

## Main points regarding the five detained Water Defenders in El Salvador

Updated April 9, 2023

### **I. Factual background**

Five Water Defenders from the Salvadoran NGO ADES Santa Marta,<sup>1</sup> who led the effort to pass a law prohibiting metallic mining in El Salvador to save the water supply in 2017, were arrested on January 11, 2023. They remain in pre-trial detention as of today, more than two months after their arrest. They have been ordered detained for six months, a period of pre-trial detention that can be renewed several times up to three years. In addition, the judge has ordered complete secrecy (that is, a gag order) of the proceedings.

The five Water Defenders were FMLN combatants during the civil war in El Salvador (1980-1992). They have been charged with three alleged crimes involving one person—herself a supporter of the FMLN guerrillas—that allegedly took place 33 years ago (1989) during the Salvadoran civil war. The alleged crimes are murder, unlawful deprivation of liberty, and unlawful associations (because they were members of the FMLN, which is now being implied to be an unlawful organization by the government of Nayib Bukele).

### **II. Significant irregularities in the case**

#### **A. The criminal charges were filed without real evidence**

Due to the secrecy requested by the prosecutors from the Attorney General's Office and granted by the judge at the second hearing, there is little public information about the charges. However, information from statements of the prosecution to the press in the immediate days after the arrest, as well as statements from the defense attorney before the gag order was given to the parties, indicates that there is little real evidence to connect the five Water Defenders to the alleged crimes.

#### **B. The criminal charges rest entirely on the testimony of a secret witness who contradicted himself and will not be available for cross-examination at trial**

The only evidence supposedly linking the accused to the alleged crime was testimonial evidence from a secret witness who was presented to answer questions only at the initial hearing so that he would not have to be present for cross-examination at trial. As a result, the only opportunity

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<sup>1</sup> Asociación para el Desarrollo Económico y Social de Santa Marta (located in the department of Cabañas, El Salvador). Santa Marta is a community that suffered significant violence during the war and emigrated to Honduras for several years during the war, before returning to Cabañas. See Robin Broad and John Cavanagh, *The Water Defenders: How ordinary people saved a country from Corporate Greed* (Boston, MA: Beacon Press, 2021), for more on this.

for the defense to cross-examine the secret witness was at the initial hearing, without any advance notice and indeed within one minute of receiving the charging document with the secret witness's statement. Even with no time to prepare the cross-examination, the defense lawyer's cross-examination got the secret witness to contradict himself on having witnessed the crime and to admit that he does not have first-hand knowledge of the events.

C. A secret trial is incompatible with the notion of transitional justice

Conducting a secret trial regarding an alleged crime, which is alleged to be a "crime against humanity," is unjustified and unprecedented. In the very few other cases related to transitional justice in El Salvador, the initial hearings and the related documents have been open to the public.

D. Pre-trial detention of the accused is unprecedented in transitional justice cases

This is the sole alleged war-crime case from the Salvadoran civil war in the 1980s where the defendants have been ordered to be held in prison pending trial, a process that could last years. The defense appealed this ruling on pre-trial detention in February 2023. It has become known publicly that, in response, the prosecutors have made a request to the Salvadoran Supreme Court for the recusal of the one judge who appears to be the most likely to be the judge who would rule on the defense's appeal, a judge with a reputation of independence and impartiality. The prosecutors base their recusal request on the fact that this judge happens to have the same last name (Rogel) as a former FMLN congresswoman and thus, the prosecutors claim, could be biased in favor of the accused.<sup>2</sup>

E. The lawyer representing the five Water Defenders is not being allowed to meet with his clients to prepare their defense

On March 9, 2023, the five Water Defenders were transferred from a detention facility to a permanent prison. Since that day, their attorney has not been allowed to visit them to prepare their defense, thus denying the accused a basic right to due process. This conduct is contrary to Salvadoran law, international law, and contrary to the practice in the few legitimate cases related to real human rights violations currently in other Salvadoran courts.

III. **The real reason behind this prosecution is not related to justice or an alleged crime or emergency measures to stop "terrorism," but an attempt by the government of El Salvador to silence opposition to mining**

The lack of evidence, together with the fact that the Attorney General's Office requested and obtained complete secrecy for the proceedings, plus the fact that the five arrested Water

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<sup>2</sup> <https://www.laprensagrafica.com/elsalvador/Fiscalia-pide-que-magistrado-sea-recusado-en-el-caso-Santa-Marta-20230227-0094.html>

Defenders remain in pre-trial detention (both requests and decisions unlike any other of the few cases being slowly tried by the Salvadoran judiciary, all against members of the military and paramilitary organizations until now), indicate that the Water Defenders (plus another member of the same community) were arrested, detained, and charged in an arbitrary and discriminatory manner, for political reasons related to their opposition to metallic mining in El Salvador.<sup>3</sup>

#### **IV. The criminal charges must be dismissed pursuant to the 1992 National Reconciliation Law**

In addition to all the above, the Attorney General should not have brought these criminal charges in the first place because the alleged crimes are included in the amnesty passed by El Salvador in January 1992. The amnesty, included in the National Reconciliation Law, is limited to members of the FMLN—in fulfillment of the commitments signed by the Government of El Salvador, the FMLN, and the United Nations Secretary-General, with the full support of the United States Government, including the U.S. Congress.

The amnesty in the General Reconciliation Law of 1992 remains in full force. It was the 1993 blanket amnesty (that is, the amnesty that extended beyond the FMLN combatants to the Salvadoran military and others, without exceptions) that was declared unconstitutional by the Constitutional Chamber of the Salvadoran Supreme Court in 2016.

In fact, the 2016 Supreme Court decision expressly states that the 1992 National Reconciliation Law is fully in force. The only crimes removed from the amnesty in the 1992 National Reconciliation Law are crimes included in the Truth Commission Report and other crimes of equal or greater seriousness and impact on society. The alleged crimes with which the Attorney General's Office has charged the five Water Defenders are not even close in magnitude and impact on society to the crimes included in the Truth Commission Report.

#### **V. The impact of this arbitrary prosecution on international peace**

This is not only about El Salvador. Members of the international community who believe in a rules-based international order have a stake in protecting the commitments made in the 1992 Peace Agreement.

The Peace Agreement (including interim agreements) was negotiated under the auspices of the Secretary-General of the United Nations. The final Peace Agreement was signed by the representatives of the Government of El Salvador and of the FMLN insurgency, and by the United Nations Secretary-General, in Mexico on January 16, 1992. The governments of Mexico, Spain, Colombia, and Venezuela acted as "Friends of the Secretary General" in the peace

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<sup>3</sup> See *The Water Defenders* on the role of ADES and the community of Santa Marta in the metallic mining ban.

process including implementation. The United States government was an active participant and facilitator in the peace process and its implementation. Canada also supported the implementation of the Peace Agreement.

A very important part of the final 1992 Peace Agreement was a mechanism for FMLN combatants to agree to lay down their weapons and be assured reinsertion in the political life of El Salvador.<sup>4</sup> The only way to achieve this objective was through a limited amnesty (as described above) that precluded individual FMLN combatants (after laying down their weapons) from prosecution and imprisonment for crimes committed during the war, with the exception of crimes that constituted gross violations of human rights, which would be included later in the Truth Commission Report set up under a previous interim agreement and reconfirmed in the 1992 final Peace Agreement. This was the origin of the January 23, 1992 National Reconciliation Law, approved one week after the final Peace Agreement was signed.

The Salvadoran Peace process not only ended the conflict in El Salvador, but also has been used as a model for ending internal conflicts in other countries across the world.

However, starting two years ago, Salvadoran president Bukele began to criticize the Peace Agreement as “fake.” Some contend that he did so due to the Agreement’s emphasis on demilitarizing Salvadoran society and removing the Armed Forces from public security functions -- two commitments that Bukele has undone under the guise of combating the gangs with which Bukele himself has made deals.<sup>5</sup>

In an apparent response to Bukele’s disdain for the Salvadoran Peace Agreement, Mexican President Andres Manuel Lopez Obrador publicly reaffirmed the importance of the Salvadoran Peace Agreement for Mexico, while on an official visit to El Salvador in May 2022.<sup>6</sup>

If the Attorney General of El Salvador and the Bukele Administration insist on continuing with this illegal prosecution of the five Water Defenders, they would be in clear violation of a central commitment from the Salvadoran Government in the 1992 Peace Agreement that ended the Salvadoran civil war. That a government can violate a central part of an international peace agreement 31 years later for political purposes would set a seriously damaging precedent for the UN and for international peace, both for any existing peace agreements as well as for future ones. Why negotiate a peace agreement if it can be broken?

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<sup>4</sup> El Salvador Peace Agreement, Chapter VI, Political Participation by the FMLN (“The following agreements have been reached concerning political participation by the FMLN and shall be subject to the implementation timetable contained in this Agreement: 1. Adoption of legislative or other measures needed to guarantee former FMLN combatants the full exercise of their civil and political rights, with a view to their reintegration, within a framework of full legality, into the civil, political, and institutional life of the country.”) Available at [https://peacemaker.un.org/sites/peacemaker.un.org/files/SV\\_920116\\_ChapultepecAgreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/SV_920116_ChapultepecAgreement.pdf)

<sup>5</sup> See <https://www.wola.org/analysis/bukele-peace-accords/>

<sup>6</sup> <https://www.elsalvador.com/noticias/nacional/acuerdos-de-paz-nayib-bukele-exalta/953487/2022/>

## **VI. Conclusion**

For the reasons stated above, governments of counties with an interest in preserving a rules-based international order should send a clear message urging the Attorney General of El Salvador to:

- 1) As an initial step, withdraw the request for preliminary detention of the accused so that they can be released from jail and sent home immediately; and
- 2) As a second step, request the dismissal of all charges against the accused, pursuant to the 1992 National Reconciliation Law.

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## **Selected additional links**

### 1) News articles:

- <https://www.theguardian.com/world/2023/jan/14/el-salvador-environmental-defenders-arrested-mining-ban>
- <https://news.mongabay.com/2023/02/is-el-salvador-preparing-to-reverse-its-landmark-mining-ban/>

### 2) Letter signed by 251 organizations from 29 countries requesting that charges be dropped:

- <https://ips-dc.org/release-251-organizations-from-29-countries-call-on-salvadoran-government-to-drop-the-charges-against-leading-water-defenders-arrested-on-january-11/>

### 3) Official documents:

- 1992 El Salvador Peace Agreement:  
[https://peacemaker.un.org/sites/peacemaker.un.org/files/SV\\_920116\\_ChapultepecAgreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/SV_920116_ChapultepecAgreement.pdf)
- 1992 Salvadoran National Reconciliation Law:  
<https://www.acnur.org/fileadmin/Documentos/BDL/2002/1840.pdf>
- 2016 Salvadoran Supreme Court decision confirming 1992 National Reconciliation Law is in full force (relevant pages: 43 (subsection 5(v) and 42 (Subsection 5(i) of the holding):  
<https://www.jurisprudencia.gob.sv/VisorMLX/PDF/44-2013AC.PDF>