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The Mass Imprisonment of Possible Gang Members: What Was Once Constitutional No Longer Is

ABIGAIL HARTNETT*

I. INTRODUCTION

On March 26, 2022, El Salvador experienced its most violent day since the country's civil war ended nearly thirty years ago.¹ Over sixty people were murdered in one day, seemingly by the country's notorious gangs.² In response to the violence, the President of El Salvador, Nayib Bukele, requested the Legislative Assembly adopt a State of Emergency.³ The Legislative Assembly promptly adopted a thirty-day State of Emergency, which has come to be known as the Regime of Exception (the Regime).⁴ The Regime of Exception has been extended every thirty days since its original implementation.⁵

The Regime of Exception has come at the cost of people's right to freedom of expression, freedom of press, freedom of assembly, and

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1. *El Salvador Declares State of Emergency After Gang Killings*, AL JAZEERA (Mar. 28, 2022), <https://www.aljazeera.com/news/2022/3/28/el-salvador-invokes-state-of-emergency-after-62-killings-in-a-day>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Eddie Galdamez, *The Salvadoran State of Exception Gets Extended for Thirty More Days*, EL SALVADOR INFO (Jan. 9, 2024) <https://elsalvadorinfo.net/the-salvadoran-state-of-exception-gets-extended-for-another-30-days/>.

due process under the law.⁶ More than 70,000 people have been arrested as a result of the Regime's implementation and continued extension.⁷ Although the Constitution of El Salvador (Constitución Política de la República de El Salvador) grants the Legislative Assembly the ability to declare a thirty-day state of emergency in response to serious disturbances of the public order, the continued extension of the Regime of Exception is unconstitutional because the Regime long ago resolved the disturbance gangs pose to public order.⁸ The Regime likely violates the American Convention on Human Rights, as well as the International Covenant on Civil and Political Rights.⁹ However, this note is focused solely on analyzing how the Regime interacts with El Salvador's Constitution.

II. BACKGROUND

El Salvador is not unfamiliar with violence.¹⁰ The country has a long history of military dictatorships, political repression, and limited democratic reform.¹¹ The people of El Salvador suffered through a long civil war that claimed the lives of over 75,000 people.¹² During the country's civil war many citizens immigrated to the United States, particularly to Southern California.¹³ It was there that the initial Salvadoran gangs were established.¹⁴ For a time, El Salvador was

6. *El Salvador's State of Exception, Explained*, ALIANZA AMERICAS (Apr. 27, 2022), <https://www.alianzaamericas.org/region-central-america/el-salvadors-state-of-exception-explained/?lang=en>.

7. Carlos Barrera, *Portraits from El Salvador's nearly 2-year, sprawling crackdown on gang suspects*, NPR (Feb. 6, 2024, 1:44 PM), <https://www.npr.org/sections/pictureshow/2024/02/06/1226991801/el-salvador-state-of-exception>.

8. Carlos Martinez, *Bukele Government Dismantled Gang Presence in El Salvador*, EL FARO (Feb. 3, 2023), https://elfaro.net/en/202302/el_salvador/26694/Bukele-Government-Dismantled-Gang-Presence-in-El-Salvador.htm. (Finding that the presence of gangs in the country is largely gone and that the Regime has managed to undermine the gangs and take control of their territory. The effects of this are felt throughout the country with an overall feeling of safety among residents.)

9. Stephanie M. Huevo, *Marching Back to the Past: Militarism in El Salvador*, ORIGINS (Feb. 2023), https://origins.osu.edu/read/marching-back-past-militarism-el-salvador?language_content_entity=en.

10. Martinez, *supra* note 8.

11. Tariq Zaidi, *A Nation Held Hostage*, FP (Nov. 30, 2019), https://foreignpolicy.com/2019/11/30/el-salvador-gang-violence-ms13-nation-held-hostage-photography/#cookie_message_anchor.

12. *Id.*

13. *Id.*

14. *Id.*

protected from these gangs, but in the late 1980s the United States began deporting gang members back to El Salvador.¹⁵

After the country's civil war concluded in the early 1990s, the country was left with a weak state that was incapable of dealing with the gangs.¹⁶ Without any formal policy, the gangs flourished.¹⁷ MS13 and Barrio 18 became the most prolific gangs in the country and began extorting, torturing, and dismembering residents.¹⁸

Until today, the country's gang problem has remained a consistent problem.¹⁹ Past governments have tried a range of tactics, from tough on crime approaches to negotiating with the gangs themselves.²⁰ Although some policies initially worked, all eventually faltered.²¹ As a result, in March 2022, President Nayib Bukele established the Regime of Exception.²² The Regime was established under Article 29 of El Salvador's Constitution, which allows the government to suspend constitutional guarantees in the case of a serious disturbance to the public order.²³ The Regime has proven to be wildly successful and even critics admit that the gangs have largely been dismantled.²⁴ However, it has come at the expense of many individual rights.²⁵

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Carlos A. Carballo, *El Salvador's Crime Prevention Policies—From Mano Dura to El Salvador Seguro*, Naval Postgraduate School (2015) (Master's thesis, Naval Postgraduate School).

20. *Id.*

21. *Id.*

22. *El Salvador Declares State of Emergency After Gang Killings*, AL-JAZEERA (Mar. 28, 2022), <https://www.aljazeera.com/news/2022/3/28/el-salvador-invokes-state-of-emergency-after-62-killings-in-a-day>.

23. *El Salvador's State of Exception, Explained*, *supra* note 6.

24. Martinez, *supra* note 8.

25. *El Salvador: One year into state of emergency, authorities are systemically committing human rights violations*, AMNESTY INTERNATIONAL (Apr. 3, 2023) <https://www.amnesty.org/en/latest/news/2023/04/el-salvador-state-emergency-systematic-human-rights-violations/> (Amnesty International stated that the majority of the detentions under the Regime are arbitrary. Furthermore, ill-treatment and torture are commonly experienced by those imprisoned and at least 132 people died in government custody without being found guilty of any crime.).

A. *El Salvador's Current Governmental Structure*

El Salvador established their current constitution in 1983.²⁶ The Constitution of 1983 (Constitution) established a government that is republican, democratic, and representative, consisting of three branches: the Executive Branch, the Legislative branch, and the Judicial branch.²⁷ The Executive branch is led by the President and is made up of the Vice President, the Ministers and Vice Ministers of State, and their dependent functionaries.²⁸ The Legislative branch is a unicameral Legislative Assembly (*Asamblea Legislativa*) composed of elected Deputies.²⁹ Finally, the Judicial Branch is composed of the Supreme Court of Justice (*Corte Suprema de Justicia*), the Chambers of Second Instance (*Cámaras de Segunda Instancia*), and the local courts (*Juzgados de Primera Instancia*).³⁰ The Supreme Court is the highest court in the land and is comprised of Magistrates elected by the Legislative Assembly.³¹ The Constitution establishes that the Supreme Court of Justice has a Constitutional Division which is tasked with resolving the petitions of unconstitutionality of laws and decrees and regulations.³² If the constitutionality of the Regime was to be challenged, the matter would be heard before the Court's Constitutional Division.³³ However, the success of such a challenge would be questionable given the lack of judicial independence that currently exists within the country.³⁴

Only Deputies elected to the Legislative Assembly and the President, through his Ministers, have the power to propose laws.³⁵ However, in regard to legislation concerning the judiciary, the

26. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983.

27. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 85, art. 121, art. 150, art. 172.

28. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 150.

29. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 121.

30. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 172.

31. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 173.

32. *Id.*

33. *Id.*

34. *El Salvador: New laws Threaten Judicial Independence*, Human Rights Watch (Sept. 2, 2021) <https://www.hrw.org/news/2021/09/02/el-salvador-new-laws-threaten-judicial-independence>.

35. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 133.

Supreme Court of Justice may propose legislation.³⁶ The Constitution requires that the majority of the Legislative Assembly shall be present to deliberate and pass legislation.³⁷ Importantly, the President's Ministers also have the right to propose to the Legislative Assembly the suspension of the constitutional rights guaranteed by Article 29.³⁸ Article 29 allows for the suspension of certain constitutional guarantees in cases of war, invasion of territory, rebellion, sedition, catastrophe, epidemic, other general disaster, or serious disturbances of the public order.³⁹

B. Constitutional Guarantees and Due Process

The Constitution provides for a broad range of constitutional guarantees and due process protections.⁴⁰ Every person has the right to life, physical and moral integrity, liberty, security, work, property, and possession, and to be protected in the conservation and defense of the same.⁴¹ Furthermore, every person is guaranteed the freedom of expression, the right to associate freely and meet peacefully, and protection from correspondence interference.⁴²

In regard to due process, no person shall be deprived the right to life liberty, property and possession, or any other rights without previously being heard and defeated in a trial under Article 11.⁴³ Moreover, every person accused of an offense shall be presumed innocent until proven guilty and provided with the assistance of a defense lawyer.⁴⁴ If a person is administratively detained, detention should not last longer than seventy-two hours.⁴⁵

36. *Id.*

37. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 123.

38. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 167.

39. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 29.

40. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 2-28.

41. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 2.

42. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 6, art. 7, art. 24.

43. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 11.

44. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 12.

45. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 13.

These constitutional guarantees may be suspended in cases of war, invasion of territory, rebellion, sedition, catastrophe, epidemic, or other general disaster, or serious disturbances of the public order.⁴⁶ This period of suspension of constitutional guarantees shall not exceed thirty days.⁴⁷ However, if the circumstances which motivated the suspension continue, the suspension may be extended for an equal period of time by means of a new decree.⁴⁸ When the circumstances that motivated the suspension of constitutional guarantees disappears, constitutional guarantees shall be re-established.⁴⁹

C. History of violence and prior attempts to resolve gang violence

For most of the twentieth century, El Salvador was ruled by military dictatorships.⁵⁰ Political repression and limited democratic reform was the norm.⁵¹ Incidents of massacres, torture, and disappearances were not rare.⁵² In 1980, following a coup that installed yet another military junta, the country's long and devastating civil war began.⁵³ It is estimated that the civil war resulted in more than 75,000 deaths, 8,000 disappearances, and over 1 million people were displaced.⁵⁴

During the civil war, many Salvadorans fled the country and settled in Southern California where Latinos often lived in communities with one another.⁵⁵ These neighborhoods are where El Salvador's modern day gangs originated from, most notably the Mara Salvatrucha, MS13.⁵⁶ The gangs in these Latino communities first arose as self-defense groups, defending the neighborhood from other

46. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 29.

47. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 30.

48. *Id.*

49. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 31.

50. See generally Mayra Gomez, *The Role of International Intervention in Facilitating Violence and Peace in El Salvador, 1977-1998*, 2 HUM. RTS. REV. 76 (2001).

51. See generally *id.*

52. *Id.* at 77.

53. *Id.* at 79.

54. Irina Carlota Silber, *Mothers/Fights/Citizens: Violence and Disillusionment in Post-War El Salvador*, 16 GENDER & HIST. 561, 562 (2004).

55. Emma Mahern, *La Mano Extendida: The Interaction Between International Law and Negotiation as a Strategy to End Gang Warefare in El Salvador and Beyond*, 24 IND. INT'L & COMP. L. REV. 767, 770 (2014).

56. *Id.*

neighborhoods.⁵⁷ Beginning in the late 1980s, the United States began deporting many Salvadorans with criminal records from Southern California, thus transferring one country's gang problem to another.⁵⁸

At this time, post-civil war El Salvador was a weak state incapable of dealing with new problems.⁵⁹ Upon the arrival of the deported Salvadorans, the country had no re-integration policy, no psychological support, and a serious lack of policy for these gang members.⁶⁰ Without any structure, these former gang members flourished and the gangs expanded resulting in the two most prolific gangs currently in El Salvador, the previously mentioned MS13 and Barrio 18, commonly known as the 18th Street Gang in English.⁶¹

MS13 and Barrio 18 have traditionally operated in a decentralized manner and are financed through daily extortion.⁶² Often these gangs extort anywhere from \$2 to \$3 for small business and \$5 to \$20 for medium-sized business on a daily basis.⁶³ Seventy percent of all businesses in the country are victims of the gang's notorious extortions.⁶⁴

Upon the arrival of gangs in El Salvador, the number of homicides and extortions skyrocketed.⁶⁵ El Salvador became known as one of the most dangerous countries on Earth.⁶⁶ Gangs were not only known for their widespread violence but also for the brutality with which they carried out their attacks.⁶⁷ After firearms, gang members are most likely to use machetes to torture, kill, and dismember their victims.⁶⁸ In 2015, there were 103 murders for every 100,000 inhabitants.⁶⁹ In comparison, in Guatemala, one of El Salvador's neighbors, the murder rate was 29.5 per 100,000 inhabitants in 2015.⁷⁰ Additionally, it is estimated that as many as 500,000 Salvadorans were

57. *Id.*

58. *Id.* at 771–72.

59. *Id.* at 772.

60. *Id.* at 771.

61. *Id.* at 770–72.

62. *Id.* at 772.

63. Zaidi, *supra* note 11.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. David Gagne, *InSight Crime's 2015 Homicide Round-up*, INSIGHT CRIME (Jan. 14, 2016), <https://insightcrime.org/news/analysis/insight-crime-homicide-round-up-2015-latin-america-caribbean/>.

70. *Id.*

involved in gangs either through direct participation or through coercion and extortion.⁷¹ The gangs have laid claim to neighborhoods throughout the country where they are the de facto authority and where they extort local residents and businesses.⁷² An opposition to the gangs inevitably results in a death sentence to one's self or family.⁷³

Prior government administrations have tried, and failed, to contain and solve the gang violence.⁷⁴ Beginning in 2003, President Francisco Flores, revealed his plan to rid the country of gangs.⁷⁵ It was called *La Mano Dura*, the "Iron Fist" in English.⁷⁶ In an effort to curb gang power and violence, *La Mano Dura* increased police raids in gang-held areas, enacted tougher sentences for suspected gang members, and permitted arrests of suspected gang members on the basis of their physical appearance.⁷⁷ *La Mano Dura* resulted not only in prisons that were overcrowded but actually resulted in increased murder rates.⁷⁸

Despite the lack of success with *La Mano Dura*, the next president, President Antonio Saca, followed in his predecessor's footsteps and announced Super Mano Dura.⁷⁹ Super Mano Dura built off of its predecessor's foundation and permitted the same types of illegitimate arrests.⁸⁰ Again, murder rates increased.⁸¹

In 2012, under a new administration, the country tried a different tactic—negotiating with the gangs.⁸² The government began negotiating with the leaders of MS13 and Barrio 18.⁸³ With the help of the Catholic clergy and non-governmental organizations, meetings were held between the government and gang leaders that were imprisoned at the time.⁸⁴ The government pressured the leaders of MS13 and Barrio 18 into forming a truce and reducing the number of killings in return for a transfer to lower security prisons with more liberal visitation policies and more chances to interact with other gang

71. Zaidi, *supra* note 11.

72. INT'L CRISIS GRP., *supra* note 68, at 3.

73. *Id.* at 3, 6.

74. *Id.* at 10-12.

75. Carballo, *supra* note 19, at 24.

76. *Id.* at 25.

77. *Id.* at 26.

78. *Id.* at 27.

79. Carballo, *supra* note 19, at 1.

80. *Id.* at 25-26.

81. *Id.* at 25-27 & 27 fig.1.

82. *Id.* at 36.

83. *Id.* at 12, 36.

84. *Id.* at 35-36.

members.⁸⁵ It has also been reported that these truces included pacts that gangs would be allowed to continue their extortion.⁸⁶

When looking at homicide rates alone, the negotiated truce reduced the homicide rate to the lowest rates in a decade.⁸⁷ However, extortions and other violent crimes continued to traumatize the nation.⁸⁸ After a small time period of success, in which public criticism of the truce rose, the truce failed.⁸⁹ The homicide rate began to rise yet again and stayed high for the years to follow.⁹⁰ Until the Regime, government administrations continued to flip flop between a strong hand approach and forming truces with the gangs: when one approach failed, the government defaulted to the other.⁹¹

D. *Current Régimen de Excepción*

In March of 2022, following the murder of eighty people in one weekend, President Nayib Bukele ordered the Legislative Assembly to activate an emergency decree.⁹² The Legislative Assembly complied and passed the emergency decree, which is known widely as the Regime of Exception (*Régimen de Excepción*).⁹³

The Legislative Assembly is permitted to pass such a decree under Article 29 of the Constitution which allows constitutional guarantees to be suspended under serious disturbances of the public order.⁹⁴ Under the Regime of Exception, the government suspended the constitutional freedom of association, the right to be informed of the reasons behind detention, the right to counsel, the guarantee of limited detention, and revoked privacy protections around communication and correspondence.⁹⁵ Most recently, the government approved group trials for the tens of thousands of people who have been arrested.⁹⁶ Prosecutors will be allowed to simultaneously try hundreds of people

85. *Id.* at 36-27.

86. Zaidi, *supra* note 11.

87. *Id.*

88. Carballo, *supra* note 19 (manuscript at 45).

89. *Id.*

90. *Id.*

91. *Id.*

92. *El Salvador's State of Exception, Explained*, *supra* note 6.

93. *Id.*

94. Constitución de la Republica de El Salvador [CONSTITUTION] Dec. 1983, art. 29 (El Sal.).

95. *El Salvador's State of Exception, Explained*, *supra* note 6.

96. Nelson Renteria, *El Salvador backs mass trials for thousands held in crime crackdown*, REUTERS (July 26, 2023), <https://www.reuters.com/world/americas/el-salvador-approves-group-trials-amid-crime-crackdown-2023-07-26/>.

who are from the same area of the country or who are alleged to be part of the same criminal group.⁹⁷ The country's security minister has suggested that up to 900 defendants may be prosecuted at a time.⁹⁸

Under the Constitution, an emergency decree may only be implemented for thirty days but may be extended thereafter if the circumstances which prompted the decree remain.⁹⁹ The Regime was initially implemented in March 2022,¹⁰⁰ and since then, it has been extended every thirty days.¹⁰¹

Since its implementation, the Regime has resulted in the mass imprisonment of 73,000 people.¹⁰² In the first six months more than 52,000 people were arrested.¹⁰³ As of early October 2023, the number surpassed 70,000 people.¹⁰⁴ Furthermore, at least 174 people have died while in state custody.¹⁰⁵ Many have been detained while inside their homes, at work, or while relaxing in backyard hammocks.¹⁰⁶ Individuals have been detained for having a tattoo, living in an area with many gang members, or having a criminal record.¹⁰⁷

E. Domestic and international response to the Regime

The Regime has been overwhelmingly supported by Salvadorans who still live in the country, as well as the ones who have

97. *Id.*

98. *Id.*

99. Constitución de la Republica de El Salvador [CONSTITUTION] Dec. 1983, art. 30 (El Sal.).

100. *El Salvador's State of Exception, Explained*, *supra* note 6.

101. Galdamez, *supra* note 5.

102. Barrera, *supra* note 7.

103. U.S. EMBASSY IN EL SALVADOR, EL SALVADOR 2022 HUMAN RIGHTS REPORT (2022).

104. *Relatives of jailed Salvadorans say 'mass trials' unconstitutional*, REUTERS (Oct. 13, 2023), <https://www.reuters.com/world/americas/relatives-jailed-salvadorans-say-mass-trials-unconstitutional-2023-10-13/>.

105. Renteria, *supra* note 98.

106. Mary Beth Sheridan, *How to match Bukele's success against gains? First, dismantle democracy.*, WASH. POST (Sept. 19, 2023), <https://www.washingtonpost.com/world/2023/09/19/bukele-salvador-gang-crackdown/>.

107. *Id.*; Efren Lemus, *Salvadoran Schoolteacher Denounces Systematic Torture in Prison*, EL FARO (May 11, 2023), https://elfaro.net/en/202305/el_salvador/26841/salvadoran-schoolteacher-denounces-systematic-torture-in-prison. (Alexander Eduvay Guzmán Molina, a schoolteacher, was one of the first people arrested under the Regime. Guzman is the assistant director of a secondary school in Ilopango, San Salvador as well as running a small taxicab business on the side. He was initially arrested on charges of "illicit associations" and spent six months in prison before he was released. imprisoned, Guzman experienced and witnesses guards beating prisoners with batons, spraying mace inside cells, hunger, and overcrowding. Guzman argued that it was a policy of torture by the state.).

immigrated abroad.¹⁰⁸ When President Bukele was first elected he pledged to eradicate gangs in the country within three to four years.¹⁰⁹ Most Salvadorans continue to support the Regime, despite the horrors that have occurred as a result of it.¹¹⁰

Additionally, neighboring countries like Honduras and Guatemala have shown great support for the Regime.¹¹¹ Citizens of these neighboring countries have held pro-Bukele marches.¹¹² Honduras has followed suit with a similar crack-down on their gangs and Guatemala's former presidential candidate called El Salvador a "model for reference."¹¹³ Costa Rica's security minister, Jorge Torres, urged his government to follow in El Salvador's footsteps.¹¹⁴

The Regime has found support in South America as well.¹¹⁵ The mayor of Lima, Peru, who is also eager to win the next presidential election, promised a "Bukele plan" to crack down on crime in the city.¹¹⁶ Additionally, pro-Bukele street parades have made waves in Chile.¹¹⁷

Despite the Regime being largely popular among Salvadorans at home and abroad, domestic, and international human rights organizations, local opponents of the plan, and foreign governments have expressed concern about the Regime and the reports of arbitrary arrests, invasion of homes, unfair judicial procedures, and the deaths of detainees.¹¹⁸

The local Humanitarian Legal Aid (SJH) organization has spoken out about inmates who have died while imprisoned as a result

108. Hilary Goodfriend, *Indefinite Exception*, SIDECAR (Sep. 8, 2023), <https://newleftreview.org/sidecar/posts/indefinite-exception>.

109. Zaidi, *supra* note 11.

110. Goodfriend, *supra* note 110.

111. Will Freeman, *Nayib Bukele's Growing List of Latin American Admirers*, AMERICAS Q. (Feb. 16, 2023), <https://www.americasquarterly.org/article/nayib-bukeles-growing-list-of-latin-american-admirers>. ("To his many critics, El Salvador's President Nayib Bukele has become a ruthless strongman, trampling due process and other civil protections. But within Latin America, his militarized crackdown on gangs is winning him a fan club that won't stop growing...").

112. *Id.*

113. Brian Osgood, *Could El Salvador's gang crackdown spread across Latin America?*, AL JAZEERA (Aug. 7, 2023), <https://www.aljazeera.com/news/2023/8/7/could-el-salvadors-gang-crackdown-spread-across-latin-america>.

114. Freeman, *supra* note 113.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See infra* notes 118-25.

of inmates the Regime.¹¹⁹ SJH noted that of the deaths they were investigating, “none of them are profiled as gang members, all without having been defeated in court.”¹²⁰

Additionally, Humans Rights Watch found that human rights violations were not isolated incidents but rather similar violations were carried repeatedly across the country by both the military and the police.¹²¹ They found that police commanders appear to have established a quota policy, requiring officers to arrest a certain number of people every day, and claim they can arrest anyone they want.¹²² Furthermore, many families were refused information about detainees’ whereabouts.¹²³ Amnesty International has held that the deaths of those in state custody, the arbitrary detention, mass criminal prosecutions, and the indiscriminate imprisonment of thousands of people are incompatible with an effective, fair, and lasting public security strategy.¹²⁴

In April 2022, Secretary of State Anthony Blinken issued a press statement expressing the US government’s concern over the implementation of the Regime.¹²⁵ The government was concerned

119. *Cuatro de los detenidos bajo el régimen de excepción de Bukele en El Salvador aparecieron muertos en una fosa común* [Four of those detained under Bukele’s emergency regime in El Salvador were found dead in a mass grave], INFOBAE (Feb. 26, 2023), <https://www.infobae.com/america/america-latina/2023/02/26/cuatro-de-los-detenidos-bajo-el-regimen-de-excepcion-de-bukele-en-el-salvador-aparecieron-muertos-en-una-fosa-comun/>.

120. *Id.*

121. “*We Can Arrest Anyone We Want*” *Widespread Human Rights Violations Under El Salvador’s State of Emergency*, HUM. RTS. WATCH (Dec. 7, 2022), <https://www.hrw.org/report/2022/12/07/we-can-arrest-anyone-we-want/widespread-human-rights-violations-under-el>.

122. *Id.*

123. Will Grant, *El Salvador gangs: Mass arrests bring calm but at what price?*, BBC (May 18, 2023), <https://www.bbc.com/news/world-latin-america-65596471>. (One resident of Soyapango, a formerly gang held district in San Salvador, was stopped on his way soon after the Regime was imposed, the police arrested him, took possession of his cellphone, accused him of unlawful association, and detained him. His mother has not seen or heard from him since, despite the 18 days she spent outside of the jail in an effort to gain information about her son’s whereabouts).

124. *El Salvador: One year into state of emergency, authorities are systematically committing human rights violations*, AMNESTY INT’L (Apr. 3, 2023), <https://www.amnesty.org/en/latest/news/2023/04/el-salvador-state-emergency-systematic-human-rights-violations/>; Grant, *supra* note 122. (A resident of Soyapango claims that he sister was taken into custody, despite never been convicted on any gang-related crime at the time of arrest, and later died from what authorities say was a cancerous tumor on her nose. The resident claims her sister was not sick when she was taken into custody and still was not convicted of gang-related crimes at the time of her death.)

125. Press Statement, Anthony J. Blinken, *Violence and Threats to Free Speech in El Salvador* (Apr. 10, 2022), <https://www.state.gov/violence-and-threats-to-free-speech-in-el-salvador/>.

specifically with the criminalization of reporting on certain gang activities and how the Regime attempts to censor the media, prevent reporting on corruption and other matters of public interest, and silence critics of the Salvadoran government.¹²⁶ Blinken reiterated that “[j]ournalists must have the freedom to do their jobs without fear of violence, threats, or unjust detention.”¹²⁷

III. ANALYSIS

Prior to the Regime of Exception, the quality of life for the residents of gang controlled neighborhoods was bleak.¹²⁸ Residents could not wear clothing displaying certain numbers that were associated with rival gangs, the high homicide rate throughout the country was always a looming concern, and most suffered from extortion.¹²⁹ However, today life is very different.¹³⁰ Children can play soccer late into the night, families can go out without fear, and no longer are residents paying monthly fees to the gang extortionists.¹³¹ The implementation of the Regime may have been constitutional at the time of its passing because of the serious disturbance gangs brought to the social order, but today the situation is greatly improved and there is no longer a serious disturbance of the public order.¹³² Therefore, it is unconstitutional for the government of El Salvador to continue the curtailment of constitutional rights and due process through the continued extension of the Regime.

The Regime was implemented under Article 29 of the Constitution.¹³³ As previously discussed, Article 29 allows the government to curtail basic constitutional rights under certain situations. Article 29 states:

126. *Id.*

127. *Id.*

128. Natalie Kitreoff, *El Salvador Decimated Its Ruthless Gangs. But at What Cost?*, THE NEW YORK TIMES (Apr. 9, 2023) <https://www.nytimes.com/2023/04/09/world/americas/el-salvador-gangs.html?searchResultPosition=2>.

129. *Id.*

130. *Id.*

131. *Id.* (Kitreoff quotes Felix Ulloa, El Salvador’s vice presidents, who states that now, “people can go out, they buy things, go to the movies, to the beach, they see soccer games. We’ve given people back their liberty”).

132. *Id.* (In areas and neighborhoods that were historically violent, such as Las Margaritas in Soyapango, abandoned houses that belonged to gang members are being renovated and reoccupied by new tenants and car owners are free to park their cars without having to pay \$10 a month to the gang extortionists.)

133. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 29.

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 and may be accomplished by a decree of the Legislative Organ or the Executive Organ, as the case may be.¹³⁴

At the time of the Regime's implementation, the government had determined that the level of gang violence and gang control in the nation had constituted a serious disturbance of the public order.¹³⁵ As a result, the government exercised their constitutional power to curtail one's right to the guarantees established in Articles 5, 6, 7, and 24 of the Constitution.¹³⁶

It is likely that the Regime was initially constitutional.¹³⁷ Prior to the Regime, most everyone would have agreed that gang violence was a serious issue in El Salvador.¹³⁸ It was common for Salvadorans to witness gang members gleefully committing acts of violence against civilians, resulting in a society that was paralyzed by fear that anybody could be an informer for a gang, that nobody is safe, and that anyone can disappear.¹³⁹ However, after the country's homicide rate peaked in 2015, the rate has continued to steadily decrease.¹⁴⁰ In 2022, the year the Regime was implemented, the country achieved one of its lowest homicide rates in decades.¹⁴¹ Given the decline in the country's

134. *Id.*

135. *El Salvador's State of Exception, Explained, supra* note 6.

136. Constitución de la Republica de El Salvador [Const. of the Republic of El Salvador] Dec. 1983, art. 5, 6, 7, 24. (Article 5 provides for the freedom of movement. Article 6 provides for the freedom of expression and the freedom of press. Article 7 provides for the freedom of assembly and the freedom of association. Article 24 provides for the right to privacy regarding telecommunications.).

137. Zaidi, *supra* note 11.

138. *Id.*

139. *Id.*

140. Homicide rate in El Salvador from 2014 to 2022, Statista, [https://www.statista.com/statistics/696152/homicide-rate-in-el-salvador/#:~:text=El%20Salvador%3A%20homicide%20rate%202014%2D2022&text=In%202022%2C%20there%20were%20approximately,100%2C000%20inhabitants%20in%20El%20Salvador.\(In%202016,there%20were%2081.2%20homicides%20per%20100,000%20inhabitants.In%202017,there%20were%2060%20homicides%20per%20100,000%20inhabitants.In%202018,there%20were%2051%20homicides%20per%20100,000%20inhabitants.In%202019,there%20were%2036%20homicides%20per%20100,000%20inhabitants.In%202020,there%20were%2019.7%20homicides%20per%20100,000%20inhabitants.In%202021,there%20were%2017.6%20homicides%20per%20100,000%20inhabitants.In%202022,there%20were%208.7%20homicides%20per%20100,000%20inhabitants.\)](https://www.statista.com/statistics/696152/homicide-rate-in-el-salvador/#:~:text=El%20Salvador%3A%20homicide%20rate%202014%2D2022&text=In%202022%2C%20there%20were%20approximately,100%2C000%20inhabitants%20in%20El%20Salvador.(In%202016,there%20were%2081.2%20homicides%20per%20100,000%20inhabitants.In%202017,there%20were%2060%20homicides%20per%20100,000%20inhabitants.In%202018,there%20were%2051%20homicides%20per%20100,000%20inhabitants.In%202019,there%20were%2036%20homicides%20per%20100,000%20inhabitants.In%202020,there%20were%2019.7%20homicides%20per%20100,000%20inhabitants.In%202021,there%20were%2017.6%20homicides%20per%20100,000%20inhabitants.In%202022,there%20were%208.7%20homicides%20per%20100,000%20inhabitants.))

141. *Id.*

homicide rate, the mass imprisonment of potential gang members, and the relative safety that has taken hold in society, the continued extension of the Regime is no longer constitutional as the serious public disturbance no longer exists.¹⁴²

The newfound safety that has been established with the Regime is most evident in Soyapango, a district in El Salvador's capital, San Salvador.¹⁴³ Soyapango was once a battleground for MS13 and Barrio 18.¹⁴⁴ It was normal for the two gangs to dump victims' bodies in ditches, streams, roadsides, and wasteland across the district.¹⁴⁵ Local residents were unable to go from one neighborhood to the next because of the turf wars between the gangs.¹⁴⁶ If residents dared to venture into a neighborhood controlled by a rival gang, it was likely they would be killed.¹⁴⁷ Now the reality is very different for the residents of Soyapang—they may come and go as they please.¹⁴⁸

In February 2023, one of El Salvador's largest newspapers, *El Faro*, announced that the presence of gangs is largely gone.¹⁴⁹ *El Faro* stated that President Bukele's Administration had managed to undermine the gangs and take control of their territorial presence.¹⁵⁰ The Administration's ability to undermine the gangs' extortion efforts resulted in near collapse of their internal structures.¹⁵¹

El Faro's reporters traveled through the country to fourteen different communities that had lived under the gangs' control and spoke with business owners, veteran gang leaders, and police officers.¹⁵² When asked directly whether the government had destroyed the gangs, the veteran gang leader stated that the gangs have been ruined and rephrased the reporter's question by stating that "if what you mean to ask whether are no longer any cipotes [gang members] with presence in these places, its true. They're no longer there."¹⁵³ By

142. *See infra* note 142-146.

143. Will Grant, *El Salvador gangs: Mass arrests bring calm but at what price?*, BBC (May 18, 2023), <https://www.bbc.com/news/world-latin-america-65596471>.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* ("This [area] was run by the MS_13. If we went into the nieghbourhood next to ours, run by the 18th Street [gang], you might never come back. Now we can come and go as we please.").

148. *Id.*

149. Martinez, *supra* note 8.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

isolating gang members from their leaders in prison, the veteran gang member argues, the gangs were left with a fragmented structure and no capacity to make important decisions.¹⁵⁴ Former police officers have even acknowledged that the measures addressed the gang problem.¹⁵⁵ A police officer, who has more than twenty years of experience, stated that “[t]he gangs as we knew them, as a national structure, no longer exist.”¹⁵⁶

The turf wars that historically prevented people from visiting neighborhoods controlled by the rival gang, causing families and friends to meet in neutral locations in an attempt to avoid punishment, are largely over.¹⁵⁷ Soyapango’s neighborhoods were famously divided among MS13 and Barrio 18.¹⁵⁸ For years, Las Margaritas, a neighborhood within Soyapango, was a bastion of MS13.¹⁵⁹ A resident of Las Margaritas explained that the gang functioned much like the police: by controlling who entered the neighborhood, demanding residents received permission from the gang before a relative visited, and determining how much one should pay in extortion fees for their vehicle or business.¹⁶⁰ Today, the resident claimed, there were no gang members left in Las Margaritas.¹⁶¹

Residents of former gang controlled neighborhoods have done something that they previously could never have ever dreamed of, they openly spoke with journalists about the gangs in the middle of the street and in broad daylight.¹⁶² Previously, residents would have only told reporters that they did not know anything regarding the gangs.¹⁶³ All over the country, locals are seeing life come back into markets, soccer fields, parks, etc.¹⁶⁴

154. *Id.*

155. *Id.*

156. *Id.*

157. *See infra* notes 155-159 and accompanying text.

158. *Id.*

159. *Id.*

160. *Id.* (“The gang was like the police: They charged you \$20 for every vehicle, and if you didn’t pay, they’d steal it. If a relative wanted to visit, you had to ask for permission from the *bichos* [gang members]. If you had a business, you had to pay them. Now none of them are left.”).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (In Nahuizalco, in the west of El Salvador, one park used to be a constant battlefield between three gangs. Today, tourists visit the park. In eastern San Miguel, there was a strip of land that that [sic] was once controlled by MS13 and La Mirado Locos, a smaller gang. The two gangs would regularly meet there. Today, residents meet up on weekly basis to clean up the trash and are planning to build a children’s park in its place.).

In San Salvador, El Salvador's capital city and busiest city, gang violence has largely disappeared.¹⁶⁵ In the Center District of the city there are 40,000 formal and informal vendors that twelve million people transit through on a daily basis.¹⁶⁶ Previously, gangs laid claim to individual streets which prohibited vendors from selling a meal a mere ten yards from where they prepared it.¹⁶⁷ Today, this problem is greatly reduced.¹⁶⁸

Even critics of the Regime admit that it has, to some extent, produced tangible results.¹⁶⁹ For example, the Deputy Director of human rights at the Passionist Social Service, a non-profit institution that works in sectors affected by gangs, has stated that the gangs have largely been dismantled and weakened.¹⁷⁰ Moreover, opposition parties to the current administration accept the results of the Regime.¹⁷¹ The leader of the country's prominent right-wing political party, ARENA, conceded that the Regime has produced a serious loss for the gangs.¹⁷²

The current situation with gangs and gang violence within El Salvador no longer justifies the extreme measures of the Regime. The serious public disturbance to the social order no longer persists as testified by many residents, police officers, and business owners.¹⁷³ It is no longer justified for the administration to deny people their right to freedom of expression, freedom of press, freedom of assembly, and their right to due process under the law.

IV. CONCLUSION

The continued extension of the Regime of Exception is unconstitutional. Although the Regime was likely constitutional when it was initially passed in March 2022, its continuous extension every 30 days is unconstitutional because gangs no longer pose a substantial risk to the public order.¹⁷⁴ It is time for the government to reinstate the

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* (“You can circulate in communities that were controlled by gangs and feel calm in public spaces. Regardless of whether we agree with the President’s vision, it’s unobjectable.”).

173. *Id.*

174. *El Salvador Declares State of Emergency After Gang Killings* (Mar. 28, 2022), <https://www.aljazeera.com/news/2022/3/28/el-salvador-invokes-state-of-emergency-after-62-killings-in-a-day>.

constitutional guarantees granted to the people of El Salvador. When the Regime was initially passed, gangs controlled much of the country's territory and prevented residents from living without fear.¹⁷⁵ Today, residents of former gang controlled neighborhoods can live without paying extortion fees, come and go as they please, and speak freely about their experiences with the gangs without fear of repercussions.¹⁷⁶ Given the results of the Regime, it is no longer constitutional to continue extending the Regime as the disturbance to the public order no longer exists.

175. *Life Under Gang Rule in El Salvador*, International Crisis Group (Nov. 26, 2018), <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador>.

176. Martinez, *supra* note 8.