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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-sixth session (22-26 August 2016)

Opinion No. 31/2016 regarding Milagro Amalia Ángela Sala (Argentina)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate by its resolution 1997/50. The Human Rights Council assumed that mandate by its decision 1/102 and extended it for a three-year period by its resolution 15/18 of 30 September 2010. The Council extended the mandate for a further three years by its resolution 24/7 of 26 September 2013.
2. In accordance with its methods of work (A/HRC/30/69), on 17 February 2016 the Working Group transmitted a communication to the Government of Argentina concerning Milagro Amalia Ángela Sala. The Government replied to the communication on 18 April 2016. Argentina is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis for the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

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(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or other status and aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Milagro Amalia Ángela Sala, born in Argentina on 20 February 1963, is the leader of the Organización Barrial Túpac Amaru (Túpac Amaru Neighbourhood Association), part of the Network of Social Organizations of Jujuy.

5. The Network is located in the city of San Salvador de Jujuy, in the Province of Jujuy, and focuses on the revitalization of the province's most neglected population groups, especially those for which social indicators are below the national average, and on the promotion and protection of human rights in the province. Túpac Amaru carries out housing, health, employment and education initiatives within the framework of a number of national and provincial programmes. Much of its work is done by local cooperatives organized by residents.

6. Recently, Ms. Sala was elected to the Parliament of the Southern Common Market (MERCOSUR), also known as PARLASUR, an office that affords her a number of privileges granted to legislators in Argentina, including immunity from arrest and in respect of the exercise of freedom of expression.

7. The local authorities pursued a strategy of prosecuting Túpac Amaru and Network leaders to prevent the spread of a social protest in Jujuy Province.

8. In 2009, Túpac Amaru was branded in the National Congress as an organization that "instils terror" in Jujuy Province. In 2012, the organization was accused, without evidence, of possessing 500 weapons on the list of the National Weapons Registry, a falsehood that the Registry itself refuted a few days later.

9. In 2015, a plan was announced for the re-registration of local cooperatives, in what was said to be an attempt to ensure the transparent allocation of public funds, was announced. Such a plan would affect the activities of the organizations and cooperatives coordinated by Túpac Amaru, so on two occasions, 24 and 30 November 2015, the Network of Social Organizations of Jujuy decided to seek a meeting with the authorities to begin talks on the implementation of the plan. The authorities, however, did not respond.

10. On 14 December 2015, the Network organized a peaceful demonstration in Plaza Belgrano in San Salvador de Jujuy to demand the opening of a forum for dialogue between the provincial executive branch and social organizations.

11. On 15 December 2015, the State Attorney (*Fiscal de Estado*) charged Ms. Sala, together with the three of her associates who were with her at the encampment in the plaza, with abetment under articles 194 and 209 of the Criminal Code and sedition under article 230 (2) of the Criminal Code. On the same day, the Network released a statement in which it again requested the establishment of a forum for dialogue with the Government, reaffirmed that its demands were and would remain peaceful and stated the following: "We are not against banking. All the cooperatives issue electronic invoices and are in good standing. We are not against having a consolidated registry of social organizations. We are listed with the Ministry of Social Development. We want respect for the leaders who were democratically elected by our membership. We respect the Governor of Jujuy and are convinced that in a democracy the will of the people must prevail."

12. On 17 December 2015, during a press conference, Ms. Sala explained that she was not opposing the expanded use of banking services or registration of the members of cooperatives; rather, the aim was to create a forum for dialogue between the Government and representatives of social organizations.

13. On 12 January 2016, the authorities sent an ultimatum to the organizations whose members were still camped in Plaza Belgrano.

14. By Decree No. 403-G-16, the implementation of the new cooperatives registration programmes was made official, and measures were taken against the demonstrating organizations, including the immediate suspension of their legal capacity and the institution of proceedings aimed at its permanent withdrawal.

15. The ultimatum stated that the persons and organizations that were still occupying the plaza as of midnight on 14 January 2016 — a month after the start of the demonstration — would be ineligible for “any type of social benefit or plan, any lot or housing awards and/or any provincial government plans or programmes for the provision of housing or plumbing or other facilities to be built by cooperatives or social organizations, regardless of whether they are paid for with provincial or national funds”.

16. Together with the promulgation of Decree No. 403-G-16, the provincial executive filed a criminal complaint against Ms. Sala and three of her associates.

17. Against this backdrop, the local authorities urged the judiciary officials working as substitutes during the summer recess to summon Ms. Sala to answer to charges of having committed the above-mentioned offences. The source states that, despite the vagueness of the charges and the absence of any clear or precise description of the offences that she was said to have committed, it became clear that Ms. Sala was being accused of organizing a protest which blocked traffic and of sedition for participating in a protest in an attempt to ensure that the provisional decree concerning the work of the cooperatives was rescinded.

18. On 11 January 2016, after naming a trusted defence lawyer, establishing her legal domicile and providing her residential address, Ms. Sala appeared before the alternate Court of Criminal Appeals of the Province of Jujuy. When she finished making her statement, the judge did not order her arrest or any kind of personal restriction. On 16 January 2016, however, the judge, at the request of the substitute Prosecutor for Criminal Investigation, issued a warrant for Ms. Sala’s arrest.

19. On the day that the warrant for Ms. Sala’s arrest was issued, the Minister of Public Safety of the Province of Jujuy, with a large show of police force, placed Ms. Sala under arrest after raiding and searching her home. Ms. Sala was taken to the Special Police Unit for Women and placed in a unit of the Provincial Prison Service. Since then, Ms. Sala has been deprived of her liberty.

20. A few hours after Ms. Sala’s arrest, her counsel submitted a request for her release. In the absence of a reply, an application for habeas corpus was submitted on her behalf. It claimed that the prosecutor, on waiving his investigative powers (article 369 of the Criminal Code), was not empowered to initiate an investigation or request measures such as the arrest of suspects. Despite that restriction, the Prosecutor’s Office continued pursuing the investigation. On 18 January 2016, the application for habeas corpus was rejected by the due process judge presiding in Chamber No. 1.

21. On 17 January 2016, the judge, at the express request of the government of the Province of Jujuy, ordered the evacuation of Plaza Belgrano and the surrounding streets. The police of Jujuy Province were authorized to carry out the court order.

22. On 21 January 2016, Ms. Sala was transferred from the Special Police Unit for Women, where she had first been held, to Unit No. 3, the Women's Unit, of the Provincial Prison Service, located 10 kilometres from the capital city of Jujuy Province.

23. On 26 January 2016, the prosecutor rejected the petition for release submitted by counsel, thereby ensuring Ms. Sala's continued detention.

24. On 29 January 2016, 13 days after her arrest, and although no new information had been added to what had been known on the day of Ms. Sala's arrest, the judge ordered her release. Despite this order, Ms. Sala never left the detention facility where she is currently housed.

25. On the evening of 29 January, in proceedings conducted at the same time as the judge was ordering her release in connection with the original case, a warrant for Ms. Sala's arrest on charges of defrauding the State, extortion and unlawful association was issued. In this second case, the criteria (interfering with the investigation and posing a flight risk) to be analysed by the judge to determine whether pretrial detention was called for were the same as for the case of alleged abetment and sedition.

26. On 15 February 2016, the application for release filed by the defence on 29 January 2016 in connection with the second case was rejected. The rejection mentions other criminal proceedings in which Ms. Sala is not involved and, as there is no specific analysis of the influence of those proceedings on the rejection, the source is of the view that there were no legitimate grounds for rejecting the application. The primary reason for the rejection and the main focus of the decision was the "serious charges against her"; there was no in-depth analysis of the likelihood of her hindering the investigation or posing a flight risk.

27. Irregularities occurred throughout the proceedings, directly affecting her right to due process: first, Ms. Sala is in detention as a result of proceedings aimed at coercing the social organizations participating in the protest to clear their encampment. On 11 January 2016, with no legitimate reason for the involvement of a substitute judge and prosecutor, Ms. Sala was summoned for questioning. At the time, she was still free. Five days later, however, and although nothing pertaining to the criminal proceedings had changed, the provincial Minister of Public Safety was, in a break from usual practice, assigned responsibility for conducting the raid, search and arrest.

28. Neither the judge nor the prosecutor on duty at the time of the events in question believed that there were grounds for summoning Ms. Sala for questioning and still less for ordering her arrest. The prosecutor, despite having laid the charges for blocking traffic and having ordered the evacuation of the encampment, did not pursue the criminal prosecution of Ms. Sala any further, as a result of which the provincial executive lodged a criminal complaint against him for his alleged failure to fulfil his duties as a public servant. That development, coupled with the improper use of the judicial recess, shows how social protest is criminalized and reveals the political motives behind the prosecution of Ms. Sala.

29. When the warrant for Ms. Sala's arrest was issued, it made no mention of anything about the situation as it stood as of 14 December 2015 that had not already been known; the decision to issue the order was therefore unfounded and unsubstantiated (the order does not mention what evidence there is for the allegations or explain the judge's reasoning). The source then states that, in any criminal proceedings for the offences of abetment or sedition under similar circumstances, the defendant is never deprived of his or her liberty before or during the trial. The source is therefore of the view that a number of Ms. Sala's constitutional rights, such as the presumption of innocence, are being violated.

30. The source also argues that the reference to the provision regarding in flagrante delicto, contained in article 311 of the Code of Criminal Procedure of the Province of Jujuy,

is in violation of the law, as the alleged offence was committed on 14 December 2015 — that is, more than a month before the arrest warrant was issued.

31. The application of article 319, which establishes the requirements that must be met (but in this case were not) in order for the prosecutor to direct that an accused person be held in pretrial detention, was cited as a precedent. On the one hand, the offences with which Ms. Sala has been charged can carry a suspended sentence and, accordingly, entitle her to remain free during her trial; on the other hand, it is believed, on the basis of nothing more than the fact that two criminal proceedings have been brought against her (one for making threats and the other for causing damage) — proceedings which have not established her guilt — that she will try to evade justice or interfere with the investigation. As two different criminal cases have been cited for the purpose of keeping her in detention, the source believes that Ms. Sala's right to personal freedom has been violated.

32. The arrest of Ms. Sala in the second case was made solely to justify her continued detention, for an indefinite period and without supporting arguments, in connection with the protest, in violation of her right to freedom of expression and the presumption of innocence.

33. Attention is drawn to the importance of her position as a member of the Parliament of the Southern Common Market and the immunity that she therefore enjoys, as provided for in Act No. 27120 and in article 32 of the Code of Criminal Procedure on the non-deprivation of liberty of a person enjoying immunity. According to the source, this privilege has been disregarded by the provincial courts.

34. Finally, the source submits that Ms. Sala's detention is arbitrary under category I of the circumstances applicable to the consideration of cases submitted to the Working Group, since the criminal charges used in an attempt to justify her initial detention are flawed not only by literal interpretations of the offence of blocking traffic that seek to criminalize protest but also by the broad reinterpretation of incitement to obstruct a public thoroughfare. In addition, the charge of sedition per se is "dangerous, vague and arbitrary, an unjustified restriction of the rights to freedom of expression and a fair trial". Consequently, as the statements in question were made in the course of the exercise of the right to protest, the criminal proceedings initiated for the offences of abetment and sedition have no clear factual basis.

35. Ms. Sala's detention is linked directly to the exercise of her right to freedom of expression as part of a social protest. At the international level, this right is recognized chiefly in articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the International Covenant on Civil and Political Rights, to which Argentina is a party. At the regional level, it is set forth in articles 4 and 21 of the American Declaration on the Rights and Duties of Man and articles 13 and 15 of the American Convention on Human Rights, which recognize the right to freedom of expression and the right of assembly. The original arrest of Ms. Sala and the evacuation order were the outcome of proceedings designed to criminalize the protest through the harassment and prosecution of the leaders of the Túpac Amaru Neighbourhood Association and the Network of Social Organizations of Jujuy. Ms. Sala's case therefore falls under category II of the applicable circumstances for the consideration of cases submitted to the Working Group.

36. Lastly, the source states that Ms. Sala's case also falls under category III of the applicable circumstances for the consideration of cases by the Working Group owing to the irregularities that occurred throughout the proceedings, starting, in particular, with the presumably selective criminal prosecution of Ms. Sala, the lack of an investigation and the absence of valid arguments for the detention of the accused, the violation of the presumption of innocence, the selection of the judge and the prosecutor to be assigned to the case during the judicial recess and the vague charges brought against Ms. Sala, among

other things. These circumstances, submits the source, suggest that a fair and impartial trial is unlikely.

Response from the Government

37. On 15 December 2015, the State Attorney of the Province of Jujuy brought a criminal complaint, which was assigned to the court on duty at the time, against Ms. Sala and others for offences defined in the Criminal Code.

38. The incidents referred to in the complaint took place a few days after the inauguration of the new Governor of the Province of Jujuy, when members of the Network of Social Organizations set up an encampment in response to the announcement of a transparency plan that required that all monetary benefits received in connection with social programmes had to be paid directly into bank accounts and that gave the cooperatives a deadline for identifying their members. A rally was held to protest the plan which entailed the deployment of logistical support that included trucks, pickup trucks, vans, sound equipment, tables, chairs, soccer equipment, electrical equipment that was then connected to street lighting, generators, gas cylinders, tents and sunshades.

39. The complaint brought by the Prosecutor's Office alleges that, on 14 December 2015, the accused incited other people to commit the offences indicated in the complaint by occupying public areas, preventing public transport from operating normally and hindering the effective exercise of the rights of State authorities.

40. The Public Prosecution Service requested the opening of a criminal investigation of Ms. Sala on suspicion of abetment in combination with breaching the peace. That request was made on the following grounds:

(a) Ms. Sala engaged in evasive manoeuvres, failing to appear to make a statement the first time she was summoned and presenting an inauthentic medical certificate to account for her absence;

(b) Ms. Sala failed to honour her commitment, made at the time that she gave her statement, to refrain from any action that, through public expressions or conduct incompatible with that commitment, could hinder the discovery of the truth;

(c) Ms. Sala interfered with the application of the measure ordered by the provincial government of Jujuy by Decree No. 403-G-16;

(d) The acts that were committed on public thoroughfares exceeded the bounds of the right to protest and dissent and reached the point where they became unlawful. They thus constituted a situation of flagrante delicto;

(e) The existence of a number of cases against Ms. Sala would, in view of a possible joinder, rule out the possibility of her serving a suspended sentence.

41. On 16 January 2016, the due process judge ordered Ms. Sala's arrest and a raid and search of her home.

42. On 28 January 2016, Due Process Court No. 3 of Jujuy reversed the decision and ordered her release in the case on the grounds that the reasons for her arrest no longer obtained. It required a secured bail bond of 30,000 Argentine pesos.

43. On 21 March 2016, the Appellate and Supervisory Court quashed the prosecution's appeal against the decision that had led to the order to put an end to Ms. Sala's detention, thereby confirming her release.

44. In this case, Ms. Sala was accused of having caused public alarm by openly inciting members of various social organizations to commit crimes and obstruct traffic. By reason

of the establishment of the encampment and other actions designed to prevent the application of Decree No. 403-G-16, Ms. Sala was charged with breach of the peace.

45. In Case No. P-129652/16, the alleged involvement of the accused in the offences of unlawful association, defrauding the State and extortion is being investigated.

46. On 18 March 2016, the Public Prosecution Service, after analysing the alleged facts, determined that various unlawful acts had been committed and brought criminal proceedings against Ms. Sala for her role as head of an unlawful association and as co-principal in the crimes of extortion and defrauding the State.

47. The circumstances that gave rise to the investigation related to warnings issued by the Office of the Auditor General in 2010 about irregularities in the unsupervised use of public funds for the construction of housing and related facilities which allegedly reflected the existence of a complex web of corruption.

48. In this case, Ms. Sala's counsel filed a motion for her release, which was rejected. The decision was appealed to the Appellate and Supervisory Court of Jujuy, which rejected the appeal, thereby upholding her detention pending trial.

49. The defence also filed a motion to have the detention order lifted by reason of her status as a member of the Parliament of the Southern Common Market. The motion was considered by Due Process Court No. 1, which found that her detention had been "ordered by a competent judge in the context of judicial proceedings and in full accordance with the requirements set out in article 319 of the Code of Criminal Procedure. This rules out the possibility that the accused enjoys constitutional privileges and immunity, which, by law, cannot be extended."

50. A motion to nullify the prosecutorial and judicial investigation was also filed on grounds of the alleged violation of the guarantee of the right to a natural or duly appointed judge to preside over the proceedings. The motion was rejected on 2 March 2016. That rejection was appealed, and the appeal is currently pending. In addition, a motion for the annulment of the detention order was filed; it was not granted, however, as it gave no new arguments for the annulment. The motion filed by Ms. Sala's counsel during the preliminary criminal investigation had also sought the annulment of the prosecutorial proceedings and hence the detention order which was then pending.

51. The consideration of another motion, entitled "Motion for annulment filed by the accused Milagro Sala regarding the main Case File No. 2990/12", resulted in the finding that article 16 of Act No. 27120 was unconstitutional and the rejection of the motion.

52. Furthermore, the motion had sought the annulment of the proceedings, but the petition for annulment for violation of the constitutional guarantee of defence at trial was rejected, as it is not addressed in any provisions of the Code of Criminal Procedure and did not correspond to any constitutional guarantee.

53. It should be emphasized that allegations made concerning the events related to the encampment are moot, since Ms. Sala, within the framework of the criminal investigation, obtained her release by order of 28 January 2016, without prejudice to the continuation of the proceedings.

54. Ms. Sala is currently under arrest on serious charges in Case No. 129652/16; her alleged involvement in the offences of unlawful association, defrauding the State and extortion is being investigated.

55. The judge who issued the detention order stated in his decision that: "The situation of the aforementioned detainees falls under the provisions set out in article 319 (1) of the Code of Criminal Procedure since, if they were to remain free, they could presumably

attempt to circumvent justice; it is therefore appropriate to order the detention of the two defendants.”

56. The decision also states that: “This takes into account not only the seriousness of the offences that they are accused of but also the need to prevent them from interfering with the investigation, as various measures to obtain evidence necessary to the elucidation of the case are pending.” These observations by the judge hearing the case show that he took into account international standards for the use of pretrial detention.

57. It should be added that Ms. Sala’s expert counsel had the chance to contest those arguments when filing a motion for her release. That motion was rejected by the judge on 12 February 2016, leading to an appeal of the decision. On 26 March, the Appellate and Supervisory Court of Jujuy rejected the appeal.

58. The Court’s arguments included the assertion that: “The risk of flight, too, was considered by the due process judge, who concluded that the significant penalty that could be imposed for the alleged offences constituted an impediment to granting bail.” In addition, “the possibility of a procedural risk was duly considered by the judge when he stated that the accused headed a social organization responsible for various public works in the province and that the case was serious and complex; he pointed out that it involved several cooperatives, officials and private citizens and that it must be kept in mind that the accused is responsible for the operation of the cooperatives, so it is logical and reasonable to infer that she would interfere with this investigation.”

59. The judicial proceedings are being conducted before independent courts whose members were appointed by the provincial authorities of the government whose term of office ended on 9 December 2015 (who belonged to the same political party as Ms. Sala) and in accordance with procedural rules established by the previous provincial government. There is therefore not the slightest indication of any rights violation or plan to “blackmail” or “harass” the leader of a social organization.

60. With regard to Ms. Sala’s detention, it can be concluded that:

(a) It does not fall under category I, as the criminal charges that justified taking Ms. Sala into custody exhibit no legal defect. The claim concerning the criminalization of social protest has no factual or legal basis. By contrast, the legal basis for her detention in the encampment case — which, incidentally, is moot, since she has regained her freedom in that case — can be easily verified. In addition, the basis for the arrest in the case involving unlawful association and defrauding the State is clearly established by the judge who ordered it and the court that reviewed the order;

(b) Ms. Sala’s case does not fall under category II either, as she is currently being held in custody for serious offences that the State cannot fail to investigate. Her detention is connected to cases of corruption;

(c) As there has been no failure to observe international norms relating to the right to a fair trial, the case does not fall under category III either. There has been no hand-picking of judges in connection with the criminal case. The charge on which Ms. Sala is being held is specific and relates to serious offences. The judges who are involved are the natural judges who were appointed before the current administration in Jujuy assumed office, and the accused is afforded all the judicial guarantees recognized by international law.

61. Mention should be made of the reference made by the source to “the selection of the judge and the prosecutor in the case during the judicial recess”. This is based on the belief that the fact that the investigation of Ms. Sala fell to an alternate court (as a result of the summer recess) in some way supplanted the court that had originally intervened in the case. There is no legal or factual basis for this claim, as it ascribes to the prosecutor in the

encampment case an attempt to manipulate circumstances that are entirely out of her control.

62. The provincial government of Jujuy did not decide on what date the encampment would be set up. That occurred in late 2015, which was only two weeks before the judges of that province, like all judges throughout the country, began their judicial holiday, i.e., the legally established period of the year during which the judiciary is in recess; the scheduling of that recess is not determined by the authorities. At no time did the judiciary of the Province of Jujuy, which is bound by the Argentine State's international obligations, proceed in a manner incompatible with the prevailing legal standards in respect of pretrial detention, and there was therefore no violation of any of Ms. Sala's human rights.

63. The prosecution requested that an investigation be undertaken and that the accused be summoned and notified that they were under investigation on suspicion of having committed the unlawful acts mentioned in the complaint. A hearing was held in which Ms. Sala was informed of the investigation that had been opened in her case; she named a counsel of her choosing and was summoned to make a statement.

64. The prosecutor submitted a request for a detention order, citing the provisions which served as the legal basis for doing so, and produced a comprehensive account of the reasons that led him to believe that it was unlikely that Ms. Sala would interfere with the proceedings or elude justice. Ms. Sala's detention was ordered by the judge on the basis of her conduct during the proceedings and the position she had taken after the hearing. It should be recalled that this order was rescinded a few days after having been issued.

65. The detention order issued in connection with the case of unlawful association and defrauding the State was duly substantiated by the judge, who analysed the available evidence and gave reasoned arguments for restricting Ms. Sala's freedom. The decision, appealed by Ms. Sala's expert counsel, was upheld by the higher court after an analysis of all Ms. Sala's grievances and an explanation by each judge of his or her reasons for voting to reject the appeal.

66. All requirements for the decision to order pretrial detention have been met in this case. The order was issued by competent, lawfully appointed judges without interference by the State's political authorities, and the decisions — both the one ordering her release in the encampment case and the one upholding the detention order in the case involving unlawful association and defrauding the State — were reviewed and upheld by appellate courts. In all the decisions, both those of the lower court and those of the higher court, a detailed study of the available evidence was conducted, and reasoned arguments were made for the decisions being contested by the source.

67. The reference to Ms. Sala's status as a member of the Parliament of the Southern Common Market merits special mention. The provisions of Act No. 27120 are referred to in support of the claim that Ms. Sala has parliamentary privileges and therefore enjoys immunity in respect of arrest and the exercise of freedom of expression.

68. This issue has already been defined by the Argentine courts. It has been specifically noted that immunity is of a functional and exceptional nature in relation to the other branches of government and, therefore, cannot be extended by legislative means to other cases expressly contemplated in the Constitution, as so doing would violate the principle of equality before the law.

69. Moreover, it should be noted that, as will be shown below, the Protocol of 9 December 2005 establishing the Parliament of the Southern Common Market does not grant its members any immunity other than in respect of expression and only in instances of expression occurring in the exercise of their functions. In no way can such immunity be

understood to extend, as claimed by the source, to situations not expressly provided for therein.

Further comments from the source

70. On 1 August 2016, the source provided additional comments in which it is stated that social protest is a core method of petitioning the authorities, one of the most effective collective forms of expression and a channel for complaints of human rights abuses or violations.

71. The judicial proceedings were set in motion by the State Attorney, with the Governor of the Province of Jujuy acting as plaintiff. The case that led to Ms. Sala's initial arrest was conducted by an alternate court that was in session during the summer recess. Her arrest was not sought by the prosecutor who could legitimately have sought it or ordered by the judge who could legitimately have done so. In December 2015, in fact, the natural prosecutor had sought the evacuation of the encampment but had not taken action against Ms. Sala, whereas the alternate court did move to restrict her freedom.

72. The State not only supports but also endorses the serious actions taken by the authorities of the Province of Jujuy to imprison Ms. Sala and thus severely restrict her right to freedom of expression, personal freedom and judicial guarantees, materially preventing her from acting as a member of the Parliament of the Southern Common Market.

73. The Argentine Government justifies bringing charges for such offences as abetment and sedition in response to participation in a social protest, as it was in fact the establishment of the encampment that it viewed as criminal behaviour, which it later equated with criminal offences.

74. The State submits not only that it was proper to initiate criminal proceedings against the participants in a social protest but that it was also appropriate to detain Ms. Sala once she had defied the criminal extortion to which she had been subjected by deciding that the encampment should remain in place even after she had been informed of the case against her.

75. During the night of 15 January 2016, the substitute prosecutor asked the judge to order Ms. Sala's arrest, although there were no justifiable reasons for doing so. The due process judge granted this request a few hours later, very early in the morning of Saturday, 16 January, and immediately asked for leave. The search of Ms. Sala's home and her later arrest took place on that same day, Saturday, 16 January 2016.

76. Ms. Sala's lawyers immediately filed a motion for her release and applied for a remedy of habeas corpus. On 18 January, the due process judge presiding in Chamber No. 1 rejected the habeas corpus application. However, on 29 January 2016, since no new information had been added to what had been known on the day of her arrest, the judge ordered her release, a decision that was appealed by the Public Prosecution Service.

77. Ms. Sala never left prison, as the judge, in a manoeuvre designed to ensure that she remained there and thus to limit her right to freedom of expression, decided that she should remain in detention in connection with a second case, initiated on 15 January, in the middle of the judicial recess, in which she is accused of defrauding the State, extortion and unlawful association.

78. Ms. Sala remained in detention in connection with the second case in the absence of a formal pretrial detention order that substantiated the existence of a procedural risk that would justify her continued detention. The defence filed several motions contesting her detention, even though it did not have a formal order to appeal against. All those motions were rejected. At the same time, other criminal proceedings (of previous and current years) against Ms. Sala were reopened or initiated.

79. More than 100 days after the initial arrest, in late April 2016, the same due process judge ordered Ms. Sala's placement in pretrial detention.

80. The decision made by the judge on 28 April 2016 confirms the arbitrariness of the detention and violates due process:

(a) It does not mention or specify the criminal charges that prompted the issuance of the order for pretrial detention;

(b) It transcribes many sections of the prosecutor's request and makes no mention of the offences for which, in the judge's own view, issuing an order of this seriousness would be appropriate;

(c) According to the arrest warrant of 16 January 2016, Ms. Sala was arrested on three criminal charges. When she was informed of the charges against her, however, she was apprised only of the charge relating to one criminal act. The pretrial detention order does not provide any details, and there are only a few specific references sprinkled amid wholly unsubstantiated, dogmatic assertions;

(d) The order contains empty assertions while giving no clear or specific reasons for holding Ms. Sala in pretrial detention. It states that there is a flight risk and risk of interference with the investigation but does not explain on what grounds those conclusions were reached. It portrays her in a negative light as a social leader with considerable power but does not link this alleged "social power" to the risk of flight or interference with the investigation. On the contrary, her conduct as an accused person has been exemplary: she always cooperated with the justice system, voluntarily provided her home address, named a counsel of her choosing and, until the day of her arrest, appeared without delay whenever she was summoned by the courts;

(e) The order provides no analyses or reasoning and fails to substantiate the charges. It makes brief references to certain statements and administrative records, but those few references are insufficient to justify an order of this nature. Statements made by other persons facing charges in the case, which are nearly identical to those brought against Ms. Sala, are cited repeatedly. In Argentina, people under criminal investigation who make statements as part of the proceedings are not required to tell the truth, so if they lie they cannot be charged with perjury. How is it possible to believe, on any serious or reasonable basis, and without further analysis, the accusations that a person who has been charged with an offence makes against another, when lying and perhaps improving one's own legal situation entails no risk whatsoever? That was the case with regard to the statements made by two other women under investigation;

(f) Mention should be made of the information about one of those women that appeared in the press — now the object of an investigation by the federal judiciary — a few days after she made her accusation against Ms. Sala. It emerged that this person was allegedly threatened into making that statement by the Governor of Jujuy, Gerardo Morales, and that, a few days after making her statement, and as a result of the pressure she had been under, she had attempted suicide. Despite the charges against this person, almost identical to those against Ms. Sala, she is still free;

(g) It should also be noted that, despite the judicial recess — during which only urgent cases requiring immediate action are dealt with — the prosecutor not only received the complaint lodged by the cooperative members late at night but also began to make arrangements for the investigation. The offences cited in the complaint were not being committed at the time, and there was no reason to deal with the case on an exceptional basis during the summer judicial recess;

(h) Throughout her detention, there has been no recognition of Ms. Sala's parliamentary privileges as a member-elect of the Parliament of the Southern Common

Market. Under Act No. 27120, holding this office grants her the privileges, including in respect of arrest and expression, enjoyed by legislators in Argentina.

81. There are good reasons to wonder whether the judiciary acted independently in connection with Ms. Sala's detention. Political and judicial officials who have played a key role in the illegal deprivation of Ms. Sala's liberty were appointed by the governor and, in some instances, there are substantive indications that they have acted in response to explicit instructions from him and have sought to keep her in prison.

82. On the very day that he took office, the Governor issued a decree appointing the State Attorney, who, in that capacity, has taken the actions that are largely responsible for keeping Ms. Sala in detention.

83. It was the State Attorney who filed a criminal complaint of abetment, breach of the peace and blocking traffic — in what is known as “the encampment case” — against Ms. Sala on 15 December 2015. And when the natural prosecutor did not charge Ms. Sala, the State Attorney associated himself with the prosecution, following “specific instructions from the governor” to expedite the case against her. To that end, photographs and videos have been included in the case file. All that they show is Ms. Sala and members of the organization involved in a peaceful protest, which, in the State Attorney's view, should be suppressed and punished.

84. Moreover, the State Attorney filed a criminal complaint of dereliction of duty by a public official against the prosecutor for not having charged Ms. Sala as the governor had requested.

85. In addition, two days after Ms. Sala was arrested, charges of extortion, defrauding the State and unlawful association were filed. This case (No. 129652/16), which is the one that legally “justifies” her detention, was also opened on the specific instructions of the governor.

86. Although the encampment that led to the accusation was set up on 14 December 2015 and criminal proceedings were initiated on the same day pursuant to the complaint lodged by the executive branch, with the corresponding prosecutor and judge being notified, the specific case against Ms. Sala proceeded only once the judicial recess had begun (January 2016).

87. A bill introduced by the governor on 17 December 2015 was passed into law by the legislature of Jujuy as Act No. 5895, which provided for the establishment of the Public Prosecution Service, to be headed by the Attorney General (*Fiscal General de la Acusación*), who was sworn in and took office on 4 January 2016.

88. The first decision signed by the Attorney General amended Order No. 213/15 of the High Court of Justice of Jujuy in order to allow the juvenile court prosecutor to continue to act as prosecutor in the cases against Ms. Sala. Pursuant to that order, the juvenile court prosecutor was supposed to leave her position as the substitute prosecutor on Friday, 15 January, at 11.59 p.m. Decision M.P.A. No. 1 allowed her to remain in charge of the cases that had been assigned to her during the judicial recess. Oddly enough, although the complaint of extortion, defrauding the State and unlawful association (No. 129652/16) lodged by the cooperative members concerned incidents from previous years and was not an urgent matter that needed to be attended to during the recess, it began to be processed at 6.30 p.m. on 15 January 2015.

89. On 18 January 2016, however, as the criminal case (No. 127785/15) concerning the encampment had not been opened during the recess, the Attorney General issued a second decision, Decision M.P.A. No. 2, wherein he instructed the aforementioned prosecutor to take over the encampment case, the related cases and all cases against Ms. Sala.

90. The decision that authorizes a prosecutor responsible for juvenile affairs to intervene in all the cases in which Ms. Sala is under investigation, as well as in any future cases against her, is unconstitutional and illegitimate, as it authorizes intervention or action on the basis of the person who is involved in criminal proceedings that are either under way or have not yet begun. Prosecutorial action is thus to be undertaken on the basis of who a person is, regardless of the offence concerned, where in the province it was committed or when the act occurred. This amounts to the establishment of a form of personal jurisdiction, on the basis of a name and surname, which is prohibited by the Constitution and the International Covenant on Civil and Political Rights.

91. Finally, to ensure that the aforementioned prosecutor remained in charge of the Office of the Prosecutor for Criminal Investigation for the entire year, as the judicial recess had ended on 31 January, Decision M.P.A. No. 13 was issued on 1 February. In that decision, she was named Head of the Office of the Prosecutor for Criminal Investigation No. 1. Not only are all the cases against Ms. Sala handled by Office No. 1, but until that day, that assignment had ordinarily been given to another prosecutor. The new appointee had been working as a juvenile court prosecutor until that time.

92. In every case, she ruled against releasing Ms. Sala, while making baseless, dogmatic statements and disregarding established standards in respect of the deprivation of liberty. She requested Ms. Sala's detention in the case brought on charges of extortion, unlawful association and defrauding the State only days after it had begun and with no legal or sound reasons for so doing.

93. In addition, as time passed, the number of criminal cases against Ms. Sala increased to seven. None of them has involved the issuance of a pretrial detention order, and all entail the same violations of Ms. Sala's rights as a person under investigation.

94. All the evidence, when analysed sequentially and as a whole, shows that, since 16 January 2016, when Ms. Sala was unlawfully deprived of her liberty for having participated in a protest, the political and judicial authorities of the Province of Jujuy have done everything they could to keep her in prison, regardless of whether in doing so they were violating all of Ms. Sala's due process rights, the privileges that afford her protection as a parliamentarian and the rights recognized by the international legal order.

95. The Parliament of the Southern Common Market recently issued a statement denouncing the absence of Representative Sala from one of its sessions as a result of her detention and instructed the President of the Parliament to ask the provincial and national authorities to allow Ms. Sala to attend its sessions.

96. The *Milman* judgment cited by the State refers to a legal action initiated by a lawmaker who petitioned for the immunity granted under article 16 of Act No. 27120 to be found unconstitutional, since, by according members of the Parliament of the Southern Common Market and national legislators equal standing under domestic law, it goes beyond what the regulations of the Southern Common Market provide for. The court rejected the action because the arguments that were presented were not connected to any case, trial or dispute, as required for the initiation of a constitutional review in Argentina. It is therefore untrue, as the State seeks to assert, that this issue has already been resolved by the Argentine courts.

97. The court specifically stated that its decision in the *Milman* case did not cover or include situations in which the scope of the immunity of an elected member of the Parliament of the Southern Common Market is at issue. It should also be borne in mind that article 16 of Act No. 27120 states:

In all matters not specifically envisaged by the Protocol establishing the Parliament of the Southern Common Market or not specifically regulated by the relevant bodies,

members of the Parliament of the Southern Common Market representing the people of Argentina shall have the same standing as national legislators under domestic law. In the absence of any specific provision, the provisions establishing the conditions in respect of parliamentary immunity, compensation, employment and social security regulations and the formalities required by protocol shall apply to them.

98. The Argentine Constitution (art. 75 (24)) states that Congress is empowered to ratify integration treaties that delegate powers and jurisdiction to supranational organizations under reciprocal and equal conditions and that respect the democratic order and human rights. The norms derived from those treaties take precedence over statutory laws. This clearly demonstrates the institutional importance accorded to the integration and establishment of the Parliament of the Southern Common Market and, consequently, to ensuring that the necessary requirements for the participation of an elected member of the Parliament are met, in accordance with the rules set forth at the regional level as expressed in the Protocol establishing the Parliament of the Southern Common Market.

99. The Office of the Special Prosecutor for Cases of Institutional Violence of the Public Legal Service of Argentina has indicated in its opinion that the detention of Ms. Sala is an illegitimate and unlawful deprivation of liberty of a member of the Parliament of the Southern Common Market.

Discussion

100. The information received from both the source and the Government of Argentina has made it clear to the Working Group that members of the Network of Social Organizations of Jujuy, starting on 14 December 2015, demonstrated by setting up an encampment in Plaza Belgrano in the capital city of the Province of Jujuy. This peaceful social protest was organized in reaction to Decree No. 403-G-16, which dealt with a plan for transparency, re-registration of cooperative members and the establishment of requirements that social projects use banking services for their disbursements.

101. Exercising their civil liberties, Ms. Sala and members of the Network of Social Organizations of Jujuy requested the establishment of a forum for dialogue with the provincial government.

102. Ms. Sala was deprived of her liberty on 16 January 2016, initially as part of legal proceedings in connection with allegedly criminal acts committed by her as a leader of social organizations and the aforementioned social protest.

103. Charges have been brought against Ms. Sala by the public authorities in two cases. In the first case (No. 127785/15), she is accused of having committed offences under various articles of the Criminal Code (abetment, breaching the peace, blocking traffic and sedition) in the course of her involvement in a social protest (the encampment). As a result, she has been held in custody since 16 January 2016.

104. On 29 January 2016, the due process judge presiding in Chamber No. 3 of Jujuy ordered her release; despite that order, however, Ms. Sala remained in detention owing to the fact that another case against her had been opened the day before.

105. On 18 March, in connection with the second case (No. 129652/16), the Public Prosecution Service initiated criminal proceedings against Ms. Sala in her capacity as head of an unlawful association and as co-principal in the commission of the offences of extortion and defrauding the State as defined in the Criminal Code.

106. The Argentine Government has stated that the criminal investigation launched in order to determine whether those offences had been committed was prompted by warnings that were issued by the Office of the Auditor General in 2010 about irregularities in the use of public funds for the construction of housing and related facilities.

107. The Working Group finds it surprising that various persons filed criminal complaints in 2016 regarding acts that the State had presumably been aware of since an audit conducted in 2010 and that the legal and procedural steps taken to address that situation coincided precisely with Ms. Sala's involvement in a peaceful social protest and, in particular, were initiated just days after a judge was on the point of ordering her release. The Working Group is also struck by the fact that one of the people who reported Ms. Sala said that she had made her statement as a result of pressure and threats, apparently because two of her children, who have not been subject to any legal repercussions, are implicated in similar offences.

108. The Working Group recognizes that peaceful assemblies: (a) are an essential element in economic, social and personal growth within a democratic context; (b) make positive contributions to the development of democratic systems; (c) make it possible to hold Governments to account and to express the will of the people as part of democratic processes; (d) play a critical role in the protection and promotion of a broad range of human rights; (e) amplify the voices of people who have been marginalized or who present an alternative narrative to established political and economic interests; and (f) are a means of engaging not only with the State but also with others, including corporations, religious, educational and cultural institutions, and the public in general.¹

109. The Working Group recalls that the Human Rights Council has taken note of the responsibility of States to prevent arbitrary detention in the context of peaceful protests and in particular to avoid the abuse of criminal proceedings in these contexts.²

110. Consequently, in the view of the Working Group, Ms. Sala's detention is arbitrary, as it has resulted from the exercise of her human rights under articles 19 and 21 of the International Covenant on Civil and Political Rights and articles 19 and 20 of the Universal Declaration of Human Rights.

111. The Working Group finds that Ms. Sala's exercise of her right to a legal defence has been obstructed in various ways, ways that have included shortcomings in terms of her notification of the charges against her and a lack of precision and clarity in reference to the acts that she has been accused of committing. In addition, the Working Group is not convinced that Ms. Sala's arrest or pretrial detention were carried out pursuant to applicable law, and it has not been shown to its satisfaction that the authorities provided proper evidence of the legality of their actions to the due process judge. Furthermore, contrary to the legal provisions mentioned above by the parties concerned, it would seem that one of the Government's main arguments for Ms. Sala's pretrial detention is based on the seriousness of the offence rather than on the suspect's personal circumstances, in particular in respect of flight risk or the risk of her tampering with evidence or interfering with the criminal proceedings. The Government submitted dogmatic arguments to the Working Group in which it simply reiterated the content of the applicable laws, thereby failing to show that the detention order was an individualized, reasonable measure that was necessary to prevent flight or disruption of the proceedings. The Working Group has been persuaded that the detention order was misused to deprive Ms. Sala of her liberty for several days and that consecutive charges were also lodged against her to that end.

112. The Working Group did not receive any substantive information from the Government of Argentina on legal actions taken between 2010 and December 2015, a period during which it was aware of the alleged commission of criminal acts by Ms. Sala. Instead, it would appear that the pace of legal and procedural actions sped up when the protest began in December 2015. In addition, it notes that the judges and prosecutors

¹ See A/HRC/31/66, paras. 5 and 6.

² See Human Rights Council resolution 25/38, para. 2.

assigned to process the charges initiated proceedings in respect of offences that were not urgent and could have waited until the end of the judicial recess.

113. The Committee recalls that article 9 (1) of the Covenant states that: “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. Therefore, for deprivation of liberty to be considered lawful or not arbitrary, the previously established legal procedure must be respected.³ In this context, the Human Rights Committee has stated that as part of the procedures for carrying out deprivation of liberty, officials authorized to arrest should be identified.⁴

114. The purpose of parliamentary immunity and the procedure for withdrawing it prior to the detention or prosecution of lawmakers is to protect the legislative process from judicial abuses. Against that backdrop, in countries whose laws establish specific grounds and a special procedure for the deprivation of liberty and/or prosecution of lawmakers, those standards specify “such grounds and in accordance with such procedure as are established by law”. As mentioned, when the legal order requires the withdrawal of immunity as a precondition for depriving a person of liberty, this requirement must be observed. Once immunity has been withdrawn, the authorities are empowered to order a person’s detention. Failure to withdraw immunity results in arbitrary detention, as the detention was not ordered by an authorized judicial official. It also constitutes a violation of the right not to be arbitrarily deprived of freedom and the right of due process in criminal proceedings.

115. Accordingly, the Working Group finds that the deprivation of liberty, in the absence of the implementation of the corresponding procedure for the removal of Ms. Sala’s immunity, was carried out in violation of applicable Argentine law under both its Constitution and legal standards deriving from international instruments. The Working Group therefore concludes that Ms. Sala’s detention is in violation of the rights set out in articles 9 and 14 of the International Covenant on Civil and Political Rights and in articles 9 to 11 of the Universal Declaration of Human Rights.

Disposition

116. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Milagro Amalia Ángela Sala is arbitrary and falls under categories II and III of the applicable circumstances of arbitrary detention for the consideration of cases submitted to the Working Group.

117. Under applicable international law, victims of arbitrary detention have the right to seek and obtain reparation from the State, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In accordance with this opinion, the Working Group requests the Government of Argentina to immediately release Ms. Sala and to afford her appropriate reparation, including compensation.

Follow-up procedure

118. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide information on action taken in follow-up to the recommendations made herein, including information indicating:

- (a) Whether Ms. Sala has been released and, if so, on what date;

³ See general comment No. 35 (2014) on liberty and security of person, para. 11.

⁴ Ibid., para. 23.

(b) Whether Ms. Sala has been granted some form of monetary or other compensation;

(c) Whether an investigation has been conducted into the violation of Ms. Sala's rights and, if so, what the outcome of the investigation was;

(d) Whether any legislative amendments or changes in practice have been made to bring the laws and practices of the Government into line with its international obligations in accordance with the present opinion;

(e) Whether any other action has been taken pursuant to the present opinion.

119. The Government is invited to inform the Working Group of any difficulties it may have encountered in acting upon the recommendations made in the present opinion and to indicate whether any further technical assistance is required that may be provided in the context of, for example, a visit by the Working Group.

120. The Working Group requests the source and the Government to provide the information mentioned above within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the present opinion if further problems in relation to the case are brought to its attention. This follow-up action will enable the Working Group to keep the Human Rights Council informed of the progress made or any problems that arise in the implementation of its recommendations.

121. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they have taken.⁵

[Adopted on 24 August 2016]

⁵ See Human Rights Council resolution 24/7, paras. 3 and 7.