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THE COST OF SECURITY: TORTURE AND PUNITIVE  
POPULISM IN  
EL SALVADOR'S ANTI-GANG STRATEGY

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## **Abstract**

The purpose of this thesis is to provide an assessment to the complex interplay between punitive security measures used to contrast gang violence in El Salvador post-war period. In particular, this document targets issues of torture, human rights violations and organized crime. At first, the research addresses the legal definition and framework of protection regarding torture and crime, its instruments and the actors. It follows the exploration of the immediate post-war challenges faced by El Salvador and the conditions that contributed with the rise and institutionalization of organized crime under the form of gangs. Theoretical concepts such as punitive populism and Enemy Criminal Law are explored as an explanation for the use of a particular punitive strategy in contrasting organized crime.

Consequently, the document addresses the evolving policies applied as a strategy against gang violence and how these raised concerns regarding their effectivity and the impact they had on individuals. The institutional response using punitive policies is analysed starting in 2003 until 2018. The discussion is structured around the State action and the shortcomings of the policies resulting in the rise of violence and generalized cases of torture and ill-treatment against gang members. After 2019, the discussion is structure around the use of an extraordinary constitutional tool to fight gang violence and institutionalizing ill-treatment and torture against gang members. The narrative built around the individuals who belong to these gangs promotes the legitimation of State punitive actions against them. The reaffirmation of this model is confirmed with the last elections held in February 2024. As a conclusion, in an environment where violence is endemic and the State action is ineffective, the rise of populist punitive leaders can lead to the use of unconventional constitutional tools and the institutionalization of human rights violations legitimize by the majority.

Key words: torture, gangs, punitive populism, El Salvador, security policies

## Résumé

L'objectif de cette thèse est de fournir une évaluation de l'interaction complexe entre les mesures de sécurité punitives utilisées pour contrer la violence des gangs dans la période d'après-guerre au El Salvador. En particulier, ce document aborde les questions de la torture, des violations des droits de l'homme et du crime organisé. Dans un premier temps, la recherche aborde la définition légale et le cadre de protection concernant la torture et le crime. Elle suit l'exploration des défis immédiats de l'après-guerre auxquels El Salvador a été confronté et examine les conditions qui ont contribué à la montée et à l'institutionnalisation du crime organisé sous la forme de gangs au Salvador. Des concepts théoriques tels que le populisme punitif et le droit pénal ennemi sont abordés pour expliquer l'utilisation d'une stratégie punitive particulière pour contrer les gangs.

Par conséquent, le document aborde l'évolution des politiques appliquées en tant que stratégie de lutte contre la violence des gangs et la manière dont elles ont suscité des inquiétudes quant à leur efficacité et à leur impact sur les individus. La réponse institutionnelle utilisant des politiques punitives est examinée de 2003 à 2018. La discussion est structurée autour de l'action de l'État et des lacunes des politiques qui ont entraîné une augmentation de la violence et des cas généralisés de torture et de mauvais traitements à l'encontre des membres de gangs. Après 2019, la discussion est structurée autour de l'utilisation d'outils constitutionnels non conventionnels pour lutter contre la violence des gangs et de l'institutionnalisation des mauvais traitements et de la torture à l'encontre des membres de gangs. Le récit construit autour des individus qui appartiennent à ces gangs montre la légitimation des actions punitives de l'État à leur encontre ouvertement. La confirmation de ce modèle est confirmée par les dernières élections qui se sont tenues en février 2024. En conclusion, dans un environnement où la violence est endémique et l'action de l'État est inefficace, la montée des leaders populistes peut conduire à l'utilisation d'outils constitutionnels non conventionnels et à l'institutionnalisation de violations des droits de l'homme légitimées par la majorité.

Mots clés : torture, gangs, populisme punitif, El Salvador, politiques de sécurité

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## Introduction

Despite being considered as an absolute right, torture and ill-treatment is still practiced around the globe. In particular scenarios, there is a legitimization of the use of prohibited acts against individuals who commit certain crimes or belong to certain groups. Considering a particular form of organized crime such as gangs, a narrative can be built around these organizations promoting and institutionalizing ill-treatment and torture against them. In contexts where there are high levels of violence, the low government capacity to contrast gang activity and the low trust of the citizens towards its institutions can promote the rise of popular figures that promise to end the problem using punitive and open contrast policies against gangs. This is the particular case of El Salvador, where endemic violence was part of the livelihood of the country for decades. The structure of gangs and the inadequate State response help popularise a figure that embraces punitive populism and currently institutionalizes openly torture and ill-treatment towards imprisoned gang members.

I decided to tackle this particular issue due to my connection to Latin America and the common danger that gangs represent for the region. In particular, the recent rise of violence in Ecuador due to gangs and drug traffic has worried me deeply. This opened my mind to the expansion of gang violence and the impact they can have within our societies. Moreover, it was brought to my attention the similarities in the narratives built around gang members and the strategies followed by the present administration. I wish to understand the phenomenon in order to look for possible constructive solutions and long-term sustainable programs to avoid the institutionalization of gangs, maintaining the differences from country to country of course.

In order to carry out this investigation I looked for literature regarding torture, populism and gang activity in El Salvador. The historical approach followed was aimed to show the structural and historical origins of the gang phenomenon in El Salvador and the security strategies followed by several administration without having a real impact in controlling gang violence. The historical and theoretical analysis was vastly discussed by papers and online documents, on the contrary the recent events of El Salvador after 2019 are very recent and therefore not many sources are available. Moreover, the nature of the right being infringed and the places where they are being performed are of difficult access. Official records do not fully display the dimension of the problem. On the contrary, secrecy and mystery is created around these issues. Not having official recognition of the cases of torture and ill-treatment made this research difficult and relied only on the testimonies of few victims that were released. As President

Bukele is still in power, openly discussing these issues is also controversial especially due to his open criticism and lack of confidence regarding human rights and the NGO's that seek to highlight the problems and bring to the attention of the public opinion what the government is doing.

Security comes at a price and gang members are placed under a narrative that labels them as unworthy of the protection from torture or ill-treatment. In order to discuss this, the thesis follows the following structure. The first part articulates the concepts of torture and gangs together with the historical context of El Salvador. The first chapter focuses therefore in the theoretical definition and international standards regarding torture, ill-treatment, organized crime and punitive populism. This is important because it gives the reader the basic elements to build a conceptual baseline and understand the particular situation of El Salvador. Subsequently the situation of El Salvador is explored following a historical approach on the situations and developments that contributed with the formation of the current situation. Structural and long-term effects are tied to the problem of gang violence in El Salvador therefore the second chapter emphasises the situation that contributed with the institutionalization of gangs.

The second part of this thesis focuses in the different strategies implemented by past administrations regarding gang violence and the torture cases present in contrasting gangs. With the analysis of the different actions and the shortcoming of the implementations it shows how the narrative of gang members as unworthy of the prohibition against torture was structured and naturalized through several plans and State initiative arriving to the terrorist label. Nevertheless, at first due to the bipartisan political situation, the violation was not explicit nor systematic. Rather, the consequences of punitive action will leave a prison system in poor conditions and the judiciary system incapable of responding and addressing justice issues to support the action implemented by the Executive. In the last chapter on the contrary I focus on the last actions implemented by President Bukele and how the systematic and institutionalized use of torture and ill-treatment is a central element of his administration.

The discussion around the issue of gang violence and how the State contrast their activities is central for the region of Latin America. Concerns should be raised regarding this issue, as the effectiveness of Bukele's State policy has showed important results despite the abuses of due process and the practice of torture against gang members. These results are gaining the attention of other countries in the region, with a particular risk of legitimizing through democratic means



the open disregard for the respect of the human dignity of a particular group of individuals, gang members.



## Part I Combating Torture and Organized Crime: Legal and Punitive Measures in Post-War El Salvador

Human rights protect the dignity of individuals at all times. In particular situations, the scenario can be created for severe and systematic violation of human rights. Extraordinary measures can be adopted to respond to threats still protecting some core rights that must be respected even during periods of exceptional limitations. In particular, the prohibition of torture has acquired an absolute status, demanding its respect in a permanent matter. Therefore, international and regional instruments define and establish the proper framework to contrast the practice of torture and ill-treatment. The absolute character constitutes a limit to the State action when it responds to threats such as organized crime. In particular, gang violence has become growing concern for States due to its structure and the repercussion for the society. Relevant is the case of El Salvador, which highlights a particular violent history that marked the country and its citizens. As a direct consequence, gangs formed and institutionalized in the country creating a long-term impact that would affect this Central American State for decades.

### Chapter 1. Post-War Challenges: Torture, Organized Crime, and Punitive Policies in El Salvador

#### 1.1 Prohibition of torture and other forms of ill treatment: concept and legal framework

The prohibition of torture has acquired *jus cogens* status due to its fundamental role in protecting human dignity and its inherent worth. There is an absolute ban on torture and other forms of cruel, inhuman or degrading treatment or punishment under international human rights law (IHRL). This is supported by *jus cogens*, considered as a hard nucleus protecting fundamental principles of the International Community. Within the Vienna Convention on the Law of Treaties of 1969 in article 53 *jus cogens* is defined as:

[...] a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

From the absolute character of *jus cogens*, as established by the Vienna Convention, derives that serious breaches of peremptory norms shall bear particular consequences. In fact, conduct leading to serious violations of *jus cogens* should be brought to an end through State cooperation using lawful means (ILC 2022, p 70). This approach has been accepted and recognized by the International Court of Justice in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. It determined the duty to cooperate to bring to an end violations concerning the right of self-determination and humanitarian law (ICJ, 2004, para 155). Above lawful collective action, where the United Nations architecture can foster a comprehensive response, there is an individual obligation on States to make lawful efforts to bring the violation to an end (Int law commission, 2022, p 75). It results then a clear obligation to refrain and avoid any action that could result in the violation of such important norms and most importantly an obligation to bring to an end any conduct contrary to peremptory norms.

The non-derogable character present in *jus cogens* dispositions overlaps the absolute character of certain human rights norms. It results then in the crystallization process of certain principles developed by international and regional human rights instruments. The set of rights considered non-derogable present in the ICCPR, the ECHR and the IACHR are: a) right to life, b) prohibition of torture, or cruel inhumane or degrading treatment, c) prohibition of slavery and d) non-retroactivity of criminal law. On the other hand, these coincide with peremptory norms and thus do not depend their fundamental authority from State consent (Criddle & Fox-Decent, 2012, p.57). With these special categories of norms, the duty to respect is *ipso facto* expected regardless of the status of ratification or adhesion to a regional or international instrument. Moreover, there are special regional and international institutions that monitor de respect and implementation of those instruments.

Despite the recognition of the existence and the implications of *jus cogens*, challenges are still in place to assure a complete accountability and implementation of the content enshrined in those norms. In particular, during emergency contexts where State action is overpowered by constitutional mechanisms in order to respond to a threat.

### 1.1.1 International Legal Framework

In international law, three instruments detail and encompass the prohibition of torture, besides its customary character: The Universal Declaration of Human Rights, the ICCPR and the CAT. These instruments allow a proper definition and creates specific positive and negative duties aimed for States in order to implement their content. Efforts have been made in order to better define and prevent these types of acts, nevertheless the vertical relation between individual and States poses a constant danger to the weakest of them, that is the individual. This absolute but fragile right, that underpins the shared values of the International Community, is constantly being tested for which a constant action or surveillance need to be implemented to avoid serious violations (Jill Edwards, 2022, p 3).

#### The prohibition of torture in the International Bill of Human Rights

The internationalization of the prohibition of torture and other cruel, inhuman, and degrading treatment or punishment was established with the Universal Declaration of Human Rights in 1948. Expressed in article 5, the prohibition states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

This freedom from torture was conceived as universally unequivocal. In the aftermath of the world conflict and the practices carries of by the Nazi regime in the concentration camps, the ban reflected a general opposition and contrast to those actions. The prohibition was adopted also by the ICCPR of 1966 in the same terms in article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The protection of the dignity together with the mental and physical integrity of the individual was shaped in the article. The covenant states the negative duty to refrain from committing acts of torture by establishing legislative and other measures to ensure the prohibition of such acts. Together with the negative actions, positive requirements present in article 10.1 shape the positive duties addressed to States to particular categories of individuals subjected to the will of the State:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The Human Rights Committee in the General Comment No. 20 tackles the developments and interpretation around article 7. Agreeing on the absolute nature of the prohibition, it concludes that no derogation is acceptable and that no justification may be invoked in order to legitimize a violation (Human Rights Committee, 1992, p 1). This is in line with the *jus cogens* nature of the norm. The Covenant in article 4 makes the respect of prohibition of torture be applied under all circumstances even during times of public emergencies:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision<sup>1</sup>.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

The non-derogable nature expressed by article 4.2 of the ICCPR is related to their nature of peremptory norms of international law. *Jus cogens* norms and certain human rights dispositions share the same baseline principle of protection of human dignity and the limitation of States' action against the human persona. As for the derogation, two fundamental conditions need to be met: the public emergency threatens the life of the nation and the State must have officially declared a State of Emergency (Human Rights Committee, 2001, p 2). Concerning the assessment of a legitimate derogation, if the action conducted by the State constitutes a basis for individual responsibility for a crime against humanity then article 4 cannot be invoked as a justification for the exception of responsibility (*Ibid*, p 5). Procedural guarantees must also be secured in order to protect non-derogable rights listed by the ICCPR. Procedural safeguards

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<sup>1</sup> Article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion)

may never be subject to measures that may bypass the protection of non-derogable rights (*Ibid*, p 6).

Furthermore, there is no precise actions that amount to torture but rather it depends on the nature, purpose and severity of the treatment applied in each individual case (*Ibid*). The approach followed by the Committee considers torture as acts amounting in physical pain but at the same time acts that cause mental suffering. In particular, the prohibition is extended regarding corporal punishment as repercussion for a crime or as a disciplinary measure. The vision encompasses negative duties to prohibit and punish such acts but also positive actions concerning legislative, administrative and judicial measures to prevent torture under State jurisdiction. In addition to the general protection deriving from article 7, meaning a universal enjoyment, States need to provide a special attention to vulnerable persons. In particular concerning detainees, the Human Rights Committee's General Comment n°20 relating to ICCPR article 7 states that: that:

[...] keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment [...]. To guarantee the effective protection of detained persons, [...] detainees to be held in places officially recognized as places of detention and for their names [...] to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention [...].

Finally, the approach followed by the Committee regarding the responsibility is large. In this sense, individuals must be held responsible whether they encourage, order, tolerate or perpetrate prohibited acts amounting to torture or ill-treatment. There is a general shared view on the consequences, practices and responsibility of the absolute norm. Nevertheless, the lack of a precise definition and the elements to establish the nature of certain acts was not addressed.

### The UN Convention against Torture

Significant progress has been made to identify and clarify key elements of torture and ill-treatment. One milestone advance was the adoption of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984. The main concern

present during the drafting was not to reiterate the absolute non-derogable character of the prohibition, but rather to make more effective fight against torture and other ill-treatment around the world (Nowak, 2020, p 6). In article 1 torture is defined as:

[..] 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 acting in an official capacity.

As such, torture comprises three main dimensions consisting in a) the gravity of the inflicted pain, whether mental or physical; b) the intentionality behind the act; c) the instrumental use of it as a mean to obtain information, punish or intimidate the victim (International Committee Red Cross, 2014, p 1). In addition, the requirement concerning the prohibited acts is that those acts be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (CAT, 1984). This approach seeks to develop a link between the torture or ill-treatment actions and the State agents. As the principal duty bearer, the State and all its agents acting or representing it, have also the duty to ensure the respect, protection and implementation of the absolute prohibition of torture. Direct actions are understood in a large sense, as promotion or instigation to commit torture or ill-treatment are prohibited as well.

As a result, one of the central effects regarding the criminal responsibility of perpetrators is the fact that its only applied to torture and not to other forms of ill-treatment making the distinction between acts significant (Nowak, 2020, p 7). On the other hand, the preventive measures encompassed in the CAT apply equally to torture and cruel, inhuman and degrading treatment or punishment. In fact, the CAT establishes a preventive duty upon States regarding cruel, inhuman and degrading treatment or punishment in article 16.1:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

There are two main elements that differentiates between torture and other forms of ill-treatment. Firstly, regarding the specific intent of the act and the severity of the treatment (UNVFVT, 2009, p 7-8). Regarding the latter, the specific intent is shaped around the instrumental purpose



of the act. The former consists in a level of severity that goes beyond a mere degradation or humiliation (ICRC, 2014, p 1).

Beyond a general duty to prevent, there are several specific duties i.e. training law enforcement and prison personnel (article 10), systematic review of interrogation rules (article 11), carry out investigation of alleged torture acts or ill-treatment when reasonable ground to believe it is being perpetrated (article 12), inadmissibility of information extracted by torture (article 15) for instance. Important is the *non-refoulement* principle established by article 3 of the CAT since most of the individual complaints of article 22 are invoked under the breach of article 3 (Nowak, 2020, p 7). In addition to the preventive obligations, positive obligations are established whenever there is a breach ensuring correct reparations for victims. This is provided by article 13 of the CAT, in order to examine the allegation and access domestic remedies. Individual complaints may be submitted to the Committee against Torture as established by article 22 but only 71 States out of 174 State parties have accepted the procedure.

A third type of duty is established by the CAT, that is the need to use domestic criminal law against perpetrators (*Ibid*). In fact, all acts amounting to torture need to be criminalize by domestic criminal law and have the appropriate penalties in accordance to the grave nature of those acts. Moreover, the *jus cogens* nature of the prohibition establishes, in accordance with article 5, the universal jurisdiction principle and thus imposes the State to establish their jurisdiction in order to extradite the individual or prosecute before their own criminal courts. This is in line with article 2 of the CAT, which emphasizes that no exceptional circumstances may be invoked to justify acts of torture:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

The monitoring of State compliance is shaped around an independent treaty body. A Committee of 10 independent experts with a mandate to examine the State's mandatory periodic reports (article 19) and the optional inter-State and individual complaints (articles 21 and 22). Regarding the absolute nature of the prohibition, the Committee Against Torture in the General Comment N° 2 emphasizes that no exceptional circumstances may be invoked to justify acts of torture in the territory of a State party. In particular, terrorist threats or violent crime and armed

conflicts are mentioned as public emergencies that may not justify for a violation of the prohibition of torture or ill-treatment (Committee Against Torture, 2008, p 2). The Committee against Torture has the innovative possibility, under article 20, to start an *ex officio* inquiry procedure in case of receiving reliable information of well-founded indications of torture by a State party (Nowak, 2020, p 9). The inquiry is not dependent of any complaint and may lead to the creation of a *in loco* fact-finding mission. However innovative, the provision might be limited due to the possibility to opt out by a State party, the high confidentiality of the whole process and the explicit agreement of the State to carry out the fact-finding mission (*Ibid*). With the adoption of an Optional Protocol in 2002 the idea of enhancing and performing the purposes of the CAT was materialized. Hence, the Optional Protocol specifies further measures to assist State parties to the CAT to prevent acts of torture by establishing a system of regular visits by international and national bodies to places where people are deprived of liberty as to prevent torture and ill-treatment. For this purpose, the Optional Protocol creates a Subcommittee on Prevention of Torture and other cruel, inhuman, degrading treatment or punishment (hereinafter Subcommittee on Prevention) and encourages the creation, at a domestic level, of a National Preventive Mechanism (NPM) as a visiting body as well. In the case of the NPM the Optional Protocol provides just further detail regarding a pre-existing obligation under the CAT as stated by the General Comment N. 2 about article 2 of the CAT concerning the creation of an impartial mechanism for inspecting and visiting confinement and detention places. The Subcommittee on Prevention's mandate is to visit places where people are deprived of their liberty and assist the NPM in the analysis of the system of deprivation of liberty in order to reduce risk factors, ameliorate dialogue and ultimately improve the treatment and conditions of detainees. The complementary relationship between international and national institutions regarding the CAT denotes the particular preventive vision about the measures and cooperation needed in order to render transparent the mechanisms and the internal systems of States parties in order to reduce the risk and tackle possible torture acts.

#### 1.1.1.2 El Salvador standard of protection from torture

The prohibition of torture is incorporated in El Salvador's legislation. There is an explicit prohibition under article 366-A of the Criminal Code:

The State agent or public servant that, while on official duty, inflicts intentionally to an individual the official, public employee, public authority or agent of public authority who, on the occasion of the duties of his office, intentionally inflicts on a person severe pain or suffering, whether physical or mental, for the purpose of obtaining from him or from a third party information or a confession, to punish him for an act he has committed or is suspected of having committed, or to intimidate or coerce him or another person, or for any reason based on any kind of discrimination, instigates, induces or consents to the infliction of such pain or suffering, or is suspected of having committed, or to intimidate or coerce such person or another, or for any reason based on any kind of discrimination, instigates, induces or consents to such acts or fails to prevent their execution, shall be punished by imprisonment for a term of six to twelve years and disqualification from the exercise of the respective office or employment for the same period of time.

The prohibition is established as a crime against humanity in the Salvadoran legislation. The final observations of the Committee Against Torture suggests that labelling torture under crimes against humanity limits the impact and possibility of prosecuting other acts of torture that do not constitute crimes against humanity under international law (UNCAT, 2022). Concerns were raised during the State review as the penalty for acts of torture ranges from 6 to 12 years. At the same time, the penalty from disqualification from office, that accompanies the sentence is limited to the same duration as the prison term, which does not reflect the severity and the seriousness of the crime.

Moreover, concerning the CAT, El Salvador has not accepted the procedure for individual complaints established by the convention framework, limiting greatly the ability of individuals to report their State. On the other hand, the OPCAT, which helps implementing a national mechanism that further supports the implementation of the convention has not been ratified by El Salvador. During the last reporting cycle, the Committee encouraged the ratification of this instrument but there has not been an affirmative action towards ratifying it.

### 1.1.2 Regional legal framework

As gang violence has been present in extreme forms in Central America, El Salvador presents an interesting case to analyse the development in the strategies to fight gang violence. In particular, the InterAmerican system allows for an important insight concerning the interpretation of the prohibition of torture through a regional perspective.

## InterAmerican Convention of Human Rights

In addition to the international instruments, in the Americas sponsored by the Organization of American States (OAS), the Interamerican Convention of Human Rights includes the prohibition of torture. Under article 5, the right to Humane Treatment states that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

This definition does not clarify the types of acts which amount to torture or ill-treatment nor it distinguishes between prohibited acts (APT & CEJIL, 2008, p 95). The particular focus on persons deprived of their liberty responds to the region's history concerning military dictatorships during the decades of 1960 and 1970 where serious violations of human rights and dignity of the person were perpetrated by the government.

The importance of the prohibition is underlined, in the InterAmerican system, pursuant article 27 regarding the cases of suspension of guarantee under the convention establishing the right as non-derogable:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American

States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

In consequence it cannot be suspended during war, public danger and other threats to the independence and security of State parties (ICHR Advisory Opinion, 2022, p 21). To better comprehend the concept in the InterAmerican system, it is necessary to resort to a categorial regional instrument and the jurisprudence of the InterAmerican Court of Human Rights.

### InterAmerican Convention to Prevent and Punish Torture (IACAT)

Notably in the Americas, the Convention to Prevent and Punish Torture (IACAT) was adopted in 1987. It aimed to define torture under the Interamerican framework. The logic behind the IACAT follows the international definition of torture, with some elements of difference, as follows in article 2:

[...] torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental **capacities**, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

In comparison with the international definition given by the CAT, the IACAT strikes apart concerning the purposes of which cause the acts of torture using the formula “for any other purpose” rather than “such purposes as”, the level of suffering and pain does not have to be severe, and focuses on methods intended to obliterate the personality or diminish the capabilities of the victims independently whether such methods cause pain or suffering (APT & CEJIL, 2008, p 96). Similarities include the need for a material element, the intent and the qualified perpetrator. As for the material element, it is considered the intention of the author to inflict pain or suffering or other methods aimed to obliterate or diminish the victim’s personality and capability. To determine which acts, amount to torture, the approach followed by the InterAmerican Court considers both objective and subjective elements. As for the latter, the length of time for which the pain was inflicted, the methods adopted to produce such pain or

suffering, the purpose, the arbitrariness, the general political circumstances are considered together with the former elements of age, sex and particular vulnerability of the victim<sup>2</sup>.

Moreover, the second part of the article established that physical or mental pain and suffering derived from natural consequences of legal measures does not amount to torture, as long as those actions are within the boundaries of law, are officially perpetrated and are proportionate to the aim achievable (Hassanova, 2022, p 118). As for the obligations derived from the IACAT, the focus once more is harmonizing domestic criminal codes in order to prohibit, prosecute and punish acts of torture within the national jurisdiction. Conversely, perpetrators should face severe penalties, actions based on a superior's order may not be invoked as a justification, universal jurisdiction is established regarding the crime of torture, *ex officio* investigations should be launched if there is a presumption that acts of torture are being committed.

With particular emphasis in the intentionality, the approach followed by the InterAmerican system states that in order to establish individual responsibility, solely psychological factors cannot determine a violation to the IACAT. Hence, the intent and motivation are irrelevant thus a violation can be established even without knowing the identity of the individual perpetrator. What is central is the fact that the act was carried out with the acquiescence and support of the State or whether the State did not take measures to prevent the act or event punish the perpetrator<sup>3</sup>. In addition, the violation can occur even if the victim has not suffered. As a result, the sole fact of subjecting an individual before official State bodies that practice torture can be considered a violation regarding the positive duty of due diligence in preventing violations to the persons integrity<sup>4</sup>. Consequently, the approach followed by the IACHR regarding the intentionality, it can be met not only by the State failure in abstaining from committing acts but also from not accomplishing the positive duties assigned to them for the prevention and repression of torture.

Besides the definition of torture at a regional level, the IACAT also reiterates the absolute character of the prohibition of torture and ill-treatment in article 5:

The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

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<sup>2</sup> See *Ximenes-Lopes v Brazil*, IACHR (Series C) No. 149, judgement of 4 July 2006, §127.

<sup>3</sup> See *Velásquez-Rodríguez v Honduras*, IACHR (Series A) No. 4, judgement of 29 July 1982, §173; *Godínez-Cruz v Honduras*, IACHR (Series C) No. 5, judgement of 20 January 20 1989, §183.

<sup>4</sup> See *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*, §175

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.

In particular, the article underlines two conditions that cannot be used to justify acts of torture such as the characteristic of the detainee, the absence of control from the State over the prison facility. Concerning the prison system and detained individuals, the highlight established by article 5 goes in the direction to underline the particular vulnerable condition of detained people and the duty of States towards them in managing prisons.

### Regional case law

The wider approach regarding the purpose element in torture of the InterAmerican system responds to the expansive definition of torture present in the IACAT (APT & CEJIL, 2008, p 97). In several judgements of the InterAmerican Court it was determined different scenarios that amount to torture. Massive human rights violations where torture is used in a systematic way to intimidate the population are within the scope of the IACAT. As well as violent acts, planned and inflicted deliberately upon the victim to annul his/her personality can be classified as physical or psychological torture<sup>5</sup>. Furthermore, the threatening of ill-treatment may amount to torture if reached the required level of severity due to the degree of moral anguish inflicted by the possible physical harm<sup>6</sup>. The InterAmerican system shows a wider flexibility regarding the definition of torture and the State's responsibility than other regional systems in order to promote a greater protection of this fundamental right.

In the same way as torture, the case law of the InterAmerican Commission and Court developed the concept of cruel, inhuman or degrading treatment or punishment. Article 6 of the IACAT states as follows:

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction [...] likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

The IACAT nor the IACHR provides detail concerning the difference between acts of torture and other forms of ill-treatment. Nevertheless, the InterAmerican system adopted the

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<sup>5</sup> See Gómez-Paquiyaury Brothers v Peru, IACHR (Series C) No. 110, judgment of 8 July 2004, §116; Tibi v Ecuador, IACHR (Series C) No. 114, judgement of 7 September 2004, §148

<sup>6</sup> Urrutia v Guatemala, IACHR (Series C) No. 103, judgement of 27 November 2003, §92

development from the jurisprudence of the European Court of Human Rights in the case *Luis Lizardo Cabrera vs. Dominican Republic*<sup>7</sup>. According to the interpretation of the ECHR, inhuman treatment is understood as to deliberate cause a severe mental or psychological sufferance, that given a particular situation, cannot be justify, additionally degrading treatment or punishment happens when there is a severe humiliation in front of other or if the person is forced to act against their will or conscience<sup>8</sup>. However, the minimum level of severity needed for a treatment to be inhuman or degrading is relative and depends on the particular circumstances of each case, for instance the length of the act, the physical and mental effects and in some cases the age, sex, and health condition of the victim. According to the European Court of Human Rights torture is a type of inhuman treatment that has a specific purpose, that is to obtain information or a confession, inflict a punishment and generally is an aggravated form of inhuman treatment. As a result, torture is englobed by inhuman treatment and inhuman treatment is englobed by degrading treatment. Even though the European system the differentiation factor between acts is the intensity of the inflicted sufferance, for the InterAmerican system does not consider intensity as criterion to distinguish torture but rather objective criterion such as: a) the intentionality, b) the physic or mental sufferance, c) the purpose, d) the act must be perpetrated by a public officer or a private acting in his name. In general, the InterAmerican Court followed the approach established by the European Court of Human Rights on the severity of treatment noting that the violation of the physical and mental integrity has several gradations ranging from torture to ill-treatment with different degrees of physical and mental effects caused by endogenous and exogenous factors that must be evaluated and considered in a case by case approach<sup>9</sup>. In addition, the particular vulnerability of the victim may transform into torture, what otherwise could be considered ill-treatment. Overall, the distinction between torture and inhuman or degrading treatment is not rigid but depends on the specific situation of the victim and the overall case.

The InterAmerican system, through hard law but specially through the work of their institutions, has established and developed the concept of torture and ill-treatment. With a cross-fertilization process, it has reached for clarity to other systems when needed in order to harmonize and clarify the different acts to better understand the length and essential elements key to better

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<sup>7</sup> See *Lizardo Cabrera v Dominican Republic*, Case 10832, Report No. 35/96, 17 February 1998, §76.

<sup>8</sup> *Ibid*, §§77-80

<sup>9</sup> See *Loayza Tamayo v Peru*, IACHR (Series C) No. 33, judgement of 17 September 1997, §57



respond to violations. The particular history of the region has allowed an engagement against acts that harm the dignity of the person.

In addition, the InterAmerican framework has clarified the use of State of Emergency in the case *Zambrano et al. vs Ecuador*. The suppression of guarantees and the use of Armed Forces in order to respond to threats can be highly delicate due to the force exercised by the State. It is in these particular scenarios where individuals are highly exposed to the violation of core rights. Notably, the InterAmerican Court of Human Rights (IACtHR) stroke against the Ecuadorean governments suspension of guarantees in order to fight common crime. While accepting the possibility of the use of Armed Forces in order to control emergencies or disturbances, the Court underlined the extreme care under which the institution shall act to respond to social protests, domestic disturbances and common crime (IACtHR, 2007, p 14). Under the view of the Court, the suspension of guarantees must be legitimate only to the extent and the period of time strictly required by the exigencies of the situation and should not be used as an instrument to fight common crime (*Ibid*, p 15). Overall, proportionality and procedural guarantees assure a comprehensive framework that need to be in place even during emergency times.

The developments in the international and regional levels have helps frame the prohibition of torture and ill-treatment as a peremptory norm of international human rights law. In addition, this absolute prohibition has been used and invoked during different international cases. Notably in the Furundzija case, the International Criminal Tribunal for ex-Yugoslavia stated:

Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules.<sup>10</sup>

Human rights law has developed in order to protect individuals from being subjected to torture or ill-treatment. Nevertheless, it is stressed the most when individuals are subject to conditions that make them vulnerable.

## 1.2 Post war armed violence: Organized crime and institutionalized gangs

Globalization rises an important issue concerning organized crime. These types of organizations, due to their nature, pose considerable threat to the capability and the ability of

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<sup>10</sup> ICTY, The Prosecutor v. Furundzija, Trial Chamber, 10 dec. 1998 §153

States to respond to their actions. As a result, the primary role of the State in ensuring effective control over its jurisdiction is affected. Organized crime can assume the form of gangs. These types of institutions can generate violence and become a relevant actor mining the enjoyment of rights. These types of organization can originate in post-conflict scenarios where conditions of ungoverned spaces and State inability to manage the territory promote the development of parallel governance structures. Moreover, in extreme conditions, a *quasi*-control of the territory make gangs an actor that replaces the State in some areas and becomes impregnated in the society making it difficult to eradicate their presence.

### 1.2.1 Violence as a consequence of war: Gangs in Central America

The end of a conflict does not directly imply the return to security (Geneva Declaration Secretariat, 2008, p 49). Several post-conflict threats that develop in the aftermath of a conflict can become a stronger menace than the actual armed conflict. Post-conflict violence is particularly delicate due to the difficulty that it may pose to the consolidation of a sustainable peace and the long-term effects regarding development and democratization. Risk factors contribute to understand post-conflict violence. Generally speaking, high levels of economic inequality can trigger and legitimate violent acts in order to compensate for the social injustices present in the society. Post-conflict societies are vulnerable to higher risk of conflict recurrence with at least 50% of countries emerging from a conflict situation sliding back within the subsequent 5 years (*Ibid*, p 58).

Criminal violence, if not direct armed groups, can contribute to the increase in violence. General conditions of economic exclusion, rapid urbanization, unemployment and unequal access to services can marginalize a portion of the society. Many of these factors can be interpreted by the increase in urbanization. As a result, post-conflict urban armed violence can be developed in these types of post-war scenarios. As for the youth, they are the group that most likely may join certain criminal organizations to perpetrate and be victimized by armed violence (*Ibid*, p 59). The general risk factors can coexist with structural risks, these being economic shocks, rising levels of economic inequality can be factors contributing to the explanation of violence in post-conflict societies.

When focusing on the demographics, a considerable large portion of young adults, ranging between 15 and 30 years old are present in a society. Since 1970, more than 80% of the civil wars developed in countries where 60% of the population was younger than 30 (*Ibid*, p 60).

Youthful societies represent a potential risk rather an explanatory cause for armed violence. Youth bulge tends to mobilize easily and become a target for recruitment in criminal networks and non-state actors that can potentially contribute to rise in violence.

Central America presents a region where organized crime has structured and vastly developed in different countries of the region. Therefore, these groups represent the core of the security problems in the vast majority of States. In particular, territory-bound organized crime is the most common type of groups present in Central America. The territorial focus organizations can be understood as street gangs, also known in Central America as *Maras* (UNODC, 2012, p 21). Territorial organized groups are a State-substitute organization where they impose an order in parts where the State has neglected or do not fully control (*Ibid*, p 22). The rapid urbanization process, often abrupt and sudden, creates the ideal scenario for vulnerable individuals or immigrants that suffer marginalization, to search or create mechanisms to cope with the exclusion from many good and services. Organized crime thus becomes a valid opportunity to provide a network of aid and help. Security becomes then one of the priorities and in response a type of informal security groups may form in order to assure protection for the community (*Ibid*). The need to sustain the group may need voluntary contributions at first, but once the groups grows and institutionalizes, and control is assured in the territory, the gangs may impose a mandatory tax contribution. The enforcement then requires a solid structure that may develop to respond to this need. As they become intensely involved in local affairs, the activities are limited to extortion, loan sharing or labour racketeering in the zones where they exercise their influence (*Ibid*). Central America presents a region where organized crime has become an important issue, with at least 54,000 members across the Northern Triangle (*Ibid*).

Sub-state groups like gangs are alternative forms of governance. Developed in areas where the State has difficulties in implementing and enforcing its presence. Its niche in Central America is due to economic and social factors that are present in the area. Their growing numbers and the effective control the exercise over large part of urban areas and the violence gangs can provoke are important factors that governments have tries to control unsuccessfully. In order to tackle this phenomenon, the State need to ensure key rights, following a comprehensive approach to solve root causes and structural problems that contributed with the development of gangs. State action, using its repressive apparatus may, in some cases, reduce violence but will not solve the main cause of the creation of these organizations.

## 1.2.2 Organized crime

Organized crime is defined by the Federal Bureau of Investigation as:

Any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole (Von Lampe, 2016).

In fact, is the idea of a group of individuals, coordinating together through a structured organization to carry out criminal activities. The dimension of the group may vary from few individuals to thousands. Their activities are carried out in order to create profit (Treverton, 2009, p 12). These types of organization can be compared to business enterprises due to their way of making rational choices about their activities, who they associate and in how they manage their revenue (*Ibid*). The main differences between legal businesses and organized crime is the product they offer is illegal (drugs, extortions for instance), they evade regulation and the methods they use to protect the market are illegal too, such as intimidations, violence and threats. The principal element that distinguishes organized crime with regular crime is the sporadic nature of the former. In fact, it is the enduring nature of networks of actors engaged in continuous activities that gives the special connotation to organized crime. Two elements are shared by bod organized crime and the traditional mafia, that is the territorial link and the hierarchy within the group.

In addition, a distinction must be addressed concerning terrorist groups and organized crime. While the means of both groups is similar, due to the need to raise money in order to carry out their activities, they differ in the ends of their actions. Terrorism's main goal is political or ideological, whereas organized crime is driven by financial motives (*Ibid, p 15*). Consequently, terrorist organizations seek to advance in their social or ideological agendas through the support of their criminal activities, unlike organized crime that use violence to protect and advance in their criminal agendas. Above all, criminal organizations do not want to destroy the status quo but rather impregnate in the shadows to thrive in their *quasi*-business activities. Nevertheless, increasingly organized crime, through gangs, are identified as a source, not only of violence and insecurity, but also instability and an indirect threat to the State (Hazen, 2010, p 369).

The vast majority of deaths due to armed violence is caused in no- conflict or no-war zones (Genevan Declaration Secretariat, 2008, p 67). These deaths are result of a combination of actions such as criminal violence, State-led violence, organized crime, gang violence, etc. In

this context, gangs have been identified as the main cause of violence and as a potential source of instability in countries where they have acquired an institutionalization level capable of impacting adversely within the society (*Ibid*, p 370). With this level of impact, it is possible to compare gangs to armed groups. In particular non-state armed groups that act in opposition to the government. Yet this label risks to put together several different groups such as insurgents, freedom fighters or rebels with street gang members. Nevertheless, the way they use violence against the State may be a common denominator to include gangs as non-state armed group even if the opposition to the government is not linear or evident.

### 1.2.2 Institutionalized gangs

Gangs, as a type of organized crime, have several elements that help to identify them as an organization. They are predominantly an urban phenomenon, members are marginalized from the broader society, generally members are young males predominantly, present a high cohesion factor between members. The predominant element that distinguishes gangs from other non-state armed groups is that they do not seek to overthrow the State (*Ibid*, p 376). Generally, street gangs were conceived as temporary and non-highly institutionalized. However, the phenomenon of institutionalized gangs emerged after 1980's with their ability to sustain themselves in time, the engagement in large criminal activity and the capacity of generating violence. This high institutionalization has justified the State use of Enemy Criminal Law concept by jailing members of the gangs and heavily responding with violence in many national contexts (Jackson & McBride, 2000, p 28-29). In many cases, the State hard response to gang violence have resulted in an increase of cohesion among members of the gangs and higher levels of violence in response to State action.

The phenomenon of gangs is particularly difficult to tackle using common anti-insurgent tactics and the use of State force has resulted in ambiguous results. Above all due to the fact that gangs do not seek to overthrow or contrast openly the State but rather remain low and try to infiltrate into the government, through bribes and collaborations, in order to avoid being harassed and continue their economic and social domination over territories. Gangs are silent enemies but very dangerous due to the economic relevance and the violence that they can produce within their jurisdiction.

Armed groups such as gangs do not emerge in a political vacuum (Geneva Declaration, 2008, p 126). Understanding gang phenomenon nowadays means to switch the conflict lens generally

attributed to urban violence. Considering Central America, violence derived from gangs amount to around 10-60% of the total violence in the region (UNODC, 2007, p. 64). Even if their main goal is not to replace the State, their activities may destabilize the society and thus create real threats to the national security of a nation. Often described as “urban insurgency” that may promote a “*coup de street*”, State response reproduce violent means to counter back and contain gangs. There are 4 concepts that allows to engage in a discussion of whether gangs fall within the conflict lens. Often when compared to insurgents, the analysis focuses on the ungoverned spaces, the relationship to the state, the role of violence and the groups sustainability (Hagedorn, 2007, p 304).

The ungoverned spaces within a State are referred to parts of the territory where effective State control is weak or absent. In many developing countries, the lack of capacity, experience, or resources affect the power of the State to reach out certain areas. In those areas, certain forms of informal structures tend to form in order to provide services that otherwise would be provided by the State. In some cases, groups such as gangs provide services and represent a social mattress where people arrive to seek some sort of help and protection. Depending on the type of governance offered, they risk to erode the support for government and diminish the legitimacy over the political system (Hazen, 2010, p 381). Nevertheless, gangs tend to operate in spaces where the territory is under-governed rather than completely abandoned. Overall, gangs tend to be armed actors with certain control over economic activities, territorial claims and competition with other groups. The challenge therefore is positioning themselves as an alternative to the legitimate government in areas where the State is weak and not effective, undermining democracy, governance and the law (*Ibid*).

Subsequently, in relationship to the State, gangs seek to have friends inside the government and law enforcement institutions in order to secure operations regarding the informal and illegal actions. The relationship is structured around several factors including the final goal of the gang, the relationship with political officials, the desire to impose control, the relationship with the community (Hazen, 2010, p 382). Generally, the final goal of gangs does not seek to confront the State but rather coexist. When cases of engagement between law enforcement members, it is often due to the State’s effort to eliminate the illegal activities. There is no direct physical threat but rather clashed regarding the control over areas where gangs exercise a quasi-sovereignty. The relationship with politics is present in highly institutionalized gangs. The links that may exist between gangs and institutions can help promote a particular agenda and benefit from the election of certain official, rather than others. Gangs act, in this case, promoting a

particular interest seeking collaboration between elected officials to further ensure the sustainability and durability of their pseudo-enterprise. The concerns regarding the involvement of gangs with politics are mainly corruption and insecurity. Another point is the desire or ability of the State to control ungoverned areas. When gangs in particular areas have demonstrated an effective control over the territory and the population, the State act upon them, focusing on highly structured gangs in order to reduce homicide rates and control the economic activities. These efforts may not always be effective due to the systematic problems faced by States in developing countries regarding, not only money, but political will and know-how first-hand experience to tackle institutionalized problems that their society faces. Meanwhile, the nature of the relationship between gangs' members and the community influences the persistence of gangs within neighbourhoods. The majority of cases the support that gangs may have within a specific community is tied to the economic function and use of violence to threaten the local populations. In this way, it is a *de facto* acceptance due to the impossibility of truly facing them or changing their current situation.

Next, violence has a particular role within organized crime through gang activities. Specially used to create fear among the population in order to gain control over the territory. In this way, gangs use violence the same way armed groups use it. Generally, the violence is unleashed when they protect their territory from other gangs therefore against other gang members. An element of distinction can be drawn considering the recruitment. Often armed groups force individuals to join them in arms, whereas in gangs, individuals join them by choice. Nevertheless, there are several cases of initiation rituals that involve extreme violence against the individual to prove their loyalty, commitment and bravery to the group. Often in highly institutionalized gangs present in Central America, death punishment is imposed to those who leave the group. Targets of violence are generally rival gang members or the law enforcement personnel when they threat the territory. Nevertheless, violence can extend to civilian population through some practices of extortion. Gang members force enterprises and simple shop owner to pay a monthly rent to the gang, in order to sustain their illegal activities. The consequences of the nonpayment or the delay in one of the transactions can unchain violence against the owner, their relatives and can cause property damage.

Sustainability of the group is another essential element to consider. The perpetuation of a gang is due to general security concerns, economic opportunities and the institutionalization. In several scenarios, insecurity or external threat push individual to associate. In the case of gangs, a conflict situation can increase the cohesion amongst member and an incentive to new

individual to join the gang. In areas where there is high poverty, discrimination and general marginalization, gangs provide a refuge and safe space for their members (Spergel, 1990, p 171). Together with the normalization of their actions and behaviour, the institutionalization process is reinforced. They become a natural feature of areas or neighbourhoods where they are tolerated (Hazen, 2010, p 385). Together with the ability to become relevant economic actors, gangs can become sustainable and be involved in the informal market.

The level of institutionalization of the gangs defines whether they can be considered violent groups and thus pose a real threat to the sovereignty and stability of the nation. Organized crime, in the form of gangs, especially in Central America, have acquired the level of seriousness and organization capable of affecting day to day activities within different jurisdictions. The illegal activities they carry out, the influence and control over the political game and the use of terror and systematic violence against civilians has pushed governments to respond using tactics and strategies against them as if they were armed groups. Nevertheless, gang members are also individual who suffer a double discrimination. Firstly, by being marginalized and growing in areas where little opportunity is given in the formal sector and chances of thriving are reduced to small informal opportunities. Secondly, once they searched for help in organizations that exercise effective control and can grant them the social mattress that the State did not offered them, they become object of rejection and marginalization from the State when applying strong measures against them, that often represent degrading and inhuman treatment. This legitimization of a practice that is prohibited by international standards, is the result of decades of sufferance and violence that conditions the local population to solve the problems using, once again, violent methods creating a vicious cycle.

### 1.3 Punitive populism and the Enemy Criminal Law: a strategy to combat organize crime

#### 1.3.1 The emergence of punitive populism

Punitive populism offers simple solutions to complicated issues (McSherry, 2019, p 173). It is understood as the political strategy of using criminal law to obtain electoral gains on the premise that the increase of the severity of penalties means less crime (Antón-Mellón, 2017). Generally, crime gives a low-cost resource to attract mass attention. In particular where organized crime develops in gangs and the violence are endemic. Tough on crime leaders are favoured by the



climate of insecurity and use iron fist policies to combat crime and lower violence. For this, criminal law is used as an instrument by politicians, that seek positive electoral results, by promoting the increase of sentences to lowers criminality or that high sentences are in line with moral standards in a society (Arrieta Ruiz, 2018, p 38). In general, punitive populism promotes an increase in the sentences for particular activities. As discussed in section 3.1.2, this general attitude is applied in El Salvador not only during the last administration but throughout all administration that dealt with gangs. Punitive populism emerges as a way to explain why governments adopted repressive and iron fist policies to fight criminality. One particular characteristic, already mentioned, is the use of the law, and in particular criminal law just for electoral purposes without considering the real effectivity of the reforms. In general, the behaviour of leaders who adopt punitive measures, are surface antidotes that may relief pain but not cure the disease. There are empirical limits that show how punitive populism is not an effective answer to fight criminality. No persuasive evidence can be found that large-scale imprisonment or the increase of the severity of punishment are deterrents of violence (Hough, 2002). Nevertheless, the use of punitive measures is legitimized due to a general pattern of decrease in public trust in institutions such as the criminal justice system (*Ibid*). As a result, liberal democracies have shifted from the paternalistic political styles to a more responsive and populist styles of politics. In the particular case of El Salvador, mass-media representations of justice and crime have contributed public anger and thus fuelled anger towards institutions and the political system (*Ibid*).

The use of punitive policies to respond to criminal violence could increase in countries where there are several economic difficulties. The affordable nature of a punitive approach is tempting for a political class that seeks re-election as an electoral tool. A comprehensive approach towards solving crime involves necessarily high public investment. Social policies and investment to balance the inequalities comet at a high price. The return on the investment is not immediate with these kinds of policies. Therefore, the rise of punitive populist leaders that promise to solve the insecurity by using the criminal law as an instrument may continue to rise, specially where there is endemic violence and a high public distrust towards the political system.

### 1.3.2 The Enemy Criminal Law: instrument to fight organized crime

Gunther Jakobs understands two types of criminal law, the one reserved for the citizens (Citizen Criminal Law) and the other is reserved for the enemies of the State (Enemy Criminal Law). These are not two separate spheres of the Criminal Law but rather two sides of the same coin. In fact, there are overlapping scenarios where the author of a crime is treated as a person/citizen and others where it is considered as a source of danger or as a mean to intimidate others (Jakobs, 2003, p 22). The Enemy Criminal Law is understood as the special criminal law designed to fight enemies of society aimed for those who deny the legal system such as terrorists or organized crime (Golser, 2016, p 77). This reasoning is used by punitive populists to create a separation between members of the society, in this case gang members, in order to use the law against them.

It is true that the Law is the result of a relationship between members of a particular community. The individuals are members with rights and obligations, thus the enemy is determined not by this relationship but in opposition to it. Coercion is the means through which the Law is implemented. Seen from a jus-naturalistic perspective, the individual who infringes the Law breaks the social contract of the society, consequently abandoning the benefits of participating in that community (Jakobs, 2003, p 26). Rousseau articulates this reasoning determining that the criminal that infringes the social contract stops being a member of the State, consequently being at war against it. In the Social Contract of Rousseau, it states that as a consequence:

[...] when we put the guilty to death, we're doing this not so much to a citizen as to an enemy. He has broken the social treaty—the investigation and trial show this, and the judgment declares it—so he is no longer a member of the state. But he has recognized himself as a member if only by living there; so he must be lopped off by exile, as a violator of the compact, or by death, as a public enemy.

Nevertheless, in reality even the criminal is treated within the Law and the States should give the opportunity of being re-integrated in society and keep the status of a person. This comprises that the criminal has the obligation to proceed with a reparation.

Overall, according to Jakobs, the State can understand criminal behaviour in two ways. Firstly, as individuals who commit a crime, a mistake or as individuals that must be coerced to avoid the destruction of the public order (Jakobs, 2003, p 47). He sustains that both concepts are valid and have their place in society, nevertheless there is the risk of a misuse of the former. Considering the concept of Enemy Criminal Law, can it be justifying its use against organized crime? The fight against criminal groups and the equality of weapons proposed by Hefendehl

are two concepts in harmony with the Enemy Criminal Law. The latter due to the existential threat that criminal groups represent for society and the former as the means employed to combat them. The consequence of the use of these concepts to legitimize the targeting of particular members of the society is dangerous.

With the rise of organized crime under the form of gangs, the concept of the Enemy's Criminal Law is understood as a quick and effective way to protect society. As the enemy is seen not as a legal subject, the State is allowed to use any means, including the suspension of rights. This de-humanization is a narrative present in the case of El Salvador and will be mentioned further below in the work. Using the enemy label, or in some cases declaring them terrorists, allows for a direct infringement of the individuals rights without considering domestic or international law protecting the fundamental rights of the criminal. This infringement occurs using measures aimed to prevent a crime from happening (Diez, 2008, p 531). What is also important to point out is that, in normal situations the identification of enemies is guarantee by a fair trial and the individual has the right to be presumed innocent. On the contrary for the Enemy's Criminal Law, the declared enemies, that are solely suspects, tend to remain detained awaiting for trial. This preventive measure, used indiscriminately and systematically, is not only a form of punishment but also an infringement of fundamental rights (*Ibid*, p 533).

## Chapter 2. A State in Crisis: El Salvador history of violence

### 2.1 The origins of violence in El Salvador

#### 2.1.1 The factors that triggered an internal conflict

El Salvador is a small country located in Central America. With a population of 6 million people, the country has struggled with violent episodes that condition severely the destiny of the nation. During the decade of 1980's a civil war struck the society, leaving behind destruction, fear and a culture of violence that shaped the relationships within the State and between its citizens. The process that led to a Civil War is multidimensional. Different factors combined to trigger a conflict that decimated 75,000 individuals and marked profoundly the Salvadorian society.

The crisis that led to the Civil War can be explained with two important events for the Salvadorian history. The first was marked by the 1972 electoral fraud that sought to maintain the power in the hands of the military government in place since 1931. Known as the "gorilato", the military regime avoided a civil democratic succession that would have ended 41 years of non-democratic governments in power (Mayorga, 2014, p 9). Since the fraud, the social and political unrest accumulated until the assassination in 1980 of a very influential religious figure, Monsignor Arnulfo Romero. A fierce advocate for the rights of peasants and poor people. As a result, the event marked the start of the Civil War that submerged the country in a spiral of crisis and violence that lasted until 1992 with a peace agreement. The 20-year period marked profoundly the mentality and the society of El Salvador leaving behind a trail of consequences that affect until the present.

The social and political problems in El Salvador had their first causes in the economic structure that was in place. Since the first decades of the XXth century the instability was marked by the social revolts in 1932 in response to the oligarchic system, in power for over 60 years. The traditional political power was tied to the economic activity of coffee cultivation and exportation. Many of the land was expropriated in order to create vast coffee production centres tied to the high sphere of political power in the country. The main economic and political groups linked to the coffee business was responsible for a considerable portion of the general economy responsible for 95% of the income (Bell, 2013, p 29). The 1929 the Great Depression affected greatly the exportation of coffee, creating an acute economic crisis that led to an important recession in El Salvador. The economic difficulties were accompanied by a *coup d'Etat* in 1931

promoted by the military and the creation of the Communist Party. These events led to massive agitation and demonstrations in 1932. A violent response and repression were unleashed, leading to the capture of some communist leaders that orchestrated the demonstrations. Between the most prominent figures it was Augusto Farabundo Martí. The transition from the oligarchic period to the military dictatorship, was marked with violence and repression.

The multidimensional causes of the internal conflict are prevalently endogenous (*Ibid*, p 10). The influence of external factors can be explained by the logics of the Cold War and the presence of both the USA and the URSS supporting different sides of the conflict. Nevertheless, this can explain just in part the internal conflict and plays an important, but not predominant role, in understanding the causes of the Civil War. Endogenous factors played a predominant role in understanding the causes of the conflict (*Ibid*, p 11). First, the extreme socio-economic inequality present in the country. Second, the psycho-social awareness of injustice acquired by a segment of the population. Finally, the lack of legitimacy of the political system. These three factors together with the external general action involving insurgents and counterinsurgent action lead to explain the logic of the Salvadorian internal conflict.

The economic and social inequalities were key factors behind the conflict (Tan, 2021, p 2). Historical unequal structures present in society together with the exacerbated violent repression and the closure of the political sphere contributed to the Salvadorian Civil War (*Ibid*, p 5). Before the conflict, the economic structure distributed the wealth derived from the coffee business to a small percentage of the population. Consequently, the vast majority of the population did not have access to quality healthcare system, education, formal employment, not to mention low wages (*Ibid*). This led to a massive part of Salvadorans in social exclusion. On the contrary, a small elite controlled the economic and political structures overrepresenting their interests at the expense of the majority. The share of income of the highest 20% amounted to 50%, while the lowest 20% had less than 10% of the national income (Bell, 2013, p 34). This high inequality in the distribution of income did not allow for a proper wealth redistribution from 1950 to 1980, where the GDP grew in a rate that could have allowed a 70% increase in the GDP per capita (Mayorga, 2014, p 12). At the beginning of the conflict, El Salvador was already one of the poorest and most unequal countries in Latin America (Acosta, 2020, p 2). This extreme inequality fuelled and contributed to the beginning of the armed conflict.

Additionally, this high inequality was linked to the injustice awareness of vast segments of the population. This condition allowed the population to realize that such injustices needed to

change. The mass consciousness, canalized by different political movement including the communists, contributed to an effective call to action. The high economic growth experiences in the 50's and 60's impulse a modernization process in the country (Mayorga, 2014, p 13). The highly dense country had a highly effective road system that connected the vast majority of the territory (*Ibid*). This factor contributed to an efficient communication through different means such as mass media, printed media and the radio. Many important events of the region were followed by the population, i.e. the Cuban Revolution, the *coup d'Etat* against Salvador Allende in Chile, the Sandinist Revolution in Nicaragua. The deficient educational system, nevertheless expanded the services between 1950 and 1980 allowing student to develop their cognitive capabilities and critical thinking (*Ibid*). At the same time, El Salvador lived a strong urbanization process. The modest industrialization brought many peasants to be employed in cities creating shaping a proletarian segment of population. Additionally, the impact of the Liberation Theology current that promoted the protection of the poorest and oppressed through political and civil organizations was particularly strong in El Salvador. This current was embodied in the country by Monsignor Romero, that became one of the most prominent figures not only for El Salvador but also for the whole region. These elements contributed to the awareness and critical consciousness of large segments of the Salvadoran population that wanted to change the injustices and participate in the political changes in the country. The call to action and the organization started shaping, nevertheless the political sphere was closed and did not allow a proper processing of the social unrest due to the non-democratic military governments in power throughout 4 decades in El Salvador.

Equally important, the lack of legitimacy of the political and the impossibility to participate effectively in the political arena concurred in explaining the causes of the armed conflict. After the 1931 *coup d'Etat*, a succession of military governments followed in El Salvador, monopolizing the political sphere. Together with the economic elite controlling the economic system, the political and structures where governed by a relatively close group. In response to any social unrest or strike, the military adopted a repression strategy in response. The level of closure of the political system varied in response to the effective threat opposed by the opposition. For instance, in the decade of 1960 the National Assembly was elected using a proportional system, avoiding a total control of the legislature by the military. One decade later, the government turned into a more authoritarian cut, committing fraud in the general election of 1972 and 1976. Moreover, the military did not allow opposition parties to organize and promote their reforms by exiling their leader, repressing their meeting and persecuting political

leaders. The fragmentation of the opposition using indiscriminate arrests, disappearances and murder became a common practice (UN Truth Commission, 2001, p 24). In this way, the political system lost progressively the support and the legitimacy of the people. The lack of transparency and the separation of power lead to the clandestine organization of groups in order to process their political ideas. The use of violence started to disseminate within these organizations. During the period before 1980, the number of members belonging to these clandestine organization grew exponentially. The first armed groups started to operate after the electoral fraud of 1972, committing assassinations and kidnapping prominent economic and political figures. The impossibility of peaceful mechanisms to process conflict brought many young individuals to adhere to these organizations, using violence as the only mean to participate in politics and promote significant change.

The lack of democratic means to process the conflict together with a general awareness of the rampant inequality created the necessary condition to push individual to use the force and fight. In 1979, in order to avoid a general internal conflict, a Revolutionary Government Junta was created and several reforms were announced. The objective was to end corruption and violence, measures to ensure a fair wealth redistribution and guarantee to exercise human rights together with the promise of having general elections in 1982 (UN Truth Commission, 2001, p 20). Nevertheless, the struggle between civilians and the military intensified with massive strikes and repressive response from the State. This struggle triggered the increase of death squad activities from military origin and the creation of opposition armed groups. On March 1980 Monsignor Romero was shot dead by a sniper while celebrating mass. This event further polarized the Salvadoran society marking the beginning of a violent process that would amount to a Civil War.

### 2.1.2 Civil War (1980-1992) and peace agreement

The Civil War in El Salvador represented a devastating scenario in modern Latin American history. The war between the insurgent left-wing groups joined in the Farabundo Martí National Liberation Front (FMLN) against the government supported by the oligarchic military regime in place since 1932 claimed the lives of 75,000 civilians, soldiers and insurgents. During 1980's, with a population of around 4 million, one out of 56 Salvadorans lost their lives (Chavez, 2015, p 1784). The conflict lasted around 12 years, until the peace agreement was

signed between the parties. Even after the end of the Civil War, the tool left by the conflict had profound consequences for the society, contributing to explain the problems that the country faces nowadays in terms of security and violence.

The political repression by the military government intensified by the end of 1970's. The opposition block, organized in different branches, contested the economic and social injustices tied to the land distribution. All demonstration where meet with extreme violence generated by the government in order to contain the social claims of the opposition. Several security institutions, together with the military, where in charge of implementing the brutal repression against civilian population in order to avoid and reduce insurgent activity. Throughout the years, the opposition groups develop auto defence militia forces in order to respond to the security forces brutality. Between 1978 and 1979, the formation of these groups intensified and structured. They were not merely militia structures, but behind there was a political education that sought to support their activities and clarify an objective: build a fairer, just and humane El Salvador (Sánchez Céren, 2014, p 36).

The crisis of 1979 allowed for a proper organization of different militia ground under one General Command in order to coordinate and better respond to the anti-insurgent operations promoted by the government. In fact, the fracture within the military allowed for a young group of official to put forward a failed democratization process. The process did not last due to the support and intervention of the USA in order to remove the more progressive official and reinstate the repressive military commands in order to support the authoritarian regime (Sánchez Céren, 2014, p 36). This episode reinforced the militia group's idea of the impossibility of having real opportunities to seize power and overthrow the government acting individually. By the end of 1980, 5 different guerrilla groups united in the Farabundo Martí Liberation Front. The lack of legitimacy of the government, together with the cruel repression in different sectors brought the insurgent fight to be the only real possibility to confront the State action.

The high scale confrontation started the 10<sup>th</sup> of January 1981, when the FMLN launched the "final offensive". This plan combined both a military offensive together with a general strike and urban insurgency (Álvarez, 2010, p 18). The seize of power was programmed before the new Reagan administration took office, as the insurgents anticipated reinforced aid to the Salvadoran government in response to the attacks (*Ibid*). The strategy, launched from the rural areas did not reach its goal due to the lack of coordination and the failed mass popular



insurgency expected. The 2,500 insurgent soldiers did not suffice to overthrow the government and after a week, the FMLN organized a tactical retreat. Since then, they organized in the rural areas of the country and the conflict became total with both sides capable of inflicting importance damage to the other but not a totally overcome the other.

The first period of the conflict, from 1981 to 1983, the FMLN follow a strategy that consisted in “resist, grow and move forward”. Controlling up to ¼ of the territory, destroying important military equipment, infrastructure and promoting an economic sabotage, the now 12,000 insurgents succeeded partially. In response, the Salvadoran government began training small squads capable of responding quickly to the FMLN squads in the rural area and funded a civic action that sought to ameliorate the social situation in the rural Salvador. These actions were also partially successful and did not draw important support to the State forces. The high cost of the FMLN operations caused financial sustainability problems, together with extreme living conditions led to high decertation rates. The insurgents were convinced of their chance of overthrowing the government, which led to a closure from any kind of negotiation with the authorities (Álvarez, 2010, p 20). On the other hand, also the Salvadoran government, with the influence of the USA closed any possibility of negotiation with the FMLN. Instead they focused on allowing some reforms, particularly the Agrarian reform, in order to gain rural support and held “demonstrative elections” to legitimize the institutions (*Ibid*).

After 1984, the incapacity to defeat the regular forces with only weapons was acknowledged. The FMLN started to combine armed strikes together with political action in order to neutralize the government with a general insurrection. The ramification of the FMLN groups in El Salvador intensified. The reconstruction of the popular movement became equally important. The creation of legal political structures formally disconnected from the FMLN would allow to use State resources to operate and participate in elections. Together with general economic difficulties experienced during the 1980’s, the FMLN saw in the protests a new opportunity to radicalize the popular movements and demonstrations that could lead to the insurrection (Álvarez, 2010, p 21). With the general presidential election, held in 1984, and the victory of the Christian-democrat Duarte, the strategy displayed by the official forces and backed by the US gave results. To avoid losing space in the political arena, the FMLN unleashed a large-scale offensive in 1989. The 14-day offensive, that concentrated mainly in the capital, took the lives of 1,000 civilians and thousands fled the air strikes. The Armed Forces reaction with heavy innocent casualties and the unsuccessful expected mass uprising paved the way for the negotiating the end of the war. In this context, both parties decided to mediate the conflict

through the United Nations in 1990. The first agreement sought to establish the base for negotiation in areas such as politics in order to declare a ceasefire. The agreement comprised a series of constitutional reforms, human rights, judicial system, economic and social issues together with the verification of a UN mission. After several months of negotiations, the parties signed in 1991, another agreement committing to the reform of the Armed Forces together with the creation of a new security branch, a National Civil Police independent from the military branch. Also reforms regarding the electoral system and human rights protection were established. Notably, the incorporation of up to 20% of FMLN combatants to the new National Civil Police body and a land redistribution program were important victory for the FMLN. In January 16, 1992 the peace was reached after the signing of the peace treaties held in Chapultepec Castle in Mexico. Bringing an end to a 12-year civil war and demobilizing around 15,000 FMLN militants. Nevertheless, the consequences of the civil war had a mid-term and long-term effect in the Salvadoran society that will contribute to the development of another difficult internal situation: gangs.

## 2.2 The consequences of the internal conflict: Gangs in El Salvador

The internal conflict left scars that contribute with the violence lived by El Salvador since the early 2000's caused by gang violence. The culture of violence, together with a weak justice system and the availability of weapons constitute elements that helped developed violent criminal activity in the post-war scenario. Moreover, the effects of the confrontation between insurgent forces and regular forces forced thousands of Salvadorans to abandon their homes and seek refuge in other countries such as the USA. Even after the signing of the peace accords and the incorporation of the FMLN to the political life, many Salvadorans returned to a devastated reality. These factors contributed to the rise of a new type of violence, perpetrated by organized crime.

### 2.2.1 The Culture of Violence, institutions and weapons

Violence is not a recent phenomenon in El Salvador. During various decades, the Salvadorans have struggled with internal problems that derived in contrast and conflict. The social revindications, the violent repressions and the civil war have marked the Salvadoran society

and their institutions profoundly. The total war that was carried out in the Salvadoran territory was high in intensity and in duration. Moreover, the reduced territory on which the conflict developed touched the vast majority of individuals. During the conflict, thousands of young people and children grew in an environment with high levels of violence and even participated in some actions (Cruz, 2000, p 190). The peace agreements and the incorporation of the FMLN into the political life of El Salvador caused an abrupt challenge concerning the structural problems that were not able to address and solve in the short term. The end of the war brought a change in the paradigm. The violence that was once exercised under the institution and the organization of insurgent groups was now diffused and without a supervision. Unorganized, anarchic and unforeseen, the post war scenario presented the elements to institutionalize and develop parallel structures that will encapsulate the social unrest and, in the mid-term, develop into a structural gang phenomenon (*Ibid*).

The impact of a conflict have important consequences in the population regarding not only the material damages but also the psychological (*Ibid*, p 192). In particular, it can develop and incorporate value systems and social norms that legitimize and employ the use of force as a mechanism to obtain an objective. War transforms the vision of the employ of force in the society. The militarization of El Salvador, deteriorated the social bonds by implementing a model of violence as a mean to solve the differences and internal problems (Samayoa, 1986). During the conflict, human life became not sacred and often disposable. Certain believes are still present in the Salvadoran society as to the need to carry weapons and the necessity of the military to solve the problems (Cruz, 2000, p 193). The homicide rate in the post-war Salvador was around 140 deaths for 100,000 habitants being, in average 8,000 murders. These statistics are combined with public opinion favourable in using violence to combat gang activity (*Ibid*). The interiorization of violence within the Salvadoran society was a direct cause of the war. In certain cases, the incorporation of ex insurgent FMLN to the regular forces allowed the reinforcement of military practices. With the end of the conflict, the reincorporation to the civil live of many ex-insurgents was carried out by State programs. Nevertheless, the real impact of those reinsertion programs focused on the land redistribution and the technical knowledge rather than a real training for a job market insertion (*Ibid*, p 194). One important consequence of the culture of violence, derived from the internal conflict, is the proliferation of gangs or *Maras* as they are called in El Salvador. According to the National Civil Police, around 20,000 young individuals formed part of the *Maras* around the area of El Salvador city (*Ibid*). The age of the gang members ranges from 15 to 21 years old. By the end of the 90's, around 70% of

young individuals had been at least one time in prison (*Ibid*, p 195). The violence perpetrated by the end of the decade responded not to political motives but rather to retribution or punishment to other gang members.

The institutional fragility upon which the Salvadorans had to implement and assure the peace contributed to exacerbate the violence within the society. During the war, the judicial system was used to legitimate and approve State action against insurgents. As a consequence, corruption and lack of a correct administration derived in large parts of the country not having tribunals (Cruz, 2000, p 196). The reform of the judicial system, that was defined in the peace agreement, had problems during the implementation. For instance, between 1993 and 1994, around 80% of prisoners lacked a formal sentence (*Ibid*). The low legitimacy for the State institutions was reinforced by the judicial inability to process and guarantee justice for the Salvadorans, encouraging acting by themselves in order to seek justice. Restructuring the security effectives in one body, under civil power, was slow and not efficient. Many parts of El Salvador, for a period of time, did not have protection for over a year (*Ibid*, p 197). This situation created the possibility for impunity, not having a proper institution to process crimes nor an institution to protect and monitor the territory, contributing to the possibility of the development of criminal activity.

Disarming the territory after a conflict is very complex. Even if the peace agreements contemplated the recollection of lethal weapons, the process was not fully capable to collect them all. According to the report of the UN Observers Mission in El Salvador (ONUSAL) of 1993, around 100 weapons were retrieved from civils after one year of the agreement<sup>11</sup>. At large, disarmament was not fully effective, leaving thousands of civilians armed. During the 1990's the homicide rate in El Salvador stayed above 100 homicides for 100,000 habitants<sup>12</sup>.

The general situation after the conflict created the environment for organized crime. As a response to the vacuum left by institutions, the culture of violence, the ineffective institutions and the generalized used and possession of weapons contributed in reinforcing the structural problems of poverty and injustice. After the Civil War, the economic structure of El Salvador was weak and the social problems that the country faced before the war where still present.

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<sup>11</sup> Security Council, 1995 "Report of the Secretary General on the United Nations Observer Mission in El Salvador", S/1995/220,

<https://documents.un.org/doc/undoc/gen/n95/085/29/pdf/n9508529.pdf?token=Pvicxtj5wXaSeZR47k&fe=true>

<sup>12</sup> See The World Bank, Intentional Homicides rates per 100,000 people in El Salvador, 1994-2021

<https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?locations=SV>

## 2.2.2 The roundtrip: Salvadoran diaspora and the US deportation policy

The war disrupted the Salvadoran economy and waged violence throughout the country. The costs of war considering the damages in infrastructure amounted to \$2 billion, roughly 30% of the GDP for 1990 (International Crisis Group, 2017, p 3). Moreover, the income *per capita* declined around 25% during the 1980's, carrying 56% of the population below the poverty line and with levels of inflation that reached 25% yearly by the end of the 80's (*Ibid*). With foreign aid reduced and a right-wing government prioritizing macroeconomic stability through fiscal discipline, the social scenario was very difficult. During the 80's, over one million Salvadoran were forced to leave their homes (Baley & Hane, 1995, p 178). The majority sought refuge in the United States. The massive migration was met with an exclusionary refugee policy. With the 1980 Refugee Act in the USA, the status recognition followed a case by case basis, excluding a group evaluation (Roumie, 2017, p 32). Thousands of displaced Salvadorans faced massive incarceration and deportation. A vague and biased interpretation of "fear of persecution" was followed by the US government. During the 80's, the US recognized only to 2,6% of applicants the refugee status (*Ibid*, p 33). Salvadorans living in the US suffered structural violence marked by marginalization, fear of deportation, exploitation in the workplace and a non-guarantee of their fundamental rights (*Ibid*). In 1996, with the introduction of an Illegal Immigration Reform and Immigrant Responsibility Act, deportation procedures were eased to include minor offences and illegal overstay in the country causes for deportation (ICG, 2017, p 5). The condition of immigrants was highly vulnerable, limiting their mobility and participation into the labour market. As a consequence, poverty was generalized within the Salvadoran community living abroad. From 1993 to 1998 around 65,000 individuals were deported back to the North Triangle of Central America. Salvadoran nationals around 35% of the total removals but from the total of criminal deportees, they represented around 47% (*Ibid*, p 6).

The long-term effects of this marginalization are noticeable in the 2011 which show that only 29% of Salvadorans living in the US has received the citizenship, 46% were undocumented and 25% held a temporary status and significant 71% were eligible for removal if detained due to lack of documentation or a criminal record (Roumie, 2017, p 33).

The largest group of Salvadorans were residents in California, in particular Los Angeles. The area was composed by two predominant groups, the African American and Mexicans, that had profound differences and competed for status and space within the Californian society. Salvadoran youth that arrived to Los Angeles, with a vulnerable status, entered the existing

street gangs. Between 2% and 10% of Salvadoran youth entered street gangs in Los Angeles (Dingeman-Cerda, 2014, p 94). In Los Angeles, gangs such as 18<sup>th</sup> Street and the Mara Salvatrucha (MS-13) developed into hostile rivals. Within these gangs, Salvadorans would incorporate new norms, value systems and actions. The principal activities of the gangs at the time dealt with drug trafficking. With the peace agreement and the legal US framework, thousands of Salvadorans returned to El Salvador voluntarily and forcefully through deportation (Roumie, 2017, p 37). Many of the deported had criminal records and ties to gangs, exporting the gang phenomena to the small central American country. Due to the lack of US criminal record sharing between governments, many deportees with criminal past were invisible to the local authorities (*Ibid*). The reintegration proved very difficult, with high financial burdens and the non-recognition of the national reality. In many cases, the returned did not speak Spanish and parts of their families stayed in the US, creating a situation where social ties were absent or weak (*Ibid*, p 38). Salvadorans returned to a country facing structural problems of a post-conflict situation, consequently the weak support system, inexistent economic opportunities and further criminalization of deportees marginalized a big portion of Salvadorans.

### 2.2.3 The Emergence of Salvadoran Gangs: The Maras

The post-war Salvador faced another problem such as the formation and institutionalization of gangs. The deportation of thousands of illegal and criminal Salvadorans, together with the voluntary return of others contributed with the formation of gangs in El Salvador. The gang phenomena in El Salvador already existed in a small scale during the 80's. With different small cliques, they controlled small urban areas, conducting minor criminal activities (Cruz, 2009, p 3). The influx of gang members in the US back to El Salvador meant the diffusion of the cultural style of gang membership in the US (*Ibid*, p 4). Newcomers from the US served as cross-culturalizers and transnational social fertilizers for the youth in El Salvador. Gangs in post-conflict Salvador thrived due to the economic marginalization, social exclusion and post-war violence. Many of the members came from an uneducated background, they had experienced violence within the household and had lived in marginalized neighbourhoods. The multiple marginality that Salvadorans youth suffered encouraged many to join their local cliques and found support in these criminal organizations. The gangs contributed with sources of meaning, identity and living as a response to the increasing exclusion and lack of opportunities of post-conflict Salvador.

The institutionalization of Salvadoran *Maras* is not only explained solely by the deportees that arrived to the country, neither by the local post-war conditions in El Salvador. Both concur to explain in part the development of gangs. Nevertheless, the institutionalization of the *Maras* is the result of what the State and its institutions have done to deal with those organizations (*Ibid*, p 7). The strength that gangs have developed responded to the threat of violence coming from the State institutions and also by other gangs. The social cohesiveness is the direct result of external threats and can reinforce the legitimacy of the use of violence (Decker *et al*, 1998). Salvadoran gangs have developed from small group, territorial based into a dense network of cliques that are involved in organized crime at a national and regional scale.

At the beginning, gangs were reduced territorial organizations, engaged with minor criminal activities in public spaces. By the end of the civil war, the reconfiguration of gangs was influenced by the experiences lived in the United States, creating a division of identity and territorial control. By importing existing gang culture from the MS-13 and the 18<sup>th</sup> Street, the meaning of gang warfare was redefined in order to contrast the rival gang (Cruz, 2009, p 8). The first years of institutionalization, gang violence was driven between members of rival gangs (*Ibid*). In a later stage, due to the State enactment of hard policies against gangs, the institutionalization accelerated and completed. With the implementation of massive arrests and incarcerations, the Salvadoran government contributed with the organization within the prisons of the gang members due to the decision of separating individuals according to their gang membership to prevent outbreaks of violence (*Ibid*). The possibility of assembling members from different territories in the same place facilitated communications and connections among members. Moreover, the gang persecution led to the massive violation of fundamental rights of those who were arrested (*Ibid*). As a result, to harsh policies, the *Maras* who did not sought political objectives, started to organize and structure in order to face State crackdown operations.

Salvadoran *Maras* institutionalized and structured in response to the extra-legal State force, while incarceration provided an environment to coordinate and strengthen their ties. The politics of violence used against the gangs contributed to the exacerbation of the resolved violence implemented by the *Maras*. By time, violence perpetrated by the gangs has developed into a more complex and organized one. This is noticeable concerning the types of criminal activities. The gangs passed from shoplifting, mugging, pickpocketing to deadly assaults, rapes, robberies. Together with extortion, racketeering and even collaborating with northern organized crime cartels of drug trafficking (Cruz, 2009, p 14). The gangs in El Salvador have shaped their identities around the use of violence, that together with weak institutions and structural

problems of social exclusion only exacerbate and intensifies these organizations. The State response using more violence has developed a spiral that has affected the country but has not solved the problem of gang violence. In the meantime, the *Maras* kept posing a real threat to the society and the State.



## Part II Evolving Punitive Measures and the Rise of Torture in El Salvador: An Overview of State Strategies and Human Rights Violations

This section is dedicated to analyse the post-war framework of individual protection together with the strategy used by previous administrations to face gang violence. A particular analysis is dedicated to the prison system, place where most of the abuses are perpetrated and institutionalized. Finally, there is an overview of the current situation in El Salvador under the presidency of Nayib Bukele and the misuse of the State of Emergency as an instrument to institutionalize the punitive approach against gang members.

### Chapter 3. El Salvador's War on Crime: Institutional Responses and the Rise of Torture

#### 3.1 State and crime in El Salvador

El Salvador has been classified, on several occasions, as the country with the highest homicide rates in the world. As one of the most violent countries, 35% of homicides in 2015 in the region occurred in El Salvador despite representing only 13% of the total regional (Martinez-Reyes & Navarro, 2021, p 131). The World Health Organization considers that having over 10 homicides constitutes a situation of endemic violence that can reach epidemic proportions. With this numbers, it is evident that El Salvador has lived a period of high endemic violence that influenced policy makers to respond to a continuous wave of violence. The security politics implemented by different government lacked a comprehensive vision to tackle the root causes of the problem, focusing on punitive measures rather than preventive and constructive measures (Falkenburger & Thale, 2008, p 50). Since 2003 until 2019 the strategies implemented by the right-wing administrations (ARENA) and the left-wing administrations (FMLN) failed to solve the problem of gang violence. The policies have exacerbated violence and strengthen gangs.

### 3.1.1 El Salvador institutions for individual rights protection

With the end of the Civil War and the peace accords, El Salvador established profound institutional reforms in order to implement the content agreed by the FMLN and the government. Nevertheless, violence was endemic and diffused in El Salvador. For this reason, mechanisms and institutions were created in order to assure the respect and protection of human dignity. The Truth Commission established in 1992, in order to investigate serious acts of violence occurred during the Civil War, documented 22,000 complaints of human rights violations for instance extrajudicial killings, torture, enforced disappearances. The Truth Commission concluded that the systematic and the scale of the violations was derived 85% by State agents, 5% to FMLN forces and the remaining to death squads or paramilitary groups (DPLF, 2022, p 13). In order to materialize the changes needed to avoid further human rights violations, El Salvador modified its Constitution in 1991-92 with particular focus on the Armed Forces and the judiciary.

The Armed Forces underwent important changes as a direct result of the peace accords. For instance, modifications involved, the subordination to civil power, reduction of privileges, redefinition of military justice and an educational system for the Armed Forces (López *et al*, 2015, p 16). The specific role assigned was the defence of the sovereignty and the territory while being an institution in permanent service to the Nation as described by article 212 of the Salvadoran Constitution:

The mission of the Armed Force is to defend the State's sovereignty and territorial integrity. The President of the Republic may exceptionally order the Armed Force to maintain internal peace, in accordance with that provided by this Constitution.

The subordination to civil power was a central change adopted in order to avoid further involvement of the army in the political life. Article 213 translate this change as:

The Armed Force forms a part of the Executive Organ and is subordinate to the authority of the President of the Republic in his capacity as Commander-General. Its structure, juridical regime, doctrine, composition, and functioning are defined by the law, the regulations and special provisions which the President of the Republic adopts.

Police corps were also subject of a complex restructuring after the Civil War. Firstly, the dissolution of all previous police corps, that had been accused of systematic human rights violations and has a bad reputation amongst civilian was decided. Secondly, a new National

Civil Police (NCP) was created, whose mission was to preserve order, peace and public security under the control of civil authorities. In article 159.3, the Constitution defined:

The National Civil Police shall be charged with the functions of urban police and rural police, which guarantee order, security and public tranquility, as well as collaboration in the investigation of crime, and all the proceeding in accordance with the law and with strict respect for Human Rights.

The human rights training was a central element highlighted by the Constitution to create a culture of human rights amongst the security agents of the State. Important was the separation in two bodies was designed to avoid the solely control by the military of the security guarantee in El Salvador as described by article 159.2:

The National Defence and Public Security shall be assigned to different Ministries. Public Security shall be the duty of the National Civil Police, which shall be a professional body, independent of the Armed Force and detached from all party activity.

The Armed Forces reforms and the creation of the NCP sought to change the institutional framework of security in the country. The citizen security was understood as a function of a non-military government, managed by civil authorities jointly with a civil police corps (López *et al*, 2015, p 17). The intervention of the military is envisaged but strictly under the supervision of civil authorities, changing the classic prerogatives of the Armed Forces before the constitutional reforms.

The legal system also followed important changes strengthening institutions responsible of guaranteeing rule of law and human rights protection (López *et al*, 2015, p 17). Notably by creating a particular Procurator for the Defence of Human Rights (PDHR). The origin of the PDHR can be traced back to the Peace Accords in relation to two objectives: the promotion of the reconciliation and democratization together with guaranteeing the respect for human rights (Dodson *et al*, 2001, p 55). In this way, the mandate established by article 194 of the Constitution was broad and included:

1st. To guard for the respect and guarantee of Human Rights; 2nd. To investigate, officially or by a denouncement that has been received, cases of Human Rights violations; 3rd. To assist alleged victims of Human Rights violations; 4th. To promote judicial or administrative resources for the protection of Human Rights; 5th. To maintain vigil over the situation of private persons with respect to their freedom. He shall be notified of all arrests and shall take care that the legal limits of administrative detention are respected; 6th. To carry out inspections, where he deems necessary, to

secure respect for Human Rights; 7th. To supervise the performance of the Public Administration before persons; 8th. To promote reforms before Organs of the State for the advancement of Human Rights; 9th. To issue opinions on bills of law which affect the exercise of Human Rights; 10th. To promote and propose steps he deems necessary to prevent violations of Human Rights; 11th. To publicly or privately formulate conclusions and recommendations; 12th. To elaborate and publish reports; 13th. To develop a permanent program of promotion activities on knowledge of and respect for Human Rights; 14th. The others assigned to him by the Constitution or the Law.

However, the PDHR is under the Public Ministry, an Executive branch institution, the election of the figure is carried out by the Parliament with 2/3 of the votes and has a three-year term in office. This procedure expected to reduce partisan choices, promoting bargaining between political parties present in Parliament (*Ibid*, p 56). The NCP and the PDHR are key institutions created after the conflict in order to prevent and prosecute cases related to the violation of human rights. Both institutions played an important role in implementing State policies contrasting gangs since 2003. As the criminal activity of gangs increased, the pressure put forward by the government in order to contrast them offered cases and policies in divergence with human rights standards.

### 3.1.2 The anti-criminal strategy: El Salvador punitive policies to contrast organized crime 2003-2018

El Salvador's political system became a two-party system. Dominated by the right-wing Alianza Republicana Nacional – ARENA (National Republican Alliance) party and the ex-insurgent left party represented by the Frente Farabundo Marti - FMLN, after being recognized as a party in 1992. Since 1989 until 2009 ARENA governed for 4 consecutive terms. As gang's violence structured and grew considerably since the 2000's, the right-wing party focused its efforts by implementing temporary specific measures and punitive policies to avoid the institutionalization of gangs unsuccessfully. In 2009, the presidency was won by the FMLN and maintained control of the executive until 2018. For two presidential periods, the left-wing party tried to adopt a different approach on gangs but inevitably fell in the application of punitive and coercive policies to contrast, once again unsuccessfully, the rampant violence generated by gangs. For two decades, El Salvador implemented punitive policies to contrast violent actors with scarce results, without solving gang violence or insecurity.

### The Flores Administration: *Mano Dura* & *Ley AntiMara*

The first iron-fist program, *Mano Dura*, was implemented from July 2003 to August 2004 under the administration of Francisco Flores through the Memorandum n° 01700. The document consisted of a plan without phases but highlighting the need for coordination between Armed Forces, Police and the Attorney General. The particular coordination between the army and the police was established under the Executive Accord n°226 that allowed for an extraordinary involvement of the Armed Forces in public security tasks. Two macro-areas were structured for the combined operations between Armed Forces and Police. Firstly, it established constant patrolling of public areas, identification of individuals, car checkpoints, fire arms and drug decommission. Secondly, the Plan *Mano Dura* sought to investigate and prosecute gang members. As a result, during that period, massive capture operations resulted in 19,000 detainees accused of being a gang member (Aguilar, 2019, p 14). Nevertheless, only around 5% were arrested and tried formally, as for the vast majority did not have sufficient elements to accuse them. In parallel, to support the program, the executive proposed a special regime in the form of a temporary 180-day law to aid their anti-gang strategy. The criminalization of gangs materialized with the *Ley AntiMara*<sup>13</sup> (Law Against Maras). It was designed as a punitive instrument, defining *Maras* as unlawful association that altered public order and affected good customs (Fuentes, 2015, p 127). The special law could be applied for individuals from 12-years old that incurred in crimes detailed in the law or in the Criminal Code as stated by article 2 of the *Ley AntiMara*:

Article 2 - The present law shall apply to all persons over twelve years of age who commit the crimes or misdemeanors contemplated in this law or in the Penal Code, hereinafter referred to as conducts, within the national territory.

Offenders between twelve and eighteen years of age, members of gangs shall enjoy special treatment and procedure determined in this law.

When a minor between the ages of twelve to eighteen years of age, commits crimes or misdemeanors contemplated in this law or in the Penal Code and the Office of the Attorney General of the Republic notices that he/she has the discernment of an adult, he/she shall request the Judge of Minors to evaluate this situation; if the Judge of Minors considers that he/she is capable of discerning the unlawfulness of the conducts and infractions committed as an adult, he/she shall declare him/her as an adult and the pertinent legislation will be applied.[...]

Notably, a special procedure could allow prosecute minors as adults if, according to the judge, the minor had the capacity to reason as an adult (*Ibid*). Together with the introduction of the

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<sup>13</sup> See *Ley AntiMara*, Legislative Decree n°158, published in the Official Record n°188, vol 361, October 2003, <https://www.acnur.org/fileadmin/Documentos/BDL/2016/10410.pdf>

word *Mara*, the coercion forces were able to apprehend large number of believed gangs members.

Even if the application was established for 180 days, The *Ley AntiMara* was declared unconstitutional by the Constitutional Court of El Salvador in the resolution 52-2003/56-2003/57-2003<sup>14</sup> brought to the court by 3 cases. The court ruled that the special regime disregarded the principle of presumption of innocence, the principle of legality, children rights, and the principle of equality. In particular, due to the violation of El Salvador's engagement with international children's rights in article 40 of the Convention on the Right of Children of 1989 and the due process as criminal responsibility derives from the act and not from the author (Aguilar, 2019, p 15). Notably the *Mano Dura* program and the *Ley AntiMara* debuted the State practice of punitive policies and illegal legal figures to obtain concrete short-term results, in many cases, responding to electoral cycles.

#### The Saca Administration: *Super Mano Dura* & Anti-Illegal Association Activities and Groups Law

In 2004 the Presidency was won by ARENA's candidate Antonio Saca. As the previous anti-gang legislation had been declared unconstitutional, Saca incorporated new security policies and iron-fist strategies in his program, continuing with the persecution of gang members. His plan, named *Super Mano Dura*, structured around 4 main areas, together with two elements of prevention (*Mano Amiga*) and rehabilitation (*Mano Extendida*) that distanced itself from the previous plan. Together with this temporary measure, President Saca also promoted legal reforms to support the implementation and efficacy of his plan.

*Super Mano Dura* plan provided 4 main working areas comprising prevention, direct combat, correction of wrongful behaviours and dissuasion of crime (Reyna, 2017, p 17). With similar objectives as the old plan, the new version included a specific budget, hypothesis of scenarios, human resources, and phases of development (Fuentes, 2015, p 133). Besides the structured framework, the plan created two combined task forces. The first one, concerning the Armed Forces and the police was the Anti-Gang Task Force. The second was the Specialized Section Anti-Gang combining police officers and prosecutors. The formation of this task forces was

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<sup>14</sup> See Constitutional Court, Sentence n° 52-2003 Ac Constitutional Court, Supreme Court of Justice April 2004, <https://sv.vlex.com/vid/435345566>

meant to reduce past mistakes concerning anti-gang strategies regarding massive arrests but no prosecution due to the lack coordination between institutions.

With *Super Mano Dura* emphasis was applied to punitive crackdown operations with the support of the Police and the Armed Forces. The activities consisted in the identification, raid, surveillance and apprehension of individuals in highly controlled gang territories in the same way as the previous plan. High pressure was demanded to the police during the raids. (Aguilar, 2019, p 17). The result, after one year, carried around 35 raids and 14,000 individuals detained (*Ibid*). The majority were tried for unlawful association, as a crime established in the Criminal Code and the *ad hoc* temporary law created as described in the next paragraph. Nevertheless, the efforts deployed to increase conviction were not effective as just 30% of the detained faced trial and conviction. Moreover, the plan considered two elements forgotten by the previous plan, being prevention and rehabilitation. Nevertheless, the repressive domain of the plan prevailed largely.

The special regime created with the *ad hoc Ley para el Combate de las Actividades Delincuenciales de Grupos o Asociaciones Ilicitas Especiales* (Anti-Gang Law)<sup>15</sup> had a temporary character of 90 days that stated:

In order to reduce the levels of violence derived from individuals that belong to crime groups, known and gangs or Maras, is necessary a new special law to prosecute and trial the activities of gang members that belong to those groups.

The Anti-Gang Law defined gangs in article 3.1 as groups or special unlawful associations which activities impacted the pacific social coexistence, public order, good customs and public security. Moreover, it considered different elements to determine the existence of a gang such as:

- a. Recurrent and usual gathering
- b. The unjustified exclusivity regarding a territory compared to other groups
- c. Symbols or designs like a mean of identification to the group
- d. Marks of tattoo or scar like a mean of identification to the group

Two or more of these elements were considered as proof of the existence of a *Mara*. This law considered the belonging to a gang a crime and determined harsher sentences, ranging from 3 to 6 years:

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<sup>15</sup> See Legislative Decree 305, *Ley para el Combate de las Actividades Delincuenciales de Grupos o Asociaciones Ilicitas Especiales*, April 2004, <https://www.refworld.org/es/leg/legis/pleg/2004/es/126958?prevPage=/es/node/126958>

4. The individual that forms part of a gang shall be punished with prison from 3 to 6 years. The prison time will double in the case of the individual being a leader or chief of the group.

Also, the law created the new crime of induction to become a gang member, with a particular highlight of severity in the punishment if the induced individual were to be minor.

5. The individual or group that promote, induce or pressure the enrolment in a gang shall be punished with 3 to 6 years of prison.

The temporal nature of this law, of 90 days, allowed the capture of a high number of individuals but did not lower the homicide rate, which unveils the inefficacy of the plan. After this period, the law stopped producing legal effects. The temporary character sought to look for a rapid response and an appearance of efficacy in the administration. Nevertheless, the strategy of punitive measures adopted by President Sacca became clearly ineffective in the mid-term. Resulting in severe institutional credibility, El Salvador was submerged in a security crisis that could not be handled by the government. It is possible to assume that the enactment of short-term temporal plans responded to the need to assure rapid results. The homicide rate, which is the main focus to determine the security situation in the country, had to be decreased and the integral approach tackling structural issues is a plan that demands economic resources and the results are not visible in the short-term. In order to demonstrate results, the use of temporal instruments was the only effective way to work for the ARENA administrations concerning gang violence. Therefore, the social programs presented by the Sacca administrations had its shortcomings. For instance, the creation of volunteer camps where gang members could be treated concerning their drug or economic problems only treated 20 ex-gang members (Reyna, 2017, p 19). The lack of technical capacity, political will and budget constrained both *Mano Amiga* and *Mano Extendida* plans.

#### The Funes Administration: integral approach, gang truce and re-militarization

Mario Funes, candidate of the FMLN, won the presidential elections in 2009. This event was significant because it marked the first opportunity of the FMLN to occupy the Executive in El Salvador. Elected president Mario Funes proposed an integral vision to combat gangs. For the first time, funding for prevention programs was increased to 14%, compared to the historic 1% average from past administrations (Mahern, 2014, p 778). Funes wanted to develop an



integrated approach on security issues to distance himself from previous crackdowns and iron fist policies. The idea was to de-mediatise the conflict and see gang members not only as criminals but also as victims of broader structural problems such as marginalisation (Van der Borgh & Savanije, 2015, p 161). No particular plan nor extraordinary measure was presented by the new administration which demonstrates a political will to bring the issue to a normal political debate rather than developing particular temporary measures. Nevertheless, this idea contributed to a slow implementation of the new integral security policies and the approach evidenced internal problems such as lack of institutional capacity, absence of experience, difficulty in coordinating between institutions. Together with a deteriorating security situation in the first year of the new administration the integral approach on gangs was limited (Van der Borgh & Savanije, 2015, pp 161-162). It is plausible to consider that political and economic groups had links with gang members and pushed for a more punitive approach in order to benefit certain branches of the government, in particular the military (Aguilar, 2019, p 35). Consequently, the implementation of the integral vision to combat gang was blocked by the rampant increase in violence that forced the government to react inevitably with the use of force. Integral approaches to tackle the structural problems that caused and nourished gangs imply a long-term commitment and the results are not visible instantly.

Notably, the iron-fist measures returned after an attack perpetrated against civilians to a bus, burning it and killing 14 people (Fuentes, 2015, p 136). Just a few days after the accident, the Legislative Assembly approved the *Ley de Proscripción de Maras, Pandillas, Agrupaciones, Asociaciones Ilicitas y Organizaciones de Naturaleza Criminal*<sup>16</sup> (Gang Proscription Law). The law established as the objective:

1. Are illegal and proscribed the called gangs or Maras such as MS13, Barrio-18, Mara Máquina, Mao Mao and the organizations, association or criminal enterprises such as Sombra Negra, therefore it prohibits the existence, legalization, economic finance and support to any of the gangs.

The new law differed from the precedent by the length and the declaratory nature of its articles (Molina, 2017, p 21). In the majority of the articles, the law established the criminal acts, the loss of political rights, the annulment of ownership related to gang activity and designed the police and the Attorney General as responsible institution to carry out the law (*Ibid*). Notably,

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<sup>16</sup> See Legislative Decree n° 458, *Ley de Proscripcion de Maras, Pandillas, Agrupaciones, Asociaciones Ilicitas y Organizaciones de Naturaleza Criminal*, September 2010, [https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117\\_073001876\\_archivo\\_documento\\_legislativo.pdf](https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_073001876_archivo_documento_legislativo.pdf)

the proscription extended not only to the creation of gangs but also punished collaborating with those groups and financing them. It is important to highlight the particular care devoted to children belonging to gangs distancing from past approaches. Article 9 of the law established

The minors identified as members of *Maras*, that due to their age and exposure to higher risk, will be tried according to particular laws. The Prosecutor General will be notified in order to safeguard the integrity and adopt measures of protection.

Moreover, for the first time the law established the need for a particular permanent legal instrument to handle desertion and rehabilitation of gang members in article 10:

A special law will establish the condition of abandon, desertation and rehabilitation of the members of gangs defined by this law.

Nevertheless, gangs organized an opposition to the law, trying to pressure the executive to remove the Gang Proscription Law. In response the government continued with heavy-hand response and the use of punitive actions against the *Maras*. As a result of the increase threats and violent actions, the Funes administration started a progressive increase in the number of effectives in the Armed Forces and its role in the fight against gangs. Generally, the use of the Armed Forces was recurrent but limited only to supporting the police officers in the raids and surveillance of dangerous zones. Nonetheless, the Armed Forces acquired a permanent participation in the public security domain. For instance, the Armed Forces could participate in the coordinating meetings, managed the security in prisons and in the surroundings of schools (SSPAS, 2022, p 17). In just the first year of administration, the support of Armed Forces in security operations increased by 4 times, going from 2,000 to 8,200 soldiers (Aguilar, 2019, p 39). The recurrent use of the Armed Forces in different tasks included the surveillance of schools, prisons and migration services. During the Funes Administration, the military effectives passed from 8,600 men in 2009 to 24,800 men in 2014 surpassing the National Civil Police by 2,000 effectives (*Ibid*, p 41). The increasing presence and roles assigned to the Armed Forces incremented the cases of abuses and mistreatment against civilians. The Office of Procurator for the Defence of Human Rights registered an increase of 537% from the period 2009 to 2011 in the number of complaints received against the Armed Forces (Aguilar, 2019, p 43). By the end of 2011, high rank military personnel were appointed as head of the National Civil Police and the Ministry of Justice. Surprisingly, due to the need to apply iron-fist policies, the FMLN brought back the military to civil institutions going against the spirit of the Peace Accords. They were removed from office one year later by a resolution of the Constitutional

Court. Nevertheless, the impact they had in the State apparatus helped the Armed Forces increase their influence in the government. The promised war on crime was delivered by the appointments, underlining the intention of authorities to fight gangs. The relatively high trust in the military institution was used by the government to give an image of a capable government (Van der Borgh & Savanije, 2015, p 170).

In 2012, the homicide rate decreased considerably. At first, the government backed this reduction due to their plans, in reality a truce was obtained between gangs. The government had endorsed the process with the help of some facilitators. The gang leaders initiated talks in the high-security prisons where they had been transferred. By reaching an agreement, the cessation of hostilities was developed and certain requests were transferred to the executive. These included the suspension of police operations in their territories, repealing the Gang Proscription Law and pardon senior prisoners (*Ibid*, p 171). Thus, the administration wanted to distance itself from the process, the relaxing of prison regime for high rank gang members that returned to normal security prisons, made it clear the involvement of the government in the truce. The innovative decision of brokering a truce between groups resulted in a drastic reduction of homicide rates, like no previous plan had managed to. During this period, gang managed to affirm themselves as political actors capable of influencing the government. The truce was relevant because it showed their political power but also their territorial control as homicide rate reduced by 60% (Reyna, 2017, p 27). Until the end of Funes administration, homicide rates remained low. The temporary reduction in violence, due to the truce, had a high cost in the long run. Allowing old gang leaders to reunite with the gangs, after years in isolation, promoted the return to the control of over their members inside and outside the prison (*Ibid*, p 172). The truce helped gangs strengthen their position, grow their unity and gave them political capacity to condition the institutions at their will.

#### The Sanchez Ceren Administration: violence and gangs as terrorists

In 2014 Salvador Sanchez Ceren, FMLN candidate won the general elections. The decision of the previous administration on the militarization of several civil institutions was in contrast with the principles and objectives of the FMLN. After the election, Sanchez Ceren created a National Security Council through the Decree n°62<sup>17</sup> with the particular task of:

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<sup>17</sup> See Presidential Decree n°62, *Creacion del Consejo Nacional de Seguridad ciudadada y convivencia*, September 2014, <https://www.transparencia.gob.sv/institutions/capres/documents/256089/download>

Promote and facilitate the dialogue around public policies regarding justice and security to establish national sustainable accords

As a direct result of the work promoted by the National Security Council and in partnership with the UN Development Program (UNDP), the plan *El Salvador Seguro*<sup>18</sup> (ESS) was presented in January 2015. The strategic plan comprised 5 main domains going from prevention to rehabilitation, from victim protection to criminal prosecution, and institutional strengthening. The plan established that around 70% of the available funds shall be directed to prevention programs against violence. Nevertheless, the vast majority of funding still needed to be found (Reyna, 2017, p 29). The ESS presented important progress indicators that could measure the implementation and the actual impact of the plan together with a permanent institution that created accountability (*Ibid*). The territorial implementation was developed in 3 stages, growing from 10 to 50 municipalities with the highest violent rates in El Salvador. At a local level, action developed around education, restructuring public spaces and the creation of workspaces. In reality, the vast number of objectives reduced the impact of the implementation, slowing the results. Moreover, many programs were created before the plan, making the ESS just an instrument to finish previous programs. Finally, the National Security Council was just an advising institution that was left with no real coordination nor approval powers. As such the National Security Council mandate to monitor the implementation of the ESS was limited to the discourse rather than to the practice. The allocation of funds in reality did not follow the plan ESS objective of prioritizing the prevention domain. Figures of 2016 show that 68% of funds was destined to crime persecution, 3% to victim reparations and 27% to prevention (Reyna, 2017, p 30). Concerning the prevention, most of the activities involved cultural events, sports and reconstruction public spaces (*Ibid*). The persecution of crime, established within the ESS plan, focused in the institutions that prosecute and tried individuals rather than other punitive institutions the police of the Armed Forces. Nevertheless, after 2016 the budget distribution focused specifically on the activities related to combined forces from the military and the police (*Ibid*).

In 2016, the government to solve the high violent crisis experienced during the last months, expedited a set of Extraordinary Security Measures (ESM)<sup>19</sup>. Distancing from the strategy

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<sup>18</sup> See *El Salvador Seguro*, 2015, <https://www.refworld.org/legal/decrees/natlegbod/2017/en/121547>

<sup>19</sup> See Legislative Decree n° 321, 2016, Disposiciones Especiales Transitorias Y Extraordinarias En Los Centros Penitenciarios, Granjas Penitenciarias, Centros Intermedios Y Centros Temporales De Reclusión, <https://www.acnur.org/fileadmin/Documentos/BDL/2017/11064.pdf>

followed by the previous administration, Sanchez Ceren interrupted the dialogue between the State and gang leaders, returning them back to the high-security prisons. This closure resulted in increasing rates in homicide during the Sanchez Ceren administration. Further polarization was created due to the targeting and killing of military and police personnel. As the vast majority of gang action was coordinated from prisons, the Extraordinary Security Measures targeted the prison system. In particular, the ESM focused its efforts in controlling the Salvadoran prison system. In article 2 of the ESM establishing the measures as:

In the case there are reasons to believe in destabilizing acts organized by organization prohibited by the Law and prisoners were involved in those activities, being committed inside or outside the prison or if they create a risk for life or individual integrity the following measures can be adopted:

- a. Create temporary prison centres
- b. The relocation of prisoners
- c. Restriction of movement in particular cells within the prisons
- d. Visit restriction
- e. Mandatory education and formation courses
- f. Any other action that helps the present law.

In parallel, the Constitutional Court solved three cases of unconstitutionality relative to the *Ley Especial Contra Actos de Terrorismo*<sup>20</sup> (LECAT) dating from 2006. With the particular objective of:

1. Prevent, investigate, sanction and eradicate the crimes herein described, as well as all of its manifestations, including its financing and related activities, and by their form of execution, means and methods employed, which evidence the intention to provoke states of alarm, fear or terror in the population, by putting in imminent danger or affecting the life or physical or mental integrity of persons, material goods of significant value or importance, the democratic system or the security of the State or international peace

In order to achieve this, the LECAT established the meaning of terrorist organizations and their acts as any attempt against the life of individuals or their families, armed occupation in cities, substance adulteration, hate speech, any act against public infrastructure. The prison sentence was established up to 60 years in the case of death or serious injuries. Finally, disposition regarding goods expropriation, special prosecution procedures and prevention duties to all public institutions.

The relevance of LECAT returned during the Sanchez Ceren Administration as the Constitutional Court solved 3 unconstitutionality cases brought to it in 2007. In the sentence,

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<sup>20</sup> See Legislative decree n°108, 2006, *Ley Especial Contra Actos de Terrorismo* (LECAT) <https://ssf.gob.sv/descargas/Leyes/lavado/Ley%20Especial%20Contra%20Actos%20de%20Terrorismo.pdf>

the Constitutional Court argued and developed the idea that gangs were terrorist organizations<sup>21</sup>:

Notably it is a fact that criminal organizations such as gangs, coordinate actions and systematically: attempt against life, security and the individual integrity of the population, including public servants and security personnel, public and private property, extort, reduce the living space of citizens by forcing them to leave their homes or neighborhoods, act against the right to education, acts against free movement due to the control over certain areas [...]. For these reasons gangs are terrorist groups and any other organization that pretend to monopolize the prerogatives of the State [...].

The Supreme Court considered that both MS-13 and Barrio 18 gangs were terrorist groups, as any other organization that seeks to overthrow the government and usurp the power or systematically violates fundamental rights of the population (Martinez, 2019, p 690). The consideration of the Court also extended to collaborators or financiers no matter the degree of collaboration (*Ibid*). With this declaration and the application of the ESC, Sanchez Ceren sustained a repressive and punitive policy against gangs even if the violence was not able to be controlled. Even if the last years of the Sanchez Ceren Administration registered a decrease in the number of violent homicides, the solely attribution to the ESM and the terrorist label is reductive. In fact, the impact could have existed but it cannot explain in whole the decrease. For this, the decrease is also attributed to the fact that the modality of crimes changed during that period affecting official record of homicides. Gangs criminal practice mutated from simple direct homicides to burning bodies, dismember them and hiding the bodies (Aguilar, 2019, p 76). The phenomenon of enforced disappearances extended to gang activities receiving in 2018, more than 2,500 cases of missing individuals (*Ibid*). During Sanchez Ceren administration, the frontal waging war against gangs resulted in high homicide rates and the aggravating problem of gang violence against civilians and Armed Forces.

The use of punitive plans and programs was a common denominator for all previous administrations. Even if some included prevention plans or an integral strategy to reduce crime, these programs were not effective due to a budget constraint and the lack of political will. Instead, the administrations use political too, through the legal system to fight directly gang activities. The use of punitive criminal plans and the excessive participation of the army in security operation did not resulted in effective State control over gang member nor reduced sustainably the violence in the country. The only period where there was a significant reduction

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<sup>21</sup> See Constitutional Court, Ref. 22-20007/42-2007/89- 2007/96-2000, pp 40-42, <https://www.acnur.org/fileadmin/Documentos/BDL/2016/10563.pdf>

was thanks to the dialogue between gangs and the truce that allowed for a drastic drop in homicide rates. Nevertheless, once the truce ended, drastic levels of violence re-emerged and intensified. As a direct indicator of the ineffectiveness of those policies, homicide rate will be discussed in the following section. The use of force to fight gangs translated in a stronger institutionalization and organization of gangs that became relevant actors capable of conditioning the political system in El Salvador.

### 3.2 The shortcoming of a punitive State model: the generalized use of torture and ill-treatment.

For almost two decades, El Salvador implemented punitive policies to contain and solve gang violence without positive results. With a continuous cycle of violence and crackdowns, the phenomenon of gang violence intensified and institutionalized leading to an increase in homicide rates throughout the years. Together with the high rates of homicides, the recurrent intervention of the Armed Forces in security operation created hostile environment where the vulneration of human rights was present. The punitive strategy used involved massive arrests and incarceration for individuals which directly impacted the Salvadoran prison system. As a consequence, detention centres became a place for a generalize infringement of the prohibition of torture and ill-treatment.

#### 3.2.1 The consequences of a punitive approach on gangs: detention centres and prison population

Punitive approach has been generalized in order to combat gang violence. The limits of this approach are visible following two indicators. The homicide rates and the prison population. The latter is an indicator of the level of violence present in the society. The former shows how the use of punitive policies have resulted in the increase of the prison population not respecting a proper infrastructure and conditions for detainees. Moreover, as gang members become prisoners, the responsibility for their individual integrity is fully passed to the State. In many cases, the increase of prison population has created more problems and vulneration of the detainee's dignity due to the living conditions but also due to direct actions the security forces,

from the moment they are apprehended until they are transferred to formal detention centres with an official conviction (ICG, 2020, p 7).

Throughout ARENA and FMLN administrations, the State has responded with violence and punitive plans that initially were considered to be an effective tool to reduce violence generated from gangs. On the contrary, since the introduction of iron-fist measures, the homicide rates have increased constantly. The two periods where there was a considerable reduction was either due to a truce decided by rival gangs or by changing their violent tactics resulting in a drop-in homicide but an increase in enforced disappearances. Reduction in the registered violence was due to a truce between gangs, but even during that period homicide rates never descended to pre-iron fist levels. As described in figure 1:

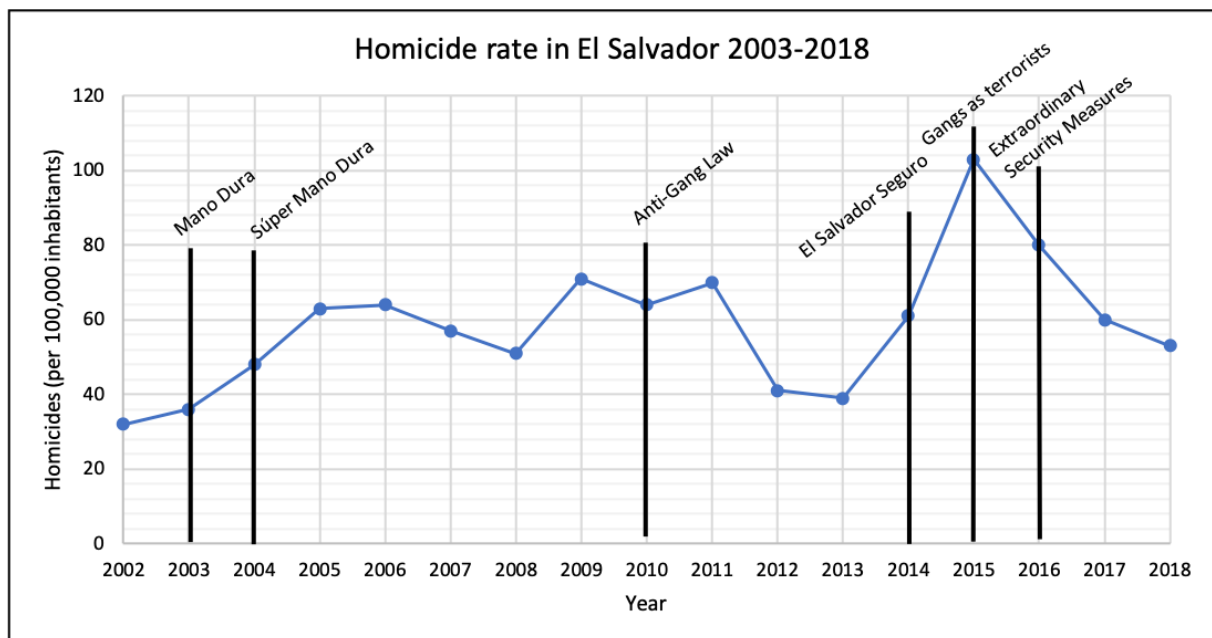


Figure 1. Homicide rate in El Salvador and the punitive strategies (Figure designed by the author with data from the World Bank, <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?locations=SV>)

The direct impact of public policies and increase in violence is neither linear nor direct. Nevertheless, the evolution of the criminal phenomenon has followed a specific path compared to the different plans and actions implemented by the State to fight crime and gangs. The frontal combat, resulting in punitive plans, favoured the participation of gangs in violent crimes. At the same time, the support given to the security forces, promoted impunity and in many cases derived in the excess or abuse of their position over individuals (Aguilar, 2019, p 22).



A direct result of the punitive approach was the massive arrest of gang members. Even if many were temporary detained and then freed, the prison population of El Salvador grew considerably since 2003 as described in figure 2:

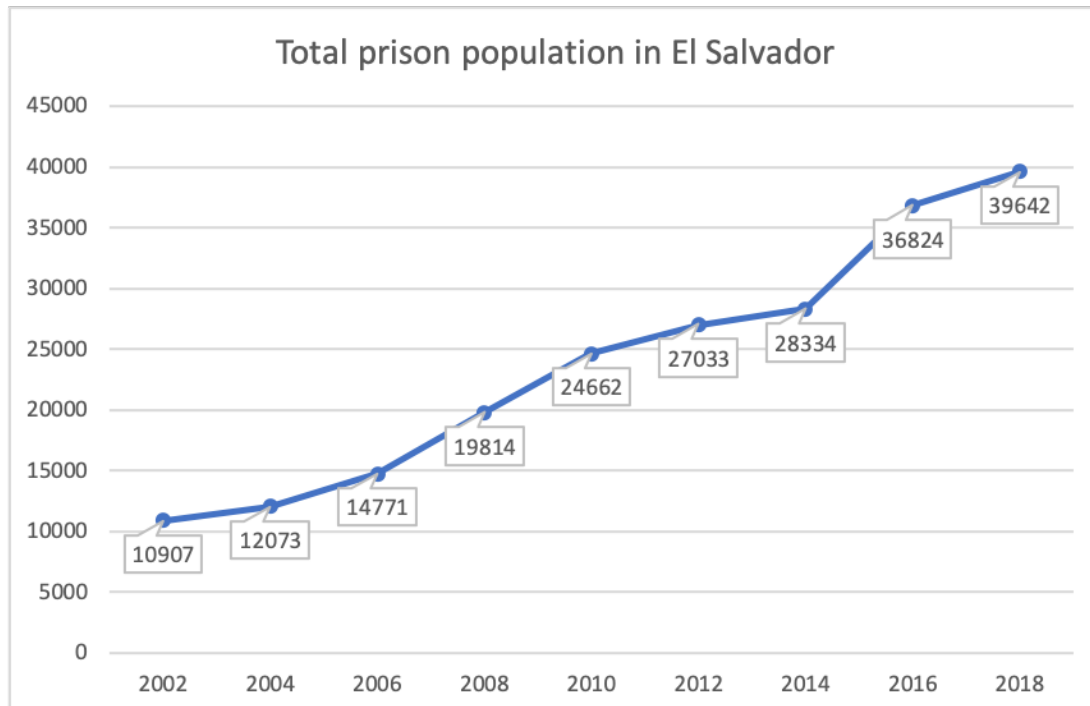


Figure 2. The total prison population from 2002 to 2018 (Figure designed by the author with data from InsightCrime, <https://insightcrime.org/investigations/el-salvador-keeping-lid-on-prisons/#:~:text=The%20total%20prison%20population%20now,estimated%20at%20just%20over%2027%2C000>)

The direct consequence of the increase in inmates caused the prison system to become overcrowded leading to a prison overpopulation. Indirectly, gang members found in the prison the perfect place to strengthen their organization and carry out their activities from within the detention centres (Aguilar, 2019, p 28). Notably, the increase of prison population did not follow the increase in the Salvadoran prison system capacity. Any prison that surpasses 100% of its capacity is considered to be overpopulated, and those who surpass 120% of its capacity have an overcrowding problem (Andrade & Carrillo, 2015, p 52). For instance, in 2015 El Salvador prison system had the capacity to receive 8,400 inmates but had a density of 367%. Meaning that for every 100 available spaces, the Salvadoran government imprisons around 357 individuals (*Ibid*, p 53). The high levels of inmates were accompanied by a policy of separation according to the inmate's particular belonging to a gang. Since 2003, prisons served as a mechanism of consolidation of the identity and institutionalization of gangs (Aguilar, 2019, p 28). Generally, prison conditions were unattended and effective control was exercised by

inmates and gangs. In 2016, the government of Sanchez Ceren decided to intervene in the prisons through his Extraordinary Security Measures. One of these measures involved declaring the prison system under a State of Emergency due to the ineffectiveness of the ordinary regime in order to restore control of prisons. For this purpose, the government confined for 24 hours inmates in their cells, restrained mobility within the prison and interrupted communications with the inmates (Aguilar, 2019, p 65). During the first year of application of the strategy, the access to prison was drastically controlled and denied it to organizations and institutions, including the Procurator for the Defence of Human Rights. Cases of cruel, inhumane and degrading treatment were practiced by the State against the inmates. The use of a punitive approach was meant to dehumanize gang members enabling to strip away their dignity and rights (*Ibid*, p 68). Many of the dispositions present during the State of Emergency declared in the prison system became permanent in 2018 through the modification of the Prison Law in August of the same year. By including extraordinary measures as ordinary, the Salvadoran State has legitimized and normalize the vulneration of the detainee's rights.

### 3.2.2 The systematization of cruel, inhumane and degrading treatment against gang members: El Salvador punitive prison model

When a person is deprived of their liberty and there is an imbalance of power, it constitutes a situation of risk due to the relation of total dependence on another (OHCHR *et al*, 2010, p 4). Risk of being tortured or ill-treated is higher during the individual's detention, throughout all the process: initial arrest, temporary detention and permanent transfer to a prison facility. Within any close facility, there is an existing and permanent risk of being exposed to ill-treatment or even torture. The experience of El Salvador throughout two decades has constantly used a punitive approach to fight gang violence. As a direct result, the prison population increased sustainably exposing detainees to overcrowding facilities and creating a scenario where ill-treatment and torture has been normalized as a conduct within and outside prisons when dealing with gang members.

Since the application of iron-fist policies in 2003, the PDHR argued that the *Mano Dura* and the *Ley Anti-Mara* had a negative effect in the judicial institutions due to an overcharge of

processes and prison population (PDHR, 2009, p 14). Severe violations of human rights occurred in prisons. Several cases of physical abuse and humiliations have been reported, together with psychological torture and prohibition of family visits to the inmates (*Ibid*, 52). Since the military and the police were authorize the exercise of control and security in the prison system, many arbitrary and abusive conduct has been denounced by the detainees (ORRPDL, 2010, p 3). In particular, intimate searched conducted by the military to female detainees, applied to all women including the pregnant females. It was attested that these practices were recurrent and no monitoring nor complaint procedure was established to redress the situation. Another aspect of concern was the food served to persons deprived of their liberty in the prison system. Insufficient nutrition, quality of food and hygiene is vastly present in the different prisons around El Salvador (ORRPDL, 2010, p 5). For instance, food being served in a degrading matter, forcing inmates to eat with their hands and improvised dishes in many cases lead to gastrointestinal illnesses (*Ibid*, p 6). Moreover, inmates who suffered a pre-existing condition did not have access to a particular food regime or diet. Since 2010 until 2018, around 6,500 complaints were launched against security personnel due to the vulneration of their personal integrity (PDHR, 2018, 23). The Salvadoran government has systematically included the Armed Forces in internal security tasks in relation to the National Civil Police. The non-separation of these two institutions to face gangs has carried numerous cases of ill-treatment due to the different approaches and training followed by each institution. Condition in the prisons continued to be a concern throughout the application iron-fist policies. Despite the Constitutional Court decision of 2014, declaring that the prison condition infringed human dignity and ordered the reduction of overcrowded centre, these measures were not followed (Cristosal *et al*, 2018, p 21). The condition in detention centres further deteriorated since the application, in 2016, of the Extraordinary Security Measures applied to prisons. Resulting for instance, in an epidemic of tuberculosis arriving to 1272 infected inmates in 2018 (Aguilar, 2019, p 67). The facilities, together with the treatment render the situation of detainees very difficult and has raised concern of human rights treaty bodies during their periodic reviews.

The conditions of detainees due to the extraordinary measures, by the structure and the systematic overcrowdings has deliberately position the detainee in a vulnerable condition, as the individual relies completely from the State. Nevertheless, the encouragement for punitive measures, comes with no surprise with a vast support by the population. In fact, a 2017 study showed that 40% would approve the use of torture to confront organized crime, 34% would approve extrajudicial executions and 17% would consent the practice of social cleaning (Cruz

*et al*, 2017, p 5). This view regarding the gang problem has been shaped during the years and validates the strongest of responses even if they remain sterile and ineffective in practice. The recurrent use of the punitive approach has extracted the human condition out of gang members. The increasing number of ill-treatment, specially within the prison system, is due to the natural constraint in infrastructure but also due to the systematic validation that the figure of the gang member is unworthy of respect. The dehumanization of gang members was established as the official narrative used to contrast the *Maras*. In more recent years, after the dehumanizing strategy was structured around the terrorist label. In many official communications and declarations, often gang members were qualified as terrorists to emphasize the enemy and abstract condition (Aguilar, 2019, p 71). This rhetoric has been in place for many years, creating a narrative that sustains and legitimizes ill-treatment if targeted to gang members in prisons.

## Chapter 4. The Persistence of Punitive Policies: Nayib Bukele's Security Measures and Institutionalized Torture in El Salvador

### 4.1 The break of a bipolar system: Nayib Bukele's punitive strategy

In 2019 the political scenario dominated either by ARENA or the FMLN was overturned by the arrival of an outsider, Nayib Bukele. Positioned himself as a pseudo-outsider, despite his participation in politics being Mayor of San Salvador with the FMLN, he became the youngest elected president in the history of El Salvador being 37 years-old. Running with a minority right-wing party *Gran Alianza para la Unidad Nacional* – GANA (Great Alliance for National Unity), he positioned himself over partisan and political ideology obtaining 53% of the preferences. Despite his popularity, the elected president had the Legislative Assembly controlled by opposition parties. Following the Sanchez Ceren administration, with the highest rate in homicides and punitive measures including the emergency in prison system and declaring gangs as terrorists, Bukele adopted a similar line regarding the security policies. In El Salvador, around 50% of murders are caused by gang related matters, *Maras* account for 60,000 active members and 400,000 related individuals (ICG, 2020, p 6). In this situation, the top priority of Bukele's Administration was to control gang violence. To do so Bukele announced his *Plan Control Territorial* – PCT (Territorial Control Plan), a security strategy that promised to end with gang violence and return the peace to Salvadorans (Forbes, 2019). At first, the plan focused on three aspects regarding the control over prisons, reinforcement of security institutions and the interruption of criminal financing sources (*Ibid*). The particular focus of interruption of financing sources was particularly important due to the pervasive presence of gangs in the economy. Through extortion, gang sustained their operations and conditioned the lives of thousands of Salvadorans. The first phase, called “preparation”, had as an objective to control the territory and the suppression of crime in just 12 municipalities (Fuentes, 2022). Phase 2, called “opportunity” was oriented towards the creation of opportunities for the youth and violence prevention. For this purpose, particular CUBOS – Urban Centre for Well-being and Opportunities were built in different zones equipped with libraries, computer rooms and cultural activities for the youth (Fuentes, 2022). The third phase, called “modernization”, and it focused on the modernization of security equipment and infrastructure to combat gangs. Actions included a special trimestral incentive of \$400 for security members and food coupons. During this phase, around 40,000 gang member suspects were detained. Phase 4, called “incursion” established the increase of 1,000 members of the

military to support the security operations. Phase 5, called “extraction” where military barricades were placed around urban centres to control the access and the exit of zones in order to capture gang members. Finally phase 6 involves “integration” focusing on structural problems faced by Salvadoran and its objective is to create favourable conditions for development and to reduce poverty. This has not been an official document released by the Executive, since the PCT is kept in high secret and no clear objectives nor measurements are available. The general line was to deploy, in a permanent manner, police and military patrols, mass detentions and the upgrade of security’s personnel equipment. Conversely, the government promoted several focused States of Emergency in prisons. As established by the Salvadoran Prison Law<sup>22</sup> in article 23:

In situation of force majeure, random cases, acts of indiscipline and general disorders, acts of destabilization like mutiny, the directors of the prison centres shall declare in emergency the prison they command or a particular section of it and as a consequence restrain the rights established by this law at article 9.6 to 9.10 of the present law for a period of no more than 15 days. In the case of a reconfirmation of the emergency situation, the General Prison Direction shall pronounce and eventually annul or confirm the suspension of rights [...].

The particular rights suspended comprised in article 9 of the Prison Law and are the following:

6. right to a remunerated activity
7. Freedom to move within the prison facility
8. To obtain information, that according to the General Prison Director may contribute with his/her rehabilitation
9. Maintain the relation with his/her family
10. To have special and adequate locals within the facility for family visits

With this framework the government enacted the State of Emergency in the 28 prison facilities in 2019, as part of the PCT, in order to control the violence that according to intelligence information, was organized within the prisons (Campos-Madrid, 2019).

Concerns were raised by the civil society as suggested by Ricardo Sosa, expert in security and criminology (Sosa, 2020). According to the expert, in 2020 there were roughly 37,000 individuals detained, from which 74% with a firm sentence and the 25% being processed (*Ibid.*). This situation creates great uncertainty for the percentage of processed individuals whose guilty

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<sup>22</sup> See Legislative Decree n° 1027, *Ley Penitenciaria*, [https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117\\_072946088\\_archivo\\_documento\\_legislativo.pdf](https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072946088_archivo_documento_legislativo.pdf)

status has not been confirmed. For instance, after the killing of 2 members of the Armed Forces, President Bukele ordered the State of Emergency in all prisons following a message via his X account<sup>23</sup>:

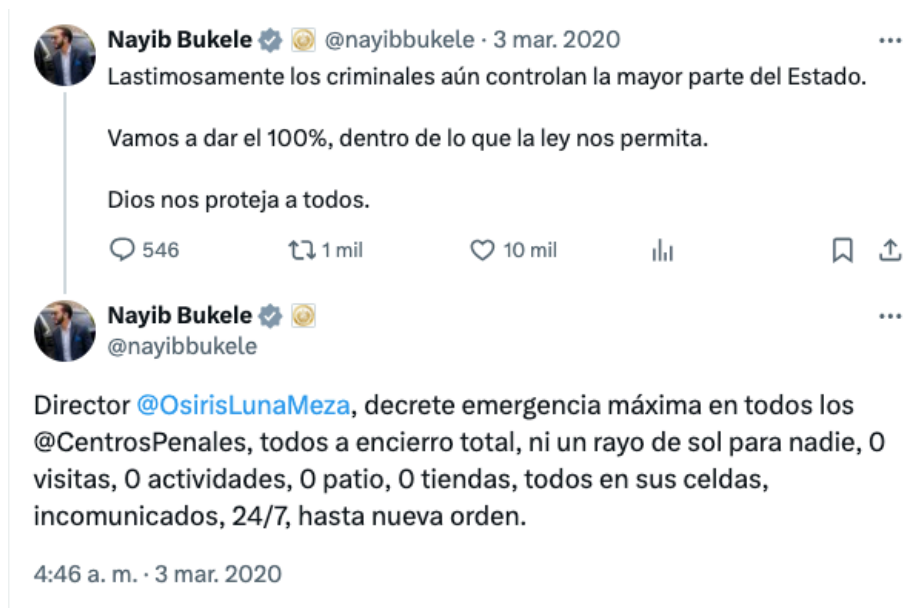


Figure 3 Message of President Bukele ordering the State of Emergency in prisons following the murder of 2 army members (translation: "Unfortunately the criminals still control a big part of the State. We are going to give 100% within the limits of the law. May God protect us. Director @OsirisLunaMeza, declare maximum emergency in all prisons, full enclosure, not a single light of sun for them, 0 visits, 0 activities, 0 outdoors, 0 stores, everyone in their cells, incommunicado, 24/7, until further notice.

Previously, in a visit organized by the InterAmerican Commission in El Salvador, the preliminary conclusions raised concern regarding the specific law applied to detainees and called for a revision in order to comply with international human rights standards (CIDH, 2019). Extreme enclosure, as envisaged by the Prison Law, can allow solitary confinement in a systematic and permanent mode, constituting a violation of El Salvador's duties established by the ICCPR under article 7 in particular *incommunicado* regime. As declared by President Bukele, this strategy was used under several States of Emergency to control communications and gang operations from the prison. Nevertheless, the UN Special Rapporteur on Torture agrees that torture is frequently practiced during incommunicado detention (van Bove, 2002, p 10). Also, UN Special Rapporteur on Torture, Nils Melzer, expressed that a regime of more than 15 days in extreme confinement conditions can amount to torture (FDP, 2020, p 9).

<sup>23</sup> President Bukele, @nayibbukele X account, <https://twitter.com/nayibbukele/status/1234686639194034178>

Bukele's approach showed an authoritarian facet early in his administration. With his election in 2019, while the Executive was controlled by him, the Legislative Assembly was dominated by opposition parties such as ARENA and the FMLN composing 56 out of 84 members. This caused impasses for the first years of the Bukele's Administration. For instance, in order to modernize the equipment of the security forces as established by his Territorial Control Plan, Bukele's administration expected a loan from the Central American Bank for Economic Integration that needed to be approved by the Legislative Assembly controlled by the opposition parties. The delay by the Legislative Assembly created an institutional *impasse* that resulted in President Bukele invading, in February 2020, the Legislative Palace and occupying the chamber with security forces<sup>24</sup>. Once inside, President Bukele occupied the chairs seat and prayed. Concern was raised by civil society associations and the Constitutional Court which declared the actions inappropriate through the Sentence 6/2020<sup>25</sup> and demanded the President to:

4.3 order the President of the Republic to abstain himself from using the Armed Forces contrary to the ends established by the Constitution, putting at risk the republican, democratic and representative form of government, the pluralist political system and the balance of power.

Nevertheless, around 79% of Salvadorans backed Bukele and the use of force against the Legislative Assembly (ICG, 2020, p 17). The strategy of Bukele has led to further militarize public security by increasing the enrolment in the Armed Forces and reinforcing the budget of the Defence Ministry (Stelmach, 2021, p 80). Following this militarization of internal security, it was established an extension of the Armed Forces in the operation of public security as established by the *Disposiciones Especiales Transitorias para la Participacion de la Fuerza Armada en Operaciones de Mantenimiento de la Paz Interna* (Special Temporary Dispositions regarding the Participation of the Armed Forces in Internal Peace Keeping Operations). Since 2019 and until the end of 2022 President Bukele reformed the temporal disposition to ensure

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<sup>24</sup> See El Faro, 2020, "Bukele mete al ejercito en la Asamblea Nacional y amenaza con disolverla dentro de una semana, [https://elfaro.net/es/202002/el\\_salvador/24008/Bukele-mete-al-Ej%C3%A9rcito-en-la-Asamblea-y-amenaza-con-disolverla-dentro-de-una-semana.htm](https://elfaro.net/es/202002/el_salvador/24008/Bukele-mete-al-Ej%C3%A9rcito-en-la-Asamblea-y-amenaza-con-disolverla-dentro-de-una-semana.htm)

<sup>25</sup> See Constitutional Court of El Salvador, sentence n°6/2020, <https://sv.vlex.com/vid/sentencia-n-6-2020-845841134>



the participation of the Armed Forces in the internal security operations through decrees number 36/2020<sup>26</sup>, 46/2021<sup>27</sup>, 41/2022<sup>28</sup>, 56/2023<sup>29</sup>

The first two years of Bukele's administration faced a fierce opposition in the legislative, reducing the margin of action of the Executive. Nevertheless, the application of the Plan Control Territorial deployed and increased security presence in the territory, built community centres in zone where high control of gangs was exercised and improved the equipment of the military. Homicide rates during that period decreased steadily even if the precise causes remain unclear (*Ibid*, p 19). The Plan Control Territorial was deployed in only 22 municipalities, and the drop in homicide rates does not coincide exclusively with those municipalities. Homicides decreased generally in all the country. Moreover, the application of the State of Emergency in prisons, as a measure to cut communications from gang prisoners with their gangs outside, did not have a direct event in the drop of homicides as this rate started to decrease before the application of this measure (*Ibid*, p 23). On the other hand, in the past, homicide reduction was attained due to the gang's willingness to establish a truce or to convince the government to ease on the punitive measures as happened in 2013-2014 and after 2016. Notably, an investigation published by an important media exposed that Bukele had actually established negotiations with gang leaders in order to lower the homicide rates (Dudley, 2020). Denied by the administration, Bukele during 2020 and 2021 kept lowering homicide rates drastically.

This popular drop and upfront attitude to fight gangs was used by Bukele's party to win the majority in the Legislative Assembly elections in 2021 with 66 out of the 84 seats available. The first actions of the newly-elected Assembly were to remove the judges from the Constitutional Court and the Attorney General and replace them with new figures backed by the new Assembly control by the Executive's party. With the alignment in the legislative and the judiciary, President Bukele started to put forward a series of measures aimed against gang members by using a constitutional tool such as the State of Emergency and triggering important changes in legislation to back up his punitive populism approach against gangs.

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<sup>26</sup> See Decree n°36, *Disposiciones especiales transitorias para la participación de la Fuerza Armada, en Operaciones de Mantenimiento de la Paz Interna*, <https://sv.vlex.com/vid/decreto-no-36-disposiciones-855375032>

<sup>27</sup> See Decree n°46, *Reformas a la Disposiciones especiales transitorias para la participación de la Fuerza Armada, en Operaciones de Mantenimiento de la Paz Interna*.

<sup>28</sup> See Decree n°41, *Reformas a la Disposiciones especiales transitorias para la participación de la Fuerza Armada, en Operaciones de Mantenimiento de la Paz Interna*.

<sup>29</sup> See Decree n°53, *Reformas a la Disposiciones especiales transitorias para la participación de la Fuerza Armada, en Operaciones de Mantenimiento de la Paz Interna*.

#### 4.1.1 Form extraordinary to ordinary measure: The permanent State of Emergency

The endemic violence, caused by gangs and State crackdowns have characterized El Salvador political life for the past 2 decades. President Bukele in March 2022, even if the PCT was in action responded to a peak of violence registered in El Salvador, by declaring a State of Emergency in all the territory. The wave of violence experienced by El Salvador in the early months of 2022, was a demonstration of the effective control and coordination that gangs still had in the territory. The exceptional regime established by President Bukele suspended certain rights and allowed the use of iron-fist policies without the normal control of institutions and the Constitution. The use of punitive action in response to gang violence was already shown by all 4 previous administrations. Nevertheless, President Bukele's party GANA had a majority in the Legislative Assembly granting a total control over the authorization and the sustainability of the suspension of rights regime. With the declaration of a State of Emergency, El Salvador marked a turning point in the strategy used to combat gang violence.

The suspension of rights followed 87 homicides in 72 hours perpetrated against innocent civilian by gang members of MS-13 and Barrio-18 (Papadovassilakis, 2023, p 11). The sudden increase in violence triggered President Bukele to invoke emergency powers in order to control and disrupt gang operation in the territory. With Legislative Decree n°333<sup>30</sup> it considered that:

Due to the grave emergency developing in our country in the last hours, concerning the increase of homicides that is affecting civilian population, where the fundamental right to life is being endangered, it is necessary to adopt legal measures to limit the exercise of certain fundamental rights through the declaration of a State of Emergency as established by article 29 of the Constitution of El Salvador.

By suspending several rights, the government was able to carry out massive arrest operations and detention of all suspected gang members in the country. In El Salvador, the State of Emergency is established by in article 29 of the Constitution, which establishes that:

In cases of war, invasion of territory, rebellion, sedition, catastrophe, epidemic, or other general disaster, or serious disturbances of the public order, the guarantees established in Articles 5; 6, first paragraph; 7, first paragraph; and 24 of this Constitution shall be suspended, except for meetings or associations with religious, cultural, economic or sport purposes. This suspension may affect all or part of the territory of the Republic

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<sup>30</sup> See Legislative Decree n°333, Régime de Excepción, <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/4214B3CA-A3AA-4435-8229-49C097CAB14D.pdf>

and may be accomplished by a decree of the Legislative Organ or the Executive Organ, as the case may be.

Likewise, the guarantees contained in Articles 12, second paragraph, and 13, second paragraph, of this Constitution, shall be suspended whenever the Legislative Organ so accords, with the favourable vote of three quarters of the elected Deputies; the administrative detention not exceeding fifteen days.

Though the Decree n°333, President Bukele established the State of Emergency considering:

1. The present decree has as objective to give the tools and the law mechanisms to institutions of Security, National Civil Police and the Armed Forces to re-establish order and security in the territory.
2. Declare the State of Emergency in all the territory due to the grave perturbations to public order derived from gang groups that threaten the life, peace and security of the Salvadoran population
3. The Ministry of Justice and Public Security, Defence and the Director of the National Civil Police coordinate the actions to implement the dispositions of the decree considering the needs and the materials to effectively respond to the threat,
4. Constitutional rights suspended are articles 7, 12.2, 13.2 and 24 in relation to article 131.27 and article 29 of the Constitution
5. The present decree will enter into force the day of publication in the Official Registry and will last 30 days.

As gang violence and the organizations represented a serious disturbance to public order, Bukele decided to suspend several rights in order to better fight these groups. This constitutional tool, as established, suspends several rights, in particular freedom of association, privacy in communications, right to be informed about the reason for arrest and to a legal representation, and finally allowing for a 15 days administrative detention instead of the regular 72 hours. The duration of the State of Emergency is of maximum 30 days, that might be extended if the Legislative Assembly deems necessary as the cause that enacted the situation is still ongoing. In particular, it is necessary for the Legislative Assembly to approve the declaration of a State of Emergency. As of June 2024, the Emergency State has been renewed a total of 28 times, creating a permanent exceptional regime in place in El Salvador. the need of the Salvadoran State to protect the life and guarantee the security, the Emergency State was founded in the need to combat, not ordinary crime, but to confront a criminal phenomenon with no comparison in the world and that generated one of the highest homicide rates in the world. The need to sustain the special regime is founded in the sustained job that security forces must implement to disarticulate terrorist groups and ultimately eradicate this phenomenon.

During the 28-month application of the State of Emergency, Bukele's Administration has detained over 79,974 individuals (Legislative Assembly, 2024, p 4). As a result of the

application of the extraordinary regime, El Salvador has managed to reduce the homicide rate to historical minimum as shown in Figure 3:



Figure 4 Decrease in homicide rate since 2018(Figure designed by the author with data from *The Economist*, <https://www.economist.com/the-americas/2023/03/16/el-salvadors-authoritarian-president-is-becoming-a-regional-role-model>)

On the other hand, the massive arrest operations, carried out by security forces in joint operations, have resulted in an overall prison population of 105,000 detainees in total (Papadovassilakis, *et al*, 2023, p 4). Several procedural guarantees and rights, such as the presumption of innocence or the right to be informed of the crime for which an individual is detained, were and are still suspended (Amnesty International, 2023, p 16). Prison population, currently the number stands over 105,000 detainees in total. Currently, El Salvador has the highest incarceration rate in the world, standing at a staggering 1,600 per 100,000 inhabitants (Amnesty International, 2023, p 30). The increase of the detainees is shown in figure 4:

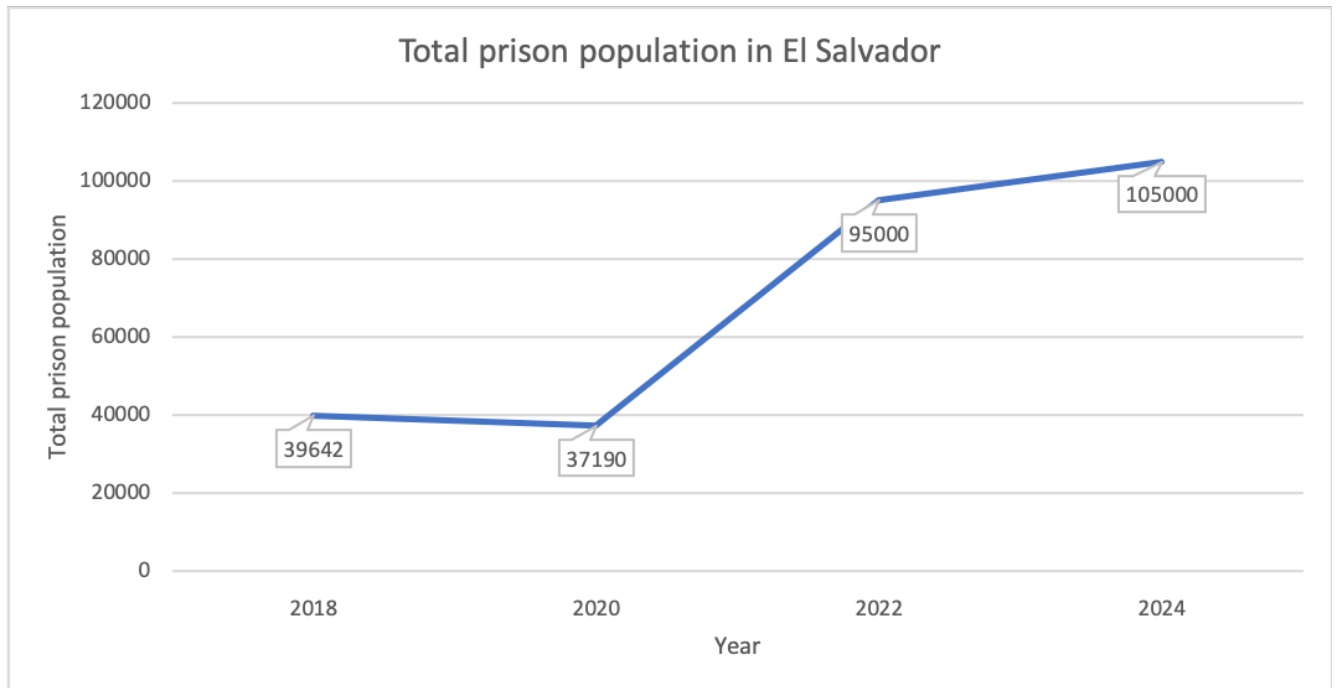


Figure 4 Increase in prison population since 2018 (Figure designed by the author with data from *The Economist*, <https://www.economist.com/the-americas/2023/03/16/el-salvadors-authoritarian-president-is-becoming-a-regional-role-model>)

Considering the increase of prison population to historical maximums and the decrease in homicides, the Salvadoran government has not eased nor terminated the State of Emergency. In practice, there has been a normalization of the expectational regime to fight gang violence. This normalization has also translated several extraordinary dispositions into permanent legislation against gang members. For example, the faceless judges, the automatic application of the precautionary detention for gang members, the limitless of pre-trial detention regime for suspected gang members and the reduction from 14 to 12 years of age as the minimum age for crimes regarding organized crime (Amnesty International, 2023, p 19). Regarding the indefinite extension of the Emergency State, the Constitutional Court of El Salvador decided in the matter in 2020, when President Bukele extended the exceptional regime more than 30 days due to Covid-19. As article 30 of the Salvadoran Constitutions states that:

The period of suspension of constitutional guarantees shall not exceed 30 days. After this period has lapsed, the suspension may be extended for an equal period and by means of a new decree, if the circumstances which motivated it continue. If such a decree is not issued, the suspended guarantees shall remain re-established in full right

Regarding this article, the Constitutional Court established that the temporal limit is established by the Constitution of El Salvador for 30 days. There is no textual limit concerning the renewal

of the Emergency State enactment, nevertheless they may be admissible if the circumstances of article 29 for the Constitution are still ongoing. For this it is fundamental to consider the facts and the circumstances around the renewal for the empiric reasons to sustain the renewal were not valid, the State of Emergency should be declared unconstitutional (Constitutional Chamber El Salvador, 2020). The reasoning of the Constitutional Chamber is in line with regional instruments such as the InterAmerican Convention of Human Rights. In fact, even if the IACHR provides for the possibility to enact a State of Emergency in article 27. Nevertheless, the wording is clear as to the extent of the renewal being:

[...] may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation [...]

Results incompatible, not only regarding the appreciation of the Salvadoran Constitutional Court but also by the IACHR, to keep renewing the Emergency State as for the exigencies of the situation being gang violence threat has disappeared. As homicide rates have reduced constantly to a historical minimum. The normalization of the exceptional regime has been noticed by the InterAmerican Commission on Human Rights, that through a press release called the State to reestablish the rights and guarantees suspended:

[...] the country has achieved an unprecedented reduction in crime in recent months: according to the Minister of Justice and Public Security, some 317 days had gone by without homicides as of March 9, 2023. However, the IACHR has warned the State of El Salvador that the suspension of rights and guarantees is an inappropriate mechanism for containing common crime, especially when applied indefinitely.<sup>31</sup>

Concerning the number of detainees, the InterAmerican Commission expressed in 2023:

[...] 90% of these detainees are still being held in pretrial detention, according to public information as of March 1. On this point, it has repeatedly expressed its concern over the multiple allegations of abuse of authority and irregularities during arrests and judicial proceedings, as well as violations of detainees' human rights. It has also urged the State to guarantee due process, fair trial, and judicial protection, as well as the dignified treatment of all people in State custody.

The consequences of the permanent State of Emergency, together with changes in legislation allowing for greater surveillance, broader persecution and faster determination of guilt carries the risk of mass violation of the right to a fair trial, according to a joint press release of UN

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<sup>31</sup> InterAmerican Commission Press Release, 2023, [https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media\\_center/preleases/2023/058.asp](https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/058.asp)

experts<sup>32</sup>. Arguing also that the level of disruption and interference in the Salvadoran justice system, as a result of the increase in cases of detention, carries the risk on guarantees of due process and protection against torture.

Overall, the continuous State of Emergency allowed for a drastic reduction and control over the territory, that once was dominated by gang members. This extraordinary tool, has been used an ordinary measure to tackle gang violence. The current situation of El Salvador, having the Executive and the Legislative powers dominated by the same party, has enabled the permanent renewal of the State of Emergency. Moreover, the concerns raised by UN experts regarding the independence of the Judiciary has negative impacts in the balancing of powers and the guarantees of rights protection exercised by them. Constitutional control, competence exercised by the Constitutional Court, has been politicized as after the destitution of all its members and the replacement with new members nominated exclusively by the Bukele's administration party that control 2/3 of the Legislative Assembly.

For the first time, iron-fist policies together with the perpetual Emergency State declared by the government, have given sustained results regarding security. The cost of reducing homicide rates is the enormous prison population accumulated in a few years. Moreover, the vulneration of guarantees and rights established by the Constitution create an uncertain situation for the individuals who, just based on presumption, may be victims of arbitrary detention, enforced disappearances and even cases of torture and ill-treatment as a State policy. Changes in legislation are accompany the expectational regime, thus setting the bases for a continuous vulneration of due process and rule of law even after the end of the suspension of rights period.

#### 4.1.2 Permanent legal reforms: substantial and procedural reforms of the Criminal Code and its impact

In the case of El Salvador, the punitive model against gangs was enhanced by the declaration of the State of Emergency. While several guarantees and rights are not applied during that time, the perpetual use of this exceptional tool has been detrimental for the respect of human dignity

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<sup>32</sup> Margaret Satterthwaite, Special Rapporteur on the independence of judges and lawyers; Fionnuala Ní Aoláin, Special Rapporteur on the promotion and protection of human rights while countering terrorism; Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions.

and the prevention of ill-treatment. The exceptional regime is accompanied by several reforms in the criminal laws that have toughened prison sentences, changed the criminal procedure and overall have created a framework that supposes for the detainee a complete vulnerability against the punitive power of the Salvadoran State. For instance, modifications involve the pre-trial detention, length of criminal sentences, vulneration of the independent and impartial judge and procedural guarantees. These elements together with the State of Emergency, contribute with the vulneration of human dignity, in particular for gang members.

Regarding pre-trial detention, it is a mechanism that allows for detention of an individual while it is while it is being judged to determine their responsibility. This cautionary measure is one of the toughest due to the fact that the individuals is put in detention before their responsibility is determines. Its main objective is to avoid the individual from facing justice or to restrict the possible interference with the case by destroying evidence or threatening witnesses. In the case of El Salvador, the Criminal Procedure Code in article 8 established the maximum time for pre-trial detention being proportional to the alleged crime committed. It establishes a maximum of 12 months for lesser crimes and 24 months for severe crimes with the possibility of a 12-month extension in cases of appeal. The case-law developed by the Salvadoran Constitutional Court established the absolute character of the time limit and that the length is considered until there is a firm sentence against the individual (Salvadoran Constitutional Court, 2011)<sup>33</sup>. In 2022, after the declaration of the State of Emergency, the Legislative Assembly modified article 8 in two particular ways. Firstly, for certain crimes tied to extortion, terrorism and other gang activities, there is no maximum time length for pre-trial detention. Secondly, hat it will remain undefined (Legislative Assembly, 2022)<sup>34</sup>. Additionally, the reforms prohibited the use of other cautionary measures than pre-trial detention. Before the State of Emergency, the judge was allowed, depending on the crime, to determine the type of cautionary measure to adopt for each case. During all the process, the cautionary measures could be revised and changed. The reform of article 2 of the Salvadoran Criminal Procedure Code established the impossibility to adopt alternative cautionary measures in cases of crimes related to gangs, terrorism and all activities within the Anti-Gang Law of 2010 and the revised versions. The logic is to avoid judges from exercising their competences in defining and analyzing case by case situation and ultimately

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<sup>33</sup> Hábeas Corpus Resolution 501-2019, del 21/10/2020, <https://sv.vlex.com/vid/sentencia-n-501-2019-862780272>

<sup>34</sup> See Legislative Decree N° 339, del 30/032022, <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/DEFEE597-6A3F-4B36-A16E-897F128BC1D6.pdf>



using other types of cautionary measures to free possible gang members. This absolute approach and modification are understood in the light of previous anti-gang strategies where high number of individuals allegedly gang members were detained but then freed due to the lack of evidence or the possibility of adopting cautionary measures. Considering the regional standard defined by the InterAmerican Convention on Human Rights, establishes the prohibition of arbitrary detention and the prompt presentation before a judge in article 7:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. *No one shall be subject to arbitrary arrest or imprisonment.*
4. *Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.*
5. *Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.*
6. *Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.*

Moreover, the InterAmerican Case Law establishes in *Suarez Rosero v. Ecuador*, the State duty to not restrain the individual's liberty beyond the strict limit that would assure the efficient development of the investigations (IACtHR, 1997, § 77). If there is no direct evidence of this, the then pre-trial detention should not be considered as first option, as it is a cautionary measure and not a punitive measure. Also, the ICCPR in article 9.3 establishes that individuals facing trial should not automatically and generally face pre-trial detention:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

In El Salvador, considering the current Criminal Procedure Code, the presumption of innocence is also vulnerated due to the recent modification. Even considering the regional standards, any action that does not uses other cautionary measure but pre-trial detention is breaching article

7.5 of the IACHR. There is no possibility of revising the cautionary measure for other nor having a maximum time-length making the situation uncertain allowing for a permanent detention regime even before declaring and establishing the individual's criminal responsibility. With the State of Emergency allowing for massive arrests without a warrant and the modification in the Criminal Procedure Code, the increase in prison population is directly related to the increase of administrative detention and the elimination of the temporal limit of pre-trial detention. Resulting in case of torture, inhumane, cruel and degrading treatment or punishment of gang members detained (FDP, 2023, p 12).

Equally important are the substantial criminal reforms aimed to strengthen the punitive State approach in the fight against gangs. The common element of the reforms is the increase in the severity of the sentences by raising the years in prison for certain crimes tied to gang activities. The reforms in the Criminal Code for unlawful association in article 345 varies from 3 to 15 years but the sole fact of belonging to any group proscribed by the Anti-Gang Law carries a sentence ranging from 20 to 30 years in prison<sup>35</sup>. Any other conduct carried out by members of the group can increase the sentence ranging from 20 to 45 years at maximum. Crimes comprised in the Anti-Gang Law regarding drugs were punished with 3 to 15 years. With the current reforms, the punishment ranges from 20 to 30 years in prison if the crime is committed by a member of an organization proscribed by the Anti-Gang Law. Furthermore, reforms to the Law Against Terrorist Act increased the sentences from 15 to 20 years for terrorist members and for the head or *jefe* a 30 to 40-year sentence<sup>36</sup>. In addition, reforms to the Youth Criminal Law establishes the possibility to condemn up to 20 years of prison to children from 16 to 18 years-old and up to 10 years children over 12<sup>37</sup>. The Special Law Against Extortion was also reformed by increasing the severity of the sentences if the crime is committed by any individual who is a member of a proscribed organization under the Anti-Gang Law, establishing a 20-30-year prison sentence<sup>38</sup>. These kind of reforms aims to use the punitive power of the State against particular individuals who, even before committing any crime, are judged as guilty for the sole

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<sup>35</sup> See Decreto Legislativo 337. 30/03/2022, Available: <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/BC86F420-8646-4F56-B9BC-EC48F0D20D38.pdf>

<sup>36</sup> See Decreto Legislativo 341. 30/03/2022. Available: <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/18515D69-2D5C-45DF-8B87-7D45156FAA97.pdf>

<sup>37</sup> See Decreto Legislativo 342. 30/03/ 2022. Available : <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/F206BC53-441C-4D71-93FF-FCEF3C15FC89.pdf>

<sup>38</sup> See Decreto Legislativo 343. 30/03/2022. Available: <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/1383BA5D-C84A-40C5-8937-A0476401259F.pdf>

fact of belonging to a criminal organization. Highlighting the approach followed by the ICCPR in article 10 it states that:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Even individuals detained need to be treated with dignity. The final objective of the prison system is the rehabilitation of the detainee and its eventual reincorporation to society. Moreover, it established the need to separate children and youth from adults deprived of their liberty. In particular considering children, the Convention for the Rights of the Children established prison as the last resort and applied for the least amount of time. The vast majority of the reforms were approved just a couple of days after the State of Emergency was declared. These reforms were developed to support the implementation of the State of Emergency. However, the increase in the criminal sentences as a mechanism to punish and persuade the commission of crimes is not proved to be directly linked nor there is evidence of a reduction in criminality (FDP, 2023, p 12). On the contrary, increasing the punishment as a mechanism to cope with criminality goes against the principle of legality, human dignity and proportionality enshrined in the Salvadoran Constitution in articles 15, 86, 1, 2, 4, 10, 11. Also, regional case-law established in *Uson Ramirez v. Venezuela* that even if the internal legislator has the authority to determine the content of the laws, rationality and proportionality should be the guiding principles of the State when implementing its punitive power in order to avoid the abuse of power when establishing crime punishment (IACtHR, 2009, §87). The constant increase of the criminal sentences contravenes article 27 of the Salvadoran constitution that proclaims a humanist approach on the prison system:

The death penalty shall be imposed only in cases foreseen by the military laws during a state of international warfare. Imprisonment for debt, perpetual punishment, infamy, outlaws (las proscriptivas) and all forms of torture are prohibited. The State shall organize the penitentiary centres with the objective of reforming offenders, educating them, and teaching them work habits, seeing to their re-adaptation [into society] and the prevention of crime

Human dignity is vulnerated by dehumanizing gang members due to their behaviour. The increase in deprivation of their liberty reduces individuals to mere objects controlled and monitored by the State resulting in a biological existence within the prison cells (FDP, 2023, p 13). The consequences of applying an iron-fist legal framework may result in the pressure of the prison system that is not designed to cope with an excessive quantity of inmates resulting in overcrowd and inhumane condition in prisons.

Legal guarantees that assures due process were also touched by the recent reforms. These guarantees ensure the right to be judged by a competent authority, impartially established by law. In this matter, three reforms were made regarding faceless judges, the creation of specialized judicial court for hearings and the possibility to regroup individual cases under the same group and judge them. As a measure to ensure the protection and safety of the justice operators, it is established that names and identity of judged shall remain unknown to avoid any identification by the individuals in trials. Even during virtual or in-presence trials, there shall be mechanisms to ensure that their identity remains unknown. By reforming the Criminal Procedure Code in its article 73-A, the State seeks to incorporate protection measures in order to ensure the integrity of judges. In addition, a specialized court was created in order to treat cases related to Organized Crime. In particular, the reform seeks to respond to current criminal reforms in order to expedite work carried out by the judiciary as a result of the State of Emergency and the increase in criminal cases derived from it. Lastly, through a particular decree N°803, the State allowed the possibility to regroup individual cases into groups according to the prosecutor's criteria. This in order to better respond to the framework of the State of Emergency. It was established that individuals who share common criminal structure, denomination, functioning territory or any other criteria may result in the regroup of them within a same trial. These reforms by nature contradict the rule of law and the due process established by the Salvadoran Constitution. The creation of specialized, *ad hoc*, tribunals to process individuals capture during the State of Emergency violates article 190 of the Constitutions and the Case Law of the Salvadoran Constitutional Court where it states that the jurisdiction need to be certain and created before the event. Specialized tribunals create uncertainty in the application of the law and of its jurisdiction. Independence and impartiality are also touched by these reforms. Individuals detainees under the State of Emergency see their due process and legal guarantees vulnerated. In particular, the ICCPR established the absolute

character of the requirement of competence, independence and impartiality of a tribunal in its article 14:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees [...]

In this sense, the Human Rights Committee has established the absolute character of due process and judicial independence even during emergency contexts, in its General Comment N°32 establishing that:

19. [...] article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

The duty and right to be judged by a jurisdiction created previously is a fundamental principle of due process related to the equality before the law because it protects and ensures the individual the possibility to be treated as equals. The InterAmerican Court developed this reasoning in *Apitz Barbera et al v. Venezuela* implying the right for individuals to be judged by ordinary jurisdiction established beforehand and the State has the duty not to create nor substitute this jurisdiction to avoid the judgment by special tribunals created ad hoc to judge

certain crimes (IACtHR, 2008, §50). Concerning the impartiality, the current reforms allowing faceless judges vulnerates the principles mentioned above. The impossibility of knowing the identity of the judge avoids the possibility to identify possible circumstances that would oblige the judge to excuse himself from treating the case. The Human Rights Committee tackled this issue in the General Comment N° 32 as a strategy used against terrorists:

23. Some countries have resorted to special tribunals of “faceless judges” composed of anonymous judges, e.g. within measures taken to fight terrorist activities. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives from the proceedings; restrictions of the right to a lawyer of their own choice; severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado; threats to the lawyers; inadequate time for preparation of the case; or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant. Tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial.

Moreover, this figure is incompatible with the InterAmerican system of protection as established by the InterAmerican Court in *J v. Peru* considering that by using faceless judges, there is a violation of article 8.1 of the InterAmerican Convention because it avoids individuals to know the identity of their judges and thus to value their capability and competences which eventually could lead to a disqualification of the judge to hear the case, and finally to exercise their right to defend against an independent and partial tribunal (IACtHR, 2013, 184). In addition, the new competence designed to the prosecutor to regroup individual cases based on certain characteristics violated El Salvador’s engagement regarding the ICCPR in its article 14 that ensures the right to equality before courts and tribunals and to a fair trial as understood by the General Comment N°31 § 13:

13. The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision [...].

The inequality present during the hearing, created by the capacity of the prosecutor to regroup different individual cases, leaves no room for the defendant to appeal that decision and thus creating an uncertain and vulnerable situation before the law and the judiciary. The impact deriving from these reforms have a grave character that which go against basic guarantees that allow for equality before the law and due process. The right to be heard and tried before an impartial and independent judge are vulnerated permanently during the State of Exception in El Salvador.

Finally, another set of reforms regard the witnesses and massive trials. These too contribute to the vulneration of due process and the inability for individuals to defend themselves against the punitive power of the State. Firstly, modification to article 221 of the Criminal Procedure Code established the possibility for a third witness to contribute with information regarding a particular case<sup>39</sup>. This witness was not there to presence a situation but heard information concerning the individual that witnessed in person the situation. This figure was established only in extraordinary cases, nevertheless the reform allows for these witnesses to contribute when there is a high danger to the integrity of direct witnesses in cases involving gang members. This procedure was declared unconstitutional by the Constitutional Court of El Salvador due to the incompatibility of the witness contribution and the right to defence that has to be exercised by the individual<sup>40</sup>. The cases of admission for third witnesses in cases is exceptional but after the reforms, individuals accused of being part of a banned group in the Anti-Gang Law automatically allows for the contribution only of third witness. On the other hand, the possibility of having massive trials in the framework of the State of Emergency was established by reforming the Law Against Organized Crime<sup>41</sup>. There is no precise number limit to which group trial should follow. According to information derived from investigations, there have been trial up to 500 individuals at the same time since the start of the State of Emergency (Cristosal, 2022). The risk of having massive proceeding, involving many individuals could vulnerate and condemn many innocent individuals due to the lack of individual attention of the judge in the particular case. Individual right to exercise defence is completely obliterated. These

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<sup>39</sup> Legislative Decree No. 339 de 30 /03/2022, published in Diario Oficial No. 65, Tomo 434, <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/DEFEE597-6A3F-4B36-A16E-897F128BC1D6.pdf>.

<sup>40</sup> Constitutional Court, Sentence Habeas Corpus 89-2019 de 18/09/2020. Pag.3, <https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/1/2020-2029/2020/09/E16C6.PDF>.

<sup>41</sup>Legislative Decree No. 547 de 26/10/2022, published in Diario Oficial No. 225, Tomo 437, <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/0DBB218F-96FA-40CB-A5BC-C12E9F09CFFF.pdf>.

proceedings go against international and regional standards. At an international level, the ICCPR in its article 14.3 (a) states that:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him [...].

Together with the InterAmerican Convention in article 8.2 (b):

- [...] 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
- a. the right of the accused to be as or does not speak the language of the tribunal or court;
  - b. prior notification in detail to the accused of the charges against him [...]

Both international legal instruments are being vulnerated by the State of El Salvador. These guarantees, essential for due process, has been eliminated due to the massive numbers held during the proceedings. With high numbers, individuals do not know exactly the motive of their detention, reducing their possibility of a proper defence. The defence has limited time, reducing the effective possibility to exercise a proper defence, having around 4 minutes to defend around 400 to 500 individuals (OHCHR, 2023).

During the State of Emergency, and having the majority in the Legislative Assembly, President Bukele was able to put forward a comprehensive set of reforms to codes and laws that supported his fight against gangs using extraordinary means. Nevertheless, it results that the various reforms impact the enjoyment and the respect of several rights regarding due process and effective justice. With the vulneration of these rights, there is an open door that allows for further impunity and the commission of further violations of rights in particular concerning the prison populations that relies totally on the dependence of the State. El Salvador has institutionalized a punitive model to fight gang violence. The progress made in reducing homicide rates and neutralizing gangs is due to the misuse of a constitutional tool, that together with the historical control over the legislative, has helped perpetuate the strategy against gang members.



## 4.2 The institutionalization of punitive State action

President Bukele's Administration has applied a fierce anti-gang strategy involving the suppression of rights and the direct combat against gang members. The high number of detainees and the conditions to which they are subject can amount into ill-treatment and other human rights violations. As security is re-established, the popularity and the effectiveness of the model has positioned El Salvador as one of the safest countries in the continent. These results have awarded President Bukele an outstanding popularity that led to the reconfirmation of a second mandate and the continuation of the application of punitive measures of security. As the extraordinary use of punitive measures continues, the international community and organizations show preoccupation as for the sustainability of those policies.

### 4.2.1 The punitive prison model as a torture regime

As a result of continuous operations of Armed Forces and Police, El Salvador has detained around 76,000 individuals (Cristosal, 2024, p 3). From the start of the State of Emergency, security agents spread into communities and zones where the presence of gang was diffused. The exceptional regime has facilitated the massive detention of individuals without following the normal procedure of due process or respect of human rights standards. Even if there is a margin of manoeuvre to face exceptional cases, the reiterate use of the Emergency Regime has transformed the exceptionality into a normal situation. The legislation reforms accompanied by the State of Emergency have allowed for arbitrary detention through anonymous complaints or tips that, in many cases, were motivated by an economic compensation offered by the government but not necessarily true (*Ibid*). The permanent suspension of rights in El Salvador has increased the individual's vulnerability against the State punitive approach to fight gangs. In order to support the pressing increase in prison population, as a result of arbitrary and massive detentions, El Salvador announced the construction of a mega-prison in June 2022, the Terrorist Confinement Centre (CECOT). The mega-prison has the capacity to hold up to 40,000 inmates and it is located 74 km outside San Salvador. The complex, that covers around 7 football stadiums, has 33 blocks and 19 watchtowers besides several levels of walls and electrified fences as shown in figure 4:



Figure 5 El Salvador mega-prison CECOT<sup>42</sup>

The prison has 32 cells in each pavilion, in which iron bunk beds are distributed, together with 2 showers and sinks from which the flow is controlled by the guards. There are also black-out cells, with no windows, to close bad-behaved prisoners. The mega-prison was inaugurated after 8 months in 2023 and the prisoners receive a terrorist treatment (Poveda, 2024, p 125). It is the biggest prison in Latin America with the capacity to hold the vast majority of the detainees resulted from the State of Emergency. There is very strict control over the access to the prison, which remains strongly monitored by the military and the police. Inside the complex, prisoners sleep in bunk-beds without mattresses or pillows and without any kind of privacy due to the overhead supervision of the cells by prison guards. An artificial light is turned on 24 hours a day in order to monitor and check on prisoners (BBC, 2024). Temperature during the day can reach up to 35°C without any source of ventilation as shown in figure 5:

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<sup>42</sup> Ministerio de Justicia y Seguridad Publica, “Presidente presenta el CECOT”, 21/01/2023, <https://www.seguridad.gob.sv/presidente-nayib-bukele-presenta-el-centro-de-confinamiento-del-terrorismo/>



Figure 6 CECOT cell with inmates<sup>43</sup>

The inauguration of CECOT was the culmination of the punitive strategy of the State against gangs. There are several organizations and human rights bodies that have provided evidence of a large-scale arbitrariness in the arrests and cases of torture and ill-treatment that are facilitated by the suppression of guarantees (Timmerman, 2023). The Inter-American Commission on Human Rights emphasized the deplorable conditions faced by persons deprived of liberty in El Salvador, and that the State of Emergency has worsened them (InterAmerican Commission on Human Rights, 2022). With the particular case of CECOT, the new built prison can host around 156 per each cell. According to official plans, the cells measure around 91m<sup>2</sup> which translates to 0,58m<sup>2</sup> per person (BBC, 2023). According to the Red Cross Committee, the recommended dimension is 3,4m<sup>2</sup> per individual in shared cells, which in CECOT represents only 1/7 of the internationally recommended standard (*Ibid*). Moreover, prison population lacks adequate nutrition as three portions of food are distributed daily but only meagre meals composed of beans and rice. Meals are eaten with bare hands, as cutlery is not distributed and detainees released declared that they were constantly hungry (Serrano, 2024). With strict security

<sup>43</sup> Marvin Recintos, AFP, “Detenidos en CECOT”, 04/02/2024, <https://exame.com/mundo/cecot-a-prisao-que-e-simbolo-da-luta-contras-gangues-em-el-salvador-e-trunfo-politico-de-bukele/>

measures, to avoid riots or confrontation, the prison system does not allow for daylight time. Session of sport activities are organized within the facilities and for a limited amount of time outside the cells as shown in figure 6:



*Figure 7 Prisoners practicing sport within the prison<sup>44</sup>*

The Salvadoran strategy of dehumanizing gang members is materialized as well by shaving all inmates' heads as a humiliation tactic every five days, to maintain a homogeneous figure within the prisons as shown figure 7:

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<sup>44</sup>Alvaro Cruz, El Mundo, “Reos del CECOT bajo dura rutina y vigilancia 24h”, 27/11/2023, <https://diario.elmundo.sv/nacionales/reos-del-cecot-bajo-dura-rutina-y-vigilancia-extrema-las-24-horas>



Figure 8 Prisoners with shaved heads and formed in tight lines<sup>45</sup>.

The cumulative and systematic nature of those actions may constitute in ill-treatment if not torture (Oette, 2024, p 144). The strategy followed by Bukele's Administration seek to incarcerate suspected gang members in conditions that are degrading due to the lack of meeting basic needs and minimum standards (*Ibid*). The prison system deliberately inflicts pains, suffering and degradation on individuals, impacting not only them but also their families. The massive media campaigns organized by the government, popularizes torture and ill-treatment which celebrates the punitive power of the State against prisoners. The Salvadoran prison system has naturalized the attack on the individual's self-determination, personal control and autonomy, vulnerating the human dignity (*Ibid*). There are several stressors that creates a torturing environment where contextual elements, conditions and practices obliterate the will and control of the victim, comprising the self (Perez-Sales, 2017, p 284). The final objective of creating such environment is to destroy gangs by destroying gang members. The current punitive prison model hosts several features that can be understood as basic characteristics of torture, it being a radical attack on human dignity, intense degradation and the complete

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<sup>45</sup> Presidencia El Salvador, AFP, "Un año desde el inicio del Estado de Excepción", 01/03/2023, <https://www.semana.com/mundo/articulo/esta-es-la-cifra-de-presos-que-nayib-bukele-trasladara-a-carcel-de-maxima-seguridad-en-el-salvador/202341/>

exclusion from the human community (Mavroniloca, 2021, p 46). Since the beginning of the State of Emergency, the State has developed a systematic practice to demonize and bestialize gang members, de, individualizing and representing them as inherently dangerous who threatens the life of the nation (Oette, 2024, p 145). By representing gang members as sub-humans, that have traded their humanity and respect of their rights on account of their suspected acts or conduct (*Ibid*). In a second moment, imprisoned individuals are subject to an instrumentalization to pursuit the policy aim of controlling gang violence.

In 20 month of the State of Emergency, recurring patterns of violations were manifested, including torture and ill-treatment of persons in detention centres (Amnesty International, 2023, p 21). The *Movimiento de Víctimas del Régimen de Excepción* (MOVIR) recorder 190 death of individuals, and Cristosal recorded 139 more in State custody, but the number may be higher, nevertheless deaths remain underreported (*Ibid*, p 33). Violent deaths report present traces of torture and ill-treatment including lacerations, hematomas, injuries from sharp objects, strangulation, among others (Cristosal, 2023). At least 28 individuals presented a violent death connected to torture. There are several common elements in those deaths presenting bodies with bruises, cuts or strangulation (Cristosal, 2023, p 32). Prison populations in El Salvador is under a State policy of punishment and terror. Several individuals who were released from prison confirm that many of the individuals arrested are not gang members, amounting only to 30% of the overall detained population (Cristosal, 2023, p 37).

Testimony of a man, 31 years, detained during the State of Emergency:

“...In the cells there were old people and youth, that in the vast majority did not have tattoos or anything related to gangs. When the prison guards arrived to look for tattoos, from 250 they only took 6. I recall a man that lived in the USA and came to visit his family in El Salvador. He has detained while building a fence in a property he bought. He suffers from pressure problems. When his family arrived to the detention centre, he was not released because police already processes him. He was not set free and he remain imprisoned the poor guy...”<sup>46</sup>

Ill-treatment has been recorded by Cristosal during the detention procedure. Several interviews state rude and harsh treatment against detainees’ individuals that are received by State agents, handcuffed and by their knees, the forced to walk while they beat them or leave them for several hours by the sun.

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<sup>46</sup> Cristosal, 2023, <https://crisosal.org/ES/informe-un-ano-bajo-el-regimen-de-excepcion-una-medida-permanente-de-represion-y-de-violaciones-a-los-derechos-humanos/>

Testimony of a man, 24 years, detained in Izalco Prison:

“They arrived around 16:00, they were instructed to leave the bus and placed by their knees in the central court of cement. There they remained for half an hour while the custodian threatens them constantly about never seeing the sun again. Their knees started to bleed and they were placed in a room to be processed”<sup>47</sup>

Testimony of a man, 20 years, administrative detention in La Esperanza Prison:

“The guards took a group and beat them. They were told not to lower their hands or else, they would have been killed. The guards yelled that they will not come out alive. All the prisoners started to worry. While they hold them there, electric current was applied to them until one of them started to bleed. They beat them up really bad.”<sup>48</sup>

While detained, many of the individuals are trapped in small cells, covered with iron walls which makes breathing difficult. In the vast majority of prisons, temperature ranges from 32° to 34°C and it further increased due to overcrowded condition in the cells. Many of the detainees faint due to the heat (Cristosal, 2023, p 39). Inmates lack water and personal hygiene contributing to inhumane conditions of detention. Some receive a cup of water or a small water bottle for the day.

Testimony of a man, 20 years, detained in Mariona prison:

“The sanitary was clogged and the previous inmates left everything dirty and filthy. The water came out of the sanitary and there was no place to shower. 5 days past and I was not able to go to the toilette. Every day, prison guards gave us 3 buckets to use as a toilette. There was no running water and people had to sleep near the toilette water. Then they developed a skin illness. When I arrived to the cell there were 45, after 10 days we became 252 persons”

The high level of overcrowding in the prisons force inmates to sleep 2 or 3 individuals per bed and even in the floor of the sanitary system (Cristosal, 2023, p 40). These conditions and testimonies highlight the inhumane conditions in which inmates live. The InterAmerican Court of Human Rights established in an Advisory Opinion OC-29/22 the State duty to guarantee the dignity of inmates:

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<sup>47</sup> Cristosal, 2023, <https://cristosal.org/ES/informe-un-ano-bajo-el-regimen-de-excepcion-una-medida-permanente-de-represion-y-de-violaciones-a-los-derechos-humanos/>

<sup>48</sup> *Ibid.*

40. To comply with the right of every person deprived of liberty to be held in detention conditions that there not be overcrowding), the separation of detainees according to different categories, infrastructure, cubic meters of air, as well as access to basic rights and services, such as medical care, ventilation and natural light, a bed, adequate conditions of hygiene and health care, food, access to water, access to education, work and recreation for the rehabilitation and social readaptation of the detainees, a schedule of visits, solitary confinement and incommunicado, among others. The Court has incorporated into its case law the principal standards on prison conditions and on the duty of prevention that the State must ensure with respect to persons deprived of liberty, by interpreting and establishing the content and scope of Article 5(2) in light of the InterAmerican and international corpus iuris in the area and, where applicable, in connection with other rights set forth in Convention. The Court reiterates, as it has done on several occasions, that it will refer to diverse interpretative sources in order to give content and scope to Article 5(2).

It results that the conduct carried out by El Salvador regarding prison conditions goes against the case law and the InterAmerican Convention on Human Rights as for the right to life and personal integrity that constitute a clear state duty towards its citizens.

Physical punishment is practiced systematically in all prisons in El Salvador. This practice is carried out, once a day, when security elements take prisoners out of their cells to count them (Cristosal, 2023, p 40). Violent practices are also performed when inmates complain, in this case they use pepper spray against them or physical violence. (*Ibid*). It is important, in understanding torture cases or ill-treatment, the intensity and the intention behind the acts perpetrated. In the case of the prisons system in El Salvador, guards systematically inflict physical pain to the detainees, the aim being to punish gang members and other prisoners that were detained. There are several testimonies of actions that may amount to torture as established by the Convention Against Torture:

Testimony of a detainee in Mariona prison:

They put prisoners by their knees and took them to the cells. Prisons guards yelled “you will never see the sun again”. Every day they threw pepper spray early in the morning and prisoners received just one meal a day. There was a hole, used as sanitary. Prison guards asked if the inmates were hungry. After a positive reply, he threw the food on the ground, where it mixed with dirt and other unhealthy matter. The next day, human rights defenders entered the facility, but beforehand we were threatened with electric punishment if anyone reported something” (Cristosal, 2023, p 41).

There are several punishment cells used for inmates that complain, talk during night hours, or do not answer to the prison guard’s questions. Generally, these cells are very small, with no light access, no sanitary services and limited access to water sources. Several testimonies of



inmates confirm that the majority of individuals who enter those cells come out extremely thin or even die:

Men, 21 years:

“A man was transferred to the punishment cell. There he received tortilla and beans to eat. After several days they took him to the nursery, extremely weak. There he received good treatment but only to be beaten and further punished later on. They transferred him to the punishment cell again. When he came out after 20 days, he had a brain injury. He was transferred to a hospital, with the mouth broken and shaking”<sup>49</sup>

The report made by Cristosal Foundation also mentions executions within the prison system in particular Mariona, Izalco y Quezaltepeque prisons. Testimonies highlight the fear in denouncing those deaths and the possibility of having hit and run style or also being killed by physical violence (Cristosal, 2023, p 41).

The physical and psychological violence that is inflicted to the individuals detained during the State of Emergency, and in particular gang members, is a deliberate strategy followed by the government of President Bukele to control gangs. According to several testimonies, physical punishment is inflicted systematically to detainees and inmates are exposed to practices of harassment and threats of inflicting them pain daily. In the last annual report of the Procurator for the Defence of Human Rights of El Salvador has reported an increase in verification requests involving cases of detained people. Nevertheless, the institutions acknowledge that the power to monitor the rights of people deprived of their liberty has been severely reduced due to the State of Emergency (Amnesty International, 2023). The State of Emergency has enabled a process of systematic vulneration of rights concerning detained gang members. Constitutional safeguards are not being respected, and institutions such as the PPHR cannot carry out its fundamental job of ensuring the respect and protection of fundamental rights. The prison population, in particular gang members, can be ill-treated without any public opinion consequences.

Torture is firmly based on applying severe pain and suffering, qualified to both physical and mental. Both dimensions can be related and in the case of El Salvador are applied. Psychological torture can be understood as procedures calculated to disrupt profoundly the senses or personality (Reyes, 2007, p 595). The pattern of physical violence is shown in a

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<sup>49</sup> Cristosal, 2023, <https://cristosal.org/ES/informe-un-ano-bajo-el-regimen-de-excepcion-una-medida-permanente-de-represion-y-de-violaciones-a-los-derechos-humanos/>

permanent base, as highlighted by testimonies. There is also psychological violence, applied thanks to the permanent State of Emergency enacted and normalized. Several non-physical methods of torture and ill-treatment are widespread in the Salvadoran prisons such as sleep deprivation, solitary confinement, fear, humiliation, forced nudity, exposure to high temperatures and light deprivation (*Ibid*, p 598). The consequence of the application of torture and ill-treatment impact negatively in the health of the detainee. The Salvadoran strategy to fight gangs has derived in a widespread disintegration of the personality of the gang member detained (Special Rapporteur on Torture, 2004, § 45). Notably, the systematic degrading nature of the methods used by El Salvador, are applied in a humiliating manner, thus considered degrading treatment. For instance, the forced removal of clothes for the purpose of humiliation is an degrading act, that can be seen in prisons (Nowak, 2006, p 838).

#### 4.2.2 The confirmation of a punitive populism approach to gang violence

After two full years, El Salvador has been under a permanent State of Emergency. The recurrent enactment is possible due to the control exercised by President Bukele of the legislative branch and its influence in the judiciary. The measure has been accompanied by permanent legal changes that reduces legal guarantees for detainees and promotes massive arbitrary detentions without following due process. The disregard for the prison population has amounted to several cases of torture and ill-treatment that is institutionalized and widespread. By the end of President Bukele's term, homicide rate in El Salvador has dropped to historical levels, becoming one of the less violent nations in Latin America but a State with the highest incarceration rate in the world. The current prison rate is of 1086 inmates per 100,000 inhabitants (Fair & Walmsley, 2024, p 2). Very far from the second State, Cuba with 794 inmates per 100,000 inhabitants (*Ibid*). This outstanding performance in security has given President Bukele a very high popularity amongst Salvadorans. The elections held in February 2024, confirmed with a high margin, the re-election and the continuation of the punitive State practice against detained gang members with no foreseen end to the vulneration of the prohibition of torture and ill-treatment. With his victory, the punitive populism approach developed in El Salvador could be considered effective for the electoral process and the re-election wanted by President Bukele.

The re-election of President Bukele came with no surprise but had to overcome certain restrictions. In El Salvador, immediate re-election was forbidden by the Constitution. In article 152, the Salvadoran Constitution establishes that:

[...] shall not be candidates for the President of the Republic:  
1. He who has filled the Presidency of the Republic for more than six months, consecutive or not, during the period immediately prior to or within the last six months prior to the beginning of the presidential period; [...]

Together with article 154, which regulates the temporal length of the presidency as:

The presidential period shall be of five years, and shall begin and end on the first of June, *without the person who exercised the Presidency being able to continue in his functions one day more.*

Both articles establish a clear limit to re-election. Moreover, article 88 complements this logic by establishing:

The principle that a President cannot succeed himself (*alternabilidad*) is indispensable for the maintenance of the established form of government and political system. Violation of this norm makes insurrection an obligation.

Article 88 clearly establishes an obligation of the citizens to respond in the case an individual wanted to seek for immediate re-election. There is a clear restriction to the right of an individual to participate in politics if seeking a re-election on the Executive. In 2021, the new Constitutional Court ruled in favour of allowing the President for an immediate re-election against a 2013 ruling against. The previous ruling 163-2013<sup>50</sup> established that the prohibition for immediate re-election analysing 6 articles of the constitution and declared a period of 10 years between periods to be able to be re-elected for office (Cristosal, 2023, p 14). The Constitutional Court highlighted the importance of the temporal window between the time a President steps down and when he runs for a second mandate. This window of 10 years would contribute with the limitation of temporal power and ultimately avoid for a degradation of the system. The new Constitutional Court in 2021, distanced itself from the 2013 decision and interpreted the restriction of article 152 broadly. The Court established the possibility of an immediate re-election only if the citizens decided to vote and confirm again the individual<sup>51</sup>.

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<sup>50</sup> See Constitutional Court, Decision 163 - 2013, <https://www.jurisprudencia.gob.sv/VisorMLX/PDF/163-2013.PDF>

<sup>51</sup> See Constitutional Court, Decision 1-2021, <https://www.jurisprudencia.gob.sv/portal/apls/2021/09/1-2021PerdidaDerechosCiudadania.pdf>

Together with a special license, the President need to leave vacant the Executive for 6 months prior to the election. The judges argued that the interpretation of the limit responded to the needs of 40 years ago and that the ultimate decision was in the hands of the citizens (BBC, 2023). With this favourable ruling, President Bukele ran for re-election in 2024 no without concerns. The US Embassy in El Salvador expressed preoccupation to the democratic principle in El Salvador stating:

This decline in democratic governance damages the relationship that the United States strives to maintain with the government of El Salvador and further erodes El Salvador's international image as a democratic and trustworthy partner in the region. The United States calls on President Bukele to demonstrate his stated commitment to democratic governance, including the separation of powers and the rule of law.

In February 2024, President Bukele won the presidential election with 82% of votes, followed by FMLN candidate with 6% and ARENA with 5% (CNN, 2024). The Legislative Assembly, that reduced the number of legislators from 84 to 60, was also won by Bukele's party controlling 54 seats<sup>52</sup>. This electoral result paves the way for another 5 years of Bukele's iron fist and punitive strategy against gang members. With the violence under control, due to the extreme misuse of the State of Emergency and the suppression of rights, now El Salvador faces economic challenges. With the promise to maintain a strong policy against gangs, now Salvadorans face other challenges such as poverty and structural inequalities that Bukele has promised to tackle. The rule of law in El Salvador has been affected by an increasing popular figure, who challenged the system and managed to assure security in one of the most violent and insecure countries in the globe. The effectiveness of the measures adopted contrasts international principles of rule of law, procedural guarantees, presumption of innocence. As a result, detained gang members are treated in an inhumane way, with several cases of torture and ill-treatment. Nevertheless, the Salvadoran people support the punitive approach followed by the government as, for the first time in the recent history of El Salvador, violence is not a concern for voters.

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<sup>52</sup> See Legislative Assembly, 2023, <https://www.asamblea.gob.sv/node/12804>

## Conclusion

The cost of security is highly paid by those who are considered to be the cause of violence in a society. The protection of human dignity and the logic of human rights protection, addressed to every individual, encounters a practical limit imposed by the State. In particular, even absolute rights such as the prohibition of torture and ill-treatment can be infringed by the State and legitimized by their citizens when practiced against a particular group within the society. For this to happen, a narrative promoting punitive measures has to be implemented and the common image of a gang member must be dehumanize passing from seeing the gang member as a victim to a criminal unworthy of respect or protection.

The case of El Salvador clearly shows that there is an infringement of the absolute prohibition of torture against detainees. As understood under international law, torture is being perpetrated due to the fact that vulnerable groups, such as prison population, are not being attended nor granted the minimum due process standard to defend themselves. Even if the government backs the actions due to the nature of the criminal (terrorist or gang member), it must be stressed that the General Comment n°2 of the Committee against Torture explicitly prohibits acts of torture in all cases and for all categories of criminals. Moreover, the IACAT stressed that the nature of the detainee cannot allow for a disregard concerning the absolute prohibition. The main goal of the government is to use punitive action to intimidate in a systematic manner to deliberately destroy the individual's personality, both being actions prohibited by the InterAmerican Case Law.

Following the research, it is important to stress some recommendations regarding the current situation in order to avoid further disregard of the situation:

- Re-establish the guarantees and normal procedures regarding due process by ending the continuous re-enactment of the State of Emergency.
- Ratify the OPCAT, allowing for regular visits to see the conditions in prisons and to establish a National Preventive Mechanism to ensure a better compliance regarding the prohibition of torture and ill-treatment
- Engage in an open dialogue with NGO's that provide evidence of torture cases, in order to effectively contrast and reduce the cases of torture
- Assess the cases of detainees and ensure reparations for the victims of torture and ill-treatment during the State of Emergency

- Reduce the participation of the Armed Forces in public security activity to avoid possible cases of abuse and human rights violations

By addressing the punitive strategies and their consequences for human dignity, the thesis calls attention about the severe limits and the ineffective results shown during the years in El Salvador. Nevertheless, there is a constant use of punitive strategies to tackle gang violence. It seems that the rapid and reactive reaction of the State is more common than structures and long-term sustainable problems that would tackle the real causes of gangs: poverty and inequality. In a world that looks for rapid and instant solutions, these types of responses could be understood and therefore help to solve in the short terms but not necessarily translate in long-term solutions. Punitive populism is a remedy that reduces the symptoms but does not cure the disease.

It would also be interesting to understand the balance between rights and democracy. Even if liberal democracies are built to avoid the tyranny of the majority, in El Salvador the use of democratic means, such as votes, are used to legitimize and institutionalize practices that infringes a peremptory norm such as the prohibition of torture. It would be worthy to analyse the antagonism of human rights, by populist leaders, whenever they found important limits to their action.

The conditions lived by El Salvador are extremely particular and with difficulty could be applied in other countries of the region. However organized crime, under the form of gangs, is a growing concern for many countries of the region which have to face severe internal problems due to the actions perpetrated by gangs. For this reason, it would be important to promote cooperation and promote a regional understanding about the best practices regarding anti-gang policies in order to better respond to a regional problem.

As for the effectiveness of the punitive model established by President Bukele, many citizens applaud and look up to the model implemented in El Salvador. The risk of not highlighting the real results of the fundamental rights suppression and its consequences for the population can encourage other political leaders to use the same strategies, undermining human rights and the Rule of Law in order to contrast violence generated by gangs. Individuals who commit a crime and infringes the rights of other must face justice. However, this justice should not be arbitrary nor disregard the human nature of the criminal. The cost of security should not infringe human dignity.

Gangs are a social phenomenon that emerges from poverty and inequality. Gang members are also victims of a system that has not given proper opportunities for the development of their human capacity. The real solution to gang violence is development and creating opportunities for individuals. No one is born being a criminal and organize crime fills the primary role of the State by supporting the individuals that form part of them. It would be interesting to further research the role of marginalization and the formation of gangs. Reclaiming the central role of the State and guarantee the conditions for a fair economic growth is the path towards the control and contrast of gangs everywhere.

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