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War in the Streets:

*El Salvador's Gang Problem and the Need for International Prosecution and Intervention by
the Inter-American Court of Human Rights*

By Mary Lynn Seery

INTRODUCTION

“It’s like being in a war and being the only one without a weapon.”¹ During the last twenty years, gang violence has been an escalating problem in Latin America as a whole. The former gang member cited above correctly compared the epidemic of gang violence to a war in which civilians have had no defense. After over a decade of civil war in the 1980s, residents of Central and South America continue to search for safety; and it is elusive for most. While the problem of gang violence is pervasive in this area, El Salvador is often cited as the most exaggerated example. Even after the end of its twelve-year civil war in 1991, the country of El Salvador continues to experience high levels of judicial impunity and violence.² It experiences one of the highest murder rates per capita in the world, coupled with one of the lowest rates of prosecution for these crimes. The most devastating actors contributing to the astoundingly high rates of violence in El Salvador are private actors in the state: members of the various gangs operating within the country, most famously, the Maras.

¹ LAURA PEDRAZA FARIÑA, SPRING MILLER & JAMES L. CAVALLARO, NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 49 (International Human Rights Clinic, Human Rights Program, Harvard Law School, 2010). (The Harvard Law School International Human Rights Clinic exhaustively examined the high rates of violence and judicial impunity in El Salvador, conducting various interviews with victims, gang members, and innocent bystanders. This source provides a detailed view of the problems that may be tackled by the Inter-American Court and a foundation for understanding the problem of gang violence. It will be relied upon heavily as anecdotal evidence of the problem of gang violence addressed herein.)

² *Id.* at 2-3.

The violent actions of gang members, coupled with judicial impunity in prosecuting individuals responsible for homicides, constitute an epidemic in El Salvador that as of the present time has not been effectively managed by the state itself. The widely documented and continued instances of gang violence and judicial impunity in this state makes El Salvador an ideal case study for the illustration of how the Inter American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”),³ can and should take jurisdiction over cases of gang violence. The purpose of the court, established under the Pact of San Jose,⁴ is to further the four fundamental tenets of the Organization of American States: democracy, human rights, security, and development.⁵ At this juncture, three of these four principles have been thwarted by gangs in El Salvador.

Over the course of its history, the Inter-American Court has applied the rights guaranteed by the Pact of San Jose to instances of suspected state-sponsored violence, and even violence at the hands of guerillas, or non-state actors, in the context of civil war. This reasoning has not yet been applied in instances where the same judicial impunity and disregard for human life is a result of violence at the hands of private actors in the context of gangs. These private actors, gang members, raised in a culture of violence during the civil war, now pose the biggest threat to the lives of residents of El Salvador. The Court upheld the rights to life and judicial protection in a variety of cases before them, including Case of García Prieto et al. v. El Salvador, concerning forced disappearances during the civil war.⁶ Thus, the Inter-American Court should extend its

³ Inter-American Court of Human Rights was established in 1979 as the judicial body of the Organization of American States, an international organization of which 35 countries in the Americas are a party. Of these 35 member states is the Latin American country of El Salvador.

⁴ ORGANIZATION OF AMERICAN STATES, Multilateral Treaties, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Oct. 17, 2012).

⁵ PETITION AND CASE SYSTEM: INFORMATIONAL BROCHURE, Inter-Am. Comm’n H.R. 4-6 (2010).

⁶ García Prieto v. El Salvador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 188 (Nov. 20, 2007).

reasoning developed in cases of forced disappearances and clandestine violence during the Latin American civil wars to the context of gang violence, because these cases exhibit similar levels of judicial impunity coupled with violations of the rights to life and judicial protection. Reparations should similarly be afforded.

In reaching this conclusion, Part I will discuss the factual basis for finding jurisdiction within the court in the cases of gang violence. Part II will first examine the substantive claim under the rights to life and to judicial protection and how the Court has defined these rights. Section B of Part II will extend the analysis of these rights to the actions of gang members. Finally, Part III will discuss the potential remedies that the Inter-American Court of Human Rights should order in order to prevent further human rights violations by gang members.

I. **JURISDICTION AND RECEIVING THE CLAIM INTO THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

This section will discuss the factual requirements for receiving a claim into the Inter-American Court on a jurisdictional level that are satisfied by the epidemic of gang violence in El Salvador. The Pact of San Jose requires that for a state to be subject to the jurisdiction of the Inter-American Court of Human Rights, five basic conditions must be met. First, a state must be party to the American Convention. Next, the defendant state must be implicated by action, acquiescence or omission. Third, domestic remedies must be exhausted by the state. Fourth, victims must have been denied a remedy under domestic laws. And last, there must be an unwarranted delay of a remedy to victims. The analysis of whether a remedy can be afforded to victims of gang-based violence in El Salvador will begin with an application of the problem to these five basic requirements for jurisdiction. First and most basically, El Salvador is a member of the Organization of American States and ratified the American Convention or the Pact of San Jose on June 20, 1978. It consented to the jurisdiction of the Inter-American Court on June 6,

1995. Thus, the prosecution of gang violence in El Salvador satisfies this preliminary condition. The remaining four conditions will be discussed in Sections A and B.

A. *State Action, Acquiescence, or Omission*

The second jurisdictional requirement of the Inter-American Court is that the state of El Salvador must be found responsible, by act, acquiescence, or omission, for the alleged violations by gang members. In cases of gang violence, El Salvador has been unable and unwilling to make any progress toward mitigating this problem. In its 2011 Global Study on Homicide, the United Nations Office on Drugs and Crime reported that El Salvador boasted one of the highest murder rates per 100,000 residents in 2010, at 66, second only to Honduras (82.1).⁷ Compare this to the homicide rate in the United States where there are a reported 4.6 homicides per 100,000 residents.⁸ This frightening statistic has increased even since 2002, climbing closer to the homicide rates reported in the period just following the civil war in the 1980s and 1990s.⁹ According to the United Nations Office on Drugs and Crime report of the International Statistics on Crime and Justice, in 2006, only 1.186 out of 100,000 homicides were prosecuted.¹⁰ Of those prosecuted, only 39 out of 100,000 resulted in conviction.¹¹ Compare this with Europe as a whole where the median prosecution rate is 973 out of 100,000 are prosecuted, and 698 out of 100,000 prosecutions result in convictions.¹² These statistics are alarming and point to an omission by the state of El Salvador to protect citizens both from harm itself and also by effective operation of the criminal justice and judicial systems. The Court has explicitly stated

⁷ U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 2011, at Table 8.1 (2011), https://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf.

⁸ *Id.* at 50.

⁹ *Id.* at 50-52.

¹⁰ European Institute for Crime Prevention and Control, *International Statistics on Crime and Justice*, HEUNI Pub. Ser. No. 65, at 96-102 (2010) available at http://www.unodc.org/documents/data-and-analysis/Crime-statistics/International_Statistics_on_Crime_and_Justice.pdf.

¹¹ *Id.*

¹² *Id.*

that actions and omissions with close links to the state are not the only way that international responsibility may be derived. It may also be generated

by acts of private individuals not attributable in principle to the State. The States Party to the Convention have *erga omnes* obligations to respect protective provisions and ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons. The effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals.¹³

The high murder rate and low prosecution rates demonstrate the failure of the state to effectively protect the rights of its citizens from each other. While a state may argue that it is unable to respond effectively to violations by its citizens, it is nonetheless the responsibility of the state to try its best to do so. In the case of El Salvador, its high murder rates have been climbing, rather than decreasing, which evidences the state's failure to take any steps necessary to correct the problem. By reasoning of the Court, a failure to do so constitutes the acquiescence or omission necessary to find jurisdiction with the Court.

B. Exhaustion of Domestic Remedies, Denial of Domestic Remedies to Victims, and Unwarranted Delays to Remedies

Third, the state of El Salvador must have exhausted domestic remedies, denied remedies to victims, and subjected victims to unwarranted delays in providing remedies in instances of gang-violence presented before the Court in order for jurisdiction to be proper. An individual bringing a complaint before the Inter-American Court must only to point to the previously cited disappointing rates of prosecution and conviction in El Salvador in order to satisfy this prong. Only strengthening this case is the failed attempts of the state to enact legislation to protect its citizens from gang violence. These requirements for jurisdiction may be demonstrated by the

¹³ Mapiripán Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 ¶1111 (Sept. 15, 2005).

inability of the state of El Salvador to enact effective laws combatting gangs and its inability to protect witnesses during and after trials.

The long-standing trend of impunity in the Salvadoran judicial system has a history that first gained international infamy in the 1980s. These weak institutions have yet to be strengthened to date. Judges have been unable to interpret and apply the anti-gang laws, including the 2003 *Ley Anti Mara* (“Anti-Mara Law”), also known as LAM I.¹⁴ This law criminalized gang membership and was designed to capture and prosecute gang members aggressively as part of the “Firm Hand Plan” (*El Plan Mano Dura*) under the crime of unlawful association.¹⁵ This law, however, was declared unconstitutional in 2004, and the Salvadoran Congress, the following day, passed the “Law to Combat Delinquent Activities of Special Illicit Groups or Associations” (*Ley Para el Combate de las Actividades Delincuenciales de Grupos or Asociaciones Ilícitas Especiales*), or LAM II, which did little to improve the first Anti-Mara Law.¹⁶ Again, the judiciary refused to apply the new law due to the legislature’s failure to address the concerns raised against LAM I. The judiciary has refused to implement what little anti-gang laws have been created by the government and thus, convictions and effective prosecution remain elusive.¹⁷

Further compounding the problem is the judicial inefficacy of protecting lay and expert witnesses during trial. A minimal level of protection is afforded to the identity of witnesses and their characteristics, and post-trial protections are non-existent, compounding the numbers of unresolved homicides.¹⁸ Additionally, many judges have refused to apply the provisions of the laws allowing witnesses to have their identities protected because they have been found to be a

¹⁴ FARIÑA ET AL., *supra* note 1, at 21.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 23-24.

¹⁷ *Id.* at 24.

¹⁸ *Id.* at 28.

violation of defendants' due process rights to confront adverse witnesses.¹⁹ In practice, these protections have completely failed. In fact, a conflict between the executive and judicial branches has led to an even greater failure to protect parties involved in criminal prosecutions, especially victims and witnesses. Juan Antonio Durán Ramírez stated in an interview that, "In practice, protection is symbolic, because after witnesses give their testimony, they are sent back home. They continue living in the same environment and are rarely relocated."²⁰ These witnesses remain in harm's way, and the lack of witness protection furthers a distrust of the system of prosecution. Witnesses are understandably less likely to come forward to bring perpetrators of gang violence to justice for fear that they will meet the same fate as the initial victim. The combined failures to prosecute, legislate, and protect demonstrate that the state of El Salvador has been unable to provide effective domestic remedies, especially to victims and witnesses, under domestic law, and has failed to address unwarranted delays to domestic remedies as a whole.

II. **SUBSTANTIVE RIGHTS TO BE PROTECTED IN CASES OF GANG-BASED VIOLENCE IN EL SALVADOR**

Two substantive rights protected by the Pact of San Jose are implicated in cases of violence at the hands of gangs in El Salvador. These rights are the "Right to Life" and the "Right to Judicial Protection."²¹ This section will first examine these rights as they have been defined by the Pact of San Jose and applied in cases before the Inter-American Court. Finally, Part B will discuss how these rights should be extended in cases of private gang-based violence.

¹⁹ *Id.*

²⁰ FARIÑA ET AL., *supra* note 1, at 29.

²¹ Organization of American States, American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143.

A. *Substantive Rights as Defined by the Inter-American Court of Human Rights*

The Inter-American Court has issued a multitude of opinions concerning the rights to life and judicial protection. The following sections will examine the definitions of these rights pursuant to the American Convention, as well as their expansion and application by the Inter-American Court.

1. **The Right to Life**

Article 4(1) of the Pact of San Jose defines the right to life as “the right to have his life respected. This right shall be protected by law... No one shall be arbitrarily deprived of his life.”²² When this right has been violated by the action, acquiescence or omission of the state, there is an actionable claim before the Inter-American Court of Human Rights. According to the Court, the right to life is a “fundamental human right” that “is essential for the exercise of all other human rights.”²³ States must foster an environment that protects from violations of this right and prevents violations by both its own agents and private individuals.²⁴ The right to life must be understood and applied so that its guarantees are exercised practically and effectively.²⁵

The Inter-American Court has provided:

States must adopt all necessary measures to create a legal framework that deters any possible threat to the right to life; establish an effective legal system to investigate, punish, and redress deprivation of life by State officials or private individuals; and guarantee the right to unimpeded access to conditions for a dignified life.²⁶

These definitions exhibit how the right to life has been applied in cases before the Inter-American Court since its inception. It has been explicitly defined in cases of forced

²² *Id.* at Art. 4(1).

²³ *Jeremias Osorio Rivera v. Peru, Merits, Inter-Am. Ct. H.R. (ser. D) No. 11,845 ¶ 108 (Oct. 31, 2011).*

²⁴ *The Street Children Case (Villagrán Morales et al.) v. Guatemala, Merits, Inter-Am. Ct. H.R. (ser. C) No. 63 ¶ 144 (Nov. 19, 1999).* (Protecting street children, particularly minors, from human rights violations.)

²⁵ *Case of Zambrano Vélez v. Ecuador, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 166 ¶ 79 (July 4, 2007).*

²⁶ *Id.* at ¶ 81.

disappearances, torture at the hands of police officers, state acquiescence to preventable deaths in prisons, and a variety of other instances involving armed conflict; however, it has not been extended to specific cases of gang violence.

2. **The Right to Judicial Protection**

Article 25 of the Pact of San Jose has provided all men the right to judicial protection by states. In pertinent part:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention...²⁷

This has been interpreted by the Inter-American Court to mean that states have an obligation, in cases in which force has caused injury or death, to punish those responsible by way of judicial bodies and provide a remedy to the victim and his or her family members.²⁸ States cannot impute that right on either the victim or any other party that may be involved in the matter. The duty to investigate and prosecute lies solely with the state.²⁹ The Court has provided further that the state must provide access to justice “within a reasonable time.”³⁰ These requirements to effectively investigate, prosecute, and provide a remedy to victims all in a reasonable amount of time reflect two of the core ideals of the Organization of American States – international commitment to development and security, which should be applied not only in cases of state violence, but also in cases of private violence.

B. *Substantive Rights as Applied to Cases of Gang Violence*

Understanding the substantive rights as previously defined by the Inter-American Court provides a mechanism for comparison of these cases to cases of gang violence. First, it will be

²⁷ American Convention on Human Rights, *supra* note 21 at Art. 25.

²⁸ Case of Zambrano-Velez, *supra* note 20 at ¶ 112.

²⁹ *Id.*

³⁰ *Id.* at ¶ 115.

shown that the right to life may be applied in cases of gang violence because the right has already been applied to non-state actors during the Salvadoran Civil War and other similar uprisings in Latin America. The striking similarities between the internal conflict during the 1980s is comparable to the epidemic of gang violence now affecting the state of El Salvador. Finally, it will be shown that the right to judicial protection should be applied in instances of gang violence because the deaths of both innocent civilians and gang members represent both a failure by the state of El Salvador to substantively provide justice to injured citizens and a failure to prevent a social cleansing that has been evidenced by the lack of concern for the deaths of gang members.

1. **The Right to Life and Gang Violence**

The gang culture in El Salvador has been developing since the mid-1990s, when small local gangs began to emerge. Since then, the two principal gangs operating on the widest scale are the Maras, MS-13 and M-18.³¹ It is estimated that between 10,500 and 30,000 residents of El Salvador are members of the Maras.³² Salvadoran authorities have reported that of all the homicides in their state each year, 80% can be attributed to gangs.³³ With such striking numbers attributed to the culture of gang violence in El Salvador, it is clear that the epidemic will only cease with international intervention.

If 80% of homicides can currently be attributed to gang members, the similarity is striking to the phenomenon of forced disappearances in El Salvador during its civil war. Case of Contreras et al. v. El Salvador is a judgment of the Inter-American Court in which the state of El Salvador was held responsible for the forced disappearances of six children at the hands of

³¹ FARIÑA ET AL., *supra* note 1, at 57.

³² Robert Walker, *Mara Salvatrucha, MS-13*, THE MALDON INSTITUTE, http://www.gangorus.com/ms_13.html (last updated Oct. 23, 2012).

³³ FARIÑA ET AL., *supra* note 1, at 62.

guerrillas, or subversives, during the civil war.³⁴ In this case and cases similar, individuals were abducted from their families and never heard from again. These human rights violations plagued the country of El Salvador during the entirety of its civil war and for years after. Compare this to cases of gang violence. Young people in El Salvador are coerced into gang affiliation. Youth are presented with a simple choice: either join the gang, or be tortured, or worse, killed.³⁵ Once you have been inducted into gang life, your disappearance in society is essentially forced. These young gang recruits are much like the children abducted by guerrillas with more far-reaching consequences in El Salvador's society. Specifically, the deaths of those gang members are not only forced, but the deaths of many civilians are committed at the hands of these gang members.

Similar to the violent practices of entrance into gangs, those seeking to leave gang life face even more severe consequences, and this phenomenon has become worse in recent years. Those working with gang members have reported that “whereas in the past it was difficult, but feasible, for a gang member to disassociate safely from a gang, in recent years it has become virtually impossible to do so.”³⁶ In the past, gang members could embrace Christianity as a refuge, start a family, or migrate in order to escape their once gang affiliation.³⁷ At present, one ex-gang member reported, “Right now the only way to leave a gang is to die. They tell you that if you find God you can leave, but even then they still kill you.”³⁸ This culture of “support us, or we will kill you,” is reminiscent of the civil war in the 1980s, where opposition to the rebel FMLN party (*Frente Farabundo Martí para la Liberación Nacional*, or the Farabundo Martí National Liberation Front) and support of the government, resulted in disappearance and death.

³⁴ Case of Contreras v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232 (Aug. 31, 2011).

³⁵ FARIÑA ET AL., *supra* note 1, at 72.

³⁶ *Id.* at 79.

³⁷ *Id.*

³⁸ *Id.*

At that time, the members of these clandestine death squads “wore civilian clothing, were heavily armed, operated clandestinely and hid their affiliation and identity. They abducted members of the civilian population and of rebel groups. They tortured their hostages, were responsible for their disappearance and usually executed them.”³⁹ This same exact description may be attributed to current members of gangs. Gang members wear civilian clothes. They are often armed, especially male members, and they operate under the radar of law enforcement officials who are unable to identify them because their identities are hidden. Gangs have essentially become the death squads of the twenty-first century.

The most notable similarity factually, between the cases of forced disappearances during the civil wars is that FMLN death squad members were not government actors and neither are gang members. As previously defined, the Court has held that the state must not only protect the lives of its citizens from state actors, but also from non-state actors. The Court found that the government did not protect its citizens’ right to life even in cases where the government was not, itself, acting. The Salvadoran government at present has failed to guard civilians’ right to life at the hands of gang members. The distinction between these two cases is based on a context of internal conflict; however, the fight between gangs and the government who cannot control them has exhibited and continues to exemplify that same conflict. Gangs have become the modern death squad in El Salvador, and the right to life has continued to be disregarded by members of that state.

2. The Right to Judicial Protection and Gang Violence

The Right to Judicial Protection as defined by the Inter-American court can be extended to cases of gang violence as well as a result of both failing to protect innocent civilians, failure to

³⁹ *Id.* at 9, citing COMISIÓN DE LA VERDAD PARA EL SALVADOR, DE LA LOCURA A LA ESPERANZA: LA GUERRA DE 12 AÑOS EN EL SALVADOR (Mar. 15, 1993), available at http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993.

afford fair treatment and due process to gang members through its faulty legal system, and allowing a social cleansing to occur when gang members themselves are killed. Fundamentally, as in the age of the Salvadoran Civil War, a lack of confidence in the judicial system has exacerbated the already existing problem of judicial impunity, and has resulted in further violations of the right to judicial protection. Garcia Prieto involved the state of El Salvador's failure to effectively and adequately investigate Mr. Ramón Mauricio García Prieto's death, and the threats and harassment encountered by his family members. In that case, criminal proceedings were initiated in order to investigate the death of Mr. García Prieto and the continuing threats against his family at the hands of those who had killed him, in order to frighten them into silence. These proceeding were initiated in 1996.⁴⁰ Investigations were halted through 2007, when the Inter-American Court took jurisdiction over the matter, due to the state's inability to identify the individuals who orchestrated the killing and threats of family members.⁴¹ Nine years passed before Mr. Garcia Prieto's family could be supplied a remedy and effective investigation. This type of delay and lack of resolution, however, is not unique to instances of violence secondary to the civil war in El Salvador. In fact, justice is rarely found in cases of gang violence.

As a whole, the Salvadoran judiciary is a weak and ineffective system, as described previously.⁴² The international human rights norms exhibited by the Pact of San Jose and decisions of the Inter-American Court illustrate that states must afford security on a most basic level to the citizens of their nations. According to interviews of victims and witnesses in neighborhoods where there is an especially pronounced gang presence, the state frequently fails to investigate and prosecute violence where the victim is of a "marginalized or powerless social

⁴⁰ García Prieto, *supra* note 6 at ¶ 71.

⁴¹ *Id.*

⁴² *Supra* note 10 (prosecution and conviction rates in El Salvador compared to Europe).

group,” or where the victim is simply presumed to have been a member of a gang.⁴³ Interviews with a resident of one poor region outside of the nation’s capital of San Salvador reported the incompetence of police officials in the area and explained that “police abandon their posts and disappear when gang members take to the streets in her area, leaving citizens vulnerable to extortion, threats and violence.”⁴⁴ Police who turn their backs on the protection of civilians exhibit the exact opposite of the protections that international norms champion, including the right to judicial protections, codified in the American Convention on Human Rights. Law enforcement officials are the mechanisms by which the state protects its residents. These individuals must provide a competent investigation of crime. If, instead, they turn their heads from the exact violence and crimes which they are responsible for preventing, there is a severe violation of the right to judicial protection.

Violation of the right to judicial protection is also exhibited in cases where witnesses are not protected. Witnesses, victims, and experts who would be used by the judiciary to prosecute gang members are targets for violence and retaliatory acts at the hands of other members of that gang. Researchers have examined this phenomenon and pointed to civilian insecurity and lack of protection for witnesses as the reason that witnesses do not report crimes or agree to testify after they have reported them.⁴⁵ If individuals distrust their judiciary so much as to avoid reporting or testifying against gang members, the problem of pervasive impunity escalates so that fewer and fewer crimes are investigated and prosecuted, resulting in even higher levels of impunity. This vicious cycle mirrors that which occurred during the civil war, where individuals did not and could not report crimes committed by the FMLN for fear of retaliation and further disappearances and violence. The same public insecurity that existed during the 1980s civil war

⁴³ FARIÑA ET AL., *supra* note 1, at 159.

⁴⁴ *Id.* at 158.

⁴⁵ *Id.* at 161.

has yet to be addressed and in fact has cultivated the culture in which violations of the right to judicial protection exist just the same.

Beyond the most basic failure to protect, is the disregard for due process that has evolved out of policies combatting gangs in El Salvador, which constitutes another example of failure to respect the right to judicial protection. The Super Mano Dura policy (“Super Firm Hand”) provided several main tenets to combat gang activity. First, the law provides that juveniles involved in crimes of gang activity may be tried as adults.⁴⁶ Second, profiling of gang members on the basis of tattoos enacted a policy that disregarded the basic concept of criminal law, that one is presumed innocent until proven guilty.⁴⁷ Last, and perhaps most egregious, the law was enforced retroactively.⁴⁸ Disregarding the protections of due process in combatting gang violence certainly denies one the right to effective judicial protection. In fact, it is a violation against gang members themselves, or perhaps, those wrongfully accused. On a deeper level, this also has grown the overall sentiment that the Salvadoran judiciary and its law enforcement officials do not protect the citizens, and has grown the culture of impunity within the society.

This disregard for the protection of the poor or socially powerless classes of individuals mirrors the failure to protect these individuals during the civil war that occurred decades before. In fact, evidence suggests that “Salvadoran state and law enforcement authorities may be complicit in, or at least consciously and deliberately indifferent to, extrajudicial killings and social cleansing.”⁴⁹ A spike in the unexplained homicide rate has been attributed to the indifference to deaths of those in marginalized populations who are assumed to have been

⁴⁶ U.S. Agency for Int’l. Development [USAID], *Central America and Mexico Gang Assessment: Annex 1: El Salvador Profile*, 13 (Apr. 2006) available at http://transition.usaid.gov/locations/latin_america_caribbean/democracy/els_profile.pdf.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 166.

involved in gangs, consequent to the policies of the *Mano Dura* plan that supposed the extermination of all criminals.⁵⁰ However, this mechanism for reacting to the criminality in El Salvador has further exaggerated the culture of gang violence rather than eliminate it. The Inter-American Court has stated that individuals should be protected by the state, without specification as to whether the violence is at the hands of extra-judicial or state actors, or private individuals. There has been no distinction by the court. Thus, the right to judicial protection should be extended, as applied in cases of violence associated with the civil war, to cases in which episodes of gang violence are not prosecuted effectively.

III. **REMEDIES AND RECOMMENDATIONS TO THE STATE OF EL SALVADOR AS SHOULD BE PROVIDED BY THE INTER-AMERICAN COURT**

Since violations of the rights to life and judicial protection as a result of gang violence can be adjudicated by the Court, the next step is to determine appropriate reparations for these violations. The Inter-American Court has the authority to provide remedies to victims and their families pursuant to the American Convention. Article 63(1) of the Convention states:

If the Court finds that there was been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of this right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.⁵¹

This section will discuss effective remedies that should be ordered by the Court pursuant to this power. Typically, the court awards monetary damages to a surviving victim or to his or her descendants, in a case in which a victim is deceased.⁵² However, the Court also has the power to demand states to makes specific changes to remedy rights that have been violated. These

⁵⁰ *Id.* at 202.

⁵¹ American Convention on Human Rights, *supra* note 21 at Art. 63(1).

⁵² Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 Am. U. Int'l L. Rev. 333, 362-370 (1994).

remedies are typically discussed by the court in its “merits” decision and provide specific changes to be made by the state found to be responsible.⁵³ In cases of forced disappearances, for example, the court has ordered the end to all disappearances, a truthful and thorough report on the events, and trial and punishment of those found to be responsible.⁵⁴ Due to the astounding similarities between the cases of clandestine violence and disappearances during the 1980s civil war and the instances of violence and judicial ineffectiveness as a result of escalating levels of gang violence, the court can and should take jurisdiction over these claims and provide a remedy to victims. The norms presented by the Organization of American States on its own and without consequences are being ignored repeatedly in the state of El Salvador evidenced by its continued inability to deal with gang violence. The court must take jurisdiction of these claims in an effort to provide a remedy to victims and deter further violations. Recognition of gang-related crimes by the Inter-American Court can achieve this coupled with reparations. Recommendations previously made by the international community can provide a framework for effective remedies that may be proffered by the Inter-American Court in its decisions. The following sections will discuss three central remedies that can be ordered by the Court. First, recommendations for changes in the laws in El Salvador to better deal with the epidemic of gangs should be provided. Second, the Court should order training and funding to the judiciary and law enforcement officers of El Salvador to prevent further violations and remedy the judicial impunity of the state. And last, support from non-governmental organizations in the form of prevention efforts would be effective in preventing further violations.

⁵³ *Id.* at 370.

⁵⁴ *Id.*

A. *Recommended Changes in Laws Combatting Gang Violence*

The laws combatting gangs in El Salvador have left civilians with a feeling of pervasive insecurity and distrust of their own judicial and law enforcement bodies. The Court must utilize its power to provide a remedy to guide El Salvador towards more effective and less offensive anti-gang laws because a judgment against the state insisting on this remedy will have more legitimacy than recommendations from other countries on an individual level. While the U.S. Agency for International Development (USAID) has published assessments recommending more comprehensive and preventative programs in response to gang violence, its implementation by the state of El Salvador has been elusive.⁵⁵ Correcting the problems associated with the current anti-gang legislation will help guide the state of El Salvador away from further violation of the rights to life and judicial impunity.

Officials from the legislative and executive branches of the government of El Salvador have put pressure on judicial officials to strictly punish those involved in gang affiliation as a part of the *Mano Dura* plan. The laws “outlawed gang membership, enhanced police power to search and arrest suspected gang members, and stiffened penalties for convicted gang members.”⁵⁶ As a result, suspected gang members who were arrested, yet not in fact associated with the gangs, became members while in prison, and prison overcrowding has become rampant. Conflict between the judiciary and executive and legislative has evolved out of interference with the independence of the judiciary, as exemplified by the immediate passage of LAM II after LAM I was declared unconstitutional. Even worse, homicide rates have remained higher in El Salvador than in any other country in Latin America, and policies have fostered a climate of violence due to an emphasis on gang eradication rather than rehabilitation. Thus, after almost 8

⁵⁵ *Central America and Mexico Gang Assessment: Annex 1: El Salvador Profile*, *supra* note 46.

⁵⁶ *Anti-Gang Efforts in Central America: Moving Beyond Mano Dura?*, Center for Hemispheric Policy, University of Miami (Apr. 10, 2007) <https://www6.miami.edu/hemispheric-policy/SeelkeTaskForcePaper.pdf>.

years of implementation of these strict LAM I and LAM II laws, it becomes clear that laws combatting gangs in El Salvador must take a turn in another direction.

On the most basic level, the Mara Salvatrucha (MS-13) and M-18 gangs in El Salvador have established several objectives as a result of the “firm hand” policies enacted by the government. Specifically, they want to “take over the drug trade, purchase more weapons... take over drug trafficking corridors in two or three years, and take over small cartels.”⁵⁷ Most frightening, these gangs are using young gang members to perpetrate harsh crimes on behalf of the gang, because they cannot be tried as adults.⁵⁸ Thus, the laws enacted by the state of El Salvador should be developed to combat these basic goals and mechanisms of criminal activity, rather than criminalization of affiliation with gangs, which has only resulted in further violence. In 2010, the United States Department of State, in a report provided to the Organization of American States, provided a variety of policy changes to be made as a hemisphere to combat gang violence and criminal activity that has plagued member states. While effective from a prevention standpoint through development of long-term goals, a large portion of these recommendations focused on repatriation of deportees from the United States.⁵⁹ On a more immediate level, the government of El Salvador must tackle the gang epidemic legally.

Developing stricter laws combatting drug and weapons trafficking is integral in eliminating the epidemic of gangs and gang violence in El Salvador. These practices are the most profitable for gangs and without the ability to conduct this activity, there is no incentive to join them. According to a USAID report, after the codification of the policies criminalizing gang affiliation and detention of individuals based on gang tattoos alone, violence perpetrated by gang

⁵⁷ *Central America and Mexico Gang Assessment: Annex 1: El Salvador Profile* (Apr. 2006), *supra* note 46.

⁵⁸ *Id.* at 6-7.

⁵⁹ *Working Group to Prepare a Regional Strategy to Promote Inter-American Cooperation in Dealing with Criminal Gangs*, Committee on Hemispheric Security, Permanent Council of the Organization of American States, OEA/Ser. G./CSH/GT/PD-23/10, 2-3 (Feb. 23, 2010).

members actually increased.⁶⁰ The Inter-American Court of Human Rights should direct the state of El Salvador towards policies that combat the activities of gangs, following guidance from the international community.

B. Judicial and Law Enforcement Training and Funding

Effective law enforcement and judicial proceedings are also necessary to combat the epidemic of gang violence in El Salvador. Recommendations and reparations to this effect as ordered by the Inter-American Court would direct a state to correct this aspect of the problem and prevent further violations of the rights to life and especially, in this case, the right to judicial protection. As mentioned previously, El Salvador experiences high levels of impunity in both its courts and among law enforcement officials who seem to look away from gang activity, rather than stop it. A judicial system capable of and willing to implement sound law will necessarily eliminate violations of Article 25 of the American Convention. Further, the culture of impunity that citizens of El Salvador encounter will be combatted, resulting in higher levels of confidence in the government. Funding and training to the judiciary and law enforcement officials will achieve this.

In its policy recommendations to the Organization of American States, the U.S. Department of State recognized the law enforcement can play a key role in combatting gangs in Central and South America. These recommendations included law enforcement's disruption of criminal activities, dismantling of sophisticated organization, and investigation, prosecution and incarceration of those in positions of power within the gang.⁶¹ Further, the recommendations indicate that deterrence of criminal activity is the role of law enforcement officials, and that this

⁶⁰ *Central America and Mexico Gang Assessment: Annex 1: El Salvador Profile* (Apr. 2006), *supra* note 43 at 13.

⁶¹ *Working Group to Prepare a Regional Strategy to Promote Inter-American Cooperation in Dealing with Criminal Gangs*, *supra* note 59 at 3.

should remain one of the most important targets.⁶² Last, anti-money laundering legislation should be used to identify and confiscate gang resources, and these resources should be used to compensate those who combat gang as well as those who are victims of their illicit activities.⁶³ A ruling by the Inter-American Court of Human Rights instructing the Salvadoran government to enact these recommendations previously made by the United States government would allow substantial steps to be made in contravention of gangs. This all can be accomplished through intelligence-sharing regarding gang activities operating transnationally, as well as through information about criminal deportees and gang affiliation so that law enforcement in El Salvador can monitor these individuals and enact the policies described above.

The Court can also demand the strengthening of criminal justice officials, and until this system is strengthened sanctions can be ordered against those who further violations of the right to judicial protection. The corruption that many residents of El Salvador speak to is a main concern for the international community, as it has furthered criminality and the pervasiveness of gang violence. Improving the quality of law enforcement and addressing issues of corruption and respect for human and civil rights is one way to further this end. Training in human rights norms are necessary. This is especially true because the effects of the civil war are still felt through the mentality of the citizens of El Salvador. Additionally, assessments must be made of the current capacity to identify criminal individuals and to analyze crimes within the region and possible mechanisms for improvement. This may be accomplished through the introduction of more sophisticated fingerprinting databases. It may be effective for the Organization of American States to develop a shared network of fingerprints so that all nations can be kept aware of convicted criminals and identify them if they commit additional crimes. These will provide El

⁶² *Id.*

⁶³ *Id.*

Salvador with the intelligence and mechanisms for rectifying the problems of identifying criminals.

Lastly, the prison system has become a way for gangs to recruit more members and strengthen their network across the state and beyond. The U.S. Department of State recommended in its report to the Organization of American states that prison guards and others who work in the correctional system should be taught effective tactics for isolating those known to be leaders in gang networks and separate gang members from non-gang members generally.⁶⁴ Teaching those working in the correctional system how to maintain security and safety in prisons is another mechanism by which the Organization of American States can help mitigate the gang problem in El Salvador. Based on the fact that law enforcement officials and judges are known to be ineffective or even corrupt, as previously described, part of the implementation of law enforcement action must including training of these individuals. The Organization of American States can provide mandatory training for those working in either the law enforcement or judicial profession. Trainings may include how to effectively investigate criminal activity, witness protections, and classes in judicial interpretation of laws. Partnership between the members of the Organization of American States could strengthen the overall function of the judiciary and law enforcement in El Salvador.

C. Non-Governmental Organization Support

Lastly, non-governmental organizations can play a crucial role in combatting gang activities, especially in the capacity of gang recruitment prevention and reintegration of former gang members into society in order to eventually make the problem more manageable for the Salvadoran government. The Inter-American Court can issue judgments to direct the state of El Salvador to utilize aid that it gets from various NGOs to combat the epidemic of gang violence.

⁶⁴ *Id.* at 3.

Efforts can be targeted at strengthening educational opportunities, using faith-based resources to strengthen community values, providing rehabilitation and reintegration programs for known gang members, and international cooperation to prevent deportees from strengthening the transnational characteristics of gangs in El Salvador.

Lack of quality education in the state of El Salvador has led to high instances of youth delinquency, and consequently, high rates of gang affiliation. In recent years, researchers have found a trend towards the recruitment of increasingly younger members of society by gangs.⁶⁵ The trend toward recruitment of younger members is coupled with an increased in the number of gang members who wish to continue their gang affiliation.⁶⁶ Police Commissioner Howard Augusto Cotto Castaneda reported in an interview that school teachers themselves have reported violent incidents within schools, including beatings and death threats between children of gang members and these same teachers have reported threats they have endured by gang members whose children they teach in their classrooms.⁶⁷ Thus, it is apparent that at this juncture, schools have been ineffective at providing education to children regarding the dangers of gang affiliation and in fact are in danger themselves as a result of these children. The Organization of American States, utilizing remedies provided by the Court in taking on cases of gang violence, can implement policies in which the government can mandate gang education in schools. Similar to the D.A.R.E. program that schools in the United States utilize to educate pupils on drug and alcohol abuse and resistance, El Salvador can attempt programs such as these as a part of the school day. Additionally, educational opportunities provide students a means by which then can attempt to better themselves, elevating beyond crime in order to support themselves. Clearly,

⁶⁵ FARIÑA ET AL., *supra* note 1, at 74.

⁶⁶ *Id.*

⁶⁷ *Id.* at 75.

however, the few programs currently active in El Salvador have done little, if anything, to prevent gang recruitment and violence among the younger demographic.

Similarly, while faith-based organizations once had success in preventing and helping those escape from gang affiliation, these programs have not had continued success.⁶⁸ Many fear that beyond the fears of retaliation by members of their own former gang, they fear that members of rival gangs will mark them indefinitely as a rival.⁶⁹ Thus, those who do not wish to continue as gang members have no other choice but to continue with gang activities or in the alternative, loss of life or limb. Use of church groups once again could be effective to combat recruitment. If children are involved in their church or other house of worship, they may continue to be so active and be advised that gang membership is incompatible with their faith. In this way, faith does not need to be used ineffectively to withdraw from a gang, and instead, prevent involvement as a whole.

Rehabilitation and integration programs should be proscribed for those gang members who could be tried before the Inter-American Court. Should one of these cases be taken on, the Court may order mandatory attendance in a program, similar to those programs offered to drug offenders and other criminals here in the United States. A reintegration program could help those former gang members find jobs, a task that many find difficult, and that often leads to further criminal acts. In Los Angeles, a similar program called the “Los Angeles Gang Reduction Strategy” was enacted in which families, individuals, and communities that were most heavily dominated by gang activities were identified and provided with resources to escape gang life.⁷⁰ Similarly, if this comprehensive approach were initiated in El Salvador, rather than the firm hand

⁶⁸ *Id.* at 79.

⁶⁹ *Id.* at 78

⁷⁰ City of Los Angeles Gang Reduction Strategy, April 18, 2007, available at: http://www.lacity.org/mayor/myrhspold/mayorindexright243044714_04222007.pdf.

policies that are now in place, criminalizing gang activity and only punishing offenders, rather than attacking the source of the problem, then the state of El Salvador would be able to begin managing the epidemic of gang violence.

Lastly, international cooperation to target gang member deportees would be extremely valuable to stop the escalating instances of gang membership and consequently, violence. The Maras in El Salvador initially developed when displaced migrants, attempting to escape the violence of the civil war, settled in California and formed their own gangs in reaction to the threat of those already existing. When these gang members committed crimes, they were arrested and deported back to El Salvador. With these individuals went the culture of gang life. The gangs latched onto the culture of violence already in existence, and grew to the death-squad like entities that they are today. Utilizing information on deportees in order to manage their behavior and prevent further violence and spread of gang life would also be an effective means for the Organization of American States to combat violence. If the Inter-American Court were to take these suggestions and couple programs with remedies to victims, it would be able to slowly correct the problem of gang violence in El Salvador.

CONCLUSION

The rights to life and judicial protection that are afforded to all members of the Organization of American states have been applied against those involved in the politically motivated violence of the 1980s that continued into the 1990s. The events that occurred then are no different from the epidemic of gang violence that currently plagues the country of El Salvador. As a result, the Inter-American Court of Human Rights should take jurisdiction over claims involving gang violence and help to facilitate the mitigation of this epidemic that has made El Salvador the most violent nation in the world.