

Are **crimes** **against humanity** being committed in **El Salvador's "War on Gangs"?**

A closer look at human rights violations under
the country's State of Exception is urgently needed

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The people of El Salvador have been living under a State of Exception, purportedly implemented to combat gang violence, for two years now. During that time, Salvadoran civil society groups and international organizations have documented serious human rights violations committed against thousands of people detained under the pretext of this security policy. **The question now being raised is: might the violations being committed under El Salvador's current security policies amount to crimes against humanity?**

EL SALVADOR'S CURRENT STATE OF EXCEPTION

Throughout the early 2000s El Salvador was plagued by violence: gang-related violence in particular. The numbers of homicides were staggering for such a small country. In 2015, for example, the murder rate was over 104 homicides per 100,000 inhabitants, one of the highest in the world.¹ Since taking office in June 2019, President Nayib Bukele has claimed that public security is the top priority of his administration, seeking to position himself as the leader of a “war on gangs” by adopting harsh policies to combat organized criminal groups that have long held significant power in the country.

March 2022 saw a spate of violence—allegedly carried out by gang members—that killed 87 people over a three-day period.² Independent investigative media sources have alleged that the violence followed the collapse of secret negotiations between the Bukele government and gang leaders.³ In response, President Bukele asked Congress to approve a State of Exception (also referred to as a State of Emergency).

El Salvador's Constitution, like that of other States in the hemisphere, allows for the temporary suspension of certain constitutional rights under a State of Exception, designed to operate as a time-limited response to extraordinary circumstances that pose a dire threat to national life. The relevant articles of El Salvador's constitution, Article 29, specifies ‘war, invasion, sedition, catastrophe, epidemic or other grave catastrophe, or grave alteration of public order,’ and Article 30 stipulates that states of exception and their associated suspensions of rights should last no longer than 30 days and can be renewed only once.⁴ Despite this, El Salvador's ongoing State of Exception has now been renewed 23 times since its introduction.⁵

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1 See Arron Daugherty, “El Salvador is Most Violent Nation in Western Hemisphere,” January 4, 2016, available at <https://insightcrime.org/news/brief/el-salvador-is-most-violent-nation-in-western-hemisphere/>. For comparison in 2015 Guatemala's homicide rate was 30 people per 100,000, while Chile's was 3 per 100,000. See David Gagne, “Insight Crime's 2015 Homicide Round-up,” January 14, 2016, available at <https://insightcrime.org/news/analysis/insight-crime-homicide-round-up-2015-latin-america-caribbean>.

2 *El Faro*, “Las víctimas del día más violento”, April 3, 2022, available at https://elfaro.net/es/202204/el_salvador/26107/Las-v%C3%ADctimas-del-d%C3%ADa-m%C3%A1s-violento-del-siglo.htm.

3 *El Faro*, “Audios de Carlos Marroquín revelan que masacre de marzo ocurrió por ruptura entre Gobierno y MS”, May 17, 2022, available at http://elfaro.net/es/202205/el_salvador/26175/Audios-de-CarlosMarroquin%C3%ADn-revelan-que-masacre-de-marzo-ocurri%C3%B3-por-ruptura-entre-Gobierno-y-MS.htm. See also the Center for Strategic and International Studies: “Constraining States of Exception”, June 8, 2023, available at <https://www.csis.org/analysis/constraining-states-exception#Eng>.

4 Article 31 moreover stipulates that all rights must be restored immediately there is a change in the conditions that led to the decree.

5 In February, as they had consistently since March 2022, the Salvadoran Congress approved yet another renewal of the State of Exception. Asamblea Legislativa, “La seguridad ciudadana y la paz social continuarán con nueva prórroga del régimen de excepción”, February 10, 2024, available at <https://www.asamblea.gob.sv/node/13092>.

DETENTIONS UNDER THE STATE OF EXCEPTION

Well over **76,000 people, including minors, have been detained under the State of Exception**, accused of having ties to gangs.⁶ Many or most of these detentions appear to be occurring without any reasonable grounds for suspecting that the person may have committed a crime. Mere physical appearance—including having tattoos—seems to be enough to put people at risk of arrest, with young men from poor districts a particular target. **Arrests of this nature are in themselves discriminatory, and may well qualify as arbitrary:** according to the United Nations Working Group on Arbitrary Detention, under customary international law,

“The legal basis justifying (...) detention must be accessible, understandable, non-retroactive and applied in a consistent and predictable way,” and **“an essential safeguard against arbitrary arrest and detention is the ‘reasonableness’ of the suspicion on which an arrest must be based.”**⁷

Moreover,

“A detention, even if it is authorized by law, may still be considered arbitrary if it is premised upon an arbitrary piece of legislation or is inherently unjust, relying for instance on discriminatory grounds. An overly broad statute authorizing automatic and indefinite detention without any standards or review is by implication arbitrary.”⁸

In addition to **detentions on a mass scale (including arbitrary detentions), enforced disappearances, whether of short or longer duration,**⁹ have also been documented during the State of Exception.¹⁰

DUE PROCESS GUARANTEES AND TREATMENT OF DETAINEES

Prior to the State of Exception, El Salvador’s criminal justice system, while undoubtedly imperfect, offered at least the possibility of respect for the due process of law, leading to a fair trial. Mass arrests of people in poor neighborhoods—now commonplace under the State of Exception—were not the norm, and a person detained on suspicion of an offense could assert the right to be brought before a judge, be represented by counsel, and obtain a founded decision as to whether they would or would

6 In November 2023 the Salvadoran Congress acknowledged 73,272 ‘incarcerations’ or ‘captures’ of people it called ‘gang members’ or ‘terrorists.’ By February 2024, the figure had climbed to 76,630 and the official language of announcements differentiate those affected, from those it called ‘honorable citizens’ or ‘the honorable population.’ Respectively, Asamblea Legislativa, “Régimen de excepción continuará garantizando la seguridad de la población”, November 8, 2023, available at <https://www.asamblea.gob.sv/node/13000>, and “La seguridad ciudadana y la paz social continuarán...” op. cit.

7 A/HRC/22/44, December 24, 2012, III.D.62

8 Op.cit., III.D.63, emphasis added. Likewise, the UN Group of Human Rights Experts on Nicaragua has pointed out that, “[a]ccording to International Criminal Tribunals jurisprudence, the deprivation of a person’s liberty is deemed arbitrary, and therefore unlawful, when there is no legal basis to justify the initial deprivation of liberty. If domestic law is relied upon as a justification, the relevant provisions must not contravene international criminal law.” A/HRC/52/CRP.5, March 7, 2023, para. 1039.

9 Short-term enforced disappearances occur when a person arbitrarily detained or abducted by State agents is held incommunicado, or at an undisclosed location, for a short period of time (from a few hours to a few days). The UN Committee and Working Group on Enforced and Involuntary Disappearances have made it clear that such episodes qualify fully as enforced disappearances, to which no minimum duration applies.

10 See a report submitted by DPLF and others to the aforementioned UN Committee and Working Group: DPLF et. al, *Aportes para el Comité contra la Desaparición Forzada (CED) y el Grupo de trabajo sobre las desapariciones forzadas o involuntarias (WGEID) de Naciones Unidas sobre las desapariciones de corta duración*, July 2023, available at https://www.dplf.org/sites/default/files/contribuciones_a_desapariciones_de_corte_duracion_en_el_salvador.pdf.

not be held in pretrial detention. Prisoners held on remand had the right to receive visits from family and from their lawyer. These and other due process rights are increasingly being denied to those held under the State of Exception.¹¹

Held in overcrowded prisons, denied access to counsel or family visitation, and with inconsistent access to food or medicine, **many detainees have also been subjected to severe torture and ill-treatment.**¹² Reports include accounts of beatings and electrocution, some resulting in the death of the victim.¹³ According to Salvadoran civil society organizations, at least 200 people **died in State custody** during the first months of the State of Exception,¹⁴ some from direct violence, others due to lack of medical attention for injuries, or being deprived of needed medication for pre-existing health conditions. It is likely that at least some of these deaths can be classified as **extrajudicial killings**, that is, the ‘deliberate killing of individuals outside of any legal framework’.¹⁵ Elements to consider include: 1) the victims were in State custody at the time of their deaths, entailing the State’s responsibility to protect their right to life and physical integrity; and 2) most, if not all, of these deaths occurred at the hands of State agents, either through action—torture, deliberate denial of medical care, etc. —or omission (i.e. negligence, including the failure to provide medical attention).

‘COLLATERAL DAMAGE’ OF THE STATE OF EXCEPTION, OR POSSIBLE CRIMES AGAINST HUMANITY?

As we have seen, then, credible reports exist alleging that thousands of serious human rights violations have been committed since March 2022 under El Salvador’s State of Exception. Precise figures for each category of violation, as indeed for deaths in custody, use of torture, and even exact numbers of detainees, remain to be determined, but there is no question that the numbers are large, in absolute as well as relative terms.¹⁶ Despite this, relatively little attention has as yet been paid by the international

11 See Human Rights Watch and Cristosal, *We Can Arrest Anyone We Want: Widespread Human Rights Violations Under El Salvador’s ‘State of Emergency,’* December 7, 2022, available at <https://www.hrw.org/report/2022/12/07/we-can-arrest-anyone-we-want/widespread-human-rights-violations-under-el>. See also the report by Salvadoran human rights NGO Cristosal, *Un año bajo el régimen de excepción: una medida permanente de represión y violaciones a derechos humanos*, May 2023, available at <https://cristosal.org/ES/informe-un-ano-bajo-el-regimen-de-excepcion-una-medida-permanente-de-represion-y-de-violaciones-a-los-derechos-humanos/>; or Amnesty International, *Detrás del velo de la popularidad: represión y regresión en materia de derechos humanos en El Salvador*, December 2023, especially pp. 16, and 21–24, available at <https://www.amnesty.org/es/documents/amr29/7423/2023/es/>.

12 DPLF et al., *Informe de organizaciones de derechos humanos de la Sociedad civil al comité contra la tortura de las Naciones Unidas*, 2022, available at https://www.dplf.org/sites/default/files/informe_-_comite_contra_la_tortura_cat78_el_salvador.pdf.

13 Cristosal, *Un año bajo el régimen de excepción...* op.cit.

14 See Cristosal, *Un año bajo el régimen de excepción...* op.cit. Since Cristosal’s report was published, civil society has reported dozens more deaths of detainees arrested under the State of Exception (see Héctor Silva Avalos, “Una persona muere cada cuatro días en las cárceles de Nayib Bukele en El Salvador”, Infobae, September 24, 2023, available at: <https://www.infobae.com/america/america-latina/2023/09/24/una-persona-muere-cada-cuatro-dias-en-las-carceles-de-nayib-bukele-en-el-salvador/>). For more on deaths of detainees, see also DPLF et al., *Muertes en cárceles durante el estado de excepción en El Salvador: presuntas ejecuciones extrajudiciales. Informe de organizaciones de sociedad civil ante el Relator Especial sobre Ejecuciones Extrajudiciales, Sumarias o Arbitrarias de Naciones Unidas*, 2023, available at https://www.dplf.org/sites/default/files/muertes_en_carceles_durante_el_estado_de_excepcion_en_el_salvador_-_presuntas_ejecuciones_extrajudiciales_-_informe_a_relator_especial_de_naciones_unidas.pdf.

15 Mandate of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions. The Organización Mundial Contra la Tortura, OMCT, adds that “[d]eaths resulting from torture or other ill-treatment in detention may also fall into this category (...), if the State fails to address systematic patterns of violence.” See OMCT, *Extrajudicial Killings*, available at <https://www.omct.org/en/what-we-do/extrajudicial-killings>.

16 The State’s own figures, cited above, acknowledge over 76,000 detentions in a country whose entire population, at a little over 6.3 million, is only around three quarters that of New York City.

community, including international criminal law practitioners, to the seriousness and scope of State-perpetrated violations in El Salvador.

There can be no doubt that abuses such as those discussed above—among them, arbitrary detentions, torture, enforced disappearance, and extrajudicial killing—constitute grave human rights violations.¹⁷ Some civil society groups have, however, recently begun to ask whether they might also amount to crimes against humanity under international criminal law.

Were it to transpire that crimes against humanity are being, or have been, committed, this would be a sensitive matter. Some would likely be reluctant to rush to apply the label of crimes against humanity, however warranted it might be, given the echoes of El Salvador's recent past,¹⁸ as well as the undeniable domestic popularity and broader regional appeal of Bukele's draconian public security policies. Bukele's extreme, pro-repression actions and rhetoric have earned him sky-high levels of support from many Salvadorans, not least since they have gone hand in hand with indisputable and significant reductions in visible expressions of gang-related violence.¹⁹ This public reaction is in part understandable, given the immense harm caused by gangs and the size of the challenge presented by their growing hold over the country in recent years. Nonetheless, close scrutiny of the Bukele administration's actions, its claims that they are directed toward combatting violent crime, and the harm that has resulted, is long overdue.

To this end, the remainder of this article asks questions about legal and evidentiary aspects of the crimes against humanity framework and its elements, with particular reference to arbitrary detention. It then considers whether the available information about abuses being committed by State actors under El Salvador's State of Exception constitutes grounds for suspecting that crimes against humanity might have occurred.

ARBITRARY DETENTIONS AS CRIMES AGAINST HUMANITY

Before examining more closely the elements of crimes against humanity in general and considering the possibility that the State of Exception in El Salvador has given rise to such crimes, we would like to briefly address the violation of arbitrary detention specifically and lay out some of the relevant international standards for arbitrary detentions as crimes against humanity, for two reasons. First, arbitrary detentions are perhaps not as universally or intuitively construed as possible crimes against humanity as are other grave violations such as torture or extrajudicial killing. Second, arbitrary detentions are, as we have seen, the human rights violation that has been most extensively documented in El Salvador in the current context.

17 While there is no universally accepted definition, or treaty definition, of "grave," "gross," or "serious" human rights violations, there is consensus that these categories denote violations that are especially repudiated because of the acute nature of the harm they cause. Commonly cited examples include enforced disappearance, extrajudicial executions, and torture. For a more extensive discussion on the subject see Rachel Lopez "The Law of Gravity," *Columbia Journal of Transnational Law* (2020) 58(3):565-622, available at <https://www.jtl.columbia.edu/journal-articles/the-law-of-gravity>, and Juan Pablo Albán Alencastro, "Las graves violaciones de derechos humanos como categoría jurídica," *Pro Homine*, November 3, 2013, available at <https://prohomine.wordpress.com/2013/11/03/las-graves-violaciones-a-los-derechos-humanos-como-categoria-juridica/>.

18 Namely, the 1980-1992 internal armed conflict which led to at least 75,000 deaths, and in which it has been acknowledged that war crimes and crimes against humanity were committed by the State and, in lesser measure, by armed guerrilla forces. See DPLF, *The Peace Accords in El Salvador: After Peace, Transitional Justice?*, March 15, 2022, available at <https://www.dplf.org/en/resources/peace-accords-el-salvador-after-peace-transitional-justice>.

19 See Reuters, "El Salvador says murders fell 70% in 2023 as it cracked down on gangs," January 3, 2024, available at <https://www.reuters.com/world/americas/el-salvador-says-murders-fell-70-2023-it-cracked-down-gangs-2024-01-03/>.

The Rome Statute of the International Criminal Court (ICC), which El Salvador ratified on March 3, 2016, confirms that certain forms, contexts, and types of illegal and arbitrary detention and deprivation of liberty can meet the threshold for classification as crimes against humanity under Article 7.²⁰ Article 7, paragraph 1 of the Statute states:

“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:”

The paragraph goes on to provide a list of qualifying acts, opening with the following six categories (*emphasis added*):

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;**
- (f) Torture;
- (...)

The International Criminal Court’s official Elements of Crimes document sets out the Court’s official interpretation of Article 7 (crimes against humanity). It stipulates the following under Art 7(1)(e), i.e., as elements of the ‘Crime against humanity of imprisonment or other severe deprivation of physical liberty’:²¹

1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

In case law, the ICC has found Art 7(1)(e) to have been engaged—and has therefore allowed charges of crimes against humanity to be preferred—on the basis of evidence of responsibility for deprivation of liberty involving the following conditions:

[i]n the majority of cases, individuals were not given reasons for their arrest, informed of their rights or about the location they were being brought to. On several occasions individuals were arrested violently. Moreover, the majority of detainees were not sent before the competent authorities; the few who were did not receive any legal assistance.²²

20 The ICC Office of the Prosecutor (OTP) has subsequently underlined that “the perpetrator must have severely deprived one or more persons of physical liberty and the gravity of the conduct must have been such that its occurrence would amount to a violation of fundamental rules of international law.” ICC-OTP, ‘Situation in Colombia-Interim Report, November 2012,’ para. 68.

21 International Criminal Court (ICC), “Elements of Crimes,” available from <https://www.icc-cpi.int/resource-library/core-legal-texts>.

22 ICC Pre-Trial Chamber I, Situation in the Central African Republic ii, THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI. Decision

In addition to these international criminal legal standards, in recent years UN-appointed groups of experts have addressed the issue of arbitrary detentions, including their possible classification as crimes against humanity, in two other Latin American countries—namely, Venezuela and Nicaragua.

The Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela stated, in 2020, that:

[i]n determining whether or not [an] arrest and detention were arbitrary, two issues must be considered. First, whether there was a legal basis for the arrest; and second, whether the person arrested was afforded due process. Failure to comply with either of these elements of analysis makes an arrest arbitrary.²³

In 2023, the Group of Experts on Human Rights on Nicaragua first restated that conduct involving imprisonment or other severe deprivation of physical liberty qualifies as a crime against humanity where there is unlawfulness and/or arbitrariness; where due process is denied, and where there is a context of widespread or systematic attack on a civilian population,²⁴ before summarizing the following requisite elements under international customary law:

(i) the deprivation of a person's liberty; (ii) the deprivation of liberty is carried out arbitrarily, in other words, without a legal basis; and (iii) the perpetrator, or others for whom the perpetrator bears criminal responsibility, carries out the act or omission causing the person's deprivation of physical liberty with the intent to arbitrarily deprive the person of their physical liberty or with reasonable knowledge that the act or omission is likely to cause the arbitrary deprivation of physical liberty.²⁵

These determinations, as well as the preceding discussion of prevailing international legal standards, can usefully be applied when examining the arbitrary detentions currently being committed in El Salvador under the State of Exception: as these criteria make clear, even if the State of Exception is treated by the current Salvadoran government as granting security forces the authority to detain people without meeting normal (non-state-of-exception) legal standards, detentions of this sort may still be deemed unlawful and arbitrary under international law instruments and provisions that are binding on El Salvador²⁶. For all of these reasons, there is a clear possibility that detentions currently being carried out, or prolonged, under the State of Exception may be deemed arbitrary, and/or may meet the qualifying threshold for crimes against humanity, which we discuss in greater detail in the next section.²⁷

on the confirmation of charges. No: ICC-01/14-01/21, December 9, 2021, para. 74. See also *ibid.* Section VII (confirmation of charges); subsection F (legal characterization of the facts presented) for the finding that a charge of 'Imprisonment or other severe deprivation of physical liberty as a crime against humanity' was warranted, *inter alia*, on the evidence cited above, main text.

23 A/HRC/45/CRP.11, September 15, 2020, para. 1514.

24 A/HRC/52/CRP.5, March 7, 2023, para. 1037.

25 *Ibid.* para 1038.

26 For example, due process of law provisions enshrined in the International Covenant on Civil and Political Rights (ICCPR), Art. 14; or the American Convention on Human Rights, Art. 8. El Salvador is a signatory to both. The detentions carried out under the State of Exception might also be unlawful and/or unconstitutional under domestic law; for example, when we consider the already-stated Constitutional prohibition on repeated extensions of the State of Exception. This may render the State of Exception *itself* unjust or arbitrary, at least after the expiry of its initial 60-day period.

27 Subject to discussion, below, of the necessary qualifying elements of crimes against humanity.

CRIMES AGAINST HUMANITY CRITERIA: SCOPE, SYSTEMATICITY, TARGETING, AND POLICY

Should it be determined that violations committed in the context of the State of Exception in El Salvador, including arbitrary detentions, meet the criteria for crimes against humanity, **it would not be the first time that crimes against humanity have been committed in the country**; previously, it was found that State actors carried out brutal crimes against humanity against civilians during the country's internal conflict. **While it may be too early to say definitively that the violations occurring in El Salvador constitute crimes against humanity, a preliminary inquiry should be carried out.**

Any such inquiry should examine the violations being reported considering Article 7 of the Rome Statute, including a) which of the categories of possible crimes against humanity listed therein may have been committed,²⁸ and b) whether the circumstances of any such commission further meet each of the following criteria: 1) “committed as part of a widespread or systematic attack;”²⁹ 2) “directed against any civilian population, with knowledge of the attack;”³⁰ and 3) “pursuant to or in furtherance of a State or organizational policy to commit such attack.”³¹

Below, we carry out an initial scoping exercise comparing this definitional template to what is presently known about El Salvador's human rights emergency. Sources for the assertions about definitional criteria include, inter alia, the Rome Statute and its Elements of Crimes document, other ICC reports and caselaw already cited above, and the considerations that these in turn contain, of the jurisprudence of other international criminal tribunals.

Criterion (1): Widespread or systematic attack

In Rome Statute terms, “widespread” refers to both scale and potential number of victims, that is, to crimes committed on a large scale or scope, and/or affecting a large number of victims. “Systematic” has been understood variously as characterizing crimes that are linked or structured, occur in apparently non-random patterns, require considerable deployment of significant resources, and/or involve high level political or military leaders.³² While the purpose of requiring this element is to exclude isolated, individual, or random acts from the category of crimes against humanity, it is sufficient for the overall attack, not necessarily each specific act or set of acts, to be judged widespread or systematic.³³ The attack need not be military in nature.

28 Rome Statute Article 7, paragraph 1 has already been partially reproduced, above. The list of crimes contained therein continues, with subsection (i) naming enforced disappearance, whose potential applicability to El Salvador's current situation has already been demonstrated, above. Paragraph 2, subsection (a) clarifies that “attack directed against any civilian population” should be construed as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

29 Extract from Rome Statute Article 7(1).

30 Extract from Rome Statute Article 7(1).

31 Extract from Rome Statute Article 7(2)(a).

32 The existence of an official plan or policy may be indicative that the character of the attack is “systematic,” however, under customary international law the existence of a plan or policy is not a required legal element for it to be considered systematic.

33 The elements are disjunctive, that is to say, the presence of *either* systematicity, or a widespread nature, is sufficient to meet the threshold.

In applying this template to present-day El Salvador, one might begin by considering the sheer number and relative scale of arrests made under the State of Exception - over 76,000, as stated above - and their often seemingly (legally) baseless nature. Mass arrests – and mass trials – have been reported for which no substantive evidence was ever produced. As reported by one civil society organization, police officers told the mother of a young man detained under the State of Exception, “we can arrest anyone we want.”³⁴ Civil society monitoring also suggests that abuses including mass detention form part of coordinated State practices.³⁵

Criterion (2): “Directed against any civilian population, with knowledge of the attack”

Under Rome Statute provisions and their interpretation, the “knowledge” requirement simply means that either the principal perpetrator(s), or those at whose behest they act, are aware that their actions form part of a larger attack against the affected population group.³⁶ As far as this latter is concerned, while a crime against humanity must be directed against victims who are part of a civilian population, this does not mean that the violations must affect an *entire* civilian population.³⁷ In El Salvador it is self-evident that the people detained during the State of Exception and later victimized by human rights violations form part of the general civilian population: they are not members of a State apparatus or authority, nor of any group of combatants engaged in a recognized internal or international armed conflict. While arrests, and the torture and other violations subsequently perpetrated, have largely been directed against people the State claims are gang members, “terrorists”, or—by implication—“dishonorable” citizens,³⁸ in practice, as we have seen, potentially discriminatory criteria including physical appearance and social background appear to predominate. No existing independent monitoring or reporting has yet supported official rhetorical claims that many or most detainees have connections to gang activity; something which, even if it were true, would moreover not affect the unlawful nature of the treatment that is being meted out.³⁹

Criterion (3): “Pursuant to or in furtherance of a State or organizational policy”

Evaluating whether the policy element of crimes against humanity is satisfied in any particular context entails examining the overall practice of the State or organization that is perpetrating violations. A finding that this practice shows signs of the existence of such a policy or plan does not necessarily rely on the unearthing of written directives, instructions, or orders; something can be a policy

34 Human Rights Watch and Cristosal, *We Can Arrest Anyone We Want*, op. cit. The Amnesty International report previously cited provides similar accounts of the widespread nature of violations being committed under the State of Exception (Amnesty International, *Behind the Veil ...* op. cit.); also available in Spanish at <https://www.amnesty.org/es/documents/amr29/7423/2023/es/>.

35 Amnesty International, *Behind the veil...* op. cit.

36 A requirement that could, for instance, be deemed to be satisfied if police officers carrying out arbitrary detentions know that these detentions are unlawful, and also know that colleagues have been ordered to do the same.

37 The intention is to exclude acts that only target a very limited and randomly selected number of individuals, rather than to limit the category to assaults carried out at whole-population level.

38 See Congressional rhetoric regarding the protection of supposedly “honorable” citizens, reported above (Asamblea Legislativa, “La seguridad ciudadana” op. cit.).

39 See DPLF et al, “Carta al Grupo de Trabajo sobre la Detención Arbitraria de las Naciones Unidas”, July 2022, p. 3, available at https://dplf.org/sites/default/files/carta_grupo_de_trabajo_onu_detenciones_arbitrarias_-_solicitud_el_salvador_estado_de_excepcion_0.pdf. See also Human Rights Watch and Cristosal, *We Can Arrest Anyone We Want*, op. cit., section entitled “Arbitrary Detention and Short-term Enforced Disappearances,” or Amnesty International, *Detrás del velo...* op. cit., pp. 25-26.

without being set out in writing/official documents as such. ICC and previous international tribunal jurisprudence, Article 7(2)(a) of the Rome Statute, and the ICC's Elements of Crimes document, taken together, show that a "policy" or "plan" to commit an attack is to be construed as 'active promotion or encouragement' of such an attack;⁴⁰ might even, in exceptional circumstances, "be implemented by a deliberate failure to take action,"⁴¹ and can be evidenced, among other things, by overall political and historical circumstances, contents of an announced political program, associated media propaganda, and administrative and other types of discriminatory measures.⁴²

As applied to El Salvador, the discourse and substantive content of the Bukele administration's public security 'crusade,' associated draconian "counterterrorism" provisions recently introduced, and the Legislative Assembly declarations cited above, would therefore need to be examined with a view to considering whether they could be deemed to amount to encouragement, promotion, or omissive toleration of actions constitutive of an attack violating the applicable fundamental rules of international law.⁴³ **Patterns, systematicity and similarity in eyewitness accounts, and geographical and temporal distribution of particular violations – for example, their circumscribing to neighborhoods actually or rhetorically associated with gang activity – may meanwhile be material to the matter of the existence of a plan or policy, as well as being relevant to the question of systematicity** (criterion one). The experiences and testimony of individual police officers or other security and justice system functionaries may also be pertinent, insofar as they report being instructed, ordered, and/or incited to act in particular ways that prove unlawful.⁴⁴

POTENTIAL GROUNDS FOR LIABILITY OF STATE AGENTS FOR HUMAN RIGHTS VIOLATIONS UNDER THE STATE OF EXCEPTION

Should it be determined that violations committed in the context of the State of Exception in El Salvador, including arbitrary detentions, meet the criteria for crimes against humanity, **it would not be the first time that crimes against humanity have been committed in the country**; previously, it was found that State actors carried out atrocities against civilians during El Salvador's internal armed conflict. As with the violations committed during said conflict, **there are several potential ways that State agents might be found liable, under national and international law, for human rights violations and/or crimes against humanity being committed during the State of Exception**, and several considerations regarding potential liability that should be taken into account.

40 The ICC refers to "policy to commit such attack" as entailing "multiple commission of acts referred to [in Article 7]," where it can be shown that the State or organization "actively promote[d] or encourage[d] such an attack against a civilian population." ICC *Elements of Crimes*, op. cit., Article 7 (Introduction), consideration 3 (at page 3). ICC jurisprudence further follows the precedent of the ICTY, in accepting that a policy need not be articulated explicitly but can be "surmised from the occurrence of a series of events." See ICC Pre-Trial Chamber (PTC) II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, March 31, 2010, para. 87.

41 When such failure can be shown to be tantamount to promotion or encouragement. The quote is taken from ICC *Elements of Crimes*, op. cit., Introduction to Crimes Against Humanity, para. 3, note 6.

42 See discussion in ICC (PTC) II, op.cit., (especially paras. 83-89) which in turn draws on the verdict of the International Criminal Tribunal for the former Yugoslavia, ICTY, in *Blaškić*.

43 See Case Matrix Network (2017) *Directrices de Derecho Penal Internacional: Crímenes de Lesa Humanidad*, p. 39, also referencing ICTY *Blaškić*, available at <https://www.legal-tools.org/doc/66bb47/pdf/>.

44 See Open Society Justice Initiative, *Undeniable Atrocities*, p. 50, available at <https://www.justiceinitiative.org/uploads/7dc9f3b9-21dc-4d14-90fd-aaa29ff12cc3/undeniable-atrocities-2nd-edition-20160808.pdf>. Overall, it is clear that the existence of a policy can be determined by examining the context, scale, and repetition of acts included in Rome Statute Article 7, while considering whether there are indications of coordination and planning on the part of the alleged perpetrator.

Some theories of criminal liability that might be considered for violations committed during the State of Exception are **command responsibility (also called superior responsibility) and/or joint enterprise liability**.⁴⁵ El Salvador's own Constitutional Court has previously recognized criminal responsibility that extends beyond the direct perpetrators of human rights violations and/or international crimes: in their 2016 decision invalidating El Salvador's 1992 amnesty law (and thus opening the door to criminal prosecutions of State actors for crimes committed during the armed conflict), the Court recognized the structural/systemic nature of the crimes committed during the conflict, citing the existence of "an organized apparatus of power that not only ordered and committed atrocious crimes, but did so following a pattern of criminality, rather than as isolated cases."⁴⁶ Because of the violations' structural nature, the Court stated, **criminal responsibility extended to the direct perpetrators, to those who gave the orders to carry out the crimes, and to those who, in positions of authority, could have prevented the crimes from being committed and failed to do so.**⁴⁷ **Similar conditions of structural criminality may very well apply in the context of abuses committed under current Salvadoran security policies.**

In addition to the possibility of seeking accountability for the *intentional* commission of international crimes, **we can also consider the possibility of individual criminal responsibility for State actors who have caused deaths during the State of Exception, under the criminal law theory of "commission by omission."** The allusion in ICC's "Elements of Crimes" (op. cit.) to possible perpetration, or at least liability, by omission may be relevant for considering the behavior of State organs or functionaries whose failure to perform their mandated duties of institutional oversight and protection of fundamental rights may be allowing, or materially contributing to, outcomes that constitute international crimes in the current context. **While some of the deaths in custody under the State of Exception in El Salvador may prove to have been the result of direct perpetration of grave criminal acts of torture, extrajudicial killing, or deliberate withholding of healthcare, for which the direct physical perpetrators of such acts have clear criminal liability, accountability for these and other deaths may also be attributed to those who have a duty of care and/or oversight that they failed to exercise.** Those who are potentially liable under this theory may include prison directors, the director of the National Civil Police, and/or the Minister of Justice and Public Security, who are all able and arguably obliged to act in such a way as to avoid grave harms, including unnecessary deaths among the prison population. Should they be found to have failed to do so, there may be grounds for holding them administratively and/or criminally responsible, even without a need to prove there was intent to cause the harm in specific instances or cases.

Alongside evidence of direct State perpetration of the violations currently occurring, there has also been significant documentation of State denial of said violations, and of a systematic failure to adequately investigate, on the part of Salvadoran State institutions and their personnel.⁴⁸ In

45 For more information about individual criminal liability, including joint criminal enterprise, for crimes under international law, see Due Process of Law Foundation (DPLF), *Digest of Latin American Jurisprudence on International Crimes*, 2010, Ch. 2, beginning on p. 73, available at <https://www.dplf.org/sites/default/files/digestenglishs.pdf>.

46 Naomi Roht-Arriaza, "El Salvador's Constitutional Court Invalidates Amnesty Law," *Justicia en Las Américas*, July 22, 2016, available at <https://dplfblog.com/2016/07/22/el-salvadors-constitutional-court-invalidates-amnesty-law/>.

47 Naomi Roht-Arriaza, "El Salvador's Constitutional Court Invalidates Amnesty Law," *Justicia en Las Américas*, July 22, 2016, available at <https://dplfblog.com/2016/07/22/el-salvadors-constitutional-court-invalidates-amnesty-law/>.

48 See interview with the president's personal delegated Commissioner on Human Rights and Freedom of Expression, Andrés Guzmán Caballero, published in Salvadoran newspaper *La Prensa Gráfica* on November 17, 2023 ("Un informe que diga que en El Salvador existen más de 100 torturas es mentiroso y falso": comisionado presidencial de Derechos Humanos," available at <https://www.laprensagrafica.com/elsalvador/-Un-informe-que-diga-que-en-El-Salvador-existen-mas-de-mas-de-100-torturas-es-mentiroso-y-falso-totalmente-Andres-Guzman-Caballero-Comisionado-Presidencial-de-derechos-humanos-y-libertad-de>

particular, the Attorney General's Office has repeatedly failed to investigate reports of abuses,⁴⁹ and in the person of the current Attorney-General, has echoed or endorsed statements from President Bukele and other executive agencies flatly denying human rights violations.⁵⁰ Alongside these examples of State denial of the reality of human rights abuses, **we are also witnessing significant promotion of the supposed "achievements" of the Salvadoran State in quashing real or imagined security threats. This rhetoric in turn facilitates public support for policies that are inhumane and/or unlawful.** According to local civil society organizations documenting cases of people being detained under the State of Exception, it is often the case that once someone is detained, it is extremely difficult to obtain their release, even when it can easily be demonstrated that they have no connection whatsoever with the gangs who are the purported targets of the arrest policy. This practice of indefinite, groundless detention could be construed as a deliberate attempt to stoke fear among the general population, at the same time as inflating the numbers of detainees whose arrests can then be adduced as supposed evidence of the efficacy of public security policies.⁵¹

Even if careful analysis of arbitrary detention and other abuses in present-day El Salvador should find that the elements of crimes against humanity, which can be judged at both the national and international level, are not present –for example, if the violations being committed in the current context El Salvador are found to be isolated acts by officials –they are still crimes, and should be judged under a theory of **individual criminal liability for common/ordinary crimes at the national level** (there is also, of course, the separate but equally important question of the State's international responsibility for violations of its obligations under international human rights law). **If, however, the cases of arbitrary detention, torture, enforced disappearance, and extrajudicial executions that have been reported in the context of El Salvador's current security regime are not isolated or random acts, but are being committed in a systematic way and appear to respond in some degree to explicit or implicit direction from the Bukele administration, then an investigation as to whether crimes against humanity have been committed is called for.**

LOOKING FORWARD: CHALLENGES TO INVESTIGATING GRAVE HUMAN RIGHTS VIOLATIONS AND/OR CRIMES AGAINST HUMANITY COMMITTED DURING EL SALVADOR'S STATE OF EXCEPTION

It is clear that the current human rights situation in El Salvador merits careful investigation aimed at determining whether, how, and to what extent, the serious abuses being committed under Bukele's public security policy constitute violations of international criminal law, in particular crimes against humanity. It is also clear that any such investigation will pose significant challenges, including requiring extensive resources.

expresion-20231116-0106.html). See also statements by Guzmán after visiting the country's prisons (August 29, 2023, statement), and while appearing before a session of the European Parliament (September 21, 2023, statements from Presidential Commissioner on Human Rights before the European Parliament). See also Amnesty International, *Behind the veil...* op. cit.

49 *La Prensa Gráfica*, "Fiscalía archivó 142 casos de muertes en Centros Penales," June 13, 2023, available at <https://www.laprensagrafica.com/elsalvador/FGR-archivo-142-casos-de-muertes-en-Centros-Penales-20230613-0010.html>.

50 *El Diario de Hoy*, "Estado salvadoreño niega ante la CIDH torturas y abusos durante régimen de excepción," July 15, 2023, available at <https://www.elsalvador.com/noticias/nacional/cidh-estado-de-excepcion-oea-el-salvador-regimen/1075803/2023/>.

51 Again, the official Congressional announcements cited above offer illustrative evidence of this practice. Asamblea Legislativa, "Régimen de excepción continuará," and "La seguridad ciudadana y la paz social continuarán".... op. cit.

The very nature of the State of Exception and other authoritarian policies implemented in El Salvador during Bukele's administration means that transparency and access to information have been virtually eliminated, while those who oppose or question the government and its actions are forced to live in a climate of well-founded fear. This being so, a first challenge for investigating types of human rights violation, and the possible commission of crimes against humanity, under El Salvador's prevailing State of Exception is practical and evidentiary. Obtaining information and accessing vital testimony is exceedingly difficult where violations are being committed behind closed doors—including prison doors—and are shrouded in secrecy, or actively covered up, by the relevant authorities. Even where national and international sources have managed to get access to victims, victims' families, and other witnesses, these people are often understandably reluctant to share their stories for fear of retaliation, including re-victimization. In other words, researchers, victims, and other human rights defenders inside and outside of El Salvador will require protection, security guarantees, and significant psychosocial support from professionals trained in trauma response if any investigation is going to make headway.

Another set of specific challenges for the investigation of possible crimes against humanity includes, first, how to identify named individuals who may have liability under international criminal law (as distinct from State responsibility under international human rights law - which can, and should, also be pursued before the relevant regional and international mechanisms, and which, as previously mentioned, would be the subject of a separate inquiry).⁵² A second hurdle is identifying a viable and legally mandated forum which could and would investigate and adjudicate these alleged crimes. While the International Criminal Court (ICC) has relevant jurisdiction, and El Salvador is a State party, the chances of a case being successfully brought in the present climate are relatively remote, as the ICC is a court of last resort, and there are several, complex elements involved in demonstrating that all other remedies have been exhausted. In theory individual cases could also be brought before the Salvadoran domestic justice system, but the political climate as sketched out here, with its associated acquiescence or co-optation of key justice system actors, means the prospects of robust rule of law outcomes are also limited. Litigation in third-country courts, under universal jurisdiction or universal jurisdiction plus provisions, is another possibility that could be explored.

Despite these challenges (which are not insurmountable), **the importance of a thorough examination of what is happening under the State of Emergency—for both El Salvador and the region—cannot be overstated.** As Bukele's style of governance has gained popularity at home, it has also gained immense support and traction across Latin America.⁵³ Leaving the human rights implications of his government's draconian 'securitization' regime unexamined would set a dangerous precedent, signaling tacit approval, and potentially thereby contributing to the renormalization and further expansion of repressive policies and authoritarian governance across the Americas (a troubling trend that is already on the rise). **The international community has the opportunity to shine a light on what may prove to be blatant violations of international criminal law taking place under the Bukele regime. It is an opportunity that we can, and should, seize.**

52 Including the Inter-American Human Rights System, whose role includes encouraging State parties to comply with their regional treaty commitments and monitoring said compliance.

53 See Carlos S. Maldonado, "El 'modelo Bukele' atrae a políticos latinoamericanos," *El País*, June 10, 2023, available at <https://elpais.com/internacional/2023-06-11/el-modelo-bukele-atrae-a-politicos-latinoamericanos.html>; see also France 24, "Nayib Bukele: ¿Inspira a la derecha en América Latina?" December 15, 2023, available at <https://www.france24.com/es/programas/el-debate/20231215-se-convirti%C3%B3-bukele-en-la-inspiraci%C3%B3n-de-la-derecha-en-am%C3%A9rica-latina>.

