

ARBITRARY DETENTIONS UNDER THE STATE OF EXCEPTION IN EL SALVADOR

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The Due Process of Law Foundation (DPLF), Center for Justice and International Law (CEJIL), the Centre for Civil and Political Rights (CCPR-Centre), Cristosal, Fundación de Estudios para la Aplicación del Derecho (FESPAD), Instituto de Derechos Humanos de la Universidad Centroamericana José Simeón Cañas (Idhuca), Servicio Social Pasionista (SSPAS) and World Organization Against Torture (OMCT) are writing to the Working Group on Arbitrary Detention (WGAD) to present updated information on mass deprivations of liberty in El Salvador during the state of exception that has been in effect since March 2022. These detentions have been facilitated by criminal law reforms that do not meet international human rights standards and are conducive to abuses, including violations of due process of law, as well as personal liberty and security. We will also put forward an analysis of the reasons we consider that the detentions carried out by authorities during the state of exception could be considered arbitrary under international law and the standards established by the WGAD.

1. THE STATE OF EXCEPTION

As the WGAD is aware, since March 27, 2022, El Salvador has been under a state of exception decreed by the Legislative Assembly¹ at the request of President Nayib Bukele² to restore order, citizen security, and territorial control, and to address serious disturbances of public order “by criminal groups that threaten the life, peace, and security of the population.”³

The rights formally suspended by the decree are, among others:

- (i) the right to association and peaceful assembly;⁴
- (ii) the right to be informed immediately of their rights and reasons for detention;
- (iii) the right against self-incrimination;
- (iv) the right to the assistance of counsel in court proceedings and in proceedings before auxiliary bodies of the justice system;
- (v) the right not to be administratively detained for more than 72 hours before being brought before a competent judge;
- (vi) the right to the inviolability of correspondence and the prohibition of the interception of communications and the use of unlawfully obtained information.⁵

Notably, the constitutional case law in El Salvador has established that an increase in crime does not constitute grounds to declare a state of emergency, since the State has ordinary means to overcome this kind of crisis.⁶ However, the government of El Salvador has maintained that the state of exception is justified because “the tools for combating crime have not been sufficient to contain the increasing wave of violent homicides.”⁷

The Inter-American Court of Human Rights has held that even when a state of exception suspends guarantees, it does not mean that “the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times.”⁸ Special procedures of the United

1 Legislative Decree No. 333 of March 27, 2022, and extensions.

2 Twitter account of Nayib Bukele. Published on March 27, 2022. Retrieved from <https://twitter.com/nayibbukele/status/1508103206232113164?lang=es>; Twitter account of the Office of the Press Secretary to the President of El Salvador. Published on March 28, 2022. Retrieved from https://twitter.com/ComunicacionSV/status/1508564395986763783?s=20&t=Tuj5M-JVMRH_S8qs-1DqfEw.

3 Recitals V and VI; Articles 1 and 2 of Legislative Decree No. 333 of March 27, 2022.

4 This suspension was lifted by the legislative decrees issued in August 2022.

5 Article 4 of Legislative Decree No. 333 of March 27, 2022.

6 Constitutional Chamber of El Salvador. *Judgment of unconstitutionality. 15-96 and Ac. Legislative Decree No. 668*, issued on February 14, 1997.

7 Permanent Mission of El Salvador to the United Nations and other International Organizations, Geneva, Switzerland. *Informe del Estado de El Salvador a la comunicación conjunta de los procedimientos especiales OL SLV 4/2022 en relación con el state of exception y reformas a la legislación penal en El Salvador*, December 10, 2022, p. 8. Retrieved from <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=37285>.

8 I/A Court H.R., *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*. Ad-

Nations (UN), including the WGAD, have pointed out that the duration of the state of exception—which has been extended 30 times—has far exceeded the 60-day maximum provided for in the Constitution of El Salvador and the case law of its highest court.⁹ These procedures have recently reminded the government that, under the International Covenant on Civil and Political Rights (ICCPR), rights can only be suspended in exceptional circumstances, and that this must be considered not only when a state of exception is first declared but also each time the authorities consider its renewal.¹⁰ They recalled that, under El Salvador’s international obligations, the indefinite imposition of human rights restrictions or suspensions is prohibited. Extensions of a state of emergency must meet a sufficient threshold for their justification and not merely be

prolonged when the facts no longer support the existence of a threat to the life of the nation, even if this is due to the success of the emergency measures and the improvement of the security situation. Extensions of emergency regimes for prolonged periods of time on an ongoing or intermittent basis call into question the exceptional nature of the situation and amount to permanent emergencies, which pose significant challenges to the effective protection of human rights.¹¹

Expressing concern over the repeated extensions of the state of exception and questioning its exceptional nature, several UN special procedures described it as a “permanent emergency.”¹² They also called on El Salvador to review the state of exception in keeping with its international human rights obligations, specifically the principles of legality, proportionality, temporality, necessity, exceptionality, and nondiscrimination.¹³

visory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 24. See also I/A Court H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9.

9 Legislative Assembly (October 12, 2023). *Diputados reafirman compromiso de velar por la seguridad de los salvadoreños*. Retrieved from <https://www.asamblea.gob.sv/node/12968>.

10 Article 4 of the International Covenant on Civil and Political Rights (ICCPR). See: Special procedures. Communication OL SLV 1/2024, p. 3. Retrieved from <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunication-File?gId=29035>.

11 Special procedures. Communication OL SLV 1/2024, p. 3.

12 Special procedures. Communication AL SLV 2/2023, pp. 1, 6.

13 Special procedures. Communication AL SLV 2/2023, p. 6.

2. CRIMINAL LAW REFORMS RELATED TO THE ADOPTION OF THE STATE OF EXCEPTION

The Legislative Assembly (Congress) has passed several laws and criminal law reforms that in practice have substantially weakened the system of procedural protections. UN special procedures have considered these reforms to be regressive and contrary to El Salvador's international human rights obligations. Below, we discuss some of the main reforms.

1. Dismissal and early retirement of judges and prosecutors over 60 years of age or with 30 years of service.

In August 2021, the Judicial Career Law and the Organic Law of the Office of the Prosecutor General were amended to require the mandatory and immediate removal from office of justices, judges, and prosecutors over age 60 or with 30 years of service. The reforms also expanded the power of the Supreme Court and the Prosecutor General to transfer judges and prosecutors to new positions.¹⁴ With these reforms, one third of the country's 690 judges and dozens of prosecutors over 60 or with 30 years of service were forced into retirement.¹⁵

2. Extension of time limits for pretrial or provisional detention.¹⁶

In March 2022, the Legislative Assembly amended the Code of Criminal Procedure to allow indefinite pretrial detention for all crimes committed by gang members. Previously, Salvadoran criminal procedure allowed for a maximum term of twelve months of pretrial detention for less serious offenses and 24 months, with the possibility of an additional 24-month extension, for serious offenses.¹⁷

3. Prohibition against substituting pretrial detention with another precautionary measure.

Under El Salvador's criminal procedure law before the entry into force of the state of exception, the parties to a criminal case—at any stage of the proceedings—could request the substitution of pretrial detention with another precautionary measure. However, the legislative reforms barred the use of alternative, noncustodial measures for a broad catalog of offenses. This means that, for certain offenses, judges are prevented

¹⁴ Seattle International Foundation, 2024, 10.

¹⁵ Legislative Decree No. 144. Amendment of the Judicial Career Law, August 31, 2021. Published in Official Gazette No. 175, Volume 432, September 14, 2021. Retrieved from <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/7EC23D84-BA0B-4434-8CE0-52443892A653.pdf>.

¹⁶ DPLF, 2023, 5-6.

¹⁷ As amended, Article 8 of the Code of Criminal Procedure states that “for the offenses of murder, aggravated murder, extortion, aggravated extortion, the planning of and conspiracy to commit such offenses, as well as the offenses of unlawful association, membership in terrorist organizations, and those provided for in the law regulating drug-related activities, and in general any crime committed by members of terrorist groups, *maras*, gangs, or any other criminal group referred to in Article 1 of the law prohibiting *maras*, gangs, and criminal groups, associations, and organizations, the maximum provided for in the second paragraph of this article shall not apply, and its duration shall be determined by the duration of the proceedings until a final judgment is issued.” Legislative Decree No. 339 of March 30, 2022. Retrieved from <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/DEFEE597-6A3F-4B36-A16E-897F128BC1D6.pdf>.

from trying defendants while they remain on release, thus ensuring their indefinite detention.¹⁸ In March 2022, the Legislative Assembly also expanded mandatory pretrial detention to apply to all crimes committed by gang members.

D. “Faceless judges.” The legislative reforms also allow the courts to conceal the names and identities of judges to protect their safety,¹⁹ allowing for the necessary measures to be taken in administrative and judicial acts, as well as in face-to-face or virtual hearings, to make it impossible to identify justice authorities.²⁰

E. Creation of specialized courts. Reforms to the criminal justice system also included the creation of courts with specialized jurisdiction²¹—multi-judge courts and appellate chambers—to hear criminal cases against people detained under the emergency regime.²² The purpose of this reform is to modify the ordinary jurisdiction assigned by law to another judge or court.²³

F. Group trials. In August 2023, the Legislative Assembly enacted special transitional provisions that allow for defendants to be grouped together in a single criminal proceeding based on their belonging to the same criminal organization or “other criteria requested by the prosecutor.”²⁴ These provisions set no limit on the number of people that may be tried in a single criminal case, and they allow for the introduction of evidence without an individual determination of the criminal responsibility of each person charged.²⁵

G. Use of hearsay witnesses. The reform has expanded the use of hearsay witnesses in judicial proceedings against gangs, “when, due to special factual circumstances, there is a serious danger to the life or physical integrity of direct witnesses or a reasonable fear that puts their appearance at risk, as well as in proceedings against members of terrorist groups, *maras*, or gangs,” thus limiting the right to defense and the right to confront witnesses.²⁶

18 DPLF, 2023, 7.

19 Article 73-A of the Code of Criminal Procedure. The following protective measures are established to safeguard the life, personal integrity, freedom, and other rights of members of the ordinary criminal courts and ordinary specialized agencies with criminal jurisdiction: (a) In administrative or judicial acts, the names and general information of judges, justices, or clerks, or any other information that could be used to identify them, may not be entered into the record, and a number or any other code may be used for such purposes. (b) In face-to-face or virtual hearings, the necessary means must be used to prevent their visual identification. The Supreme Court of Justice will take the necessary measures to implement these provisions, weighing the adequate exercise of the right of defense of the accused, as well as the rights of the victims, in their implementation. Legislative Decree No. 339 of March 30, 2022.

20 DPLF, 2023, 5.

21 Legislative Decree No. 551 of November 1, 2022, Provisions to the Organic Law of the Judiciary for the Conversion of Peace Courts, Creation of Arraignment Courts, and Jurisdiction over Organized Crime, of November 1, 2022.

22 DPLF, 2023, 23.

23 DPLF, 2023, 23.

24 Legislative Decree No. 547 of October 26, 2022.

25 DPLF, 2023, 18.

26 Legislative Decree No. 339 of March 30, 2022.

H. Trial in absentia. In September 2022, the authorities passed a law that allows judges and prosecutors to try people in absentia, meaning that judicial proceedings are carried out in the defendant’s absence.²⁷

I. Extension or special extension of the ordinary investigation period. On July 26, 2023, Legislative Decree No. 803 was enacted, granting the Office of the Prosecutor General of the Republic the power to regroup detainees by “cliques” (*clicas*) and/or gangs, thus determining the court in which they would be tried. The prosecutors were given 24 months from the entry into force of the decree—that is, from August 25, 2023—to carry out this process. During this period, the detainees would remain in pretrial detention, and the organized crime courts, in compliance with the decree, issued rulings to “extend or specially extend the ordinary investigation period for 24 months, until August 25, 2025.” This means that a person arrested in March 2022, who by August 2023 had been in pretrial detention for 17 months, had his or her investigation “extended” for another 24 months.

²⁷ Legislative Decree No. 339 of March 30, 2022; Legislative Decree No. 507 of September 21, 2022.

3. MASS ARRESTS UNDER THE STATE OF EXCEPTION

As of September 2024, 82,000 people have been detained during the state of exception,²⁸ including 3,300 children and adolescents. Some of the undersigned organizations have directly assisted at least 5,931 victims of these detentions.²⁹ The information gathered points to the commission of mass arbitrary detentions, enforced disappearances, torture and cruel, inhuman, and degrading treatment, due process violations, and police harassment.

The arrests have tripled the country's prison population, subjecting detainees to inhumane prison conditions, including extreme overcrowding and lack of access to food and adequate medical care.³⁰ Today, over 107,000 people remain in detention³¹.

Police and members of the military have carried out indiscriminate operations in communities where gangs are present, raiding properties and arresting thousands of young people accused of the crime of unlawful association, often without evidence. This offense, broadly and vaguely defined to criminalize anyone who "takes part" in gangs, would allow for the criminalization of journalists, human rights defenders, people with social ties to gangs, and others. On the other hand, because of this legal imprecision thousands of women and girls have been deprived of their liberty, just for the sole fact of being family members of alleged gang members.

Finally, based on the case documentation work carried out by some of the organizations signing on to this communication, it has been possible to verify that many of those detained and imprisoned had no apparent connection to gangs and their criminal activities. The number of detainees has overwhelmed legal defense services, resulting in a lack of adequate defense in each case, undermining the right to a fair trial.³²

28 Legislative Decree No. 339, march 30, 2022 and Legislative Decree No. 507, septiembre 21, 2022. Retrieved from: <https://asamblea.gob.sv/node/13308>

29 Azul Originario, Centro de Estudios de la Diversidad Sexual y Genérica (AMATE), Cristosal, Fundación de Estudios para la Aplicación del Derecho (FESPAD), Instituto de Derechos Humanos de la UCA (Idhuca), Red Salvadoreña de Defensoras de Derechos Humanos & Servicio Social Pasionista (SSPAS), 2024, 57.

30 Special procedures. Communication AL SLV 2/2023, p. 4.

31 Crespín, V. (May 29, 2024). Régimen de excepción supera las 80,200 capturas en dos años de vigencia. *El Mundo*. Retrieved from <https://diario.elmundo.sv/nacionales/regimen-de-excepcion-supera-las-80200-capturas-en-dos-anos-de-vigencia>.

32 Special procedures. Communication OL SLV 4/2022.

4. ANALYSIS OF ARBITRARY DETENTIONS

Based on the applicable legal framework, the testimonies of victims or their relatives, and statements of public officials, and as recognized by special procedures of the UN Human Rights Council (HRC), including the WGAD,³³ many detentions: (i) have been carried out with no legal basis to justify them and on the alleged grounds of “continuous flagrante delicto”; (ii) have been carried out without a warrant or without informing the person of the reasons for their arrest; (iii) lack judicial oversight and effective access to *habeas corpus*; (iv) are based on discriminatory criteria and the presumption of guilt; (v) violate due process; (vi) overload the justice system, negatively affecting the defendant’s right to a defense; (vii) have been, at times, followed by enforced disappearance; and (viii) are committed as part of a widespread and systematic attack on the civilian population.

The WGAD has reaffirmed the customary nature of the prohibition of all forms of arbitrary deprivation of liberty and has considered it a peremptory norm of international law, or *jus cogens*.³⁴ It has affirmed that this right is non-derogable, meaning that it cannot be suspended, restricted, abolished, or otherwise rendered impracticable, even in times of armed conflict (international or non-international) or public emergency.³⁵

With this information, we have identified that El Salvador has engaged in at least the following categories of arbitrary detentions, as defined by the WGAD:

4.1 Category I

According to the WGAD, category I detentions are those in which the authorities are unable to invoke a legal basis to justify the deprivation of liberty, such as, for example, 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.³⁶ In addition, it is not enough for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.³⁷ The WGAD has also found that detention under a law that is incompatible with international human rights law has no legal basis and is therefore arbitrary.³⁸

In El Salvador, most detentions under the state of exception have been carried out with no legal basis, which is why we consider that many could fall within the criteria established

33 Special procedures. Communication AL SLV 2/2023, pp. 1, 6.

34 A/HRC/30/37, para. 12; Principle 1 (Right to be free from arbitrary or unlawful deprivation of liberty).

35 A/HRC/30/37, Principle 4 (non-derogability); Guideline 3 (non-derogability).

36 A/HRC/36/38, para. 8(a). See also Office of the United Nations High Commissioner for Human Rights, 2024, 12.

37 A/HRC/WGAD/2022/70, para. 53; A/HRC/WGAD/2018/36, para. 40.

38 A/HRC/WGAD/2018/60, para. 21; A/HRC/WGAD/2018/40, para. 45; A/HRC/WGAD/43/2017, para. 34.

in category I. Specifically, local and international human rights organizations have documented:

- 1. Deprivations of liberty with no legal basis, warrant, or disclosure of the reasons for the detention.** Many people have been detained by security forces (police and/or military) without an arrest warrant issued by a judicial or administrative authority and without informing the person of the reasons for the detention or the crime of which he or she is accused.³⁹
- 2. Detentions without judicial oversight.** In most cases, detainees are not immediately brought before a judicial authority⁴⁰ thanks to the extension of administrative detention periods from 72 hours to 15 days.⁴¹ In addition, according to the human rights organization Cristosal, the Constitutional Chamber of the Supreme Court of Justice has denied or delayed access to the writ of *habeas corpus* in many cases.⁴² On the other hand, a study by the organization DPLF, published in July 2024, showed how the Constitutional Chamber systematically rejected Habeas Corpus, Amparo and Unconstitutionality petitions during the first year of the emergency regime, modifying or ignoring key constitutional precedents. This highlights an erosion of human rights protections and a lack of equal access to justice in a context of institutional crisis.⁴³
- 3. Incommunicado detention and enforced disappearance.** In the vast majority of documented cases, detainees—including children—are held incommunicado. At times, the authorities have refused to provide information on detainees' health status or whereabouts to their families for days or months.⁴⁴
- 4. Failure to comply with court orders for the release of detainees.** In dozens of cases, we have documented that prison authorities have refused to comply with court orders for noncustodial measures, keeping people incarcerated for weeks or months.⁴⁵

39 According to the WGAD, any detention by agents of the State must be carried out pursuant to an arrest warrant issued by a competent, independent, and impartial judicial authority and must state the reasons for the detention, which must include not only the general legal basis for the detention, but also fact-specific information to establish both the legal elements of the complaint and the description of the offense. See: A/HRC/WGAD/2023/11, para. 51; A/HRC/WGAD/2023/28, para. 96. See DPLF, et al., 2024, 9. Retrieved from https://dplf.org/wp-content/uploads/2024/07/informe_al_grupo_de_trabajo_de_onu_sobre_desapariciones_forzadas_e_involuntarias_wgeid_sobre_el_salvador.pdf.

40 According to the UN Human Rights Committee, 48 hours is an acceptable time limit for transferring a person to a judicial authority. See *Zhanna Kovsh v. Belarus* (CCPR/C/107/D/1787/2008), para. 7.4.

41 A/HRC/WGAD/2022/70, para. 53.

42 Seattle International Foundation, 2024, 25.

43 DPLF. Desprotección judicial: la respuesta de la Sala de lo Constitucional durante el régimen de excepción en El Salvador. Junio 2024. Retrieved from: <https://dplf.org/desproteccion-judicial-la-respuesta-de-la-sala-de-lo-constitucional-durante-el-regimen-de-excepcion-en-el-salvador/>

44 Holding people incommunicado violates their right to challenge the legality of the detention before a court. This Working Group has further established that incommunicado detention, especially during the initial stage of an investigation, creates an environment conducive to torture and cruel and inhuman treatment, as it can be used to force a person to confess to crimes and admit guilt. See A/HRC/WGAD/2022/67, para. 99.

45 Detention becomes unlawful when the circumstances justifying the deprivation of a person's liberty have changed due

5. Detentions based on the concept of “continuous flagrante delicto.” The Criminal Code defines flagrante delicto as “when the person is caught in the commission of a crime,” and it “extends to up to 24 hours after the commission of the crime.”⁴⁶

The WGAD has repeatedly noted that a person is arrested in flagrante delicto when he or she is deprived of liberty during or immediately after the commission of a crime, or is arrested in hot pursuit. Furthermore, when an arrest is made after the alleged commission of an offense, without immediacy, it cannot be considered to have been made in flagrante delicto, even if it takes place within hours of the criminal act.⁴⁷

6. Detentions based on legislation contrary to international human rights obligations. The WGAD has said when a criminal provision used as the basis for an arrest violates international human rights obligations or the principle of legality because it is vague, overly broad, discriminatory, or disproportionate, the arrest is devoid of any legal basis and is arbitrary under category I of the Working Group’s methods of work.⁴⁸ The following laws and reforms violate internationally recognized human rights; therefore, detentions arising from them have no legal basis.

a. Amendments to the Code of Criminal Procedure, Decree 339, enacted on March 30, 2022

(Automatic or mandatory pretrial detention).

- Automatic pretrial detention is established for offenses committed by members of criminal groups (including terrorist and organized crime groups), i.e., no alternative measures to pretrial detention will be allowed. At the same time, pretrial detention will no longer have a maximum term in such cases.

In numerous opinions, the WGAD has examined the issue of mandatory, informal, or automatic pretrial detention and has concluded that it violates the norms of the ICCPR, and therefore, the legal provisions that regulate it cannot be invoked as a legal basis to justify detention.⁴⁹ According to the jurisprudence of the WGAD, pretrial detention requires a judicial authority to examine the merits of each case and “must be strictly based on an individual determination that it is reasonable and necessary to prevent flight, interference

to a court order for the detainee’s release. Holding a person in custody without the necessary legal basis is contrary to international human rights standards. See: A/HRC/27/47, para. 14; A/HRC/22/44, para. 49.

46 Special procedures. Communication AL SLV 2/2023, p. 2. See also Cristosal, 2024, Chapter I, 20. Retrieved from <https://cristosal.org/ES/el-silencio-no-es-opcion-informe-completo/>.

47 A/HRC/WGAD/2020/19, para. 49; A/HRC/WGAD/2018/9, para. 38; A/HRC/WGAD/2014/53, para. 42; A/HRC/WGAD/2012/46, para. 30; A/HRC/WGAD/2011/67, para. 30; A/HRC/WGAD/2011/61, paras. 48-49; E/CN.4/2003/8/Add.3, paras. 39, 72(a).

48 A/HRC/WGAD/2020/19, para. 56.

49 A/HRC/WGAD/2018/1, paras. 59-60; A/HRC/WGAD/2019/64, para. 78; A/HRC/WGAD/2020/24, para. 98.

with evidence or the recurrence of crime.”⁵⁰ The Group has further held that pretrial detention should be the exception rather than the rule, that it should be ordered for the shortest possible period,⁵¹ and that when such a measure is unjustified or prolonged, it constitutes an arbitrary deprivation of liberty.⁵²

b. Legislative Decree 803, enacted on July 26, 2023, which contains transitional provisions to order the prosecution of defendants detained under the state of exception.

- The grouping of multiple defendants in a single case and the discretionary powers of the Prosecutor’s Office to determine the criteria for holding joint trials and to specify the court in which the defendants will be tried.

For special procedures of the HRC, including the WGAD, the regrouping of defendants into a single criminal case is incompatible with the right to a fair trial under Article 14 of the ICCPR, Articles 8 and 25 of the American Convention on Human Rights, and Articles 11 and 12 of the Constitution of El Salvador.⁵³

- Vague definitions of criminal offenses.

Special procedures of the HRC, including the WGAD, consider that Decree No. 803 includes vague definitions of criminal terms such as “unlawful association” and “taking part.” It is also vague about forms of criminal involvement and about mass trials, making it impossible for each defendant to effectively exercise his or her due process rights. In their opinion, the decree violates the rights to the presumption of innocence, to be judged impartially, to confront witnesses, to an individual determination of criminal responsibility and punishment, to equality of arms, and to be afforded the time and means for criminal defense. They consider that the vague definitions could even be used to criminalize journalism, religious or charitable activities, members of civil society organizations, human rights defenders, and defense attorneys.⁵⁴ Since the decree was enacted in 2023 but with retroactive effects to the beginning of the state of exception, its application is incompatible with the right not to be prosecuted under laws not in force at the time of the commission of the offense.⁵⁵ Based on these vague criminal definitions, children have been sentenced to long prison terms, ranging from two to 12 years. In the cases we were able to document, the convictions were based

50 A/HRC/WGAD/2022/1, para. 67.

51 A/HRC/WGAD/2022/70, paras. 64-69.

52 A/HRC/19/57, para. 57.

53 Special procedures. Communication OL SLV 1/2024, pp. 4-5.

54 Special procedures. Communication OL SLV 1/2024, pp. 5-6.

55 Special procedures. Communication OL SLV 1/2024, p. 7.

on uncorroborated, sometimes contradictory police testimony and sometimes on confessions that were false or obtained through illegal means such as ill-treatment or torture.⁵⁶

c. Legislative Decree No. 804 of July 26, 2023, amending the Special Law against Organized Crime (LECO).

- The Prosecutor General’s Office may use “any electronic medium that ensures the authenticity, confidentiality, integrity, availability, preservation, and legal compliance of information.”
- In cases involving the investigation of gang-related crimes and organized crime that have allegedly been committed by adolescents, the reforms allow the National Civil Police to keep a record on them that includes “any information useful for identifying the person, including his or her photograph.”
- The Prosecutor General’s Office may obtain evidence and findings without judicial authorization in cases where “[there is] risk of loss or deterioration of the evidence of the crime.” These actions must be approved by a judge within 72 hours.
- The period in which the preliminary hearing must be held was changed (from no less than 10 days and no more than 30 days to no less than 30 days and no more than 90 days) and the public hearing (from 60 days to a reasonable period of up to 120 days).⁵⁷ The above violates, among others, the rights of every person to be tried within a reasonable time or to be released⁵⁸ and to be tried without undue delay.⁵⁹
- The prosecutor may ask the judge for a preliminary statement from witnesses, victims, or experts at any stage of the proceedings, at which time the judge would have to order it based solely on the request. The judge must then summon all parties, and if the named defense attorney is unable to appear at the hearing, the proceeding will be conducted with the assistance of the public defender or a court-appointed defense attorney.⁶⁰
- A confession made in an abbreviated proceeding will be considered in the criminal proceeding, or in any other criminal proceeding, as evidence of another defendant’s participation in the act or acts investigated, without the de-

56 Human Rights Watch, 2024, 2.

57 Special procedures. Communication OLV SLV 1/2024, p. 7.

58 Article 9.3 ICCPR. In this regard, see Special Procedures. Communication OLV SLV 1/2024, p. 7.

59 Article 14(3)(c) ICCPR. In this regard, see Special Procedures. Communication OLV SLV 1/2024, p. 7.

60 Special procedures. Communication OLV SLV 1/2024, p. 8.

fendant being compelled to also testify at trial.⁶¹ This violates the right of the accused to examine witnesses or have witnesses examined.⁶² The provision of the confession or testimony at trial is also necessary to ensure the right against self-incrimination of the person confessing, as it allows the court to verify that the confession was made without any kind of direct or indirect pressure (physical or psychological), or torture and other cruel, inhuman, or degrading treatment or punishment of the accused by the investigating authorities.⁶³

- It allows expert opinions to be included in the court proceedings without requiring the experts to testify or be subject to examination during the trial, which could violate the defendant's right to examine or have examined witnesses for the prosecution and to challenge evidence.

Special procedures of the HRC, including the WGAD, consider that several of the amendments to the LECO introduced by Decree No. 804 appear to violate the right of defense of the accused, the principle of legal certainty, the requirements of equality before the courts and nondiscrimination, and due process guarantees.⁶⁴

d. Legislative Decree No. 928 of January 3, 2024, amending the Special Law against Acts of Terrorism.

- This decree authorizes the Office of the Prosecutor General to designate a person as a terrorist when there is an “investigation, prosecution, or conviction” against him or her for acts of terrorism broadly defined in the legislation.
- It also grants the Office of the Prosecutor General the power to issue “a national list of persons and entities designated as terrorists.” These provisions do not conform to the definitions provided by international law. Moreover, the power to list individuals for “belonging to” terrorist groups introduces further vagueness into the criteria for inclusion, as such membership does not necessarily entail causal participation in the terrorist acts of the group.

Special procedures of the HRC have agreed that the current procedure for listing terrorist entities or individuals lacks adequate safeguards to ensure a transparent,

61 Article 11 of Legislative Decree No. 804. Amendments to the Law against Organized Crime, July 26, 2023. Published in Official Gazette No. 157, Vol. 440, of August 25, 2023. Retrieved from <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/0CBE8C0B-4990-48C8-8EA6-6B867885D69E.pdf>.

62 Article 14(3)(e) of the ICCPR; General Comment No. 32 (CCPR/C/GC/32), para. 39.

63 Articles 7 and 14(3)(g) of the ICCPR; Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; General Comment No. 32 (CCPR/C/GC/32), para. 41.

64 Special procedures. Communication OLV SLV 1/2024, p. 7.

independent, and impartial review of designations, as required by international human rights law. The breadth of the criteria for inclusion on the list, coupled with flaws in due process and judicial safeguards, make this system highly susceptible to abuse, resulting in adverse and unlawful impacts on civil society and nongovernmental organizations, minorities, and marginalized communities.⁶⁵

e. Amendments to the Juvenile Criminal Law of March 30, 2022.

- **Maximum sentences for juveniles convicted of gang-related offenses were increased: juveniles between 16 and 18 years of age can now receive sentences of up to 20 years (up from seven years), and children between 12 and 16 years of age can be sentenced to a maximum of 10 years.**⁶⁶

According to a recent report by Human Rights Watch (HRW), 3,300 children and adolescents have been detained in indiscriminate raids and more than 1,000 have been convicted during the state of exception.⁶⁷ The organization has documented serious abuses committed by the authorities against detained minors, including arbitrary detentions and severe restrictions on due process, acts of torture and ill-treatment, and police harassment and stigmatization. Many had no involvement in gang activities and had in fact been victimized by these criminal groups. HRW has also documented several cases in which minors have been detained with adults for days at a time.

Human rights violations against juvenile detainees have been made possible by the criminal reforms adopted during the emergency regime, particularly the Juvenile Criminal Law, which authorizes mandatory pretrial detention for gang-related crimes and prison sentences that are incompatible with the principles of restorative justice and resocialization of juvenile offenders, which calls for differentiated treatment meant to protect and safeguard children’s development. The Juvenile Criminal Law contradicts international standards that urge countries to raise the age of criminal responsibility to at least 14. Lengthy prison sentences also violate the Convention on the Rights of the Child, which states that detention should be used only as a last resort for children, and for the shortest necessary period.⁶⁸

⁶⁵ Special procedures. Communication OLV SLV 1/2024, pp. 11-13.

⁶⁶ Special procedures. Communication AL SLV 2/2023, p. 2.

⁶⁷ Human Rights Watch, 2024, 1.

⁶⁸ Human Rights Watch, 2024, 2.

20 4.2. Category III detentions

These detentions are characterized by the total or partial non-observance of the internationally recognized principles of due process and the instruments accepted by the States concerned.⁶⁹ In El Salvador, many detentions could be classified under this category because they present the following characteristics:

- 1. Violation of the right to the presumption of innocence.** People are detained by police and soldiers without a judicial or administrative warrant for their arrest and are accused of belonging to gangs. They are presented in the media as members of terrorist associations, without regard for the presumption of innocence, meaning that the person is presumed guilty without having been heard and convicted in a trial.⁷⁰
- 2. Due process violations arising from the use of informal, mandatory, or automatic pretrial detention.** As a general rule, pretrial detention is imposed under the state of exception without even a minimal showing of indicia that would lead to an individual determination of the accused's participation in the criminal act for which he or she is being prosecuted. Because they do not make an individual determination, the courts also fail to examine the reasonableness of the measure. Thanks to these reforms, pretrial detention is indefinite and cannot be modified by other less harmful measures.⁷¹ The vast majority of people in custody under the emergency regime are in pretrial detention.⁷²

The WGAD in numerous opinions has analyzed the issue of mandatory, informal, or automatic pretrial detention and has concluded that it violates international human rights law, which requires that pretrial detention be an exceptional measure, rather than the rule, and that it be based on a reasonable and necessary individual determination. Imposing automatic pretrial detention for certain offenses reverses the presumption of innocence, such that defendants charged with those offenses are mandatorily detained without the balanced consideration of noncustodial alternatives like bail, in violation of the Universal Declaration of Human Rights and the ICCPR.⁷³

69 A/HRC/36/38, para. 8(a).

70 The presumption of innocence is one of the cornerstones of a fair trial and, therefore, non-derogable. It ensures that guilt cannot be presumed until the charge has been proven beyond reasonable doubt. In addition, public officials must refrain from making public statements affirming the guilt of the accused. See A/HRC/WGAD/2022/87, para. 116. See also Cristosal, 2023, 61. Retrieved from <https://cristosal.org/ES/informe-un-ano-bajo-el-regimen-de-excepcion-una-medida-permanente-de-represion-y-de-violaciones-a-los-derechos-humanos/>.

71 Under Legislative Decree No. 333 of the emergency regime, the guarantee contained in Article 13(2) of the Constitution is suspended: "Administrative detention shall not exceed 72 hours, within which time the detainee shall be brought before a competent judge, with the investigations that have been conducted."

72 Under international law (e.g., Article 9.3 of the ICCPR), pretrial detention should be the exception rather than the rule, and should be ordered for the shortest possible period of time. Most of the people apprehended under the state of exception can now be detained indefinitely without being brought before a judge. In addition, at the initial appearance before a judge, they are ordered to be held in "pretrial detention" without cause, for an indefinite period, and without the possible use of other, less harmful measures, in contravention of international standards. See: DPLF, 2023.

73 Articles 11(1) of the Universal Declaration of Human Rights and 14(2) of the ICCPR. In this regard, see A/HRC/WGAD/2020/19, paras. 53-55; A/HRC/WGAD/2019/64; A/HRC/WGAD/2019/14; A/HRC/WGAD/2018/75; A/HRC/WGAD/2018/53; A/HRC/

3. Violation of the right to criminal defense and equality of arms:

a. Group trials. Group trials violate or contradict due process guarantees, specifically, the right to defense and the ability to present and refute evidence. Under international human rights law, everyone has the right to adequate time and means to prepare his or her defense.⁷⁴

Special procedures of the HRC, including the WGAD, have found that El Salvador's judiciary has faced enormous difficulties in carrying out its work, with mass arrests substantially increasing its workload. Initial hearings, in which the legality of the arrest is reviewed and the charges and measures to be applied are determined, have been conducted in groups of up to 500 people. At these hearings, public defenders are often given three to four minutes to present all of the many cases of the detainees on whose behalf they are appearing. Information received by the WGAD found that the number of cases handled by public defenders jumped from 9,000 between January and March of 2022 to over 55,000 between late March and July 2022. The numbers of detainees have risen substantially since then. By October 2022, there were 287 public defenders, each representing an average of 194 cases.⁷⁵ This severely limits the right to defense and the presumption of innocence.⁷⁶

In the same regard, with more than 3,300 juvenile criminal cases and only 27 public defenders assigned to the Juvenile Criminal Unit, each attorney was responsible, on average, for 108 cases. These figures also reveal an overload in the juvenile justice system,⁷⁷ which also violates children's right to defense and the presumption of innocence.

The prosecution can also present anonymous witnesses at trial, which violates the right of defense, particularly by curtailing the right to examine witnesses. Here, it is important to note that the Salvadoran legal system "limits the possibility of examining witnesses who can shed light on the facts because only third parties who did not witness the events may be examined in cases involving alleged members of terrorist groups, *maras*, or gangs."⁷⁸

b. Power of the prosecutor's office to join cases. As noted earlier, one of the legal reforms authorizes the Prosecutor General's Office develop "a transitional procedure" to join several defendants "in a single criminal case," even when their cases are in different courts, if, in the prosecutor's opinion, they belong to the same criminal organization.⁷⁹

WGAD/2018/16; A/HRC/WGAD/2015/24; A/HRC/WGAD/2014/57; A/HRC/19/57, paras. 48-58; General Comment No. 35 (CCPR/C/GC/35), para. 38.

74 Article 8.2 of the American Convention on Human Rights.

75 Special procedures. Communication AL SLV 2/2023, pp. 4-5.

76 Special procedures. Communication AL SLV 2/2023, p. 4.

77 Human Rights Watch, 2024, 90-1.

78 DPLF, 2023, 18.

79 DPLF, 2023, 25.

On this point, the Human Rights Committee of the United Nations has established that The same procedural rights are to be provided to all parties to a proceeding, unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision.⁸⁰

Allowing only one of the parties to exercise this power violates the guarantee of equality before courts and tribunals, as well as the principle of equality of arms, established in the ICCPR.⁸¹

4. The right to be tried by an impartial and independent court:

a. “Faceless” judges. The use of judges “whose identity is kept confidential” is authorized under Article 2 of Legislative Decree No. 339, which amends Article 73-A of the Code of Criminal Procedure. This mechanism was incorporated into the criminal justice system to protect justice authorities in ordinary and specialized agencies with jurisdiction over criminal matters, including judges in charge of issuing court decisions.

It is well established under international human rights law that the use of “faceless judges,” or judges and tribunals whose identities are kept confidential, violates the guarantee of judicial impartiality. The main problem with this concept is that, because the judge’s identity is unknown, it is impossible to ascertain whether any circumstances would warrant his or her recusal from the case, for example, if he or she has a direct interest in the case, a bias, or a relationship of any kind with any of the parties that could affect or cast doubt on his or her impartiality. International law has established that tribunals with faceless judges “do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial.”⁸²

b. Specialized or transitional courts. Decree No. 551, adopted in November 2022, created multi-judge trial courts and appellate chambers, both specializing in organized crime, which have jurisdiction over crimes committed by adults and minors, and over acts that occurred prior to their creation. Regarding transitional or specialized courts that hear crimes committed during the emergency regime, the inter-American case law has established that

[when States create transitional or specialized courts] at the time the facts are occurring, the right to be heard by courts “previously established by law” [is not ensured][and therefore]

⁸⁰ General Comment No. 32 (CCPR/C/GC/32), para. 13.

⁸¹ Article 14 of the ICCPR.

⁸² General Comment No. 32 (CCPR/C/GC/32), para. 23.

those judges [do] not meet the [requisite] standards of competence, impartiality, and independence.⁸³

We recall that special procedures of the UN Human Rights Council, including the WGAD, have expressed concern about the elimination of time limits for criminal proceedings and pretrial detention, the automatic imposition of pretrial detention and the prohibition of alternatives, trials in absentia, the use of “faceless judges,” and the treatment of juveniles as adults, contrary to the obligations to “promote restorative justice and a focus on specialty.”⁸⁴

83 I/A Court H.R., *Case of Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, paras. 114-115.

84 Special procedures. Communication OL SLV 4/2022, p. 17.

**5. OTHER SERIOUS HUMAN
RIGHTS VIOLATIONS
COMMITTED AGAINST
PERSONS DEPRIVED OF
THEIR LIBERTY**

5.1 Torture and cruel, inhuman, and degrading treatment

Testimony from people who have been released from custody and relatives of detainees indicates practices that could constitute torture and other cruel, inhuman, and degrading treatment, such as mock executions, burns, asphyxiation, punishment, and discrimination in police lockups and prisons.⁸⁵ Detainees have been beaten and kicked, forced to kneel on the ground for prolonged periods of time in the sun, stripped naked and forced to do squats;⁸⁶ they have been subjected to extreme overcrowding, unsanitary conditions, lack of medical care and adequate food, solitary confinement, prohibition of conversation and prayer, indiscriminate use of tear gas, and sleep deprivation. We have documented cases of people who, while being transported to one of the country's prisons, have been beaten by police officers on their backs and legs to try to get them to admit to being gang members. Once they are in prison, the guards often do not allow them to leave their cells, depriving them of sunlight for weeks or months at a time.⁸⁷

Abuses come mainly from guards,⁸⁸ but also from other inmates with the acquiescence of prison authorities.⁸⁹ These acts have been acknowledged and encouraged by the most senior authorities of the Bureau of Prisons and the Ministry of Justice, including in public statements such as, "All the suffering that these bastards have caused to the public, we are going to put them through it in the prisons."⁹⁰ These statements point to a practice of torture and systematic ill-treatment of detainees.

5.2 Prison deaths, alleged extrajudicial executions

Of all the people detained during the emergency regime, 261 adults and four minors had died in custody as of May 2024.⁹¹ The Prosecutor General stated in June 2023 that 142 cases of de-

85 DPLF, Cristosal, IDHUCA, Amnistía Internacional & SSPAS, 2023.

86 Victim testimony, Human Rights Watch & Cristosal, 2022, 82. Victim testimony in Amnesty International, 2023, 34.

87 Victim testimony, Human Rights Watch & Cristosal, 2022, 82. Victim testimony in Amnesty International, 2023, 34.

88 See *El Faro* (October 2, 2023). "Montaña: el custodio señalado como torturador de Mariona." Retrieved from https://elfaro.net/es/202310/el_salvador/27076/montana-el-custodio-senalado-como-torturador-de-mariona.

89 *El Faro* (August 28, 2023). "Testimonios: Sobrevivientes de las Cárceles del Régimen. Testimonio #11. Señor H: 'En Mariona custodios sabían que otros reos violaban a las personas.'" Retrieved from <https://especiales.elfaro.net/es/testimonios/audios/27028/senor-h-en-mariona-los-custodios-sabian-que-otros-reos-violaban-a-las-personas>.

90 X account [formerly Twitter] of Osiris Luna Meza [Director of Penitentiary Centers]. Published on April 4, 2022. Retrieved from <https://twitter.com/OsirisLunaMeza/status/1510964901644283904>.

91 *El Mundo* (May 22, 2024). "Cristosal contabiliza 261 reos muertos del régimen de excepción." Retrieved from <https://diario.elmundo.sv/nacionales/cristosal-contabiliza-261-reos-muertos-del-regimen-de-excepcion>.

tainee deaths had been closed “for not constituting a crime.”⁹² The government of El Salvador has also said that “no deaths have been confirmed that are not linked to a health issue.”⁹³

The official narrative contradicts statements made by the victims’ relatives, individuals who have been released from custody, and data collected by civil society organizations. This evidence points to an underreporting of prison deaths. Some relatives have maintained that 200 people have died in La Esperanza Prison (Mariona) alone, and that there are clandestine graves inside this and other prisons.⁹⁴

Regarding cause of death, many people who have died in detention facilities have died after being hit or beaten by security forces during their arrest or by other detainees. It has also been documented that some have died due to lack of access to adequate medical care and medication for chronic diseases,⁹⁵ such as diabetes, high blood pressure, and cancer, among others.⁹⁶ As we have documented, most of the bodies turned over to relatives have shown signs of violence.⁹⁷

5.3. Crimes against humanity

For all of the above reasons, the practice of arbitrary detentions and other serious human rights violations must be analyzed from the perspective of international criminal law. Given the number of incarcerations and other serious deprivations of liberty in contravention of internationally recognized rules of due process, the enforced disappearances, and the murder and torture of thousands of civilians, committed during the implementation of the security policy, in particular during the state of exception in 2022, it is all but impossible to consider them as isolated cases. On the contrary, it appears that these crimes are part of a widespread pattern being carried out systematically in the country, and that the highest authorities are not only aware of these crimes, but often encourage and justify them.⁹⁸

92 *La Prensa Gráfica* (June 13, 2023). “Fiscalía archivó 142 casos de muertes en Centros Penales.” Retrieved from <https://www.laprensagrafica.com/elsalvador/FGR-archivo-142-casos-de-muertes-en-Centros-Penales-20230613-0010.html>.

93 *Divergentes* (October 19, 2022). “La mentira de Osiris Luna sobre los fallecidos del Régimen de Excepción: ‘Han muerto por temas de salud.’” Retrieved from <https://www.divergentes.com/la-mentira-de-osiris-luna-sobre-los-fallecidos-del-regimen-de-excepcion-han-muerto-por-temas-de-salud/>.

94 DPLF, Cristosal, IDHUCA & SSPAS, 2023, 8.

95 Human Rights Watch & Cristosal, 2022, 86.

96 DPLF, Cristosal, IDHUCA & SSPAS, 2023, 8.

97 Cristosal, 2023, 68.

98 See, e.g., Twitter account of Nayib Bukele. Published on May 16, 2023. Retrieved from <https://twitter.com/nayibbukele/status/1658608915683201030?s=20>; *Semana*. (October 16, 2022). “Nayib Bukele dice verdades, desafía a organizaciones de derechos humanos y enciende polémica: ‘Son más importantes derechos humanos de la gente honrada que los de los delincuentes.’” Retrieved from <https://www.semana.com/mundo/articulo/nayib-bukele-enciende-polemica-y-desafia-a-organizaciones-de-derechos-humanos-son-mas-importantes-derechos-humanos-de-la-gente-honrada-que-los-de-los-delincuentes/202243/>. It is also illustrative that the Director of the PNC has maintained that “The police officer is a street judge who has the discretion to detain and identify any individual.” See also Twitter account of the PNC of El Salvador. Published on February 14, 2023. Retrieved from <https://twitter.com/PNCSV/status/1625592644662444032?lang=es>.

6. REQUESTS

In view of the foregoing, we request:

- To participate in the next session of the Working Group, either virtually or in person.

- That the State of El Salvador be asked to provide information on the foregoing and, if appropriate, be invited to a meeting with the Working Group during its next session, in order to hear its position on this context, legislation, and practices.

- That the request for an official visit to El Salvador by the full Working Group or by one of its members be reiterated to the State of El Salvador.

- Send a communication to the State expressing concern about the current situation, and requesting more detailed information on the number of people detained under the state of exception, including children, as well as data on the duration and legal grounds for detentions, and investigations into allegations of abuses.

- That the member States of the United Nations be reminded of their international obligations regarding the absolute prohibition of suspending or restricting the right of any person not to be arbitrarily deprived of his or her liberty under the application of emergency regimes or the suspension of rights to manage emergency situations, protect public safety, or combat terrorism.

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