

¿MARERO O TERRORISTA? EXAMINING THE SUPREME COURT
OF EL SALVADOR'S DESIGNATION OF GANG MEMBERS AS
TERRORISTS

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I. INTRODUCTION

MS-13, or Mara Salvatrucha, is one of, if not the most, notorious gangs. In 2012, the U.S. Department of the Treasury designated it as a Transnational Criminal Organization (TCO).¹ It was the first U.S. street gang to be labeled as such.² What started out as a street gang in Los Angeles has turned into a multinational organization with strongholds in nearly all of the lower forty-eight states, Mexico, and the Northern Triangle. The Salvadoran government has attempted to fight this gang in various ways, finally declaring the gangs as terrorists.

On August 23, 2015, the Constitutional Court of the Supreme Court of El Salvador designated the MS-13 gang as terrorists.³ A year and a half later, the Honduran Congress passed a Legislative package in which gang members, as well as protestors, can qualify as terrorists.⁴

Some argue extraordinarily tough measures are necessary to combat gangs, even if El Salvador has to violate international human rights law to achieve its goal of social order.⁵ While gang violence must be curtailed, it cannot be procured at the expense of human rights. This Note will discuss the consequences of the Supreme Court of El Salvador's designation of the MS-13 as terrorists. It will first lay out a history of the MS-13 and the various efforts to combat this organization. It will then argue that using anti-terrorism laws and other extreme measures to combat street gangs has resulted in human rights abuses in violation of international law. Lastly, this Note will call upon the international community to act in the face of mounting evidence of human rights abuses and propose other alternatives for combating gangs.

¹ Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Latin American Criminal Organization (Oct. 11, 2012), <https://www.treasury.gov/press-center/press-releases/Pages/tg1733.aspx>.

² *In a first, U.S. labels MS-13 street gang 'criminal organization'*, L.A. TIMES (Oct. 11, 2012), <http://latimesblogs.latimes.com/lanow/2012/10/in-a-first-us-labels-ms-13-street-gang-criminal-organization.html>.

³ Sala de lo Constitucional de la Corte Suprema de Justicia [SCCSJ] (Constitutional Chamber of the Supreme Court of Justice), 24/7/2015, Case on the Constitutionality of the Terrorism Law, Diario Oficial [D.O.] vol. 408, no. 158, 135-228 (1 Sept. 2015), available at <https://www.diariooficial.gob.sv/diarios/do-2015/09-septiembre/01-09-2015.pdf> [hereinafter Corte Suprema].

⁴ *Honduras: Congreso Nacional aprobo los dos articulos mas polemicos de las reformas penales*, EL HERALDO, (Feb. 2, 2017), <http://www.elheraldo.hn/pais/1046584-466/honduras-congreso-nacional-aprobó-los-dos-art%C3%ADculos-más-polémicos-de-las-reformas>.

⁵ See generally Juan J. Fogelbach, Comment, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle to Reclaim Social Order*, 7 SAN DIEGO INT'L L.J. 223, 236 (2005) [hereinafter Fogelbach].

II. BACKGROUND

A. *Children of War*

Though it is hard to pinpoint an exact cause of the rise of MS-13, there is no doubt that El Salvador's bloody civil war was a major factor in turning young men into cold-hearted killers. The Salvadoran Civil War was fought between the right-wing military-led government and a coalition of leftist guerrillas known as the Faribundo Marti National Liberation Front (FMLN).⁶ The origin of the war can be traced back to years of civil unrest due to extreme inequality. For decades, El Salvador's wealth was concentrated amongst a small elite class, while the rest of the population lived in abject poverty.⁷ During the late 1970s, there were increasing reports of human rights violations committed by the right-wing government troops and death squads, causing the FMLN to respond with intensified guerilla tactics. The assassination of the outspoken government critic and human rights activist, Archbishop Oscar Romero, in 1980 plunged the country into full-blown war.⁸ In the ensuing twelve years, more than 75,000 Salvadorans perished and 8,000 disappeared.⁹

The war finally came to an end in 1991 with the signing of the Chapultepec Peace Agreement.¹⁰ The agreement included reforms of the armed forces, established a civilian police force, and recognized the FMLN as a political party.¹¹ Throughout the course of the war, the Salvadoran people were subjected to atrocities by both sides, but the most heinous of human rights violations came from the government itself.¹² After the release of the United Nations Truth Commission report laying out the atrocities committed by the

⁶ The FMLN was named after the revolutionary leader Agustin Farabundo Marti, who led and was subsequently killed in a peasant uprising in 1932. The government was responsible for the death of 30,000 peasants. *El Salvador profile- Timeline*, BBC NEWS (July 13, 2017), <http://www.bbc.com/news/world-latin-america-19402222> [hereinafter El Salvador Profile].

⁷ Benjamin Schwarz, *Dirty Hands*, THE ATLANTIC (Dec. 1998), <https://www.theatlantic.com/magazine/archive/1998/12/dirty-hands/377364/>.

⁸ Archbishop Oscar Romero was murdered while he celebrated mass. His assassination was a conspiracy between the country's powerful elites, politicians, and death squad commanders. Nina Lakhani, *Details of plot to murder archbishop Oscar Romero revealed in new book*, THE GUARDIAN (Jan. 19, 2017), <https://www.theguardian.com/world/2017/jan/19/archbishop-oscar-romero-murder-el-salvador-book>.

⁹ Raymond Bonner, *Time for a US Apology to El Salvador*, THE NATION (April 15, 2016), <https://www.thenation.com/article/time-for-a-us-apology-to-el-salvador/>.

¹⁰ Permanent Rep. of El Salvador to the U.N., Letter dated Jan. 27, 1992 from the Permanent Rep. of El Salvador to the United Nations addressed to the Secretary-General, U.N. Doc. A/46/864, annex (Jan. 30, 1992).

¹¹ *Id.*

¹² The United Nations Truth Commission found that state agents, paramilitary groups, or death squads allied with official forces were responsible for 85% of the murder, disappearance, and torture of Salvadoran civilians. HUMAN RIGHTS WATCH, EL SALVADOR

government, the Salvadoran Legislative Assembly quickly moved to approve the Law of General Amnesty for the Consolidation of Peace, which granted absolute immunity for those who participated in criminal acts that occurred during the war.¹³ For nearly a quarter century, Salvadoran civilians who suffered at the hands of the government never received justice as a result of the amnesty.¹⁴

Amongst the most heinous crimes, for which nobody has been brought to justice, was the massacre at El Mozote. For three days, a U.S.-trained counterinsurgency force killed more than 900 men, women, and children.¹⁵ It took the Salvadoran government 35 years to strike down the Law of General Amnesty that absolved those who carried out these extra-judicial killings.¹⁶ This long history of uninvestigated human rights violations continues to this day.

B. *History of MS-13*

Though MS-13 has become synonymous with illegal immigration, the gang originated in Los Angeles during the early 1990s.¹⁷ MS-13 was formed by children of immigrants who fled to the United States to escape the Salvadoran Civil War.¹⁸ These refugees mostly flocked to rough neighborhoods in cities where gang culture was already prevalent. After California's passage of new anti-gang laws in the mid-1990s, thousands of convicted felons were deported to El Salvador, with disastrous results.¹⁹ The Salvadoran government, still reeling from a twelve-year-long civil war, was unequipped to deal with these hardened criminals.²⁰ The gang problem in El Salvador quickly escalated and spread to other Central American countries.²¹

ACCOUNTABILITY AND HUMAN RIGHTS: THE REPORT OF THE UNITED NATIONS COMMISSION ON THE TRUTH FOR EL SALVADOR 4 (1993), <https://www.hrw.org/legacy/reports/pdfs/e/elsalvdr/elsalv938.pdf>.

¹³ *Id.* at 24; El Salvador profile, *supra* note 6.

¹⁴ David Gonzalez, *Unearthing Justice in El Salvador*, N.Y. TIMES (Feb. 14, 2017), <https://lens.blogs.nytimes.com/2017/02/14/unearthing-justice-in-el-salvador-el-mozote-massacre>.

¹⁵ *Id.*

¹⁶ Sarah Esther Maslin, *El Salvador strikes down amnesty for crimes during its civil war*, WASH. POST (July 14, 2016), https://www.washingtonpost.com/world/the-americas/el-salvador-strikes-down-amnesty-for-crimes-during-its-civil-war/2016/07/14/5eeef2ec-49bf-11e6-8dac-0c6e4acc5b1_story.html?noredirect=on&utm_term=.15bc7228f5ec.

¹⁷ MAX G. MANWARING, A CONTEMPORARY CHALLENGE TO STATE SOVEREIGNTY: GANGS AND OTHER ILLICIT TRANSNATIONAL CRIMINAL ORGANIZATIONS IN CENTRAL AMERICA, EL SALVADOR, MEXICO, JAMAICA, AND BRAZIL 16 (2007), <https://ssi.armywar-college.edu/pdffiles/PUB837.pdf>.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 16.

²⁰ *Id.*

²¹ *Id.*

In an effort to combat the gang, the Salvadoran government enacted a series of “firm hand” legislation at the turn of the century.²²

C. *Ley Anti Mara*

El Salvador enacted its first anti-gang law, the Ley Anti Mara, on October 10, 2013.²³ The law contained a laundry list of crimes intended to curtail violent gang activity.²⁴ The law was challenged on the grounds that it violated numerous provisions of the Salvadoran constitution and the U.N. Convention on the Rights of the Child.²⁵ The challenge ultimately succeeded and the law was struck down.²⁶ However, before the Ley Anti Mara was struck down, the Salvadoran legislature enacted a new version of Ley Anti Mara that no longer contained the provisions that were declared unconstitutional.²⁷ These tough measures proved popular among the Salvadoran populace, but did not solve the gang problem.

D. *Government Truce*

Finding that their hard-fist policies were not curtailing the violence, the now legitimized FMLN government decided to try something new. In early 2012, the FMLN and the gangs reached a secret truce.²⁸ In exchange for the transfer of top gang leaders to more lax prisons, the MS-13 and Barrio 18 issued orders to their foot soldiers to stop killing.²⁹ Though the murder rate decreased drastically, some believe it was artificially depressed and, in reality, gangs were making their victims disappear.³⁰ The truce eventually broke down and the government ramped up their efforts in the war against gangs.

E. *The Special Law Against Terrorism*

Interestingly, El Salvador’s latest weapon to combat gangs has been on the books for over a decade. El Salvador enacted the Special Law Against Acts

²² *Id.* at 21-22.

²³ Fogelbach, *supra* note 5, at 224.

²⁴ *Id.* at 237.

²⁵ *Id.* at 239.

²⁶ *Id.* at 242.

²⁷ *Id.* at 245-246.

²⁸ Nicholas Phillips, *The Allegory of El Salvador’s ‘Dany Boy’: MS13 Gang Leader, Activist, or Both?*, INSIGHT CRIME (Sept. 25, 2017), <https://www.insightcrime.org/investigations/allegory-el-salvador-dany-boy-romero-ms13-gang-leader-activist-or-both>.

²⁹ *Id.*

³⁰ *Id.*

of Terrorism (LECAT in Spanish) on October 17, 2006,³¹ after joining the war on terror.³² It was one of the many countries that modeled its own anti-terrorism law after the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act.³³ Though the definition of terrorism in the wording of the anti-terrorism law is vague, it was not intended to apply to gang members.³⁴ Former Salvadoran Attorney General, Luis Antonio Martinez Gonzalez, was among the first to propose the use of LECAT against gang members following the murder of an officer of the Anti-Extortion Unit in 2014.³⁵ When asked to justify using this anti-terrorism law against gang members, he responded, “[a]ssassinating police officers, prosecutors, soldiers, judges, throwing grenades, assassinating hardworking and honorable people, it is not simply crime, it is terrorism. The gangs are causing terror in the population. That is why I have designated them as terrorists and that is how they should be treated.”³⁶ These acts are heinous, to be sure, but do they qualify as terrorism by international standards?

F. *Factors Weighing for and Against Classification as Terrorists*

Street gangs and terrorist organizations have similar organizational structures in that they are both non-state actors that depend on recruiting disaffected youths. Though there are several common characteristics between gangs like MS-13 and terrorist groups, including “a propensity for indiscriminate violence, intimidation, coercion, transcending borders, and targeting nation-states,”³⁷ they have divergent motivations. Namely, gangs are motivated by profit whereas terrorist organizations are motivated by politics.³⁸ Members of terrorist organizations share an ideological belief, but for street gangs like the MS-13, a belief system is not generally a defining feature.³⁹

³¹ Decreto No. 108, 11 Oct. 2006, Ley Especial Contra Actos De Terrorismo [Special Law Against Acts of Terrorism] (El Sal.) [hereinafter LECAT].

³² Mirna Cardona, *El Salvador: Repression in the Name of Anti-Terrorism*, 42 CORNELL INT'L L.J. 129, 130-31 (2009).

³³ *Id.*

³⁴ James Bargent, *El Salvador to Wield Terror Laws Against Gangs*, INSIGHT CRIME (April 16, 2014), <http://www.insightcrime.org/news-briefs/el-salvador-to-wield-terror-laws-against-gangs-that-attack-police>.

³⁵ *Id.*

³⁶ Milagros Melendez-Vela, “*Las maras son terroristas*”, EL TIEMPO LATINO (Aug. 5, 2015), <http://eltiempolatino.com/news/2015/aug/05/las-maras-son-terroristas/>.

³⁷ GARY I. WILSON & JOHN P. SULLIVAN, ON GANGS, CRIME, AND TERRORISM 9 (2007), <http://indianstrategicknowledgeonline.com/web/ON%20GANGS%20CRIME%20AND%20TERRORISM.pdf>.

³⁸ *Id.* at 14.

³⁹ Scott Decker & David Pyrooz, *Gangs, Terrorism, and Radicalization*, 4 J. OF STRATEGIC SECURITY 151,156 (2012).

According to the United States, these gangs are not terrorists. The U.S. Department of State assessed the country's capital, San Salvador, as being a low-threat for terrorist activity and added that "[t]here are no known international terrorist groups that operate in El Salvador."⁴⁰ The report refers to the gangs as transnational criminal organizations (TCOs) and notes that both the MS-13 and Barrio 18 gangs concentrate on street-level drug sales, extortion, street crime, carjacking, murder for hire, and arms trafficking.⁴¹ That the United States does not view the MS-13 as terrorists is particularly telling because it is the very country after which the Salvadoran legislature modeled its anti-terrorism law, the same law now being used to place gangs under the terrorism umbrella.

While terrorism is a politically-charged term and there is a lack of general consensus on a proper definition, there have been international agreements around the "constitutive elements and threshold for 'terrorism.'"⁴² The U.N. Global Counter-Terrorism Strategy Review "reaffirmed that 'the acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, at threatening territorial integrity and the security of States and at destabilizing legitimately constituted Governments.'"⁴³ Each country of course possesses the power to dictate the laws within their own country.

G. The Supreme Court Resolution

On August 23, 2015, the Constitutional Chamber of the Supreme Court of El Salvador designated the gangs as terrorist organizations.⁴⁴ The designation was rendered in a challenge to LECAT, wherein the petitioners claimed that the lack of a definition of terrorism in the law grants authorities wide latitude to classify whatever conduct they believe to be terrorism as such.⁴⁵ The petitioners were correct in stating that LECAT does not actually define terrorism. The closest LECAT gets to defining terrorism is in the stated objective of the law, which is to:

prevent, investigate, sanction and eradicate the crimes herein described, as well as all of its manifestations, including its financing and related activities, and by their form of execution,

⁴⁰ U.S. DEP'T OF STATE, BUREAU OF DIPLOMATIC SECURITY, EL SALVADOR 2017 CRIME & SAFETY REPORT 3-4 (2017).

⁴¹ *Id.* at 1.

⁴² Dr. Agnes Callamard, Special Rapporteur on extrajudicial, summary or arbitrary executions, Statement at the Launch of the Parliamentary Fact Sheet on the Death Penalty and Terrorism-related Offences (Oct. 20, 2016).

⁴³ *Id.*

⁴⁴ Corte Suprema, *supra* note 3.

⁴⁵ *Id.* at 145.

means and methods employed, which evidence the intention to provoke states of alarm, fear or terror in the population, by putting in imminent danger or affecting the life or physical or mental integrity of persons, material goods of significant value or importance, the democratic system or the security of the State or international peace.⁴⁶

Despite this lack of a clear definition, the Salvadoran Supreme Court rejected the challenge and held that MS-13 and Mara 18 are terrorist groups, as are any other gang or criminal organization that seeks to usurp the powers belonging to the state or systemically and indiscriminately violate the fundamental rights of the population.⁴⁷ The court did not stop there, however. It also held that any collaborators, apologists, or financiers of the gangs would also be classified as terrorists, no matter the degree of participation and regardless of whether these criminal organizations have financial, political, or criminal motives.⁴⁸ The Court supported this classification by listing gang activities that are generally included in the definition of terrorism. These activities include “systemic attacks on the life, liberty and personal integrity of the population” along with “violations of the rights of every citizen” by forcing them to “abandon their residences by means of threats.”⁴⁹ Other activities the court considers as having terrorist-like qualities include forcing students to drop out of school out of fear of being victims of gang violence, violating their right to an education.⁵⁰

III. ANALYSIS—HAS THIS REALLY WORKED?

On the surface, the new designation appeared to have its desired effect. Between 2015 and 2016, El Salvador convicted over 200 gang members under the LECAT.⁵¹ During the first quarter of 2017, there were 807 murders in El Salvador—a 60% reduction from the same period the previous year in which 2,015 murders occurred.⁵² The government attributed this decline to the country’s “extraordinary” measures implemented in 2016, including the increased presence of soldiers in the streets and more restrictive conditions in prisons

⁴⁶ LECAT, *supra* note 31, at art. 2.

⁴⁷ Corte Suprema, *supra* note 3, at 175.

⁴⁸ *Id.* at 174-75.

⁴⁹ *Id.* at 175.

⁵⁰ *Id.*

⁵¹ Juan Carlos Rivera, Con ley, *El Salvador condena a 200 mareros como terroristas*, LA PRENSA (Jan. 5, 2017), <http://www.laprensa.hn/honduras/1032675-410/con-ley-el-salvador-condena-a-200-mareros-como-terroristas> [hereinafter Rivera].

⁵² *807 asesinatos en primer trimestre de 2017, según IML*, LA PRENSA GRAFICA (Apr. 28, 2017), <https://www.laprensagrafica.com/elsalvador/807-asesinatos-en-primer-trimestre-de-2017-segun-IML-20170428-0022.html>.

housing gang members.⁵³ The Salvadoran police force sees the designation as a useful tool because it has helped to prosecute and convict gang members with greater ease.⁵⁴ Critics, however, raised important issues of using an anti-terrorism law to fight gangs. For example, officials in neighboring Guatemala worry the radical measures will put pressure on El Salvador's neighboring countries.⁵⁵ Critics fear that as a result of these new harsh measures, gangs will migrate to other territories and there will be an increase in violence elsewhere.⁵⁶ Critics also warned the resolution would give authorities *carte blanche* to commit abuses with the pretext of applying anti-terrorism law,⁵⁷ and these fears were not unfounded.

There have been numerous reports that the Salvadoran National Police (Policia Nacional Civil, or PNC) have committed human rights abuses. On September 5, 2017, two Salvadoran human rights groups presented three cases to the Inter-American Commission on Human Rights (IACHR).⁵⁸ The report detailed three instances of alleged extrajudicial killings carried out by the PNC, including the well-publicized "massacre" at the San Blas Estate where a confrontation ensued between police and alleged gang members.⁵⁹ The PNC initially reported that the killing of the eight alleged gang members was the result of a raid where officers were attacked.⁶⁰ This version was disputed after an investigation into the killing by a Salvadoran newspaper indicated the official version was false.⁶¹ Most (but not all) of the deceased were allegedly MS-13 members. Some appeared to have been executed, which called into question the reports of a gun battle that was allegedly initiated by the gang

⁵³ *Id.*

⁵⁴ Rivera, *supra* note 51.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Alberto Najar, *¿Qué significa que declaren terroristas a las maras en El Salvador?*, BBC MUNDO (Aug. 25, 2015), http://www.bbc.com/mundo/noticias/2015/08/150825_el_salvador_pandillas_mara_terrorista_a.

⁵⁸ Parker Asmann, *El Salvador Death Squad Cases Go International*, INSIGHT CRIME (Sept. 2, 2017) <http://www.insightcrime.org/news-briefs/el-salvador-death-squad-cases-go-international> [hereinafter Asmann].

⁵⁹ Roberto Valencia, Oscar Martinez & Daniel Valencia Caravantes, *La Policia masacro en la finca San Blas*, EL FARO (July 22, 2015) <http://www.salanegra.elfaro.net/es/201507/cronicas/17205/La-Polic%C3%ADa-masacr%C3%B3-en-la-finca-San-Blas.htm> [hereinafter Valencia].

⁶⁰ *Id.*

⁶¹ Online newspaper, El Faro, conducted a lengthy investigation in an attempt to recreate the event. They interviewed eye-witnesses, examined forensic and ballistic reports, and consulted with prosecutors and human rights experts, all of which contested the official story given by the PNC. At least two of the victims were underage. Valencia, *supra* note 59.

members.⁶² It was confirmed, one of the victims of the incident, Dennis Martinez Hernandez, was not a member of the gang.⁶³ Eight police officers were accused of committing an extrajudicial killing but were acquitted by a Salvadoran judge because prosecutors could not prove who had fired the bullets that killed Martinez. Though the officers were acquitted, the judge asserted that the PNC officers had illegally executed Martinez and noted that Martinez was not a gang member but was instead an employee of the San Blas farm. The judge further stated that Martinez “was completely defenseless, he did not resist and that he begged the police officers for his life.”⁶⁴ The police officers were not charged with the deaths of the other individuals, even though there was significant evidence they were victims of extrajudicial executions.⁶⁵ As the journalist who investigated the San Blas killing put it, “the police are now judge, jury and executioner”,⁶⁶ and the evidence shows that the police are using their new role with impunity.

The IACHR report details that since 2015, “1,415 people—90 percent of whom are suspected gang members—have been killed in ‘alleged confrontations’ between security forces and alleged gang members.”⁶⁷ In comparison to the number of security forces allegedly killed by gang members—238 between 2014 and 2017—IACHR Commissioner, James Cavallaro, found that the “disproportionate ratio of slain gang members to slain police was troubling.”⁶⁸ He went on to say that “[w]hen there are figures like this, it’s about some clashes and many execution cases. We are already working with a pattern of extremely excessive use of deadly force by state agents.”⁶⁹ The Salvadoran Deputy Minister of Security has vehemently denied any responsibility of the Salvadoran government in possible human rights violations,⁷⁰ but the mounting evidence is difficult to ignore. Not only is the PNC carrying out summary executions, but the Central American University’s Institute for Human Rights (Insituto de Derechos Humanos de la Universidad Centroamericana – IDHUCA) reported the PNC is “allegedly running ‘clandestine jails’

⁶² Daniel Alarcon, *The Executioners of El Salvador*, NEW YORKER (Aug. 4, 2015) <https://www.newyorker.com/news/news-desk/the-executioners-of-el-salvador> [hereinafter Alarcon].

⁶³ Geoff Thale & Kevin Amaya, *Amid Rising Violence, El Salvador Fails to Address Reports of Extrajudicial Killings*, WASH. OFFICE ON LATIN AMERICA (Nov. 3, 2017), <https://www.wola.org/analysis/amid-rising-violence-el-salvador-fails-address-reports-extrajudicial-killings/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Alarcon, *supra* note 62.

⁶⁷ Asmann, *supra* note 58.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

where they illegally hold suspected gang members.”⁷¹ The IDHUCA documented several cases of young individuals being arbitrarily detained and kept without any justification.⁷²

The violent and sometimes unprovoked confrontations between the police and gang members have led some Salvadorans to fear the police more than the gang members and even describe the state’s actions as “terrorism.”⁷³ However, a recent study by the Kimberly Green Latin American and Caribbean Center and the Jose Simeon Cañas Central American University showed that nearly three-quarters of the Salvadorans surveyed either condoned or understood the need for extrajudicial killings.⁷⁴ Despite this apparent endorsement from Salvadoran citizens, the government and state forces cannot go unchecked and continue the systemic violation of both the Salvadoran constitution and international law.

A. *International Treaties*

El Salvador is a party to a number of International Human Rights treaties which are implicated by the government’s recent actions. These treaties include the International Convention on Civil and Political Rights (ICCPR),⁷⁵ which states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁷⁶ The American Convention on Human Rights (ACHR), to which El Salvador is also a signatory, contains the same exact language, that “[n]o one

⁷¹ Tristen Clavel, *El Salvador Police Running ‘Clandestine Jails’: Report*, INSIGHT CRIME (Sept. 20, 2017), <http://www.insightcrime.org/news-briefs/el-salvador-police-running-clandestine-jails-report>.

⁷² *Id.*

⁷³ See Nina Lakhani, ‘*We Fear Soldiers More Than Gangsters’: El Salvador’s ‘Iron Fist’ Policy Turns Deadly*, THE GUARDIAN (Feb. 6 2017), <https://www.theguardian.com/world/2017/feb/06/el-salvador-gangs-police-violence-districto-italia>; *Police wage war on gangs in El Salvador*, WASH. POST (Oct. 28, 2016), http://www.washingtonpost.com/sf/world/2016/10/28/el-salvadors-conflict-with-gangs-is-beginning-to-look-like-a-war/?utm_term=.ff682279e78c.

⁷⁴ 1,200 Salvadorans participated in the study. See JOSE MIGUEL CRUZ, JEANETTE AGUILAR & YULIA VOROVYEVA, LEGITIMIDAD Y CONFIANZA DE LA POLICIA EN EL SALVADOR (LEGITIMACY OF AND PUBLIC TRUST IN THE POLICE OF EL SALVADOR) 20 (2007), available at <http://www.uca.edu.sv/iudop/wp-content/uploads/Legitimidad-y-confianza.pdf>. Of those surveyed, 34.6 percent approved of extrajudicial killings, while 39.9 percent responded they did not approve but understood the killing of persons considered undesirable. *Id.*

⁷⁵ See *Ratification of 18 International Human Rights Treaties*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://indicators.ohchr.org> (last visited Jan. 11, 2018). El Salvador ratified the ICCPR without reservation in 1979. *Id.*

⁷⁶ G.A. Res. 2200A (XXI), at art. 6, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

shall be arbitrarily deprived of his life.”⁷⁷ Finally, the Universal Declaration of Human Rights (UDHR) declares that “[e]veryone has the right to life, liberty, and security of person.”⁷⁸ The Salvadoran constitution recognizes the binding legal authority of these treaties and states that in “case of conflict between the treaty and the law [of El Salvador], the treaty shall prevail.”⁷⁹

The use of LECAT against gang members, though declared constitutional in El Salvador, is potentially in conflict with these international treaties. Thus the Salvadoran’s use of LECAT and militarized force must give way to international law considerations.

B. El Salvador Constitution

The Salvadoran constitution declares that “[e]very person has the right to life, physical and moral integrity, liberty, security, work, property and possession, and to be protected in the conservation and defense of same.”⁸⁰ It further states that “[n]o person shall be deprived of the right to life, liberty, property and possession nor any other of his rights without previously being heard and defeated in a trial according to the law.”⁸¹ If the reports of the summary executions are to be believed, as they should because of El Salvador’s abysmal human rights record, it is clear the State actors are in violation of international treaties as well as the Salvadoran constitution.

The Salvadoran government must adhere to the principles of international law which they eschewed for the past several decades. Reports of death squads and extrajudicial killings are not limited to the period during the civil war. In the period after the civil war, a new death squad came to the fore. La Sombra Negra, or Black Shadow, began targeting gang members in the 1990s.⁸² There are reports that La Sombra Negra has reemerged in recent years with a possible connection to the police. The government, of course, has denied these claims.⁸³

In light of the mounting evidence, the international community must respond. Specifically, the U.N. Commission on Human Rights’ Special Rapporteur must visit El Salvador and investigate the claims. The Special Rapporteur is an individual appointed by the Chairman of the Human Rights

⁷⁷ American Convention on Human Rights at art. 4, ¶ 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

⁷⁸ G.A. Res 217 (III) A at art. 3, Universal Declaration of Human Rights (Dec. 10, 1948).

⁷⁹ CONSTITUCION DE LA REPUBLICA [CONSTITUTION] Dec. 16, 1983, art.144 (El. Sal.).

⁸⁰ *Id.* at art. 2.

⁸¹ *Id.* at art. 11.

⁸² James Bargent, *Has Gang Violence in El Salvador Sparked a Death Squad Revival?*, INSIGHT CRIME (May 2014) <http://www.insightcrime.org/news-briefs/gang-violence-el-salvador-sparked-death-squad-revival>.

⁸³ *Id.*

Commission to report on the extent of the practice of summary or arbitrary executions.⁸⁴ The Rapporteur has a duty to “examine situations of extrajudicial, summary or arbitrary executions in all circumstances and for whatever reason.”⁸⁵ The mandate of the Special Rapporteur, which grants the authority to investigate, “covers all countries, irrespective of whether a State has ratified relevant international Conventions.”⁸⁶ Thus, as a member of the United Nations, El Salvador must respect the mandate. The mandate of the Special Rapporteur was last affirmed in a resolution adopted by the General Assembly on December 19, 2016.⁸⁷

The resolution calls for the elimination of the “abhorrent practice of extrajudicial, summary or arbitrary executions, which represent flagrant violations of international human rights law, particularly the right to life.”⁸⁸ Further, the resolution “[a]ffirms the obligation of States, in order to prevent extrajudicial, summary or arbitrary executions, to protect the lives of all persons deprived of their liberty in all circumstances and to investigate and respond to deaths in custody.”⁸⁹ The clandestine jails and the reported killings currently in operation in El Salvador are clearly against these provisions.

C. Use of LECAT Leading to More Violence

After a period of decline in the number of homicides, which the government attributed to heavy-handed actions against the gangs, there has been a recent increase in violence.⁹⁰ At the writing of this Note, El Salvador had recently experienced the most violent month in 2017, with 435 homicides in the month of September.⁹¹ Though the government can boast of the period of declining homicide rates, the recent uptick in violence is evidence that hard-fist policies will not work, as they did not work in the past.

⁸⁴ Human Rights Council Res. 35/15, U.N. Doc. A/HRC/13/L.25 (July 11, 2017).

⁸⁵ *Id.* ¶ 7.(a).

⁸⁶ *Special Rapporteur on extrajudicial, summary or arbitrary executions*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx> (last visited Jan. 11, 2018).

⁸⁷ G.A. Res. 71/198 (Dec. 19, 2016).

⁸⁸ *Id.* at 2.

⁸⁹ *Id.* at 4.

⁹⁰ Hector Silva Avalos, *El Salvador Violence Rising Despite ‘Extraordinary’ Anti-Gang Measures*, INSIGHT CRIME (Oct. 3, 2017), <http://www.insightcrime.org/news-analysis/violence-el-salvador-rise-despite-extraordinary-anti-gang-measures>.

⁹¹ *Id.*

D. *Case of Honduras: Anti-Terrorism to the Extreme*

Honduras, El Salvador's neighbor to the northeast, followed the Salvadoran government's lead and enacted legislation that classifies gang members as terrorists,⁹² but it also went one step further. In February 2017, the Honduran congress passed a legislative package that amended the Penal Code. Chief among these changes were amendments to Article 335-B, which defines the crime of terrorism to now include:

any act intended to cause death or grave bodily injury, *fires or other harm against a citizen or his property* . . . when the purpose of said act or event by its nature or context is to intimidate or cause a state of fear in the population or force a government or an international organization to act or refrain from acting.⁹³

The Honduran legislature also removed the word "systemic" from the article, meaning that for an act to qualify as terrorism, these offenses need only occur once.⁹⁴

In May 2016, the Special Rapporteur conducted an official visit to Honduras. The purpose of the visit was to "examine the level of protection of the right to life in Honduras, particularly the legal framework and measures in place to prevent attacks on the life, security and physical integrity of individuals, and to ensure justice and accountability for such violations."⁹⁵ Honduras' murder rate rivals that of El Salvador—it was declared the highest in the world from 2011 to 2013.⁹⁶ During his visit to Honduras, "the Special Rapporteur encountered numerous reports of killings by police, military police, and military officers" and noted that "police officers have been implicated in the death squad-style killings of gang members."⁹⁷ Undoubtedly, the situation in El Salvador is just as dire as, if not worse than, Honduras, and the Special Rapporteur must make all efforts to make a country visit to El Salvador. The

⁹² *Honduras aprueba ley que califica de "terroristas" a pandilleros y manifestantes*, LA PRENSA LIBRE (Feb. 22, 2017), <http://www.prensalibre.com/internacional/honduras-aprueba-ley-que-califica-de-terroristas-a-pandilleros-y-manifestantes>.

⁹³ *Honduras: Congreso Nacional aprobó los dos artículos más polémico de las reformas penales*, EL HERALDO (Feb. 21, 2017), <http://www.elheraldo.hn/pais/1046584-466/honduras-congreso-nacional-aprobó-los-dos-art%C3%ADculos-más-polémicos-de-las-reformas> (emphasis added).

⁹⁴ *Id.*

⁹⁵ U.N. Secretariat, Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. DOC. A/HRC/35/23/Add.1, at 3 (Apr. 11, 2017).

⁹⁶ *Id.* at 5.

⁹⁷ *Id.* at 6.

Human Rights Commission received requests in 2015 and 2016 to visit El Salvador to investigate the alleged abuses, and it must act at once.⁹⁸

IV. CONCLUSION

El Salvador's classification of MS-13 and Barrio 18 as "terrorists" is both unsupported by the facts and by the standards of international law. Gangs pose a serious danger to the public at large, but these extreme remedies have led to an increase in violence which will only continue to escalate. Classifying the groups as terrorists has given the increasingly-militarized police *carte blanche* to commit extrajudicial killings with impunity. El Salvador must develop social programs aimed at combating gangs, including programs that address poverty and personal, family, and community factors that contribute to gang problems instead of fighting violence with violence.

⁹⁸ *Country Visits*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, <http://www.ohchr.org/EN/Issues/Executions/Pages/CountryVisits.aspx> (last visited Mar. 14, 2019).