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The War on Gangs: El Salvador's Playground for International Human Rights Violations

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THE WAR ON GANGS: EL SALVADOR'S PLAYGROUND FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS

By: Sanobar Valiani*

International human rights law was developed with the underlying philosophy that all human beings are born free and equal in dignity and rights. However, since its development, we have seen a vast number of human rights violations persist with no recourse. The War on Gangs in El Salvador is just one example of this. This Note examines the history of the War on Gangs in El Salvador, the tumultuous political landscape that has spurred as a result, and how political efforts to address gang violence have been used as a tactic to strip Salvadorans of their fundamental rights and dignity. This Note goes on to analyze the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the United Nations Convention on the Rights of the Child in relation to El Salvador's War on Gangs. In doing so, this Note highlights the fundamental inadequacy of

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international human rights law in preventing, mitigating, and remedying human rights violations.

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“The very phrase ‘human rights’ became for all concerned – victims, persecutors, and onlookers alike – the evidence of hopeless idealism or fumbling feeble-minded hypocrisy.”¹

I. INTRODUCTION

Thousands of Salvadorans are vulnerable to massive human rights violations including arbitrary detentions, violations of due process, torture, and ill-treatment under the current state of emergency declared by Salvadoran President Nayib Bukele.² In one case, a single mother who works as a food vendor was arrested without

¹ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 269 (1958).

² *El Salvador: President Bukele Engulfs the Country in a Human Rights Crisis After Three Years in Government*, AMNESTY INT’L (June 2, 2022), <https://www.amnesty.org/en/latest/news/2022/06/el-salvador-president-bukele-human-rights-crisis/> [hereinafter *Human Rights Crisis*].

an arrest or search warrant in her home in early April of 2020.³ A Specialized Court imposed a pre-trial detention order on her, along with five-hundred others simultaneously.⁴ The alleged crime she committed was membership of an illegal group for which there was allegedly no evidence of.⁵ Years prior to the April arrest, the woman had been arrested on the same charge, and was severely beaten while she was in detention.⁶ Although the charges were not proven and she was awarded financial reparation due to the officers' abuse of authority, the woman continued to receive police threats.⁷ As a result, the woman and her family have been forcibly displaced.⁸ The April arrest occurred after she and her family returned to their home.⁹ The day after the woman's arrest, her daughter reported that local police came to their house, put a gun to her head, and threatened that she would be next.¹⁰ In May, the daughter was arrested by those same officers who arrested and threatened her mother.¹¹

The woman and her daughter's arrests are not an anomaly in El Salvador; they are illustrative of the meticulously coordinated obstruction of justice by the three branches of El Salvador "which prosecute thousands of people in a summary, illegal, and indiscriminate manner."¹² The political use of the Salvadoran branches of government effectively circumvents the guarantees of justice, undermines the rule of law, and serves as a vehicle to commit a series of human rights violations under international law.¹³ However, the current international human rights legal system is inadequate to address these violations in an effective and sustainable manner.¹⁴

Part II of this article examines the history that led to the increased gang violence, including laws signed by former United States President Bill Clinton, which sent migrants to El Salvador.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Human rights crisis, supra* note 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *See* discussion *infra* Section IV.

¹⁴ *See* discussion *infra* Section IV.

Part III provides a background of El Salvador's War on Gangs, including the mechanisms employed by the Salvadoran government during the current state of emergency to circumvent the domestic criminal legal system, violating international human rights. Part IV will outline relevant international human rights treaties and apply those to analyze the legality of the War on Gangs. The treaties discussed include (1) the Universal Declaration of Human Rights, (2) the International Covenant on Civil and Political Rights, (3) the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and (4) the Convention on the Rights of the Child. Part V will conclude the Note by addressing the inadequacies of the international human rights legal framework as a whole, and specifically in redressing the violations by El Salvador.

II. THE PREQUEL TO THE WAR ON GANGS

Gang violence in El Salvador became a national security issue because of the United States' deportation policies in the late 1990s.¹⁵ The country's bloodletting has ranked it among the highest murder rates in the world with the most overcrowded jails.¹⁶ *Maras*, or gangs, in Central America are understood to be loosely organized transnational criminal phenomena with roots in both the United States and Central America.¹⁷ *Mara Salvatrucha* (MS-13) and the *Barrio 18* (also known as *Mara 18*), two rival gangs, originated in the U.S. Salvadoran diaspora, a product of the region's civil wars from the 1960s to 1990s.¹⁸ During this time, the United States supported various governments fighting guerilla insurgencies.¹⁹ This included providing El Salvador with billions of dollars of economic

¹⁵ *El Salvador's Politics of Perpetual Violence*, CRISIS GROUP (Dec. 19, 2017), <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/64-el-salvadors-politics-perpetual-violence>.

¹⁶ *Id.*

¹⁷ Michael Paarlberg, *Gang Membership in Central America: More Complex than Meets the Eye*, MIGRATION POLICY INST. (Aug. 26, 2021), <https://www.migration-policy.org/article/complexities-gang-membership-central-america>.

¹⁸ *Id.*

¹⁹ *Id.*

and military aid into the country.²⁰ In response to the growing violence and economic instability from the civil war, Salvadorans migrated and settled in the United States, primarily in Los Angeles.²¹ Central American teenagers in Los Angeles sought protection from pre-established largely Chicano gangs that harassed and extorted new arrivals, forming MS-13.²²

MS-13 and Barrio 18 evolved from petty juvenile gangs, to prison gangs, and finally, to transnational criminal organizations²³ (TCOs) during the 1990s.²⁴ This decade saw a series of laws passed by President Bill Clinton which led to a wave of deportations of immigrants with criminal records.²⁵ These laws include the Violent Crime Control and Law Enforcement Act of 1994, and two 1996 measures: the Illegal Immigration Reform and Immigrant Responsibility Act, and the Antiterrorism and Effective Death Penalty Act.²⁶ The laws expanded the scope of deportable offenses, leading to an era of mass deportations of immigrants with criminal records.²⁷ Consequently, annual deportations to El Salvador, Guatemala, and Honduras increased from just over 5,000 to over 100,000 between 1995 and 2014.²⁸

²⁰ Raymond Bonner, *America's Role in El Salvador's Deterioration*, THE ATLANTIC (Jan. 20, 2018), <https://www.theatlantic.com/international/archive/2018/01/trump-and-el-salvador/550955/>.

²¹ Paarlberg, *supra* note 17.

²² *Id.*

²³ See THE NAT'L SEC. COUNCIL, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: DEFINITION, <https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/definition> (last visited Mar. 5, 2022) (“Transnational organized crime refers to those self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/or violence, or while protecting their illegal activities through a transnational organizational structure and the exploitation of transnational commerce or communication mechanisms. There is no single structure under which transnational organized criminals operate; they vary from hierarchies to clans, networks, and cells, and may evolve to other structures.”).

²⁴ Paarlberg, *supra* note 17.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

In response to the high levels of deportees coming into the country, El Salvador adopted a policing model known as *mano dura* (iron fist) under which the government amended delinquency laws to allow arrest of young people for being gang members based on their clothing or association.²⁹ While more than 30,000 suspected gang members were arrested from 2003 to 2005, the country saw a spike in gang-related murders.³⁰ Gang networks flourished in the postwar chaos of El Salvador as a result of the mass deportation instigated by Bill Clinton.³¹ The number of deportations peaked under the Obama administration³² and further increased under the Trump administration. Asylum seekers were sent back to a country fraught with high levels of violence, making them vulnerable to gang recruitment.³³ The Salvadoran government continued to respond with iron fist policies and security methods, which included mass detentions and incarceration and the militarization of policing.³⁴

Deportees returning to El Salvador were, and continue to be, poorly socialized, unemployable, and discriminated against on suspicion of being gang members, all of which continue to drive gangs' membership in the region.³⁵ Gangs in El Salvador target migrants as they arrive by arranging transportation from the San Salvador airport for forced recruitment, extortion, or interrogation as potential rival gang members.³⁶ Returning migrants also face the risk of being kidnapped and killed within hours of arrival.³⁷ These tactics are facilitated by networks of U.S. gang members, even those in detention centers, who surveil and inform superiors about potential rivals returning to the origin country.³⁸ Superiors use violence against rivals

²⁹ *Id.*

³⁰ Paarlberg, *supra* note 17.

³¹ Diana Roy, *Why Has Gang Violence Spiked in El Salvador*, COUNCIL ON FOREIGN RELS. (May 4, 2022, 10:50 AM), <https://www.cfr.org/in-brief/why-has-gang-violence-spiked-el-salvador-bukele>.

³² Paarlberg, *supra* note 17.

³³ Roy, *supra* note 31.

³⁴ CRISIS GROUP, *supra* note 15.

³⁵ Paarlberg, *supra* note 17.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

in order to prove their loyalty and rise through the ranks, making deportees the ideal targets.³⁹

Approximately one-third of Salvadorans live in poverty.⁴⁰ The country's gross domestic product (GDP) growth rate of 1.9 percent is among the lowest in Central America,⁴¹ contributing to the vulnerability Salvadorans face in gang recruitment. The urban outskirts of El Salvador supply young recruits and gang sympathizers who rely on gangs' extortion and other schemes.⁴² Gang violence continues to present a challenge to those living in low-income areas as children are pulled out of schools in areas of high gang presence, divorcing them from employment opportunities.⁴³

El Salvador's hardline security policies and poor prison conditions drove violence up so much that by the early 2010s, Salvadoran government officials desperately began to negotiate with gangs.⁴⁴ A truce made in 2012 collapsed two short years later, which led to the titanic number of murders the following year.⁴⁵ In response, the government employed extreme measures of jail confinement and police raids, which were the predominant methods of combatting gang violence.⁴⁶ Additionally, El Salvador saw an increase in police brutality and extrajudicial executions.⁴⁷

III. THE WAR ON GANGS

A. *The Election*

Since the end of the bloody civil war, the Farabundo Martí National Liberation Front (FMLN) and the conservative Alianza

³⁹ *Id.*

⁴⁰ *El Salvador: Anti-Corruption Candidate Nayib Bukele Wins Presidential Election*, ASSOCIATED PRESS (Feb. 3, 2019), <https://www.theguardian.com/world/2019/feb/04/el-salvador-anti-corruption-candidate-nayib-bukele-wins-presidential-election> [hereinafter *Anti-Corruption Candidate Wins*].

⁴¹ CRISIS GROUP, *supra* note 15.

⁴² *Id.*

⁴³ *Id.*

Catherine Osborn, *The Open Secret of Government-Gang Talks*, FOREIGN POLICY (Apr. 1, 2022, 8:00 AM), <https://foreignpolicy.com/2022/04/01/el-salvador-gang-killings-state-of-emergency-bukele-truce-talks/>.

⁴⁵ *Id.*

⁴⁶ CRISIS GROUP, *supra* note 15.

⁴⁷ *Id.*

Republicana Nacionalista (ARENA) political parties have dominated Salvadoran politics.⁴⁸ In that time, both parties have failed to stub gang violence.⁴⁹ Consequently, all four 2019 presidential candidates promised to end corruption, end gang violence, create more jobs, and reduce crime.⁵⁰ Nayib Bukele, one of the four presidential candidates, made his political debut in 2012 when he became mayor of a small-town and, three years later, won election in the capital.⁵¹ He constantly criticized leftist FMLN's leadership, which led him to head the conservative Grand Alliance for National Unity party when he ran for president.⁵² Bukele stood on an anti-corruption platform and won the 2019 presidential election.⁵³

Sources from El Faro and the U.S. government have revealed that early in his presidency, Bukele's administration secretly negotiated a truce with gangs including MS-13 and Barrio 18.⁵⁴ Bukele has followed former President Funes's lead by doing so, offering the gangs prison benefits in exchange for reduced violence and encouraging voter turnout for his party.⁵⁵ The Treasury Department's designations of senior Bukele administration officials, Osiris Luna and Carlos Marroquin, noted that the Bukele administration exchanged financial incentives with Salvadoran gangs, MS-13 and Barrio 18, for political support to Bukele's political party in upcoming elections.⁵⁶ The Chairman of the Social Fabric Reconstruction Unit, discussed below, was also present.⁵⁷ Oftentimes, these agreements between state and non-state actors are informal.⁵⁸ In countries with persistent gang-presence, police resort to high-surveillance tactics in gang-dominated areas in order to "manage these relationships"

⁴⁸ *Anti-Corruption Candidate Wins*, *supra* note 40.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Osborn, *supra* note 44.

⁵⁵ Roy, *supra* note 31.

⁵⁶ DOUGLAS FARAH & MARIANNE RICHARDSON, GANGS NO LONGER: REASSESSING TRANSNATIONAL ARMED GROUPS IN THE WESTERN HEMISPHERE, INSTITUTE FOR NAT'L STRATEGIC STUDIES PERSPECTIVES 9 (Denise Natali ed., Ser. No. 38, May 2022) <https://ndupress.ndu.edu/Portals/68/Documents/stratperspective/inss/Strategic-Perspectives-38.pdf>.

⁵⁷ *Id.*

⁵⁸ Osborn, *supra* note 44.

with organized crime.⁵⁹ MS-13 has employed sophisticated methods to gain power in the current political structure, including “occupying senior government posts, participating as delegates in Bukele’s Nuevas Ideas political party, and creating mechanisms for state funds to flow to MS-13 leaders in areas under the group’s control.”⁶⁰ MS-13 has involved itself with political corruption by infiltrating the political landscape, from the municipal government to the national cabinet.⁶¹ The political support of MS-13 has given Bukele a political advantage, “one he used to decapitate the judiciary, illegally fire the attorney general investigating the pact, legalize money-laundering, and eliminate access to most government financial information.”⁶² However, if the current truce breaks, El Salvador faces the risk of becoming one of the world’s most dangerous countries once again, which would be a lesson for the rest of the region.⁶³

B. *Recent Violence*

Bukele was elected on promises to fight organized crime and improve security, but he has been faced with addressing the most recent spike in gang-related murders in El Salvador. Shortly after his inauguration on June 1, Bukele launched the Territorial Control Plan to combat gang violence and improve security in El Salvador.⁶⁴ The plan consists of seven phases, but Bukele has only released the first three phases: Phase 1: Preparation; Phase 2: Opportunity; and Phase 3: Modernization.⁶⁵

Phase 1 (Preparation) aims to heighten military and police presence through armed occupation and surveillance, in seventeen municipalities deemed to have the largest gang and crime presence.⁶⁶ Within the first two months of this phase, five thousand arrests were made nationally.⁶⁷ In addition, Phase 1 resulted in the complete

⁵⁹ *Id.*

⁶⁰ FARAH & RICHARDSON, *supra* note 56, at 11.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Osborn, *supra* note 44.

⁶⁴ Paola Nagovitch, *Explainer: Nayib Bukele’s Territorial Control Plan*, AS/COA (Feb. 13, 2020), <https://www.as-coa.org/articles/explainer-nayib-bukeles-territorial-control-plan>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

lockdown of twenty-eight prisons such that “visitors were barred, inmates were confined to their cells, and a near-blackout of cell phone signals attempted to sever all communications within the prisons and with the outside world.”⁶⁸ In April 2020, President Bukele imposed a 24/7 lockdown specifically for gang members in prison and ordered rival gang members to share cells to break up lines of communication after fifty people were killed over a span of three days.⁶⁹ He reasoned that many of the murders were ordered from within the prison itself.⁷⁰ According to Salvadoran authorities, between March 25 and 27, 2022, at least eighty-seven people were murdered by MS-13 and Barrio 18.⁷¹

Phase 2 (Opportunity) focuses on building community-centered preventative strategies that create alternative opportunities for minors and young adults who are predisposed to criminal activity.⁷² Under the authority of the executive branch, Bukele created the Social Fabric Revitalization Unit, which is tasked with creating educational and entrepreneurial opportunities, improved health and scholarship benefits, and infrastructure projects including schools, skate parks, and sports centers.⁷³

The goal of Phase 3 (Modernization) is to “fortify El Salvador’s national security forces” by equipping the Policía Nacional Civil (PNC) and Fuerza Armada de El Salvador (FAES) with new resources and technology.⁷⁴ These include helicopters, surveillance equipment, night vision tools, drones, and modern guns.⁷⁵ The phase also adds five municipalities to the original seventeen from Phase 1, resulting in a total of twenty-two municipalities seeing heightened armed presence.⁷⁶

On March 26, 2022 alone, police reported sixty-two murders, making it the most violent twenty-four-hour period since the end of

⁶⁸ *Id.*

⁶⁹ *El Salvador: State of Emergency After 62 Gang Killings in a Day*, BBC (Mar. 27, 2022), <https://www.bbc.com/news/world-latin-america-60893048> [hereinafter *Sixty-two gang killings*].

⁷⁰ *Id.*

⁷¹ Roy, *supra* note 31.

⁷² Nagovitch, *supra* note 64.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

the civil war, triggering Bukele's declaration of a "War on Gangs" through a state of emergency.⁷⁷ El Salvador's National Civil Police, made up of approximately 28,000 officers, has been tasked with policing a population of around 6.5 million, and is largely outnumbered by gang presence.⁷⁸ To mitigate this, Members of Parliament voted on new laws, meant to last for only thirty days, restricting the right to gather, allowing for arrests without a warrant, and allowing the monitoring of communications.⁷⁹ About two months later, following the murder of three officers, Bukele stated, "[w]hat is coming to (gang members) is much greater, and they are going to pay dearly for having taken the lives of these three heroes."⁸⁰ Many of the victims have no connection to Salvadoran gangs.⁸¹ Additionally, the killings are not thought to be a result of settling scores between MS-13 and Barrio 18.⁸² Instead, analysts suggest the series of violence aims to send a message to Bukele's government that the gangs are displeased with the terms of the truce negotiations and may be attempting to change the terms of the pact, deeming the current terms untenable.⁸³

Bukele declared the initial thirty-day state of emergency "a legal mechanism used to address emergency situations [which] must be eminently temporary and extraordinary,"⁸⁴ on March 27, 2022.⁸⁵ The state of emergency has been extended eight times and remains at the time of writing,⁸⁶ "giving a permanent and indefinite character

⁷⁷ *Sixty-Two Gang Killings*, *supra* note 69.

⁷⁸ Paarlberg, *supra* note 17.

⁷⁹ *Id.*

⁸⁰ Nelson Renteria, *Salvadoran President Vows Tougher War on Gangs After Police Killed*, REUTERS (June 29, 2022, 3:50 PM), <https://www.reuters.com/world/americas/salvadoran-president-vows-tougher-war-gangs-after-police-killed-2022-06-29/>.

⁸¹ Osborn, *supra* note 44.

⁸² *Id.*

⁸³ *Id.*; Roy, *supra* note 31.

⁸⁴ *Corruption under the State of Emergency in El Salvador: A Democracy Without Oxygen*, WOLA (Sep. 27, 2022), <https://www.wola.org/2022/09/corruption-state-of-emergency-el-salvador/> [hereinafter *Democracy Without Oxygen*].

⁸⁵ Roy, *supra* note 31.

⁸⁶ Juan Pappier, "We Can Arrest Anyone We Want": Widespread Human Rights Violations Under El Salvador's "State of Emergency", HUMAN RIGHTS WATCH (Dec. 7, 2022), <https://www.hrw.org/report/2022/12/07/we-can-arrest-anyone->

to the limitation of constitutional rights.”⁸⁷ The executive branch has employed the repressive state security forces of the Territorial Control Plan to implement a policy against violence by using violence, namely through repression, persecution, and stigmatization.⁸⁸ These mechanisms have aggravated the human rights and democratic crises that El Salvador is going through.⁸⁹

Not only have constitutional guarantees been suspended, but legal controls over the administrative processes for the use of public funds, state contracts, and the right of access to public information have also been eliminated.⁹⁰ The state of emergency has resulted in the lack of transparency and accountability in the management of public resources.⁹¹ This is critical because the first three phases of the Territorial Control Plan alone require a budget of about \$575 million – a significant amount of money the government obtains through loans in order to violate international human rights.⁹²

Additionally, the Salvadoran Law on Access to Public Information, enacted in 2011, guarantees the right to seek and receive information held by the state; this law is being circumvented.⁹³ President Bukele has reserved most public information, “making the confidentiality of public management as the rule and not the exception as the law dictates,” effectively failing to comply with the law.⁹⁴ The Legislative Assembly has approved decrees allowing the government to circumvent the right to access information, a right that serves as a critical tool in fighting corruption.⁹⁵ As per the Inter-American Court of Human Rights, the actions of the states must be “governed by the principles of publicity and transparency in public administration, which makes it possible for the people under its jurisdiction to exercise democratic control of the state’s actions, so that they can question, investigate, and consider whether public

we-want/widespread-human-rights-violations-under-el [hereinafter *We Can Arrest Anyone*].

⁸⁷ *Democracy Without Oxygen*, *supra* note 84.

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Nagovitch, *supra* note 64.

⁹³ *Democracy Without Oxygen*, *supra* note 84.

⁹⁴ *Id.*

⁹⁵ *Id.*

functions are being properly carried out.”⁹⁶ Yet, President Bukele has limited access to information that could reveal possible human rights violations, abuses of power, and mismanagement of the public sector and of public funds.⁹⁷ Consequently, the human rights violations discussed throughout this Note reflect only those violations that have been made known to the public through the collective efforts of NGOs, human rights activists, and journalists.

In a joint report, Human Rights Watch and Cristosal reported “widespread human rights violations committed during the state of emergency,” including arbitrary arrests, torture, and other ill-treatment of detainees, enforced disappearances, and due process violations.⁹⁸ The report cites official policies and the rhetoric of government authorities on all levels, including the President, the commander of the National Civil Police, and the armed forces that serve to incentivize nationwide abuses.⁹⁹

In short, the state of emergency is worsening the “climate of disrespect for constitutional guarantees such as the right to defense, due process, freedom of movement, and association.”¹⁰⁰ The Territorial Control Plan and the state of emergency have employed stigmatization, persecution, and repression as mechanisms of a larger systemic plan rather than isolated actions.¹⁰¹ President Bukele has also created a “judicial culture of abuse of power” and has normalized the “use of force as a method of social order by the National Civil Police, the Armed Forces, and the judiciary.”¹⁰² Even more concerning is that, while abusive mechanisms in place during the state of emergency have been employed to specifically target gang members in El Salvador, the elimination of constitutional guarantees is not limited just to gang-related crimes.¹⁰³ Citizens have been arrested for

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *We Can Arrest Anyone*, *supra* note 86.

⁹⁹ *Id.* (“[HRW] and Cristosal interviewed more than 1,100 people, including victims of abuse and their relatives, lawyers, witnesses, prosecutors, judges, journalists, human rights defenders, and government officials, from all 14 states in El Salvador. They also reviewed case files, medical records and death certificates, and even consulted international forensic experts.”).

¹⁰⁰ *Democracy Without Oxygen*, *supra* note 84.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

making statements, which violates the constitutional guarantee of free speech at the President's and his administration's will.¹⁰⁴ For example, Mario Gomez, a digital specialist, was arrested for making statements about Bitcoin and possible financial fraud by the Bukele government, and Luis Alexander Rivas was charged with the crime of contempt for posting a picture on Twitter of two of Bukele's brothers with a group of bodyguards.¹⁰⁵

Stéphane Dujarric, spokesman for the UN Secretary General, made a statement about his concerns regarding the wave of violence in El Salvador wherein he expressed "his solidarity with Salvadorans at this difficult juncture."¹⁰⁶ In the same breath, he also stated that he trusts all the measures taken in response will conform with international human rights law and standards.¹⁰⁷ As the rest of this Note explains, this has been far from the case.

IV. WAR ON GANGS' LEGALITY UNDER INTERNATIONAL HUMAN RIGHTS LAW

A. *International Human Rights Law Background*

As a member of the United Nations (UN), El Salvador is bound by the Universal Declaration of Human Rights ("UDHR" or "Declaration"), one of the founding documents of human rights law.¹⁰⁸ The underlying philosophy of the Declaration is that "all human beings are born free and equal in dignity and rights.¹⁰⁹ They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."¹¹⁰ The basic assumption of the

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *El Salvador's Congress Approved Reforms to Tighten Sentences Against Gang Members*, INFOBAE (Mar. 31, 2022), <https://www.infobae.com/en/2022/03/31/el-salvadors-congress-approved-reforms-to-tighten-sentences-against-gang-members/> [hereinafter *Congress Approved Reforms*].

¹⁰⁷ *Id.*

¹⁰⁸ *See Signatories for Universal Declaration of Human Rights*, THE DANISH INST. FOR HUMAN RIGHTS, <https://sdg.humanrights.dk/en/instrument/signees/24> (last visited Mar. 5, 2022).

¹⁰⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

¹¹⁰ *Id.*

UDHR is each man's *inalienable* birthright of liberty and equality based on his rational and moral being.¹¹¹ Articles 4 through 21 lay out several civil and political rights, including the right to be presumed innocent until proven guilty; freedom from arbitrary interference with privacy, family, home, or correspondence; freedom of movement and residence; and the right to peaceful assembly and association.¹¹² The Declaration's concluding articles entitle everyone to a social and international order under which the human rights and fundamental freedoms offered by the Declaration may be fully realized.¹¹³ Specifically, Article 29 states that "in no case may human rights and fundamental freedoms be exercised contrary to the purposes and principles of the United Nations."¹¹⁴

The preamble of the UDHR begins with recognizing that "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."¹¹⁵ The Declaration sources human rights from the recognition of inherent human dignity and serves as a declaration of rights, rather than legal duties.¹¹⁶ In the human rights context, dignity is "shorthand for the 'absolute inner worth' of an individual human being," and is not contingent upon the express or implied consent of the state.¹¹⁷ Therefore, the notion of universally recognized human dignity "transcends the state and its sovereignty," applying to state and non-state actors alike.¹¹⁸ This has significance in the international human rights legal doctrine because it emphasizes the UDHR's goal of conferring moral obligations and placing responsibility on society at large to "secure and deliver those

¹¹¹ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights* (June 1, 1997), <https://www.ohchr.org/sites/default/files/Documents/Publications/Fact-Sheet2Rev.1en.pdf> [hereinafter *International Bill of Human Rights*].

¹¹² UDHR, *supra* note 109, ¶¶ 4-21; see also *International Bill of Human Rights*, *supra* note 111.

¹¹³ UDHR, *supra* note 109, ¶ 28.

¹¹⁴ *International Bill of Human Rights*, *supra* note 111; UDHR, *supra* note 109, ¶ 29.

¹¹⁵ See UDHR, *supra* note 109.

¹¹⁶ Adam McBeth, *Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights*, 30 *HAMLIN J. PUB. L. & POL'Y* 33, 53 (2008).

¹¹⁷ *Id.* at 45-46.

¹¹⁸ *Id.* at 47.

entitlements,”¹¹⁹ rather than imposing legal duties specifically upon states.¹²⁰ This is not to be misconstrued to mean that states are not responsible to “secure and deliver those entitlements.”¹²¹ States have an obligation to further the purpose of the declaration as a set of “basic principles of human rights and freedoms . . . to serve as a common standard of achievement.”¹²² Significantly here, El Salvador expressly acknowledges inherent human dignity as the foundation for human rights and the responsibility it has as a state to secure the rights and freedoms laid out in the Declaration as it is a signatory of the UDHR.¹²³

El Salvador also ratified the International Covenant on Civil and Political Rights (ICCPR), a multilateral treaty that provides a range of protections for civil and political rights, in 1979.¹²⁴ The ICCPR came twenty-eight years after the UDHR and imposes legal obligations upon states.¹²⁵ It elaborated specific legally binding and enforceable, albeit ineffective, obligations on states for which states would need to give their explicit consent, making El Salvador’s ratification of the ICCPR significant here.¹²⁶ The treaty obligates the states that have ratified it to protect and preserve basic human rights, including but not limited to: equality before the law; freedom of speech, assembly, and association; freedom from torture, ill-treatment, and arbitrary detention; the right to a fair trial; and minority rights.¹²⁷ Article 2 of the ICCPR requires state parties to have an effective remedy for violations, and that competent authorities

¹¹⁹ *Id.* at 41.

¹²⁰ Kathleen Renée Cronin-Furman, *60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect*, 25 AM. U. INT’L L. REV. 175, 176 (2009).

¹²¹ McBeth, *supra* note 116, at 41.

¹²² *Id.* at 52.

¹²³ THE DANISH INST. FOR HUMAN RIGHTS, *supra* note 108.

¹²⁴ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, (Dec. 16, 1966) [hereinafter ICCPR]; *Status of Ratification Interactive Dashboard*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM’R, <https://indicators.ohchr.org> (last visited Nov. 18, 2023)[hereinafter *Status of Ratification Interactive Dashboard*].

¹²⁵ Cronin-Furman, *supra* note 120, at 178-79.

¹²⁶ McBeth, *supra* note 116, at 42.

¹²⁷ *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU (Apr. 2019) <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [hereinafter *FAQ: ICCPR*].

enforce such remedies.¹²⁸ Countries that have ratified the ICCPR are obliged to report to the Committee every four years.¹²⁹ The Committee then makes concluding observations, which are not legally binding and have no enforcement mechanism.¹³⁰

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Convention Against Torture” or “CAT”) exclusively deals with torture and was ratified by El Salvador in 1996.¹³¹ The treaty obligates every state that has ratified it to investigate all allegations of torture, to bring justice, and provide remedy to victims of torture.¹³² The Committee Against Torture is a body comprised of ten independent experts that monitor the implementation of the Convention Against Torture.¹³³ The Committee Against Torture meets twice a year to review reports submitted by states that have ratified the Convention Against Torture.¹³⁴ They provide their “concluding observations” after examining reports and addressing its concerns and recommendations.¹³⁵

The United Nations Convention on the Rights of the Child (UNCRC), ratified by El Salvador in 1990, expressly extends basic human rights to children.¹³⁶ The UNCRC includes the right to: life, survival, and development; protection from violence, abuse, or neglect; an education that enables children to fulfill their potential; be raised by, or have a relationship with, their parents; and express their

¹²⁸ *ICCPR*, *supra* note 124, ¶ 2; see Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-on Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 737, 737 n.91 (1995).

¹²⁹ Thornton, *supra* note 128, at 737 n.91.

¹³⁰ *See id.*

¹³¹ *Status of Ratification Interactive Dashboard*, *supra* note 124; *FAQ: The Convention Against Torture*, ACLU (Apr. 27, 2006), <https://www.aclu.org/other/faq-convention-against-torture> [hereinafter *FAQ: The Convention Against Torture*].

¹³² *FAQ: The Convention Against Torture*, *supra* note 131.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Ratification Status for CRC - Convention on the Rights of the Child*, U.N. HUMAN RIGHTS TREATY BODIES, tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC (last visited Dec. 3, 2023); *UN Convention on the Rights of the Child (UNCRC)*, SAVE THE CHILDREN <https://www.savethechildren.org.uk/what-we-do/childrens-rights/united-nations-convention-of-the-rights-of-the-child> (last visited Nov. 18, 2022) [hereinafter *UNCRC*].

opinions and be listened to.¹³⁷ The Committee on the Rights of the Child monitors the implementation of the UNCRC.¹³⁸ The rights set out in the UNCRC apply uniformly to everyone under the age of 18, regardless of how a member state defines the “child.”¹³⁹ States are obligated to do all they can, administratively and legislatively, to promote and protect children’s rights.¹⁴⁰ Notably, every child accused of committing a crime is to be presumed innocent until proven guilty and be given a fair hearing.¹⁴¹ The UNCRC is enforced through monitoring by the UN Committee on the Rights of the Child.¹⁴² Ratified states are obliged to report to the Committee every five years.¹⁴³ The Committee then provides implementation and improvement recommendations to the state.¹⁴⁴

B. Assembly and Association, No Interference to Privacy

Under Article 12 of the UDHR, “[n]o one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks.”¹⁴⁵ The Declaration also guarantees the right to freedom of peaceful assembly and association.¹⁴⁶ These rights are paralleled in the ICCPR under Articles 17, 21, and 22.¹⁴⁷

¹³⁷ UNCRC, *supra* note 136.

¹³⁸ *Id.*

¹³⁹ *A Summary of the United Nations Convention on the Rights of the Child*, SAVE THE CHILDREN <https://www.savethechildren.org.uk/content/dam/gb/reports/humanitarian/uncrc19-summary2.pdf> (last visited Nov. 18, 2022).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Implementing and Monitoring the Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/child-rights-convention/implementing-monitoring> (last visited Nov. 18, 2022).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ UDHR, *supra* note 109, art. 12.

¹⁴⁶ *Id.* art. 20.

¹⁴⁷ ICCPR, *supra* note 124, art. 17 (“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.”); *id.* art. 21 (“The right of peaceful assembly shall be recognized.”); *id.* art. 22 (“Everyone shall have the right to freedom of association with others.”).

When the Salvadoran Legislative Assembly was instructed to adopt a thirty-day state of emergency, El Salvador saw the suspension of its own constitutional rights, “including the rights to freedom of association and assembly, to privacy in communications, and to be informed of the reason for arrest,”¹⁴⁸ all of which are also enumerated in the Declaration.¹⁴⁹ At the onset of the War on Gangs, authorities were forced to meet daily arrest quotas.¹⁵⁰ Police identify people as criminals based on stigmas around tattoos, alleged third party gang affiliations, familial relations to gang members, previous criminal records, and the fact that they live in an area controlled by gangs.¹⁵¹ These violations of the UDHR carried out by the police are not isolated incidents by rogue agents;¹⁵² police have been strategically sent to high-risk areas to round up suspected gang members.¹⁵³ Officers have admitted that “many of them [gang members] are no longer here, others have died, others emigrated . . . We started with an unrealistic number and, therefore, the quotas that were requested are unrealistic.”¹⁵⁴ Consequently, authorities are accomplices to a high-level public security policy that invariably quashes inalienable human rights through the unjust prosecution and imprisonment of those living in poverty.¹⁵⁵

President Bukele’s state of emergency has allowed for the monitoring of communications,¹⁵⁶ which is a direct violation of the right against arbitrary interference with one’s privacy, family, home, and

¹⁴⁸ *We Can Arrest Anyone*, *supra* note 86.

¹⁴⁹ UDHR, *supra* note 109, art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile.”); *id.* art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”); *id.* art. 20 (“Everyone has the right to freedom of peaceful assembly and association.”).

¹⁵⁰ *See* Renteria, *supra* note 80.

¹⁵¹ Nelson Renteria, *In El Salvador’s Gang Crackdown, Quotas Drive ‘Arbitrary’ Arrests of Innocents*, REUTERS (May 16, 2022, 3:12 PM EDT) <https://www.reuters.com/world/americas/el-salvadors-gang-crackdown-quotas-drive-arbitrary-arrests-innocents-2022-05-16/> [hereinafter *Quotas Drive Arbitrary Arrests*].

¹⁵² *We Can Arrest Anyone*, *supra* note 86.

¹⁵³ *See id.*

¹⁵⁴ *Quotas Drive Arbitrary Arrests*, *supra* note 151.

¹⁵⁵ *Human Rights Crisis*, *supra* note 2.

¹⁵⁶ *Sixty-Two Gang Killings*, *supra* note 69; *see Human Rights Crisis*, *supra* note 2.

correspondence enumerated in both the UDHR and ICCPR.¹⁵⁷ Under a 2017 law, Decree 717, police are mandated to monitor deportees who have criminal backgrounds or who visit and live in areas frequented by gang members.¹⁵⁸ Those deportees are also required to check in with the police regularly.¹⁵⁹ Deportees suspected of gang ties have reported being harassed and threatened by the police.¹⁶⁰ The hyper surveillance of suspected gang members by El Salvador has been aided by the United States and regional governments, including through the Criminal History Information Sharing program.¹⁶¹ They provide law enforcement agencies with deportees' criminal investigation, arrests, detention history, and biometric data, enabling authorities to continue to interfere with Salvadorans' privacy and correspondence.¹⁶² Now, the Territorial Control Plan and state of emergency facilitate the violations of the rights to freedom of assembly, association, and to be free from interference with privacy and correspondence by mandating hyper-surveillance by armed security forces in the municipalities characterized as low-income and high crime areas.¹⁶³

C. Due Process: Fair and Public Trial and No Pre-Trial Detention, Presumption of Innocence and Right to Legal Counsel

The UDHR and the ICCPR set out various guarantees of due process. Article 8 of the UDHR ensures that “everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹⁶⁴ Article 10 of the UDHR entitles everyone to a fair and public hearing by an independent and impartial tribunal.¹⁶⁵ Article 11 of the UDHR guarantees the right to be presumed innocent until proven guilty, that no one can be held guilty of an offence that did not

¹⁵⁷ UDHR, *supra* note 109, art. 12; ICCPR, *supra* note 124, art. 17.

¹⁵⁸ Paarlberg, *supra* note 17.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Nagovtich, *supra* note 64.

¹⁶⁴ UDHR, *supra* note 109, art. 8.

¹⁶⁵ *Id.* art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”).

constitute a crime when it was committed, and that no heavier penalty may be imposed than that which was applicable at the time of committing the penal offence.¹⁶⁶ Article 19 UDHR ensures that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.”¹⁶⁷

Part 1 of Article 9 ICCPR secures the right to liberty and security of persons and mandates that no one shall be deprived of their liberty.¹⁶⁸ Article 9, Part 3 of the ICCPR requires that those arrested be brought before a judge promptly and entitles them to trial within a reasonable time or to release, therefore prohibiting pre-trial detention.¹⁶⁹ Throughout Article 9 of the ICCPR are various mentions to time, namely that everyone is entitled to trial “within a reasonable time”¹⁷⁰ and to proceedings to determine the lawfulness of his detention “without delay.”¹⁷¹ Article 14 ICCPR guarantees that “all persons shall be equal before the courts and tribunals.”¹⁷² It emphasizes the rights under Article 9 to “a fair and public hearing by a competent, independent, and impartial tribunal by law.”¹⁷³ Article 14 also entitles everyone to the following “minimum guarantees”: (a) to be informed of the charges against him promptly and in detail; (b) to have adequate time and facilities to prepare his defense and to communicate with legal counsel of his choosing; (c) “to be tried without undue delay”; and (d) the right to legal counsel of his own choosing or the right to be assigned one if he does not have legal assistance.¹⁷⁴ Finally, Article 15 ICCPR parallels Article 11 of the UDHR.¹⁷⁵

¹⁶⁶ *Id.* art. 11.

¹⁶⁷ *Id.* art. 19.

¹⁶⁸ ICCPR, *supra* note 124, art. 9, ¶ 1.

¹⁶⁹ ICCPR, *supra* note 124, art. 9, ¶ 3.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* art. 9, ¶ 4.

¹⁷² *Id.* art. 14, ¶ 1.

¹⁷³ *Id.*; ICCPR, *supra* note 124, art. 9.

¹⁷⁴ ICCPR, *supra* note 124, art. 14, ¶ 3.

¹⁷⁵ *Id.* art. 15 (guaranteeing the right to be presumed innocent until proven guilty, that no one can be held guilty of an offence that did not constitute a crime when it was committed, and that no heavier penalty may be imposed than that which

The measures put in place by President Bukele allow for detention up to fifteen days without charges and without the ability to contact legal representatives.¹⁷⁶ When detainees finally get a court hearing, up to five hundred people are seen at hearings at the same time and are summarily resolved.¹⁷⁷ “Virtually all accused detainees are subject to prosecution, even without evidence.”¹⁷⁸ This practice circumvents the Declaration’s right to a full and fair trial by an independent and impartial tribunal.¹⁷⁹ Taken together with the right to freedom of association, criminal adjudication under the current state of emergency goes against the freedoms and rights laid out under the Declaration.¹⁸⁰

The Salvadoran Assembly, with 63 votes in favor, amended the Special Law against Acts of Terrorism “in order to more expeditiously prove participation in gangs and increase penalties.”¹⁸¹ Additionally, they discussed seven other initiatives at the request of the Bukele government that aim to reform the Penal Code, by increasing “prison sentences imposed on young people - from 20 to 30 years for gang members” and reform drug legislation.¹⁸² *Prensa Gráfica* reported that the changes to penalties are as follows: between 40 and 45 years for “creators, organizers, chiefs, leaders, financiers or leaders” of gang groups and between 20 and 30 years “for those who promote, assist or favor their grouping, among others.”¹⁸³

El Salvador’s newly modified Code of Criminal Procedure now allows for indefinite pretrial detention,¹⁸⁴ directly violating the

was applicable at the time of committing the penal offence); see UDHR, *supra* note 109, art. 11.

¹⁷⁶ *El Salvador: 55,000 Suspected Gang Members Arrested Since March*, ALJAZEERA (Oct. 15, 2022) <https://www.aljazeera.com/news/2022/10/15/el-salvador-55000-suspected-gang-members-arrested> [hereinafter *Fifty-five Thousand Suspected Gang Members Arrested*]; *Human Rights Crisis*, *supra* note 2.

¹⁷⁷ *Human Rights Crisis*, *supra* note 2.

¹⁷⁸ *Id.*

¹⁷⁹ UDHR, *supra* note 109, art. 10.

¹⁸⁰ *Id.* art. 20.

¹⁸¹ *Congress Approved Reforms*, *supra* note 106.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *El Salvador: Sweeping New Laws Endanger Rights: Harsh Prison Sentences for Children, Restrictions on Free Press*, HUMAN RIGHTS WATCH (Apr. 8, 2022), <https://www.hrw.org/news/2022/04/08/el-salvador-sweeping-new-laws-endanger-rights> [hereinafter *New Laws Endanger Rights*].

provisions of the ICCPR.¹⁸⁵ Prior to the state of emergency, pre-trial detention was limited to 12 months for “less serious crimes” and 24 months for “serious crimes.”¹⁸⁶ The newly amended Criminal Code and the Code of Criminal Procedure require mandatory pretrial detention, and contain broad definitions of terrorism and “unlawful association.”¹⁸⁷ The Code of Criminal Procedure also derogates the time limits regardless of the charges for those accused of being part of “terrorist or illegal groups.”¹⁸⁸ This raises concerns about violations of defendants’ right to a trial within a reasonable time or to release.¹⁸⁹ As recently as November 2022, judges applying the recent amendment to the Criminal Code which expanded pretrial detention sent over 51,000 people who were arrested to pretrial detention and charged with gang membership.¹⁹⁰ Not only have judges and prosecutors repeatedly infringed on the due process protections guaranteed by international law, but these violations have made it virtually impossible for detainees to adequately defend themselves during criminal proceedings.¹⁹¹ Moreover, judicial independence appears to be severely restricted, if not completely eliminated.¹⁹² Two former judicial officials and a sitting judge detailed the attack on judicial independence to Amnesty International, saying that judges are instructed not to acquit those accused under the state of emergency, and that pre-trial detention must be imposed as a general rule.¹⁹³

What is more alarming is that President Bukele is damningly aware of his efforts to pressure officials from exposing the human rights violations he is responsible for.¹⁹⁴ Bukele “has tried to justify human rights violations as supposedly acceptable ‘errors’ committed” during the state of emergency.¹⁹⁵ He also warned “that the government will be ‘watching judges who favor criminals,’ in what

¹⁸⁵ ICCPR, *supra* note 124, art. 9.

¹⁸⁶ *New Laws Endanger Rights*, *supra* note 184.

¹⁸⁷ *We Can Arrest Anyone*, *supra* note 86.

¹⁸⁸ *New Laws Endanger Rights*, *supra* note 184.

¹⁸⁹ *Id.*

¹⁹⁰ *We Can Arrest Anyone*, *supra* note 86.

¹⁹¹ *Id.*

¹⁹² *See Human Rights Crisis*, *supra* note 2.

¹⁹³ *Id.*

¹⁹⁴ *See We Can Arrest Anyone*, *supra* note 86.

¹⁹⁵ *Id.*

appears to be an effort to intimidate judges and prosecutors from investigating human rights violations or releasing people who are arbitrarily detained.”¹⁹⁶ This intimidation tactic requires that judges and prosecutors presume guilt, not innocence, which is in direct violation of Article 11 of the UDHR.¹⁹⁷ Moreover, his minimization of the severity of the violations committed by reducing them to “errors”¹⁹⁸ may be to reduce international intervention and to keep his approval rating high.¹⁹⁹

The Public Defender’s Office currently does not have enough funding to ensure it can provide adequate legal assistance to detainees.²⁰⁰ Furthermore, public defenders are overwhelmed by the case-load, so it is virtually impossible for them to fulfill the rights under Article 14(3)(d) of the ICCPR.²⁰¹ Penitentiary law and incommunicado detention is such that detainees do not have access to family visits and private meetings with their lawyers and cannot communicate with them.²⁰² By August 23, 2022, 45,260 people had been sent to prison during mass hearings.²⁰³ In just one hearing, 552 people were accused.²⁰⁴ These hearings do not allow for the individualization of cases or the right to defense, which are protected rights under the UDHR and the ICCPR.²⁰⁵

The state of emergency has also criminalized reporting on the phenomenon of gangs at risk of criminalization, sentencing violators to up to 15 years in prison.²⁰⁶ A new law passed on April 5, 2022, criminalizes anyone who “participates in the creation, assists or

¹⁹⁶ *Id.*

¹⁹⁷ UDHR, *supra* note 109, art. 11 ¶ 1 (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”).

¹⁹⁸ *We Can Arrest Anyone*, *supra* note 86.

¹⁹⁹ See Nagovitch, *supra* note 64 (“With a January approval rating of 91 percent, Bukele enjoys the country’s most popular presidency in 15 years.”).

²⁰⁰ See *We Can Arrest Anyone*, *supra* note 86 (“Most detainees had public defenders who faced an immense workload and often failed to provide an adequate defense.”).

²⁰¹ *Id.*; ICCPR, *supra* note 124, art. 14 ¶ 3(d) (“[T]o be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him[.]”)

²⁰² *We Can Arrest Anyone*, *supra* note 86.

²⁰³ *Democracy Without Oxygen*, *supra* note 84.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Human Rights Crisis*, *supra* note 2.

creates” any type of visual expression that alludes to the various types of gangs, and carries a penalty of up to fifteen years in prison.²⁰⁷ The law also criminalizes any reproduction or transmission of messages or statements allegedly created by gangs by media outlets.²⁰⁸ Public officials and the official media “publicly accuse[] journalists and researchers of having links with gangs, without evidence, in an attempt to stigmatize and deter them from carrying out their work as journalists.”²⁰⁹ Authorities are trying to silence and exile journalism and discredit investigative journalism that exposes the negotiations between the government and gangs.²¹⁰ For example, the Director of the Prison Service “accused journalists at the newspaper *El Faro* of being terrorists, spokesmen for the gangs, and mercenaries.”²¹¹ High level public officials have accused human rights organizations of supporting gang-generated crime by reporting on them.²¹² The Salvadoran Network of Human Rights Defenders has recorded “the arrest of six community leaders from the municipality of Jiquilisco in Usulután in the context of the state of emergency,” accusing them of having links with gangs and putting them under house arrest, without providing any reasons for their detention.²¹³

According to Amnesty International, the rights to defense, presumption of innocence, effective judicial remedy, and access to an independent judge have all been undermined by the state of emergency and recent amendments to the Criminal Code and the Code of Criminal Procedure, as well as their implementation by Specialized Courts, the Attorney General’s Office and the Prosecutor’s Office.²¹⁴ They further emphasize that even under a state of emergency, binding on Salvadoran authorities, these rights cannot be restricted.²¹⁵

²⁰⁷ *New Laws Endanger Rights*, *supra* note 184.

²⁰⁸ *Id.*

²⁰⁹ *Human Rights Crisis*, *supra* note 2.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Human Rights Crisis*, *supra* note 2.

D. *No Arbitrary Arrest or Heavier Penalty*

Article 9 of the UDHR and the ICCPR both enumerate the right that no one shall be subjected to arbitrary arrest or detention.²¹⁶ Specifically, Article 9 of the ICCPR entitles those arrested to be informed of the reason for their arrest at the time they were arrested.²¹⁷ Under Article 15 ICCPR, no one can be found guilty for a crime that did not constitute a crime at the time the offence was committed, “nor shall a heavier penalty be imposed than the one that was applicable at the time of the offence.”²¹⁸ Article 4 is particularly noteworthy in this case because it applies to States during a state of emergency. During a public emergency, States that are Parties to the ICCPR may only derogate from their obligations under the ICCPR “to the extent strictly required by the exigencies of the situation,” however, they may not derogate from Article 15, among others.²¹⁹

Since the state of emergency went into effect, police and military personnel using excessive force have been deployed in gang-controlled areas.²²⁰ More than 5,747 people were arrested without warrants, and some were allegedly subjected to cruel or degrading treatment.²²¹ The situation worsened last May, when there were multiple murders, which led the authorities to harden their policy with mass arrests that would exceed 46,000 people within 110 days, necessitating the construction of a new prison.²²² Alarming, despite the lack of warrants and due process afforded during these mass arrests, Bukele believes that the arrests made by circumventing human rights and constitutional rights are proper and that, if anything, one percent of those arrested could be innocent.²²³

²¹⁶ UDHR, *supra* note 109, art. 9; ICCPR, *supra* note 124, art. 9.

²¹⁷ ICCPR, *supra* note 124, art. 9.

²¹⁸ *Id.* art. 15.

²¹⁹ *Id.* art. 4.

²²⁰ *In Dialogue with El Salvador, Experts of the Committee against Torture Praise Domestic Violence Legislation, Ask about the State of Emergency and Torture Complaints*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM’R (Nov. 18, 2022), <https://www.ohchr.org/en/news/2022/11/dialogue-el-salvador-experts-committee-against-torture-praise-domestic-violence> [hereinafter *Dialogue with El Salvador*].

²²¹ *Id.*

²²² *Id.*

²²³ *See Renteria, supra* note 151.

The problem with adequately and objectively identifying terrorism is that “many states’ definition of terrorism reflects the distribution of political power within their states,” which is inherently subjective.²²⁴ El Salvador’s anti-terrorism laws used to prosecute those engaging in “terrorist activities” must be clear and contain identifiable elements, because criminal prosecution requires the elements of the crime to be proved or disproved.²²⁵ However, the only definition provided is in the Special Law Against Acts of Terrorism (SLAAT), Article 1, which simply states the purpose of the anti-terrorism law:²²⁶

prevent, investigate, sentence, and punish crimes that by their form of execution, means and methods employed, evidence the intention to provoke a state of alarm, fear, or terror in the population, by putting in imminent danger or affecting peoples’ lives or physical or mental integrity, or their valuable material goods, or the democratic system or security of the State, or international peace.²²⁷

The definition fails to provide identifiable elements of the crime, offering state authorities broad discretion in recognizing an act of terrorism.²²⁸

Article 5 of SLAAT is equally as broad.²²⁹ El Salvador’s criminal laws against terrorism fail to include the UN’s requirement of intent to provoke a state of terror for political purposes.²³⁰ Instead, “Article 5 criminalizes any acts aimed at ‘destroying or damaging’ the lives or belongings of government officials and does not require an intent to cause terror or to intimidate for the purpose of obtaining

²²⁴ Mirna Cardona, *El Salvador: Repression in the Name of Anti-Terrorism*, 42 CORNELL INT’L L.J. 129, 135 (2009).

²²⁵ *Id.* at 137.

²²⁶ *Id.* at 138.

²²⁷ *Id.*

²²⁸ *See generally id.*

²²⁹ *Id.*; Decreto No. 108, 11 Oct. 2006, Ley Especial Contra Actos De Terrorismo [Special Law Against Acts of Terrorism], art. 5, Diario Oficial, 17 Oct. 2006 (El Salvador) [hereinafter SLAAT] (Actions executed “against the life, the personal integrity, the liberty or safety of an internationally protected person, of the presidents of the three branches of the government or those who take their place, and of the remaining public officials or authorities; or against their families who reside in their homes, when these acts are committed by reason of the functions that these officials must perform, will be sanctioned with a prison term of forty to sixty years.”).

²³⁰ Cardona, *supra* note 224, at 139.

a philosophical benefit.”²³¹ Blindly applying the anti-terrorism law violates its citizens’ human rights pursuant to the UDHR and the ICCPR.²³² Government authorities continue to preemptively arrest leaders of organizations in order to “subvert the citizens’ right to freedom of expression” by applying this broad anti-terrorism law, which further constitutes a violation of the right to be free from arbitrary arrest.²³³

Currently, authorities are arbitrarily detaining thousands of people without meeting adequate legal requirements.²³⁴ Warrantless raids and mass arrests have not only been permitted, but have been required during the state of emergency.²³⁵ Within a month, over seventeen-thousand suspected gang members had been arrested.²³⁶ As of September 12, 2022, 52,549 people have been detained without arrest warrants or any guarantees such as due process,²³⁷ and by October 15, 2022, that number exceeded fifty-five thousand.²³⁸ Police identify people as criminals based on stigmas around tattoos, use of English words, alleged third-party gang affiliations, familial relations to gang members, previous criminal records, or the fact that they live in an area controlled by gangs.²³⁹ Currently, the police officers’ performance is measured by the number of arrests, further incentivizing arbitrary arrests and other human rights violations.²⁴⁰ In the five months after the state of emergency was declared, “six social organizations had received 3,186 complaints of abuse of power,” the majority of which were cases of arbitrary detentions.²⁴¹

Arrests and detentions are based on detainees’ appearance and social background of the detainees, “or on questionable evidence, such as anonymous calls and uncorroborated allegations on social media.”²⁴² These stigmas are perpetuated by President Bukele and

²³¹ *Id.*

²³² *Id.* at 151.

²³³ *Id.* at 152.

²³⁴ *Human Rights Crisis*, *supra* note 2.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Democracy without oxygen*, *supra* note 84.

²³⁸ *Fifty-five Thousand Suspected Gang Members Arrested*, *supra* note 176.

²³⁹ *Human Rights Crisis*, *supra* note 2; Paarlberg, *supra* note 17.

²⁴⁰ *We Can Arrest Anyone*, *supra* note 86.

²⁴¹ *Democracy Without Oxygen*, *supra* note 84.

²⁴² *We Can Arrest Anyone*, *supra* note 86.

his government.²⁴³ Authorities are able to circumvent the prior administrative or judicial arrest warrant requirements under the new state of emergency laws.²⁴⁴ Police and soldiers also neglect to inform those arrested or their families of the reasons for their arrest,²⁴⁵ violating Article 9 of the ICCPR.²⁴⁶ In one case, “a mother who witnessed the detention of her son said that police officers told her, ‘We can arrest anyone we want.’”²⁴⁷ Detainees are deprived of their liberty and are charged with membership of “illegal groups” which carries a twenty-to-thirty-year prison sentence.²⁴⁸ Prisons have seen a dramatic increase in inmates and the new laws passed by the Legislative Assembly drastically, and retroactively, increased prison sentences for the over sixteen thousand gang members already serving jail time,²⁴⁹ in direct conflict with Article 15 of the ICCPR.²⁵⁰

E. No Torture; Prisoner’s Rights

Both the UDHR and the ICCPR provide that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”²⁵¹ The CAT effectuates this effort against torture and other cruel, inhuman, or degrading treatment or punishment.²⁵² It begins by defining “torture” in Article 1 to mean:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person

²⁴³ *Human Rights Crisis*, *supra* note 2.

²⁴⁴ *Id.*

²⁴⁵ *We Can Arrest Anyone*, *supra* note 86.

²⁴⁶ *See* ICCPR, *supra* note 124, art. 9.

²⁴⁷ *We Can Arrest Anyone*, *supra* note 86.

²⁴⁸ *Human Rights Crisis*, *supra* note 2.

²⁴⁹ *Id.*

²⁵⁰ ICCPR, *supra* note 124, art. 15.

²⁵¹ UDHR, *supra* note 109, art. 5; ICCPR, *supra* note 124, art. 7.

²⁵² G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

acting in an official capacity. It does not include pain or suffering arising only from, inherent, or incidental to lawful sanctions.²⁵³

States may adopt national legislation that adopts a broader definition of “torture,” but not a narrower one.²⁵⁴ During a public emergency, one that threatens the life of the nation, States that are parties to the ICCPR may derogate from their obligations in the ICCPR.²⁵⁵ However, States may not derogate from the provision against torture under Article 7 of the ICCPR.²⁵⁶ This restriction under a public emergency is emphasized again in the CAT. A state of war, threat of war, internal political instability, and any other public emergency cannot be used to justify torture.²⁵⁷ Torture is a crime under international law that is absolutely prohibited and cannot be justified under any circumstances.²⁵⁸ This is evidenced by the prohibition of torture in the UDHR and the ICCPR, which led to the drafting of the CAT and subsequent treaties and agreements concerning torture and the treatment of prisoners.²⁵⁹ This prohibition is part of customary international law, meaning it is “binding on every member of the international community, regardless of whether a State has ratified international treaties in which torture is expressly prohibited.”²⁶⁰ Furthermore, the United Nations Standard Minimum Rules for the Treatment of Prisoners requires access to adequate and timely medical care, adequate food, water, and sanitation in prisons.²⁶¹

On April 25, El Salvador’s Congress extended the state of emergency an additional thirty days²⁶² and Bukele simultaneously ordered twenty-four hour prison lockdowns, food rationing, and other punitive measures in prisons that housed gang members.²⁶³ There

²⁵³ *Id.* art. 1, ¶ 1.

²⁵⁴ *Id.* art. 1, ¶ 2.

²⁵⁵ ICCPR, *supra* note 124, art 4.

²⁵⁶ *Id.* art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

²⁵⁷ G.A. Res. 39/46, *supra* note 252, art. 2, § 2.

²⁵⁸ *Id.*

²⁵⁹ UDHR, *supra* note 92; ICCPR, *supra* note 113; G.A. Res. 39/46, *supra* note 252.

²⁶⁰ U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, Fact Sheet No. 04 (Rev. 1): Combating Torture, at 3 (May 2002).

²⁶¹ G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners, ¶¶ 15-16 (Jan. 8, 2016).

²⁶² Roy, *supra* note 31.

²⁶³ *Id.*

have been documented cases of torture and ill-treatment inside detention centers.²⁶⁴ By the end of May 2022, local media reported that, due to the increase in arrests, 1.7% of the country's population over the age of eighteen was in detention, and prison capacity was at 250%.²⁶⁵ That same month also saw at least eighteen deaths of prisoners in state custody.²⁶⁶ Salvadoran authorities have reported up to ninety deaths in custody during the state of emergency and have failed to meaningfully investigate those deaths.²⁶⁷ However, a report by Human Rights Watch suggests state responsibility for those deaths given the circumstances that many of those deaths in custody occurred during the state of emergency.²⁶⁸

The level of control that gang members exert inside cells, coupled with extreme overcrowding, leads to violations of the right to life and physical integrity of detainees, and in insanitary conditions, food shortages, and the lack of drinking water, health care and basic hygiene.²⁶⁹ In some cases, family members have reported that those detainees who died in prison did not receive access to the medication they needed.²⁷⁰ Furthermore, there is no access to medical care for those who have developed health conditions while in detention.²⁷¹ As of August 25, 2022, thirty-five of the seventy-three registered deaths within the country's prison system were confirmed to be a result of torture or violent deaths, twenty-three of medical neglect, and the rest of undetermined causes.²⁷² However, in most cases, the families of the victims are provided little to no information about the cause of death, suggesting the possibility of an underreporting of deaths resulting from abuse or neglect.²⁷³ The Washington Office on Latin America suggests that the "systematic, generalized, and massive manner" of arbitrary detentions and torture in prisons that have

²⁶⁴ *Human Rights Crisis*, *supra* note 2.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *We Can Arrest Anyone*, *supra* note 86.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Democracy Without Oxygen*, *supra* note 84.

²⁷² *Id.*

²⁷³ *Id.*

repressed a significant part of the population implies that crimes against humanity are possibly being committed.²⁷⁴

F. The Rights of the Child

The need for the protection of the child is enumerated in Article 24 of the ICCPR, namely that “every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”²⁷⁵ The United Nations Convention on the Rights of the Child, to which El Salvador is a party, defines a child as anyone under the age of eighteen.²⁷⁶ The Convention on the Rights of the Child, adopted in 1989, is a result of States pushing for binding rights of children under international law.²⁷⁷

Relevant provisions of the UNCRC are as follows. Article 2 requires Parties take appropriate measures to ensure that children are protected against all forms of discrimination or punishment.²⁷⁸ Article 3 requires States to act in the best interests of the child as it relates to decisions by courts of law, administrative authorities, legislative bodies, and social-welfare institutions.²⁷⁹ Article 6 grants the child the right to life, survival, and development, construing development in a broad sense to include physical health and mental, emotional, cognitive, social, and cultural development.²⁸⁰ Article 15 recognizes a child’s right to freedom of association and assembly.²⁸¹ Article 16 guarantees the child’s right to be free from arbitrary or unlawful interference with his or her privacy, family, home or correspondence, and from unlawful attacks on his or her honor and reputation.²⁸² Article 37 mandates States Parties ensure that: no child be subjected to torture or other cruel, inhuman, or degrading

²⁷⁴ *Id.*

²⁷⁵ ICCPR, *supra* note 124, art. 24.

²⁷⁶ UNCRC, *supra* note 136.

²⁷⁷ See U.N. Hum. Rts. Off. of the High Comm’r, *Background to the Convention: Committee on the Rights of the Child*, <https://www.ohchr.org/en/treaty-bodies/crc/background-convention> (last visited Mar. 5, 2023).

²⁷⁸ UNCRC, *supra* note 136, art. 2.

²⁷⁹ *Id.* art. 3.

²⁸⁰ *Id.* art. 6.

²⁸¹ *Id.* art. 15.

²⁸² *Id.* art. 16.

treatment or punishment; no child be deprived of his or her liberty and that the arrest, detention, or imprisonment of a child shall be a measure of last resort and for the shortest time appropriate; and if a child is deprived of his or her liberty, they have the right to prompt legal assistance, to challenge the legality of this deprivation before a competent, independent, and impartial authority, and that a decision on such action be prompt.²⁸³

Under the Salvadoran state of emergency, the Legislative Assembly reduced the age of criminal responsibility to twelve, deviating from the international human rights standards requirement that the minimum age be fourteen.²⁸⁴ Previously, the age of criminal responsibility of children accused of the crime of belonging to “terrorist groups or any other criminal gang” was sixteen.²⁸⁵ The new legislation allows prison sentences of up to ten years for children ages twelve to sixteen and of up to twenty years for children over sixteen.²⁸⁶ The UN Committee on the Rights of the Child, which interprets the convention, has called on countries not to set the age of criminal responsibility below fourteen, and has encouraged countries to progressively increase the age of criminal responsibility.²⁸⁷

In 2018, the United Nations reported that over 200 children were detained on national security grounds, primarily for alleged gang activity.²⁸⁸ In under two months during the state of emergency, at least 1,190 people under the age of eighteen were detained and held in youth detention facilities and charged with membership in an illegal group or a terrorist organization.²⁸⁹ Most were charged with membership of illegal groups or terrorist organizations.²⁹⁰ Additionally, those children who are subjected to hyper surveillance are being pulled out of schools, stunting their development, which is a protected right under the UNCRC.²⁹¹ El Salvador is obligated to protect the rights and freedoms of children as enumerated in the UNCRC, but Salvadoran children have been subjected to the similar human

²⁸³ *Id.* art. 37.

²⁸⁴ *We Can Arrest Anyone*, *supra* note 86.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *New Laws Endanger Rights*, *supra* note 184.

²⁸⁹ *Human Rights Crisis*, *supra* note 2.

²⁹⁰ *Id.*

²⁹¹ *See El Salvador's Politics of Perpetual Violence*, *supra* note 15.

rights violations that all Salvadoran citizens are subject to under the state of emergency.²⁹²

In one case, a sixteen-year-old was arrested by armed forces, detained for thirteen days, and accused of membership of an illegal group.²⁹³ Even though Salvadoran law establishes that children have a right not to be held in adult detention sites,²⁹⁴ he was detained in a police detention center for adults where he was chained to the wall and beaten by police officers.²⁹⁵ When transferred to a youth detention facility, he shared a cell with members of a gang who repeatedly tortured him, punching him in the head and face, kicking him in the chest, abdomen and legs, and constantly threatening him.²⁹⁶ He said they also threw a bag full of urine at his head.²⁹⁷ He reported that officials knew about the abuse and torture, but failed to do anything to stop it.²⁹⁸ In another case, two adolescent cousins were arrested for “looking like criminals” without a specific justification for their arrest and detention.²⁹⁹ The police told the mothers that their children would spend 30 years in detention.³⁰⁰ Since the cousins’ arrests, the mothers have not been able to communicate with their children.³⁰¹

V. CONCLUSION

The iron fist and mass incarceration approach in place by the Bukele Administration has effectively dismantled the rule of law in El Salvador.³⁰² Not only has it made gangs stronger and helped them recruit new members in prison systems,³⁰³ but it has also diminished the protection of rights for all Salvadorans and weakened

²⁹² *Human Rights Crisis*, *supra* note 2; see *Status of Ratification Interactive Dashboard*, *supra* note 124.

²⁹³ *Human Rights Crisis*, *supra* note 2.

²⁹⁴ *New Laws Endanger Rights*, *supra* note 184.

²⁹⁵ *Human Rights Crisis*, *supra* note 2.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Human Rights Crisis*, *supra* note 2.

³⁰² *New Laws Endanger Rights*, *supra* note 184.

³⁰³ FARAH & RICHARDSON, *supra* note 56.

authorities' capacity to investigate gang violence.³⁰⁴ However, current international legal systems are inadequate to address the human rights violations discussed above. While it is true that no nation will presently assert sovereignty as a right to violate human rights and freedoms enshrined in the UDHR,³⁰⁵ we still do not live in a world that fully protects and enforces international human rights.³⁰⁶

There is a clear consensus that the UDHR represents binding international law despite the intentions of the drafters.³⁰⁷ However, critics of the UDHR rightly point to the Declaration's lack of enforceability.³⁰⁸ The drafters anticipated or intended the Declaration "to crystallize into soft norms," which are not legally binding but carry some authority.³⁰⁹ The lack of enforceability of the UDHR, by virtue of being a set of soft norms, has led to the use of moral sanctions for violators.³¹⁰ The "naming and shaming" method, particularly the "practice of focusing moral opprobrium upon violators," is one of the most effective methods for encouraging state compliance.³¹¹ This method is largely employed by human rights NGOs that "use their resources to hold officials accountable for their actions by exposing those actions to the public and 'generat[ing] public outrage.'"³¹² The international community could employ the "naming and shaming" method to enforce El Salvador's moral obligations to put an end to violations of the Declaration, but the method is weak at best.³¹³

³⁰⁴ *New Laws Endanger Rights*, *supra* note 184.

³⁰⁵ Edward D. Re, *Judicial Enforcement of International Human Rights*, 27 AKRON L. REV. 281, 285 (1994).

³⁰⁶ Michael Van Alstine, *The Universal Declaration and Developments in the Enforcement of International Human Rights in Domestic Law*, 24 MD. J. INT'L L. 63, 73-74 (2009).

³⁰⁷ McBeth, *supra* note 116, at 41, 85-86.

³⁰⁸ Cronin-Furman, *supra* note 120, at 177.

³⁰⁹ Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT'L L.J. 251, 270 (2008).

³¹⁰ *See* Cronin-Furman, *supra* note 120, at 177.

³¹¹ *Id.*

³¹² *Id.* at 187.

³¹³ *See id.* ("[T]he power and efficacy of "naming and shaming" suggest that its persistent use must stem from more than just the inadequacy of legal enforcement: it is derived from the UDHR's encapsulation of the idea that human rights are accompanied by moral obligations. This idea that the international community has

Although the Declaration is evidence of state practice, it is not conclusive evidence of any human right as a customary law.³¹⁴ Therefore, the UDHR must be considered along with other evidence of customary law.³¹⁵ This includes human rights treaties, resolutions, and declarations of states and international organizations, as well as the writings of jurists.³¹⁶ Some modern constitutions contain “an express declaration that customary international law forms a direct part of the country’s domestic law.”³¹⁷ El Salvador enshrines many of the rights that form international law in its Constitution, namely freedom of press and expression, right to privacy, right to life, freedom of assembly and association, right to just remuneration, freedom from arbitrary arrest, right to counsel, right to be presumed innocent, right to public trial, protection from ex post facto laws, and freedom from torture, among others.³¹⁸ Particularly, Article 144 of the Salvadoran Constitution provides that international treaties will prevail where there is a case of conflict between a treaty and Salvadoran law.³¹⁹ However, the ICCPR, CAT, and UNCRC’s—all of which embody the rights enshrined in the unenforceable UDHR—are similarly inadequate in redressing the human rights violations discussed in Part IV of this Note.

To ensure member state compliance with the rights and obligations identified in the ICCPR, two mechanisms were designed alongside the formation of the Human Rights Committee.³²⁰ First, member states are obligated to turn in periodic reports on measures they have taken to implement the rights in the ICCPR.³²¹ Second, the inter-state complaint mechanism allows member states to report any other member state that is not fulfilling its obligations under the

moral obligations to individuals has recently been the subject of discussion in the debate . . . “).

³¹⁴ Cheng, *supra* note 309, at 295.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Van Alstine, *supra* note 306, at 69.

³¹⁸ See CONSTITUTION OF THE REPUBLIC OF EL SALVADOR 1983, AS AMENDED TO 2014.

³¹⁹ CONSTITUTION OF THE REPUBLIC OF EL SALVADOR 1983, AS AMENDED TO 2014, art. 144.

³²⁰ Thornton, *supra* note 128, at 736.

³²¹ *Id.*

ICCPR.³²² To date, the Treaty Bodies³²³ have only received three inter-state complaints, all in 2018 by the Committee on the Elimination of Racial Discrimination.³²⁴ The inter-state complaint mechanism for violations of the ICCPR—and for any of the treaties discussed in this Note—has never been used.³²⁵ The ICCPR, itself, fails to include a mechanism for individuals to allege that a member state is violating his or her rights.³²⁶

The Optional Protocol to the ICCPR, to which El Salvador is a state party to,³²⁷ gives individuals the option to allege violations by state parties.³²⁸ The process is as follows: first, the individual must be a victim of a violation of the ICCPR and must submit a complaint (called “communications”) to the Human Rights Committee detailing the violation, but the individual cannot do so anonymously.³²⁹ The Committee then considers the admissibility of the communication.³³⁰ Unless the individual has exhausted all domestic remedies, the communication is inadmissible.³³¹ If the complaint is considered admissible, the state has a specific time period to respond to the complaint.³³² The Committee then privately evaluates the communication on its merits.³³³ To remedy violations alleged in communications submitted under the Optional Protocol to the ICCPR, the Human Rights Committee “has urged states parties to carry out independent investigations, to institute criminal proceedings leading to the prompt prosecution and conviction of the persons responsible

³²² *Id.*

³²³ *Treaty Bodies*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/treaty-bodies> (last visited Mar. 5, 2023) (“The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties.”).

³²⁴ *Inter-state complaints*, INT’L SERV. FOR HUMAN RTS. ACAD., <https://academy.ishr.ch/learn/treaty-bodies/inter-state-complaints> (last visited Mar. 5, 2023) (referencing the cases of *State of Qatar vs. Kingdom of Saudi Arabia*; *State of Qatar vs. United Arab Emirate*; *State of Palestine vs. State of Israel*).

³²⁵ Thornton, *supra* note 128, at 737.

³²⁶ *Id.* at 738.

³²⁷ *Status of Ratification Interactive Dashboard*, *supra* note 124.

³²⁸ Thornton, *supra* note 128, at 738.

³²⁹ *Id.* at 738-39.

³³⁰ *Id.* at 738.

³³¹ *Id.* at 739.

³³² *Id.*

³³³ *Id.*

for the prohibited acts, to pay damages and to ensure that similar events do not occur in the future, notwithstanding any domestic amnesty legislation to the contrary.”³³⁴ The Human Rights Committee has further stated that the remedies it considers to be effective and appropriate include the right to submit a written communication and the subsequent prompt and impartial investigation of the complaint by competent authorities.³³⁵

International jurisprudential standards under the ICCPR consistently find that “the right to an ‘effective remedy’ of serious human rights abuses includes the obligation of signatories to investigate human rights abuses, promptly, impartially, and exhaustively, to criminally prosecute those responsible, to provide compensation, and to prevent future abuses.”³³⁶ However, presently, El Salvador strongly believes it is not engaging in human rights abuses, and it has severely limited judiciary autonomy in prosecuting cases and investigating abuses.³³⁷ Furthermore, the only future abuses it seeks to prevent is violence by gang members, by any means necessary, even those that violate its obligations under human rights law.³³⁸ In doing so, it has blissfully and ignorantly turned a blind eye to the human rights abuses it is committing, and lacks the inclination to investigate as such.³³⁹ Moreover, since the Human Rights Committee is not known for its overt application of human rights law, it is unlikely to enforce the weak remedies it deems effective.³⁴⁰

The central focus of the CAT is on prevention of torture, which focuses on education.³⁴¹ Prevention of torture, however, does not

³³⁴ Sherrie L. Russell-Brown, *Out of the Crooked Timber of Humanity: The Conflict Between South Africa's Truth and Reconciliation Commission and International Human Rights Norms Regarding "Effective Remedies"*, 26 HASTINGS INT'L & COMP. L. REV. 227, 233 (2003).

³³⁵ *Id.* at 233-34.

³³⁶ *Id.* at 254-55.

³³⁷ See discussion *supra* Part IV.

³³⁸ See *id.*

³³⁹ See *id.*

³⁴⁰ See generally Christine Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, 47 VA. J. INT'L L. 839, 848 (2007).

³⁴¹ Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application*, 14 HARV. HUM. RTS. J. 87, 100 (2001).

redress present violations of the CAT.³⁴² Article 12 of the CAT requires the parties to the Convention to investigate all allegations of torture “promptly and impartially.”³⁴³ If a member state has “reasonable grounds to believe that an act of torture has been committed,” it must investigate the prospect of torture practices within its jurisdiction.³⁴⁴ The process of filing a complaint pursuant to the CAT follows an identical procedure as the process under the ICCPR and is heard by the Committee Against Torture.³⁴⁵ Therefore, not only is the CAT’s ineffectiveness a result of this procedure, its ineffectiveness is also further reflected by budgetary constraints, political constraints, and other factors that prevent it from eradicating torture.³⁴⁶

The enforcement mechanism relies heavily on official state cooperation and its limited budgets for torture rehabilitation work suggest they are inadequate.³⁴⁷ Furthermore, in the context of enforcing, rather than preventing, violations of the CAT, the act of torture must be severe.³⁴⁸ However, the requirements of what constitutes “severe pain and suffering” are so unclear that courts have great latitude in interpreting this severity requirement.³⁴⁹ The inherent ambiguity of the CAT enables States to exercise a considerable degree of self-serving discretion in translating the CAT’s mandate into domestic law.³⁵⁰ In conjunction with the absence of an internationally ubiquitous definition of torture, the individual complaint mechanism of the CAT serves merely as a symbolic gesture.³⁵¹ The deficiencies in enforcing the CAT, both domestically and internationally, are especially prevalent when public officials are involved, as they are in El Salvador.³⁵² This is reflected by imbalances in the number of violations of torture compared to the number of convictions that result in

³⁴² *See generally id.*

³⁴³ *Id.* at 100.

³⁴⁴ *Id.*

³⁴⁵ *See id.* at 103-04.

³⁴⁶ *Id.* at 105.

³⁴⁷ Nagan & Atkins, *supra* note 341, at 105.

³⁴⁸ Julianne Harper, *Defining Torture: Bridging the Gap Between Rhetoric and Reality*, 49 SANTA CLARA L. REV. 893, 901 (2009).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ Nagan & Atkins, *supra* note 341, at 105.

³⁵² Harper, *supra* note 348, at 911.

State Reports submitted to the Committee Against Torture.³⁵³ Establishing the U.N Special Rapporteur, a position meant to help the Committee Against Torture, was an optimistic gesture but also shares the Committee's inefficacy.³⁵⁴

While the CAT has been ratified by many States including El Salvador, reports of torture, cruel, and inhuman treatment and cruel treatment and punishment in prisons continue to persist without adequate enforcement.³⁵⁵ The CAT's procedural deficiencies, ambiguities in defining the requirements of torture, budgetary limitations, and reliance on political cooperation demonstrate its failure in redressing torture internationally, leaving Salvadoran citizens without an adequate mechanism to redress torture committed during the War on Gangs.³⁵⁶

Finally, the UNCRC is the weakest of the treaties to redress any harm to the child. Complaints detailing with violations of the UNCRC can only be heard if the child's national government has ratified the Optional Protocol to the UNCRC.³⁵⁷ However, the impact of the UN Committee's approach to receiving and hearing complaints is weak.³⁵⁸ Once a complaint is heard, the UN Committee is limited to only making a recommendation to the State that it take action to remedy the complaint, which El Salvador is unlikely to do.³⁵⁹ In effect, this "ritual without substance" process relies on the same State to enforce the child's rights that violated the child's rights in the first place.³⁶⁰

Not only are the UDHR, ICCPR, CAT, and UNCRC inadequate in addressing the human rights violations in El Salvador, but the *mano dura* approach continues to feed the success of Salvadoran Gangs. The War on Gangs has packed jails with "low-level individuals" who very likely only have an immaterial relationship to gangs, handing those gangs new potential recruits.³⁶¹ Furthermore, the War

³⁵³ *Id.*

³⁵⁴ Nagan & Atkins, *supra* note 341, at 107.

³⁵⁵ Harper, *supra* note 348, at 912-13.

³⁵⁶ *Id.*

³⁵⁷ Brian K. Gran, *An International Framework of Children's Rights*, 13 ANN. REV. L. & SOC. SCI. 79, 88 (2017).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ Paarlberg, *supra* note 17.

on Gangs' dramatic approach inflates gang membership by amplifying gangs' authority, which thrive on the "larger than life" street cred they get from politicians in the Americas.³⁶²

³⁶² *Id.*