some under the age of 5, but that this had no impact on their pretrial detention. Despite the information provided by the authorities that the cost of implementing the "Programme for assistance to persons under electronic surveillance" is fully covered by the national and provincial governments, as appropriate, some detainees told the Working Group that they could only benefit from electronic tagging if they were able to pay for the device themselves. The Working Group finds that such a practice renders the use of alternatives to detention ineffective and de facto discriminates against those who are not in a financial position to cover the costs of measures such as electronic tagging. The Working Group wishes to emphasize that the implementation of alternatives to detention is the responsibility of the government at both the federal and provincial levels and that this implementation must be effective. Alternatives to detention must be available in practice to everyone, irrespective of whether they are able to pay for them.

### 4. Deprivation of liberty at police stations

39. The Working Group is alarmed about the use of police stations to hold detainees for prolonged periods. This stems mainly from the excessive use of pretrial detention across the country and the lack of space in pretrial detention facilities. During its on-site visits, the Working Group was able to observe the widespread nature of this phenomenon, with a large majority of the detainees being held at police stations at the pretrial stage for prolonged periods of time. The periods of their detention ranged from three days to five months and were undertaken in substandard conditions, in facilities which are designed to hold people only for short periods. Furthermore, persons in police custody scarcely received any information regarding the reasons for their arrest and their rights and most detainees complained of difficulties in obtaining effective legal assistance. Police officers were overburdened with the task of looking after the detainees on a long-term basis without appropriate facilities and without having received adequate training in the custody and handling of persons deprived of liberty.

40. While its mandate does not focus on conditions of detention or the treatment of prisoners per se, the Working Group must consider to what extent detention conditions can negatively affect the ability of detainees to prepare their defence and their chances of a fair trial. Holding pretrial detainees in facilities entirely unsuited for such a purpose, such as police stations that are not equipped with the infrastructure and services to ensure decent conditions of detention, poses severe impediments to the ability of the detainees to prepare for their defence. The Working Group urges the respective authorities to cease the holding of pretrial detainees in facilities not suited to such a purpose.

41. In the province of Chubut, the Working Group observed that some of those already sentenced were being held in police stations owing to the lack of space in penitentiary institutions. The Working Group urges the authorities of Chubut to step up their efforts to establish the provincial penitentiary system, including appropriate facilities with dedicated

[11] The Working Group was informed that as of August 2017, electronic tracking devices were used in over 1,560 instances. However the Government informed the Working Group that the Ministry of Justice and Human Rights provided 2,330 electronic tracking devices for use in the provinces at the request of local courts.

services for the detainees and professional penitentiary personnel, and to cease holding convicted persons at police stations for the purposes of serving their sentences. The police stations are not equipped for this purpose and police personnel are neither suited nor trained to exercise the functions of prison guards.

42. In that context, the Working Group reiterates and shares the concern expressed by the Human Rights Committee about the high levels of overcrowding in the prison system, leading to the use of police stations as permanent places of detention.[12] It therefore welcomes the recent adoption of the initiative to reform the infrastructure of the Federal Penitentiary Service, allowing for the creation of 18,000 additional places throughout the country during the period 2017 to 2023. The Working Group urges the authorities to take prompt and concrete steps to achieve that goal but wishes to remind the Government that this initiative will only have any tangible effect if other reforms, most notably the continued expansion of the use of alternatives to detention and ceasing the widespread use of pretrial detention, take place as well. In that regard, the Working Group recognizes the broadening of the scope of the programme of assistance for persons under electronic surveillance, enabling 80 per cent of the national territory to be covered.[13] The Working Group encourages the respective authorities to ensure without delay the extension of the electronic surveillance to the whole of the country.

### 5. Use of isolation and force in places of deprivation of liberty

43. The Working Group was concerned to observe that in some institutions there was no strict observance of the requisite procedures regarding the imposition of disciplinary sanctions, isolation and the use of force by guards. The Working Group was particularly alarmed by the reported use of isolation or punishment cells in some facilities, which was not preceded by any form of disciplinary adjudication process.

44. During an on-site visit, the Working Group found a small cell without windows and only bars for the door. The administration explained that this was not a punishment cell and that at times it was necessary to put inmates there when disturbances between inmates had taken place, in order to ensure their protection. However, the Working Group received detailed and consistent statements from those detained that being placed in the cell is in fact used as a punishment and even intimidation against those considered "disobedient". The Working Group was informed that such placements usually take place in the middle of the night, when large numbers of officers wearing full protective gear suddenly burst into a cell, drag inmates from their beds, at times naked, using considerable physical force and not giving inmates the option to comply peacefully and carry the "guilty" inmate to the small cell, where he or she would often be injected with a sedative to put him or her to sleep.

45. The Working Group is alarmed by these testimonies and reminds the authorities that any use of disciplinary punishment must be preceded by an adjudication process, at which the person in question has the right to defend him or herself, as well as the right to appeal against the punishment imposed. The situation described to the Working Group is akin to further deprivation of liberty of those who are already deprived of liberty, through the placement in a de facto isolation cell. It is paramount that any such further deprivation of liberty is accompanied by safeguards to ensure that it is not arbitrary and that effective, accessible and independent complaints mechanisms are in place to provide redress.

46. The Working Group notes the establishment of several mechanisms for receiving complaints regarding institutional violence and monitoring it throughout the penitentiary

[12] See CCPR/C/ARG/CO/5, para. 23.

[13] The Working Group was informed by the authorities that by means of resolution No. 86/16 of the Ministry of Justice and Human Rights, the scope of the programme of assistance for persons under electronic surveillance was broadened in terms of coverage of the population and of geographic areas. The programme is now applicable to adults who have been sentenced or prosecuted by the national, federal or provincial judiciary and are eligible for house arrest. The adoption of resolution No. 86/16 and subsequent signature of 19 cooperation agreements with provincial governments has enabled the authorities to cover 80 per cent of the national territory.

system.[14] It also commends other measures reportedly undertaken in several provinces, such as the approval of the "Investigation guide on acts of torture in confinement" in the province of Buenos Aires and the training on human rights and the United Nations Standard Minimum Rules for the Treatment of Prisoners conducted for the penitentiary staff in the provinces of Buenos Aires, Catamarca, Jujuy, Salta and Santiago del Estero. The Working Group encourages the authorities to ensure that such training is delivered on a systematic basis in every province.

47. While the Working Group commends the above-mentioned efforts, it notes with concern the absence of a unified registration system for alleged acts of violence and for victims of torture and ill-treatment at the federal level and joins the call of the Human Rights Committee for concrete steps to be taken to establish and implement such a system.[15]

### 6. Juveniles in conflict with the law

48. The current juvenile justice system in Argentina sets the age of criminal responsibility at 16 and the Working Group was informed that nobody below the age of 16 could be detained. The Working Group recalls that the deprivation of liberty of anyone under the age of 18 must be a measure of last resort and must always fully comply with the safeguards of article 37 of the Convention on the Rights of the Child, irrespective of whether it occurs in the criminal justice setting or other settings, such as health care or the detention of migrants.

49. The Working Group observed that the exceptionality of deprivation of liberty in relation to juveniles was not fully enforced in Argentina. The delegation learned of instances of individuals below the age of 16, including one who was 8 years old, being deprived of liberty and allegedly ill-treated by law enforcement agents. The shortcomings related to alternatives to detention are more serious when it comes to juveniles and the Working Group is further concerned about the limited possibilities for alternatives to detention in relation to children.

50. The Working Group also expresses its concern at the allegations of harassment and acts of violence committed by the police and other law enforcement officers against children considered to be from vulnerable backgrounds, such as children living in low-income areas or on the streets. Such acts were reported to have occurred in several locations, including in the City of Buenos Aires and the provinces of Buenos Aires and Rosario.

51. The Working Group further observed that juveniles are held in so-called "reception centres", which are often a transitional location towards detention in the criminal justice system once they reach the age of 18. The conditions of deprivation of liberty in such places were entirely inadequate, with limited provision for education, vocational training and meaningful activities, which adversely impacts the ability of the children and their interest in rehabilitation. Currently, the availability of most of those activities rests with the goodwill of the staff in charge of the facilities, which is commendable but not sustainable in the long-term. Furthermore, in some instances, the "reception centres" are so remote that it becomes very difficult for parents to keep in contact with their children.

52. The Working Groups welcomes the initiatives of the authorities aimed at establishing a coherent juvenile justice system at the federal level, in compliance with the Convention on the Rights of the Child and other relevant legislation, and in full respect of the international human rights standards applicable to Argentina. The Working Group was informed that such initiatives at the national level included an act governing the first moments of detention of children, a protocol to denounce the ill-treatment of young people in closed institutions and a proposal for a law concerning the juvenile penal regime. In the province of Buenos Aires, the Ministry of Justice and Human Rights and the Ministry of Social Development have signed an agreement guaranteeing the rights of children in conflict with the law. The Working Group encourages Argentina to take prompt action to further that agenda at all levels.

[14] The Working Group was informed that these initiatives included the creation of direct hotlines by the National Directorate for Policies against Institutional Violence and by the Federal Penitentiary Service and the creation of the Monitoring and Inspection Service of Penitentiary Institutions.

[15] See CCPR/C/ARG/CO/5, paras. 13–14.

### 7. Selectivity of the criminal justice system

53. Article 14 of the Constitution protects the human rights of all inhabitants of the nation and article 20 expressly states that foreigners in Argentina enjoy the same rights as citizens. This constitutional provision of equality before the law of all people in Argentina reflects articles 2 (1) and 26 of the International Covenant on Civil and Political Rights.

54. During the visit, the Working Group noted the selectivity in the application of the criminal justice system in relation to persons from different socioeconomic backgrounds. Those from humble backgrounds and those in situations of vulnerability, such as children, including street children, indigenous peoples and migrants, and other groups which may be subject to discrimination, such as lesbian, gay, bisexual, transgender and intersex persons,[16] are more likely to be arrested by the police on the suspicion of the commission of a crime or "withheld" for verification of identity. The Working Group learned of instances of children under the age of 10 being arrested by the police, taken to police stations without their parents, legal guardians or social services being notified, and requested to sign documents without any understanding of what they were signing and without legal assistance.

55. Similarly, the Working Group was informed of deprivation of liberty in the context of public and social protests by members of different communities, including indigenous peoples, union members and political and social movements. The Working Group wishes to reiterate that international human rights instruments guarantee the right to peaceful assembly and freedom of expression and States should refrain from preventing or punishing peaceful protests. Any punishable actions should be clearly outlined in law so as to uphold the principle of legality in criminal and administrative law. Offences such as "traffic blockage" and "disobedience and resistance to authority" are inherently ambiguous and afford a high degree of discretion to the law enforcement authorities without sufficient safeguards to ensure protection against arbitrary detention. Moreover, the free flow of traffic should not automatically take precedence over the right to freedom of peaceful assembly.[17] The Working Group also notes that the Protocol on action by the State security forces during public manifestations, adopted by the Ministry of Security in 2016, if implemented, may create an increased risk of arbitrary detention by amplifying the discretionary powers of the security forces. The Working Group acknowledges that the Protocol has not been implemented in practice and urges the authorities to repeal it.

56. The Working Group was particularly concerned to learn about the violent repression of indigenous communities, as these communities engage in protests in support of their rights stemming from various international sources, especially International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169), which has been ratified by Argentina. The Working Group was informed of the excessive use of force, ill-treatment and humiliation suffered by the members of indigenous communities at the hands of law enforcement agents and private security companies. The Working Group was alarmed by the sweeping arrests of indigenous peoples engaged in social protests. The law enforcement agencies in areas where indigenous peoples reside have no protocols for the holding of such individuals that would respect their rights as indigenous peoples and allow for the observance of their religious, spiritual and medical needs.

57. Moreover, the Working Group was informed that the application of pretrial detention is by far more common among suspects in situations of vulnerability. For instance, the Working Group learned about numerous instances of harassment of transgender persons in specific locations in Buenos Aires City and province, on the basis of a generic allegation of suspicion of prostitution. Such targeting of individuals is obviously discriminatory and in violation of international norms.

58. In the view of the Working Group, the criminal justice system of Argentina treats those from humble backgrounds, in vulnerable situations or those engaged in social protest markedly differently from others and this should be addressed as a matter of priority. In that

[16] The Working Group acknowledges the wish of lesbian, gay, bisexual, transgender and intersex persons in Argentina to describe themselves as a social movement.

[17] See opinions No. 28/2018 and No. 79/2017; see also A/HRC/20/27, para. 41.

context, the Working Group reiterates the call to Argentina of the Committee on the Elimination of Racial Discrimination to ensure effective access to justice and respect for fundamental rights and due process guarantees in proceedings against, amongst other categories, human rights defenders, members of indigenous communities, people of African descent and migrants.[18]

## B. Deprivation of liberty on the grounds of psychosocial disability

59. The Working Group commends the adoption of the Mental Health Act No. 26.657 in 2010, which introduced a progressive framework in this area. It established comprehensive, community care as a public policy objective and reformed the previous legal regulations regarding compulsory hospitalization under the provisions of article 482 of the Civil Code and national Law No. 22.914 of 1983 on persons with psychosocial disabilities and those with drug and alcohol addictions.

60. The Working Group learned of numerous alarming cases concerning the detention of individuals owing to their psychosocial disability. The Working Group met so-called social patients who do not have either the resources or the social networks to live supported in the community and are therefore confined in psychiatric institutions. Social patients often spend years and even decades confined in such institutions without any true prospect of release. Notably, the Working Group observed numerous instances in which individuals had spent between 30 and 63 years in a psychiatric institution, some of whom were social patients.

61. While periodic assessments are apparently carried out in some instances to ascertain whether it would be possible to move a person out of an institution, some social patients remain institutionalized indefinitely owing to the lack of family members and community support systems to look after them.

62. Furthermore, during its visits to penitentiary institutions, the Working Group learned that pursuant to article 34 of the Criminal Code, a security measure could be attached to the sentence imposed on persons with psychosocial disabilities. Such individuals are usually sent to the mental health-care facilities within a penitentiary for treatment and, in practice, their stay there becomes unlimited. Periodic assessments are carried out by a multidisciplinary team, but the ultimate decision on the release of the person rests with the judiciary and is thus not a decision made on the medical assessment of the health condition of the person concerned. An assessment of the "dangerousness of the individual" is required to be carried out by the judiciary, but there is a great reluctance to release such individuals as there are no guidelines on how such assessment ought to be carried out and a medical assessment is not part of it. The Working Group met individuals who have been in such places for 33 and 13 years, respectively, and the medical staff of the facility affirmed that while ongoing management of their psychosocial disability was necessary, there was no need for them to remain in a penitentiary institution. The Working Group emphasizes that penitentiary institutions are not suitable for the provision of care to persons with psychosocial disabilities, especially on a long-term basis

63. The Working Group is of the view that such examples of "social patients" and those sentenced through the attachment of a security measure to their sentence in fact constitute indefinite deprivation of liberty. While in both instances there are mechanisms in place for periodic reviews of the necessity of continued detention, without viable alternatives to detention or with the high threshold of "dangerousness" to satisfy, the review mechanisms are ineffective in practice.

64. The Working Group therefore shares the concern expressed by the Human Rights Committee during its latest review of Argentina under article 40 of the Covenant, about the prolonged placement of individuals in psychiatric institutions, shortcomings in the use of monitoring and supervisory mechanisms, and the failure to implement intermediate community support services.[19]

[18] See CERD/C/ARG/CO/21-23, para. 26.
[19] See CCPR/C/ARG/CO/5, para. 21.

### C. Deprivation of liberty in the context of migration

65. While there are currently no dedicated facilities for the detention of migrants in Argentina, the Working Group learned of plans to open such a facility in Buenos Aires. At present, most migrants are not actually held in the city. The Working Group shares the concern expressed by the Committee on the Elimination of Racial Discrimination that such plans could lead to detention not being used as a last resort.[20] It wishes to emphasize that detention in the context of migration must be an exception and will closely follow the implementation of the plans concerning detention facilities for migrants in Argentina.[21]

66. During its visit, the Working Group also noted the adoption of decree of necessity and urgency No. 70/2017 which effectively changed the provisions of the Migration Law No. 25.871. The newly adopted decree authorizes deprivation of liberty at the outset of the summary procedure, removing the principle of exceptionality, and allows detention prior to an expulsion order. The permitted detention period has been increased to 60 days, with the possibility of an indefinite extension for the duration of the proceedings. There are also restrictions on access to free legal aid and the terms for submitting an appeal have been significantly reduced. Under this framework, detention is the rule and liberty the exception, contrary to article 9 (3) of the International Covenant on Civil and Political Rights.

67. The Working Group has serious concerns about decree No. 70/2017 and the fact that this order by the executive significantly modifies the legal provisions of Law No. 25.871. Such major changes should have been subject to an open and transparent debate with a wide variety of stakeholders and discussed at the national legislature.

## V. Implementation of opinions adopted by the Working Group

68. Since its establishment, the Working Group has adopted five opinions involving Argentina (see annex II). The Working Group invites the Government to submit updated information, including on whether the subjects of those opinions whose deprivation of liberty has been found to be arbitrary, have been released and reparations made to them, or whether any other action has been taken to implement the recommendations of the Working Group.

## VI. Conclusions

69. **The Working Group appreciates and commends the willingness of the Government to submit itself to scrutiny through the visit and considers that the findings in the present report offer an opportunity to support the Government in addressing situations of arbitrary deprivation of liberty.**

70. **The Working Group was informed of positive changes that were being implemented in Argentina in relation to deprivation of liberty, notably the launch of the Justice 2020 programme aimed at strengthening justice institutions in order to guarantee access to justice for all. In that framework, the Group welcomes the adoption of several legislative instruments, such as the law unifying the instruction and criminal procedures and the law for the strengthening of the federal criminal courts and unipersonal trials.**

71. **The Working Group identified the pattern of arrests by the police on the basis of a suspicion of a crime being carried out as being discriminatory and biased against those in situations of vulnerability, such as street children, members of indigenous communities, migrants and lesbian, gay, bisexual, transgender and intersex persons. A similar pattern was observed in relation to police powers to "withhold" persons to carry**

[20] See CERD/C/ARG/CO/21-23, para. 33.

[21] See Working Group on Arbitrary Detention, revised deliberation No. 5 on deprivation of liberty of migrants.

**out identity checks, despite the lack of legislative provisions obliging everyone to carry an identification document.**

72. **The Working Group found that the existing legal framework, which provides that pretrial detention must be an exceptional measure, is not reflected in the practice of the judiciary. That results in pretrial detainees constituting about 60 per cent of those detained in Argentina. Furthermore, the Working Group observed that the two-year limit for pretrial detention was often exceeded and could range from 4 to 15 years. The separation of pretrial detainees from convicted persons, envisaged by law, was not implemented in practice in many facilities the Group visited owing to, among other factors, the lack of space. In addition, pretrial detainees were required to follow the regime of sentenced persons in breach of article 10 (2) (a) of the International Covenant on Civil and Political Rights.**

73. **The Working Group observed limitations to applying alternatives to detention in practice, despite the existence of relevant legislative provisions at the federal level and in 19 provinces, as some of the individuals interviewed were given an alternative to detention, such as electronic tagging, if they could pay for it.**

74. **The Working Group is concerned about the widespread use of police stations to hold detainees for prolonged periods, with the majority of detainees being held at the pretrial stage for periods ranging from three days to five months. Moreover, in the province of Chubut, the Working Group found some persons who had already been sentenced being held in police stations.**

75. **The Working Group is also concerned about the lack of strict observance of procedures regarding the imposition of disciplinary sanctions, isolation and the use of force by guards. In particular, the Working Group received reports of the use of isolation cells in some facilities that was not preceded by any form of disciplinary adjudication. The absence of a unified federal registration system for alleged acts of violence is of further concern to the Working Group.**

76. **The Working Group identified individuals below the age of 16 being deprived of liberty in "reception centres" with limited provisions for education, vocational training and meaningful activities and very poor living facilities and infrastructure. Some children considered to be from vulnerable backgrounds were also allegedly ill-treated by law enforcement personnel. The Working Group welcomes efforts to establish a coherent juvenile justice system at the federal level in compliance with the international obligations undertaken by Argentina and encourages the authorities to implement that agenda at all levels.**

77. **The Working Group was informed of deprivation of liberty in the context of public and social protests by indigenous peoples, union members and members of political and social movements. The Working Group is concerned that the criminal justice system treats differently those from humble backgrounds, those in vulnerable situations or those engaged in social protest, and calls upon the authorities to address this as a matter of priority.**

78. **The Working Group identified numerous instances when "social patients" who do not have the resources or social network to live in the community are confined to psychiatric institutions, in some cases for up to 63 years. The Working Group also observed that penitentiary institutions were being used for the provision of care to persons with psychosocial disabilities. The Working Group is of the view that these patterns in fact constitute indefinite deprivation of liberty.**

79. **The Working Group is concerned that plans to open a detention facility for migrants in Buenos Aires could lead to detention not being used as a last resort. It is also concerned about the recently adopted decree on necessity and urgency No. 70/2017 authorizing deprivation of liberty at the start of the summary procedure, removing the principle of exceptionality of detention in the migration setting.**

# VII. Recommendations

80. **The Working Group recommends that the Government of Argentina undertake the following measures in relation to the institutional framework:**

(a) **Appoint the federal Ombudsperson so as to enable without delay the Office of the Ombudsperson to exercise the full range of the functions of the Ombudsperson in terms of the promotion and protection of human rights;**

(b) **Ensure that the Penitentiary Attorney's Office receives unfettered access to all places of deprivation of liberty, including penitentiary facilities, police stations, including airport holding rooms, juvenile institutions, holding rooms for migrants and other relevant facilities, in law and in practice. Ensure that unfettered access is granted not only to federal institutions but also to those other detention facilities where federal prisoners or others under the federal jurisdiction are held. Any instances of denial of access must be immediately reported and investigated promptly so as to ensure non-repetition. Ensure that the Penitentiary Attorney is systematically informed of all the different places of deprivation of liberty where persons are held, including in the context of migration;**

(c) **Enable the national preventive mechanism of Argentina, both at the federal and provincial levels, to start the discharge of its mandate effectively without any further delay. In accordance with article 29 of the Optional Protocol to the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ensure that its provisions extend to all parts of the federal State without any limitations or exceptions and that the federal Government remains responsible for its implementation throughout Argentina;**

(d) **Ensure that any allegations of torture and ill-treatment trigger a prompt, thorough and independent investigation to bring those responsible to justice and provide reparations to the victims.**

81. **The Working Group recommends that the Government of Argentina undertake the following measures in relation to international human rights obligations:**

(a) **Ensure consistent interpretation of the international norms at the domestic level, both federal and provincial (local) levels;**

(b) **Ensure that safeguards to protect against instances of arbitrary detention, including access to a lawyer, are observed in all instances when a person is held against her or his will by the authorities or other entities on behalf of the authorities, or with their consent or acquiescence. Ensure that this is duly reflected in law and in practice, including in guidelines for law enforcement personnel and training, both initial and ongoing;**

(c) **Ensure that there are clear guidelines set out in legislation by the relevant authorities to put an end to the practice of detaining persons when such detention is not related to the commission of an offence, in accordance with article 9 of the International Covenant on Civil and Political Rights. Ensure that the powers of State enforcement officials to detain or hold persons for such purposes as "verification of identity" are accompanied by precise, detailed and binding guidelines so as to ensure that those powers are not used in practice in a discriminatory manner or lead to an abuse of power.**

82. **The Working Group recommends that the Government of Argentina undertake the following measures in relation to the excessive use of pretrial detention:**

(a) **Urgently revise the practice of pretrial detention across the country, both at federal and provincial levels, so as to ensure that pretrial detention becomes a measure of last resort in exceptional cases where the suspect may, for example, pose a risk of absconding, interfering with the investigation or committing a similar offence;**

(b) **Undertake concrete action to expedite the application of non-custodial alternatives. Provide additional training to professionals involved in the administration of justice with a view to ensuring that pretrial detention is not the norm and that its**

**duration is strictly limited, in accordance with article 9 (3) of the International Covenant on Civil and Political Rights. Ensure that all persons who are detained, including those in pretrial detention, have effective access to a lawyer.**

83. **The Working Group recommends that the Government of Argentina undertake the following measures in relation to the availability and application of alternatives to detention:**

(a) **Review the current approach whereby the consideration of alternatives to detention is not automatic in all cases, but rather depends upon the initiative of the prosecution or defence. Broaden the scope of the application of alternatives to detention by expanding the applicability criteria and expediting the application of non-custodial alternatives. Take concrete steps, at both the federal and provincial levels, to revise the applicable legislation so as to ensure that alternatives to detention are widely used, especially for non-violent crimes and for both pretrial and post-sentencing stages, including pending an appeal;**

(b) **Enable and encourage the judiciary to apply alternatives to detention in all possible cases and especially in instances when sending a person to a custodial setting would involve sending him or her to an overcrowded or unsuitable custodial setting. Concrete steps, such as training and implementing a zero-tolerance policy on threats, must be urgently taken to enable the judiciary to use their discretion in deciding upon the application of alternatives to detention;**

(c) **Ensure that alternatives to pretrial detention are available to all throughout the country, based on objective criteria decided upon by the judiciary, not on discriminatory grounds or according to who can afford the use of such technologies;**

(d) **Ensure that education on human rights and the United Nations Standard Minimum Rules for the Treatment of Prisoners, in particular, form part of the initial and ongoing training for penitentiary staff in every province;**

(e) **A unified registration system for acts of violence and victims of torture and ill-treatment at the federal level should be established and implemented in practice;**

(f) **Undertake immediate steps to ensure that the deprivation of liberty in relation to juveniles becomes an exceptional measure;**

(g) **Cease immediately the holding of pretrial detainees in police stations and other facilities not designed for holding people for prolonged periods of time;**

(h) **Ensure prompt and effective legal assistance to all those held in police stations.**

84. **The Working Group recommends that the Government of Argentina undertake the following measures in relation to the use of isolation and force in places of deprivation of liberty:**

(a) **Cease all practices, at both the federal and provincial levels, of placing inmates in isolation cells as a form of punishment without appropriate procedures and safeguards in place to guard against arbitrariness. Ensure that any use of isolation cells, irrespective of how such cells and/or places are described, is formalized with the appropriate procedures and governed by clearly stipulated regulations to guard against their arbitrary use, including periodic reviews of the necessity of such measures;**

(b) **Ensure that the placement of an inmate in an isolation cell is officially recognized as a form of disciplinary sanction, which must be subjected to the basic safeguards. Ensure that disciplinary rules are properly explained to all detainees upon admission and that copies of such rules are freely available in all detention facilities;**

(c) **Ensure that any application of disciplinary measures is strictly proportionate and respectful of human dignity and that there is a proper record of each instance of the application of such punishment. Ensure that any use of force is strictly necessary and proportionate, and that all instances of use of force are properly recorded, noting the type of force and/or physical restraint used and the reason for it. Ensure that any use of sedatives as a means of controlling detainees is made unlawful and is ceased immediately;**

85. **The Working Group recommends that the Government of Argentina undertake the following measures in relation to juveniles in conflict with the law:**

(a) **Take prompt action to implement the agenda aimed at establishing a coherent juvenile justice system in compliance with the Convention on the Rights of the Child and other relevant legislation in full respect of international human rights standards applicable to Argentina;**

(b) **Hold all juveniles deprived of their liberty in appropriate facilities and in adequate conditions by introducing provisions for education, vocational training and meaningful activities. Urgently address the dilapidated state of many juvenile facilities so that children receive the requisite care and education. Ensure that the disproportionate and unjustified use of force is prohibited and that this is entrenched in practice through initial and ongoing training of the staff of juvenile facilities;**

(c) **Ensure without delay that any preventive measures include the implementation of a comprehensive training programme for police and law enforcement officials on child rights.**

86. **The Working Group recommends that the Government of Argentina undertake the following measures in relation to selectivity in the criminal justice system:**

(a) **Ensure at all levels, through means such as legislation, guidelines and the training of law enforcement officials, that the de facto situation of differential treatment by the criminal justice system of persons from humble backgrounds, in vulnerable situations or those engaged in social protest ceases immediately;**

(b) **Ensure at all levels that the right to peaceful protest and freedom of expression are duly recognized in law and in practice and that those engaging in the peaceful exercise of those rights are not prevented from or punished for doing so. In that regard, ensure that particular attention is paid to the initial and ongoing training of law enforcement officials on the use of force and the exceptionality of arrests;**

(c) **Ensure that the federal and provincial legislatures clarify such offences as "traffic blockage" and "disobedience and resistance to authority" by introducing robust safeguards to ensure protection against arbitrary detention;**

(d) **Urgently repel the Protocol on action by the State security forces during public manifestations adopted by the Ministry of Security in 2016 so as to prevent the expansion of the discretionary powers of the security forces. Convene a new working group, involving civil society, to elaborate a new protocol on the actions of the security forces during public manifestations in an inclusive and transparent manner;**

(e) **Ensure respect, at both the federal and provincial levels, for the rights of indigenous peoples. Urgently provide the law enforcement agencies in areas where indigenous peoples reside with protocols for the holding of such individuals that would respect their rights as indigenous peoples and allow for the observance of their religious, spiritual and medical needs;**

(f) **Immediately cease the use of the antiterrorism law to criminalize indigenous peoples and the leaders of rural communities for activities related to the defence of their territory and their culture, which are elements duly protected by international human rights law;**

(g) **Ensure that all law enforcement authorities refrain from the disproportionate use of force. Address the situation of differential treatment by the criminal justice of persons from humble backgrounds, in vulnerable situations or those engaged in social protest.**

87. **The Working Group recommends that the Government of Argentina undertake the following measures in relation to deprivation of liberty on the grounds of psychosocial disability:**

(a) **Double the efforts to provide for community support systems for so-called social patients without a family willing to look after them, in order to eliminate the practice of indefinite institutionalization;**

(b) **Ensure that the term "dangerousness" as it currently appears in the Criminal Code, and article 34 in particular, is revised and clarified, in order to set a high threshold of "dangerousness" for the internment of patients and to render the existing review mechanisms of the necessity for continued detention effective in practice;**

(c) **Ensure the full enforcement of international standards and the Mental Health Act No. 26.657 by, inter alia, putting in place effective review mechanisms. Ensure that individuals suffering from psychosocial disabilities are able to live in the community with appropriate support provided by the State.**

88. **In the context of migration, the Working Group recommends that the Government of Argentina ensure that deprivation of liberty in the context of migration is an exceptional measure and as such, is subject to an individual assessment. The Government should ensure that any detention in the context of migration is only justified if it pursues a legitimate aim, is both proportionate and necessary, and comes under judicial oversight.**

# Annex I

## Detention facilities visited

**Autonomous City of Buenos Aires**

Hospital Dr. José Tiburcio Borda

Police station No. 32

**Province of Buenos Aires**

Ezeiza federal penitentiary, complex I

Ezeiza federal penitentiary, complex IV

Holding cells at Ezeiza International Airport under the migration authority

Holding cells at Ezeiza International Airport under the airport security police

Police station No. 1 San Justo, La Matanza

District police station northeast 3RA

Hospital Dr. Alejandro Korn, centre of primary attention No. 34

**Province of Jujuy**

Federal penitentiary unit No. 22

Provincial penitentiary unit No. 3 of Alto Comedero

Provincial penitentiary unit No. 7 of Alto Comedero

Penitentiary unit for minors of Alto Comedero

Psychiatric hospital Néstor Sequeiros

Juvenile admission centre, Malvinas, Jujuy

**Province of Chubut**

Provincial penitentiary institute

Police station of Rawson

Police station No. 2 of Trelew

Police station of Playa Unión

Socio-educational orientation centre Trelew

# Annex II

## Opinions of the Working Group on Arbitrary Detention concerning Argentina

Opinion No. 47/2011 concerning Carlos Federico Guardo (A/HRC/WGAD/2011/47).

Opinion No. 52/2011 concerning Iván Bressan Anzorena and Marcelo Tello Ferreyra (A/HRC/WGAD/2011/52).

Opinion No. 20/2013 concerning Guillermo Luis Lucas (A/HRC/WGAD/2013/20).

Opinion No. 31/2016 concerning Milagro Sala (A/HRC/WGAD/2016/31).

Opinion No. 73/2017 concerning María Laura Pace and Jorge Oscar Petrone (A/HRC/WGAD/2017/73).