

ARGENTINA

Universal Period Review – 3rd Cycle

Submission to the Universal Periodic Review by the Global Detention Project (Geneva, Switzerland)

28th Session of the UPR Working Group, October-November 2017

Submitted on 30 March 2017

The Global Detention Project (GDP) is an independent research centre based in Geneva, Switzerland, that investigates the use of detention as a response to international immigration. Its objectives are to improve transparency in the treatment of detainees, to encourage adherence to fundamental norms, to reinforce advocacy aimed at reforming detention practices, and to promote scholarship of immigration control regimes. As per these objectives, this UPR submission focuses on human rights concerns related to Argentina's policies related to the detention of people for immigration- or asylum-related reasons.¹

Context

Argentina is one of the more important migrant destination countries in South America.² Over the last two decades, the country has experienced a steady influx of people coming from neighbouring countries, mainly from Paraguay, Bolivia, Chile, and Peru.³ Additionally, there has been a modest increase in the number of people

¹ This Submission is based in part on data published on the GDP website, "Immigration Detention in Argentina," available at: <https://www.globaldetentionproject.org/countries/americas/argentina>. Please note that apart from this submission, which is narrowly focused on detention policies, the Global Detention Project has also participated in a joint Submission on Argentina to this UPR session with several organizations based in Argentina, which more broadly discusses issues related to immigration control and criminalization, in addition to detention. That separate submission was made by: Abogados y Abogadas del Noroeste Argentino en Derechos Humanos y Estudios Sociales (ANDHES); the Centro de Estudios Legales y Sociales (CELS); the Colectivo para La Diversidad (COPADI); the Comisión Argentina para Refugiados y Migrantes (CAREF); the Instituto Argentino para la Igualdad, Diversidad e Integración (IARPIDI); the Centro de Justicia y Derechos Humanos de la Universidad Nacional de Lanús; the Red de Migrantes y Refugiados en Argentina; and the Global Detention Project.

² See International Organization for Migration, "Migration flows," <http://www.iom.int/world-migration>; UN, "International migrant stock," <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml>; , Dirección Nacional de Migraciones, "Argentina es el país de América Latina con más inmigrantes," 23 April 2015, http://www.migraciones.gov.ar/accesible/indexP.php?mostrar_novedad=2738.

³ According to the UN Population Division, 1.506.531 of the total 2.086.302 foreign population comes from those countries, representing 72% of immigrants in the country.

arriving from outside the region. For example, the number of Chinese migrants rose from 5,850 in 1995 to 14,397 in 2015.⁴ According to UN statistics, other important foreign-born populations come from Italy and Spain.⁵

Argentina has traditionally emphasised integration and regularisation—as opposed to securitisation—in its approach to undocumented migration,⁶ and its Immigration Law (ley de Migraciones 25.871) has been widely lauded. This humane approach to immigration was explicitly recognized by numerous State Members of the UPR Working Group during its previous review of Argentina in October 2012.⁷ Among the specific programs highlighted during that review was the “Patria Grande” initiative (the Programa Nacional de Normalización Documentaria Migratoria), which entered into force in 2006 with the aim of regularizing the status of undocumented migrants and refugees from other MERCOSUR countries.⁸

Since taking office in December 2015, the current government in Argentina has on several occasions indicated important changes in the direction of the country’s immigration policies that could have a direct impact on the human rights of people who lack appropriate migration documentation or authorization. In January 2017, the government adopted a decree (Decreto de Necesidad y Urgencia, DNU 70/2017) that emphasizes the criminalization and deportation of undocumented migrants, thereby sharply departing from Argentina’s traditional emphasis on integration and protection of migrants rights.

Previously, in August 2016, the government announced the opening of the country’s first specialized immigration detention facility.⁹ The government’s Dirección Nacional de Migraciones responded to criticism of this decision by trying to clarify that it is was not opening a prison but rather a “retention” facility to deprive people of their liberty as they await deportation. It added that this was for the detainees own good, separating them from criminal prisoners and giving them “better protection.”¹⁰ Previously, the country applied detention measures for immigration-related reasons only on rare occasions.¹¹

Legal and policy framework

⁴ United Nations, Department of Economic and Social Affairs, Population Division, 2015,

⁵ United Nations, Department of Economic and Social Affairs, Population Division, 2015,

⁶ CELS and CAREF, 2016, Comentarios y aportes a la versión revisada de fecha 23 de julio del borrador de Declaración a ser adoptada en la Reunión de Alto Nivel para hacer frente a los grandes movimientos de refugiados y migrantes que tendrá lugar el 19 de septiembre de 2016, <http://www.cels.org.ar/common/AportesDeclaracionMigrantesRefugiados.pdf>

⁷ Report of the Working Group on the Universal Periodic Review, Argentina, Human Rights Council, 22nd Session, Agenda Item 6, UPR, 12 December 2012.

⁸ According to the law, immigrants coming from member and associated countries of MERCOSUR are to be considered “temporary residents” and granted legal status for 2 years. MERCOSUR member States are Argentina, Bolivia, Brazil, Paraguay, Uruguay, and Venezuela. MERCOSUR associated countries are Chile, Colombia, Ecuador, Guyana, Peru, and Surinam.

⁹ “El Gobierno creó un centro de detención de migrantes: alarma entre organismos de DDHH,” Política Argentina, 26 August 2016; “Columna de migración, sobre la creación de un centro de detención para migrantes,”

Radio FM La Tribu (Argentina), 24 August 2016.

¹⁰ “Migraciones de Argentina aclara que no construirá cárcel sino centro de retención para migrantes con antecedentes delictivos,” 31 August 2016, available on the website the of the Bolivian Consulate, <http://www.consuladodebolivia.com.ar/2016/08/31/migraciones-argentina-aclara-no-construira-carcel-sino-centro-retencion-migrantes-antecedentes-delictivos/>

¹¹ According to a report published by the Penitentiary Prosecutor Office, in the period 2013-2015 there were 157 immigration detention orders of which only 62 were executed (La situación de los derechos humanos en las cárceles federales de la Argentina, Informe Anual 2014, Procuración Penitenciaria de la Nación, 2014, http://www.ppn.gov.ar/sites/default/files/INFORME%20ANUAL%20PPN%202014_0.pdf)

The Constitution provides the right to liberty and protection against arbitrary detention, including guarantees to due process (Articles 14 and 18) and habeas corpus (Article 43).¹² Legal norms relevant to immigration-related detention are provided in several sources: National Migration Law N 25.871 ([NML of 20 January 2004](#))¹³; [Decree N 616/2010 of 3 May](#), approving the Regulation of the National Migration Law (RNML)¹⁴; Habeas Corpus Law N 23.098¹⁵; Law N 26.165 of 28 November 2006 on the recognition and protection of refugees¹⁶; and Law 11.179 Penal Code.¹⁷

The NML borrows the French term “retention” (*retención*) to refer to immigration detention. The law provides only limited grounds for imposing this measure: (1) in cases of refusal of entry when people are ordered to “remain in the installations at the entry point” (“deberá permanecer en las instalaciones del punto de ingreso”) (Article 35 NML); and (2) as an exceptional measure to enforce an order of expulsion or to prevent absconding during adjudication procedures (Article 70 NML).

Grounds for expulsion can be divided in three groups: (1) failure to regularize immigration status (Article 61 NML); (2) cancelation of a residence permit for reasons listed under Article 62 NML; and (3) expulsion after criminal conviction, which can be applied once the person has served half of his sentence (Article 64 NML).¹⁸ In practice, judges have also applied “early expulsion” for humanitarian reasons before half a sentence has been served (a broad interpretation of the provision of Article 64 NML).¹⁹

A new Criminal Procedure Code²⁰—adopted in 2014—establishes an additional circumstance that can lead to expulsion. It provides for expulsion in cases in which suspension of prosecution (“suspension del proceso a prueba”) is applied to a foreigner who is caught in flagrante delicto (Article 35 Law N 27.063). The application of this provision depends on the severity of the crimes.

The adoption of DNU 70/2017 introduces a number of important changes in this immigration control framework, limiting the possibility of procedural protections for people in deportation proceedings and easing limitations on the scope and duration of detention measures.

¹² Constitución de la Nación Argentina, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>

¹³ Ley de Migraciones, Law N 25.871, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/90000-94999/92016/textact.htm>

¹⁴ Decreto 616/2010, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/165000-169999/167004/norma.htm>

¹⁵ Procedimiento de Habeas Corpus, Law N 23.098, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/48612/norma.htm>

¹⁶ Ley General de Reconocimiento y Protección al Refugiado, Law N 26.165, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/120000-124999/122609/norma.htm>

¹⁷ Código Penal de la Nación, Law N 11.179, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/textact.htm>

¹⁸ Prisión e inmigración, Población extranjera detenida en cárceles federales, Cuadernos de la Procuración Penitenciaria de la Nación N 7, 2014, <http://www.ppn.gov.ar/sites/default/files/Cuaderno%20PPN%20Prisi%C3%B3n%20e%20inmigraci%C3%B3n.pdf>

¹⁹ La situación de los derechos humanos en las cárceles federales de la Argentina, Informe Anual 2015, Procuración Penitenciaria de la Nación, http://www.ppn.gov.ar/sites/default/files/Informe%20Anual%202015_0.pdf

²⁰ Código Procesal Penal de la Nación, Law N 27.063, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/239340/norma.htm#3>

DNU 70/2017 includes important changes in procedural standards for people in immigration procedures. Of particular concern for those facing detention and deportation measures is that authorities are no longer required to ensure that the Office of the Ombudsman provides free public assistance. If a person does not request access to legal aid or fails to prove the lack of economic resources, the expulsion procedure continues without any legal assistance provided.

In addition, DNU 70/2017 establishes that a person only has three days to appeal an expulsion order and three days to challenge a court ruling. Previously, regulations established 15- and 30-day deadlines, respectively. These reductions dramatically increase the burden on people in deportation proceedings to adequately organize an effective defense.

The Migration Law provides that the length of administrative immigration detention is not to exceed that which is strictly necessary to carry out expulsion (Article 70 NML). The RNML clarifies that the National Direction of Migration can request detention for an initial period of 15 days, which can be extended for an additional 30 days in cases in which expulsion is delayed and provisional release is not possible. In such a case the National Direction of Migration is to report every 10 days to a judicial organ all the measures undertaken to enforce expulsion and reasons justifying detention. (Despite the legal provision, there have been some cases of people who have been detained for longer periods of time.)

With adoption of DNU 70/2017, the specter of unlimited immigration detention, which has been repeatedly condemned by international human rights mechanisms including treaty monitoring bodies, becomes a possibility. If a person presents administrative or judicial actions to contest an immigration decision, the length of detention can be extended indefinitely until the process is resolved.

Also, DNU 70/2017 eliminates the exceptional nature of detention measures. It enables deprivation of liberty from the very beginning of an immigration procedure, even before deportation has been ordered. Thus "preventive" detention is enabled from the beginning of the proceedings, without any requirement of exceptionality. Likewise, DNU 70/2017 does not establish what elements the immigration authority must establish for a judge to evaluate a request for detention.

The law does not specifically provide for alternatives to detention. The RNML establishes that the immigration authority can refrain from detaining if the person demonstrates he will abide by an order of expulsion and leave the country within 72 hours.

Conditions in detention

As it has not had a dedicated immigration detention facility, Argentina has made use of a broad range of facilities for the purposes of immigration-related detention, including prisons, police stations, and transit zones in airports. In August 2016, the government announced the opening of its first immigration detention facility, which will be located in the city of Buenos Aires. Human Rights organizations have criticized the decision, arguing that the law recognises migration as a human right and that therefore migration policies should be aimed at paving the way for regularization.²¹

²¹ El Gobierno creó un centro de detención de migrantes: alarma entre organismos de DDHH, Política Argentina, 26 August 2016, <http://www.politicargentina.com/notas/201608/16208-el-gobierno-creo-un-centro-de-detencion-de-migrantes-alarma-entre-organismos-de-ddhh.html>

In its 2014 Annual Report, the Procuración Penitenciaria de la Nación describes three different immigration custodial cases. In two of the cases, people were held in a facility under the control of the Airport Police (Policía de Seguridad Aeroportuaria) at the Ministro Pistarini International Airport. In the third case, people were held in a facility under the control of Gendarmería Nacional, in the province of Salta. The report gives some information about the conditions of detention in each case, highlighting poor building conditions, lack of information and legal assistance, and violation of the requirement to inform the judge about the administrative detention.²²

According to the 2015 Annual Report of the Procuración Penitenciaria de la Nación, immigration authorities stopped using the facility at the international airport after receiving criticism in 2014.²³

Foreigners who are detained while awaiting deportation after serving a sentence for a criminal conviction are usually held in the prison where they served their sentence.²⁴ Detained foreigners who are to be expelled for immigration reasons not related to criminal convictions are usually held in locations operated by the different security agencies that are part of the Auxiliary Migration Police, which tend to be police stations. Police stations, thus, appear to be the most commonly used type of facility. In a case concerning four Chinese people who were detained in May 2016, the detainees were held at the Escuadrón Seguridad Vial San Justo, a facility controlled by one of the security agencies of the Auxiliary Migration Police in the province of Santa Fe.²⁵

Key concerns and questions for Argentina with regards to immigration detention

- The new decree DNU 70/2017 appears to enable unlimited immigration detention, in contravention of international human rights norms. What steps does the immigration authority plan to take to make sure that unlimited detention does not take place?
- What steps does the immigration authority intend to take to ensure that people in detention receive free public legal assistance?
- What steps does the immigration authority intend to take to ensure that detention measures are used only in exceptional circumstances?
- Please detail when the new specialized immigration detention centre will begin operations.
- Officials have justified the new specialized detention centre as a way to prevent immigration detainees from being detained in criminal facilities. However, experience from other countries indicates when new specialized detention centres are established, immigration detention continues to take place in prisons as well. What steps does Argentina intend to take to ensure

²² La situación de los derechos humanos en las cárceles federales de la Argentina, Informe Anual 2014, Procuración Penitenciaria de la Nación, 2014, http://www.ppn.gov.ar/sites/default/files/INFORME%20ANUAL%20PPN%202014_0.pdf

²³ La situación de los derechos humanos en las cárceles federales de la Argentina, Informe Anual 2015, Procuración Penitenciaria de la Nación, http://www.ppn.gov.ar/sites/default/files/Informe%20Anual%202015_0.pdf

²⁴ La situación de los derechos humanos en las cárceles federales de la Argentina, Informe Anual 2015, Procuración Penitenciaria de la Nación, http://www.ppn.gov.ar/sites/default/files/Informe%20Anual%202015_0.pdf

²⁵ Sentence of 30 August 2016 of the Cámara Federal de Casación Penal, in the case “** and others s/ habeas corpus”, <http://www.ppn.gov.ar/sites/default/files/Sentencia%20-CFCP.pdf>

that when the new specialized facility opens it will no longer use criminal prisons for immigration-related detention?

- When the new Criminal Procedure Code goes into force, does the government expect that more foreign nationals will be subject to deportation and thus detention measures?
- Research from various countries indicates that non-detention measures (“alternatives to detention”) are as effective and less expensive than detention in ensuring immigration policy objectives. Thus, many countries have begun adopting and implementing non-custodial measures and de-emphasizing detention. Please indicate what steps the government may be taking to adopt these measures and whether it foresees employing such measures instead of focusing on detention.