

https://dspace.org/

Gang violence or the continuation of an armed conflict by other means: the application of international humanitarian and criminal law to gangs as an organized non-state armed group

Pose, Jorge Claudio Lema

2023-06
University of the Witwatersrand, Johannesburg
https://hdl.handle.net/10539/38811

Pose, Jorge Claudio Lema. (2023). Gang violence or the continuation of an armed conflict by other means: the application of international humanitarian and criminal law to gangs as an organized non-state armed group [PhD thesis, University of the Witwatersrand, Johannesburg]. WireDSpace. https://hdl.handle.net/10539/38811

Downloaded from a DSpace repository. https://dspace.org/

UNIVERSITY OF THE WITWATERSRAND

FACULTY OF COMMERCE, LAW AND MANAGEMENT

SCHOOL OF LAW

THESIS:

GANG VIOLENCE OR THE CONTINUATION OF AN ARMED CONFLICT BY OTHER MEANS: THE APPLICATION OF INTERNATIONAL HUMANITARIAN AND CRIMINAL LAW TO GANGS AS AN ORGANIZED NON-STATE ARMED GROUP

SUPERVISOR: MIA SWART

STUDENT NAME: JORGE CLAUDIO LEMA POSE

STUDENT NUMBER: 2035978

DATE: 2 JUNE 2023

'Transnational criminal organizations are essentially rational actors and can even be described as Clausewitzian: crime for them is simply the continuation of business by other means.'[1]

Phil Williams

'Gangs have long been considered a source of violence of insecurity, but they are increasingly identified as a cause of instability and a threat to the state. Yet gangs operate mainly in non-conflict settings, raising questions about whether applying a conflict lens to understand gangs is appropriate. Marked differences appear between armed groups and gangs when considering concepts of ungoverned spaces, the state, violence, and sustainability. Few gangs reach the threshold of posing a direct challenge to the state. But some do and this make comparisons with other armed groups difficult and suggest the need for more specific analytical lens.' [2]

Jennifer M. Hazen

[1] Phil Williams 'Violent Non-State Actors and National and International Study' (2008) International Relations and Security Network, page 15.

[2] Jennifer M. Hazen 'Understanding gangs as armed groups' (June 2010) International Review of the Red Cross, Volume 92 Number 878, page 1. The so-called 'East Coast–West Coast hip hop war' was a confrontation during the 1990s in U.S. involving the followers and label records of two U.S. rappers: Tupac Shakur (from Los Angeles, West Coast) and Christopher George Latore Wallace (aka 'Notorious B.I.G.', from New York, East Coast). Both rappers were killed (Shakur in 1996, Wallace in 1997) in the same circumstances: a drive-by shooting which now has become a clear feature in gang violence.

CHAPTERS OF THE THESIS

I INTRODUCTION

(a) Purpose and focus of the thesis

(b) Why does this research matter?

II LITERATURE REVIEW AND METHODOLOGY

(a) Main Research Question and Methodology

III THE MARAS AS A CASE STUDY

(a) Origins of the maras as gang violence

(b) Comparative analyses of gangs

(i) First generation gangs

(ii)Second generation gangs

(iii)*Third generation gangs*

IV THE MARAS AND THE TRADITIONAL LEGAL FRAMEWORK

(a) The maras under national criminal law and as a transnational criminal organization

V INTERNATIONAL HUMANITARIAN LAW AND THE MARAS

(a) Relevance of International Humanitarian Law in relation to gang-violence

(b) International Case Law

(i) Non-state armed groups and gang violence

(ii) Les Specialis

(iii) La Tablada case

(iv) Tadic case

(*c) Why it is relevant that International Humanitarian Law applies to the maras' gang violence*

VI INTERNATIONAL CRIMINAL LAW AND THE MARAS

(a) Relevance of International Humanitarian Law in relation to gang-violence

(b) The 'political side' of the maras: peace truce, peace negotiations and amnesties

(c) Why it is relevant that International Criminal Law applies to the maras' gang violence

VII REFUGEE CLAIMS AND THE MARAS

(a) An assessment of refugee claims how persons fleeing gang violence are functionally like persons fleeing armed conflicts violence

VIII COMMERCIAL INSURGENCY: THE MARAS DISRUPTING THE SOVEREIGN FUNCTIONING OF THE STATE TO A DEGREE SIMILAR TO AN INSURGENCY

(a) Commercial insurgency

(b) Do the maras challenge the state?

(c) Do the maras create with their actions and violence an armed conflict situation in El Salvador?

(d) Maras and the use of children in the gang violence: child protection as a tool for counterinsurgency or from the Street Without Joy to the Mercy Street.

XI CONCLUSIONS

(a) Conclusion 1: Gang violence in El Salvador has reached the threshold of an armed conflict according to the standards outlined by International Humanitarian Law and the current debates on modern armed conflict

(b) Conclusion 2: Common Article 3 can be applied to the gang violence in El Salvador. Gang violence in El Salvador has a level of intensity and organization equal to an armed conflict making Common Article 3 applicable to the maras.

(d) Conclusion 3: The considerations in the ICTY Tadic ruling can be applied to the maras in El Salvador

(i) Conclusion 4: The maras in El Salvador constitute a non-state armed group accountable for crimes under International Criminal Law

(e) Conclusion 5: Organized crime violence and transnational crime are becoming a new form of non-international armed conflict

ANNEX I: *Elements of International Criminal Law – Relevant sections of the Rome Statute of the International Criminal Court*

ANNEX II: *Elements of International Criminal Law – ICTY Case Law that can be applicable to the maras if gang violence is considered an armed conflict*

BIBLIOGRAPHY

ABREVIATIONS

ACHR (American Convention on Human Rights)

COIN (Counterinsurgency)

CPA (Child Protection Advisors)

CRC (Convention on the Rights of the Child)

DDR (Demobilization, Disarmament, Reintegration)

DHS (Department of Homeland Security)

DOS (U.S. Department of State)

EOIR (Executive Office for Immigration Review)

EU (European Union)

EUROPOL (European Agency for Law Enforcement Cooperation)

GDP (Gross Domestic Product)

ICC (International Criminal Court)

ICJ (International Court of Justice)

ICRC (International Committee of Red Cross)

ICTY (International Criminal Tribunal for the former Yugoslavia)

ICTR (International Criminal Tribunal for Rwanda)

INL (U.S. Bureau of International Narcotics and Law Enforcement Affairs)

INS (Immigration and Naturalization Service)

IOM (International Organization for Migration)

IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act of 1996)

MINUSMA (United Nations Multidimensional Integrated Stabilization Mission in Mali)

MINUSTAH (United Nations Stalization Mission in Haiti)

MRM

OCHA (United Nations Organization for the Coordination of Humanitarian Affairs)

RICO (Racketeer Influenced and Corrupt Organizations Act)

TRAC (Transactional Records Access Clearinghouse)

UN (United Nations)

UNCLOS (United Nations Convention on the Law of the Sea)

UNMIL (United Nations Mission in Liberia)

UNOWAS (United Nations Office for West Africa and the Sahel)

UNODC (United Nations Office of Drugs and Crime)

INTRODUCTION

> 'The "West Side Boys" name refers to the U.S. rapper Tupac Shakur, whose deadly dispute with Biggie Smalls (aka Notorious BIG) was constructed in the media as U.S. West Coast vs. U.S. East Coast rivalry. Tupac Shakur was named after Tupac Amaru, the leader of an indigenous uprising in Peru against the Spanish during the colonial days, and the namesake of a more recent rebel group in Peru. So, in an odd series of connections between pop culture, civil wars and child soldiers, a rebel group in Sierra Leone was named for a U.S. musician, whose namesake in turn was a rebel group in Peru.'[3]
>
> Pagne Fortna

(a) Purpose and focus of the thesis

The purpose of this thesis is to develop the applicability of International Humanitarian Law and International Criminal Law to a specific organized criminal group (the maras or gangs in Central America).[4] This thesis considers that this criminal actor (the maras) within the gangs presents many similar aspects to traditional non-state organized armed groups. Furthermore, the thesis will explain how the maras have instrumented a level of violence that, in practical terms, has reached the threshold of an armed conflict: in summary, International Humanitarian Law and International Criminal Law can be applied to the maras. *It is very important to highlight that this thesis does not consider that International Humanitarian Law and International Criminal Law apply to all gangs or all organized criminal groups but to one specific gang (the maras) in one specific context (El Salvador).*

Gangs have been always associated with violence, but they are increasingly becoming and seen as a destabilization factor to the state. Because most gangs do not form part of armed conflicts, this situation raises questions about the International Humanitarian Law and Criminal law framework and gang violence. There are differences between

[3] Virginia Pagne Fortna *Does Peacekeeping Work?* (2003) Princeton University Press, page 55. Note from the author of the thesis: The actual name is Tupac Amaru II. The original name 'Tupac Amaru' refers not to the revolutionary indigenous leader of the 1780s (José Gabriel Condorcanqui), but the Inca ruler who resisted the Spanish Conquest from the fortress valley of Vilcabamba in the 1570s. José Gabriel Condorcanqui took Tupac Amaru's name to become Tupac Amaru II when he started his revolution 200 years later. The author is grateful to Professor Alonso Gurmendi who brought this point to his attention.

[4] The thesis will focus on war crimes and crimes against humanity.

non-state armed groups and gangs considering that non-state armed groups have political ends (such as replacing the state government) as a final objective while gangs are mostly motivated by money and material gains. But when gang violence escalates to a level that poses a direct challenge to the state authority, this new situation requires a deeper study in terms of International Humanitarian Law and International Criminal Law. The maras from El Salvador is one of those gangs.[5] Subsequently, the thesis will explain why the application of International Humanitarian Law and International Criminal Law to the maras is preferable to leaving to domestic law.

Organized crime and gang violence are on international news every day and constitute one of the most pressing threats that many societies in the world face today.[6] Following the end of the Cold War, states have become fully aware of the transnational reach of organized crime as a by-product of globalization. Organized crime has now an extremely negative impact on international peace and global security, particularly in fragile states, yet most peace operations, peace processes, and/or development planning for post-conflict scenarios do not have a specific agenda to counter organized crime.[7] The so-called war on drugs has also become a synonym for a fight against organized crime by government officials. But there are indicators that the reference to 'war' is not just rhetorical. More and more governments across the world are declaring organized crime groups as a clear and present danger' to the state structure and they have decided to apply militarized actions against them.[8] The

[5] The origin of the name 'mara' (for 'Mara Salvatrucha' and 'MS-13', two of the most fearsome of the maras) is quite interesting. The term 'mara' is a slang for 'gang' in the Spanish spoken in Central America. Mara may come from a 'marabunta', a term used to describe an army of ants. 'Salvatrucha' derives from the 'salva' (or short for 'Salvadoran') with trucha (that means 'trout' in Spanish but also a slang for 'street wise').

[6] It is possible to track the origins of the research on gang violence with the work from William Foote Whyte in 1955 (William Foote Whyte, *Street Corner Society*, New York, 1955, general reference to this source, not to a specific page). He conducted a study on street gangs in Boston, USA. Since then, a lot of research has been developed and published. It is of importance (including but not limited to its focus on stats) the research from the United Nations Office on Drugs and Crime (UNODC) in global, regional and national assessments. In the last three decades, however, the high level of urban violence driven by gangs and organized crime have morphed from a criminal problem to a threat to achieving development and consolidating democratic process.

[7] Crime is governed by national law mostly. But there are certain criminal activities that are also subject to very specific provisions under international law. It is possible to quote (a) piracy (which is defined in the United Nations Convention on the Law of the Sea), (b) drug trafficking (which is defined in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances) and (c) human trafficking (which is defined in the Annex II of the United Nations Convention Against Transnational Organized Crime).

[8] 'Clear and Present Danger' is the title of a Tom Clancy's novel published in 1989 about a U.S. covert military action against the drug cartels in Colombia which were considered a threat to U.S. national security. Since then, the term 'clear and present danger' has been used to describe situations affecting state security.

involvement of state armed military forces as part of the so-called 'war on drugs' (and, by extension, a 'war on crime') has expanded the circle of violence and this brings necessary questions about the application of International Humanitarian Law.

Due to the intensity and organized level of violence arising from these situations, this thesis will argue that maras' violence, a specific type of gang violence, in this context can be classified as an armed conflict.[9] *Subsequently if International Humanitarian Law applies to this situation, then the obvious implication will be that the law of war crimes committed in a non-international armed conflict will apply as a matter of International Criminal Law.* Despite this -or maybe because of this- government officials tend to avoid the use of the term 'armed conflict' when referring to state actions against the maras because they are aware of how such definition might trigger the application of certain legal obligations under International Humanitarian Law.[10] Also, the application of International Humanitarian Law places a constraint on the actions to be conducted by the states when a militarized approach is executed in order to deal with one particular security problem. The evolution of International Human Rights Law has imposed additional and more specific constraints. Jens David Ohlin and Larry May discuss the ways that military necessity operates vis-à-vis Human Rights, and International Criminal Law. [11] In a different paper, Ohlin explains that military necessity in general in the framework of International Human Rights Law.[12]

It becomes relevant to analyse under which conditions crime (or the actions of organized crime such as gang violence) in general and the maras can be described as an armed conflict. Within that context, El Salvador, the smallest country in Central America[13], is currently going through high levels of gang-related violence, with

[9] Robert Muggah, 'Rethinking the Intensity and Organization of Violence in Latin America and the Caribbean', (12 March 2012), Tuftus University, available on a digital format at: https://sites.tufts.edu/reinventingpeace/2012/02/16/part-i-rethinking-the-intensity-and-organization-of-violence-in-latin-america-and-the-caribbean/

[10] *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2001), arts 24-25. See also *UN General Assembly, Basic Principles and Guidelines* (2006) United Nations

[11] Jens David Ohlin and Larry May, *Necessity in International Law* (2016) Oxford International Press.

[12] Op cit note 11 at page 8.

[13] The State of New Jersey in U.S. is approximately 19,211 square kms, while El Salvador is approximately 21,041 square kms, making El Salvador 10% larger than New Jersey. Gauteng Province, in South Africa, is 18,176 square kms. In fact, El Salvador is almost the size of the U.S. State of Massachusetts.

homicide numbers well above those in most armed conflict-affected countries.[14] According to a 2018 report by the International Organization for Migration (or IOM), crime has been quoted as the main cause of people' displacement (inside and outside the region) in Central America since the armed conflicts in the 1980s[15]. This thesis argues that International Humanitarian Law and International Criminal Law can apply to organized armed groups. This is the main point of the present document. This scenario brings the question of whether organized criminal groups can be also considered an organized armed group and if that same organized criminal group can be considered a legal party in an armed conflict. *Subsequently, by extension, the members of these organized criminal groups (such as the maras) can be held responsible for international crimes before the International Criminal Court.* Non-state armed groups are the main actors in many contemporary international and non-international armed conflicts. As this thesis will explore below, gangs can be considered as a form of a non-state armed group but there is not enough research done on this point as well as on how International Humanitarian Law can be applied to them. This thesis aims to cover that gap.

The present research provides a new argument in order to deal with a specific crime scene in which gang violence questions the ability of the state to function and places a society's daily life into a dynamic similar to an armed conflict situation.[16] The law governing traditional cases and scenarios of internal armed conflict is defined by the relationship between governments and non-state armed groups. The main interest of the government is to treat rebels as simple criminals without any kind of international recognition and/or international status. It must be noted that, for the purpose of this thesis, the actors under International Humanitarian Law and International Criminal Law are expanded to include the maras.

(b) Why does this research matter?

The question posted at the beginning of this thesis on (i) whether International Humanitarian Law can be considered as part of the framework to be applicable to the maras, as the continuation of an armed conflict by other means, and (ii) if that

[14] El Salvador has no precious metals or minerals deposits. Its population density of 825 persons per square mile is among the top then highest in the world and the highest in Central America by far. UN Index 2018.

[15] https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf

[16] Anthea Roberts 'Law making by Non-state Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) Yale J. Int, page 132.

gang/maras violence reaches a level way above a traditional policing problem; require the introduction of new considerations and views vis-à-vis International Humanitarian Law and International Criminal Law. Christine Bell argues that 'the practice of negotiating peace agreements is producing a new law of the peacemaker –or lex pacificatoria.'[17] Bell examines different peace agreements, their structure and purpose and presents the idea of a new and emerging 'law of peace' that can apply to peace processes and non-state armed groups (inspired by International Humanitarian Law standards). In this sense, there is now a shift in politico-military affairs under which an armed conflict is increasing 'to be fought over competing social and cultural values rather than as the expansion of a state's national interests'.[18] This could be a consequence of the hesitation by states to (a) acknowledge this problem and (b) the unwillingness to surrender their sovereignty to international actors and external assistance in the form of (for example) peace operations.

This topic is very much on today's media[19] and international relations agenda to the extent that, on 30 January 2018, the former U.S. President, Donald Trump, specifically referenced gang-related violence (with an emphasis on one particular gang, MS-13 or Mara Salvatrucha) in the U.S. State of the Union Address to Congress.[20]

This is one of the most important speeches the U.S. President gives on annual basis.

It must also be noted that the growing intensity of the violence in El Salvador and Central American countries has risen too much higher levels than during the non-international armed conflict of the past in El Salvador itself. In fact, more people are dying today in El Salvador as a result of crime linked to gang violence than during the civil war in the 80s.[21] Furthermore, gang-related violence is estimated to cost El

[17] Christine Bell, *On the Law of Peace: Peace Agreements & The Lex Pacificatoria* (2008) University Press, page 3.

[18] Robert J. Bunker and John P. Sullivan *Studies in Gangs and Cartels* (2014), Routledge Taylor & Francis Group.

[19] The gang violence of the maras and their different practices have been presented in modern pot culture, particularly in movies and documentaries 'Sin Nombre' (2009), a film about the MS-13 (Mara Salvatrucha's nemesis) in Chiapas, Mexico. The National Geographic included the MS-13 in its 'World's Most Dangerous Gangs' back in 2005. A particular sad story was the subject of one of the chapters in the History Channel's television series 'Gangland' in 2007: Brenda Paz, a former gang member that became an FBI informant, provided U.S. federal authorities with first-hand details of MS-13's operations only to be murdered later on by the gang as a retaliation act.

[20]U.S. State of the Union Address to Congress accessed from https://www.whitehouse.gov/sotu/ on 1 November 2018 and Liz Robbins 'Trump targets MS-13', *The New York Times*, 31 January 2018.

[21] The raising power of the gangs has come at a big economic and social cost for those affected by maras' violence. By the early/mid 2000s, the northern tier countries of Central America (El Salvador, Honduras and Guatemala) had three of the five highest homicides rates in the world and well above the

Salvador some USD 4 billion a year, according to a study by the country's Central Reserve Bank, with up to 70 percent of businesses being victims of extortion.[22] As such, the maras have now reached sufficient levels of an organization as well as intensity through its violent practices that justify a new approach aimed to reduce the conflict dynamics and violence level.

This situation also provides an opportunity to examine if the scope of crimes against humanity should be expanded and include new forms of crimes. International Criminal Law provides an accountability mechanism for the crimes of the most serious concern to the international community such as genocide, war crimes and crimes against humanity. War crimes, as outlined in the International Criminal Law instruments, are derived from International Humanitarian Law. But it is also important to have in mind that these bodies of Public International Law are distinct: International Humanitarian Law regulates the conduct of warfare between States whereas International Criminal Law is concerned with the attribution of individual criminal responsibility to the culprits of war crimes. War crimes are divided into sub-categories depending on whether they are committed during an international or non-international armed conflict. Violations of International Humanitarian Law in the context of an international armed conflict are commonly referred to as grave breaches of the Geneva Conventions. The Rome Statute follows the conventional classification of war crimes, which mirrors the language of the Geneva Conventions, and encompasses the following four categories of crimes: (i) grave breaches of the Geneva Conventions of 12 August 1949 in Article 8(2)(a); (ii) other serious violations of the laws and customs applicable in international armed conflict in Article 8(2)(b); (iii) serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 applicable to non-international armed conflict in Article 8(2)(c); (iv) other serious violations of the laws and customs applicable in armed conflicts applicable to non-international armed conflict in Article 8(2)(e). Given the dynamic development of international criminal law (such as the maras), the question is whether other categories of crimes live up to the standard of the 'most serious concern' threshold and thus shall be incorporated within the jurisdiction of international criminal courts

number of casualties during the armed conflicts in the 1980s. For more info, please see Robert Bunker quoted above.

[22] Margarita Peñate, Kenny de Escobar, Arnulfo Quintanilla, César Alvarado, 'Estimación del Costo Económico de la Violencia en El Salvador in 2014' (article published in 2016) accessed from https://www.bcr.gob.sv/bcrsite/uploaded/content/category/1745118187.pdf on 1 November 2018, page 5.

and tribunals. Apart from the crime of aggression, which does satisfy the required high threshold,[23] attempts to include drug trafficking,[24] terrorism,[25] and prohibition of the threat or use of nuclear weapons[26] within the jurisdiction of the International Criminal Court (ICC) failed in the original negotiation of the Rome Statute and later again during the ICC Review Conference in Kampala, Uganda, in May 2010.[27] This request was rejected it as was concluded that only crimes that meet the 'most serious concern' threshold -those that are ejusdem generis within the four enumerated categories- belong in the Statute. Christine Schowbel-Patel commented as follows[28]:

> One set of offenses stand out as illuminating a possible alternative, rejected, path. These are the crimes relating to drug trafficking. It is well known that the impetus for directing renewed legal and political energies towards the establishment of a permanent international criminal court came in 1989 through a request made to the (UN) General Assembly by Trinidad Tobago.[29] The request was made on the grounds that domestic prosecution of drug-related crimes was difficult if not possible due to various forms of obstruction to domestic prosecutions.[30] The subsequent resolution by the (UN) General Assembly stated that illicit trafficking in narcotic drugs was the primary reason for establishing a permanent international criminal court.[31] However, in 1998, when the final wording of the Rome Statue was negotiated and agreed upon, drug trafficking no longer featured in the list of crimes under the Court's jurisdiction. Since then, the crime has not only been excluded from the venerable list of "core

[23] The ICC Review Conference adopted a resolution by which it amended the Rome Statute so as to include the definition of the crime of aggression and the condition under which the Court could exercise jurisdiction with respect to the crime. The actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as required for the adoption of an amendment to the Statute. The definition of the crime of aggression was based upon the United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, and was formulated as a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the UN Charter. ICC Press Release dated 12 June 2010.

[24] ICC Review Conference. ICC-ASP/8/20 Volume I Annex II, Report of the Working Group on the Review Conference, paragraphs 52-54.

[25] The Netherlands unsuccessfully sought to incorporate the crime of terrorism within the jurisdiction of the ICC. ICC-ASP/8/20 Volume I Annex II, Report of the Working Group on the Review Conference, paragraphs 40-51.

[26] Mexico submitted a proposal to include the prohibition of 'threat or use of nuclear weapons' in the Rome Statute. The proposal was not discussed at the ICC Review Conference. ICC-ASP/8/20 Volume I Annex II, Report of the Working Group on the Review Conference, paragraphs 34-39.

[27] https://www.hrw.org/news/2010/05/27/icc-strengthen-international-justice-kampala-conference

[28] Christine Schwobel-Patel, 'The Core Crimes of International Criminal Law' (2018), The Oxford Handbook of International Criminal Law, page 3.

[29] Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General (UN Doc A/44/195)

[30] Obstructions include threats, bribery, and other forms of influence on police and judges.

[31] United Nations General Assembly, 72nd plenary meeting, A/RES/44/39 (4 December 1989).

> crimes", but it has also been relegated to a different discipline together. This demotion to a so-called "treaty crime", and ultimately the banishment to the discipline of transnational criminal law, is to be understood against the background of certain hidden biases of the core crimes.

This thesis invites to rethink that rejection vis-à-vis the maras gang violence. Following this introduction, in order to understand the focus of the present research, this thesis will explain the current situation involving the maras in Central America, with emphasis on El Salvador, as follows: (a) The thesis will present the methodology and hypothesis according to which the maras (i) can be considered a non-state armed group operating in a de facto non-international armed conflict and (ii) they can also be subject to International Humanitarian Law and accountable for crimes under the Rome Statute. (b) The thesis will also explain the origins of the maras, its historical roots to El Salvador's armed conflict, and the refugee movement. The thesis will present as well for comparative purposes the traditional view on gangs which are limited to considering them as criminal/penal and police problem. (c) The thesis will develop the link between organized gang violence and transnational crimes and the level of organization, size and coordinated actions of the gangs which are functional to re-create the conditions and dynamics of an internal armed conflict. (d) Once established that the mara structure is an organized criminal group (and not just a simple criminal group), the thesis will analyse the applicable legal background with the established normative framework including (i) current debates on non-international armed conflicts and International Humanitarian Law and Criminal Law, (ii) national and international applicable case law. (e) The thesis will present the final conclusions and recommendations

II) LITERATURE REVIEW AND METHODOLOGY

'First is God, then your gang. You live for God. You die for the gang.'

Excerpt from *Castellano Chacon v. Immigration Naturalization Service*, United States Court of Appeals, Sixth Circuit, August 2003

A - Main Research Question and Methodology

While most of the current literature on the matter does not consider or extend the possibility of considering a criminal armed group as a potential subject of International Humanitarian Law, there are exceptions. For example, Marco Sassoli and Annyssa Bellal conclude that gangs can be covered under International Humanitarian Law. Annyssa Bellal in a paper related to gang violence in El Salvador makes emphasis in the parallels between an armed conflict and the level of violence in El Salvador triggered by the gangs. 'Violence (in El Salvador) is unprecedented not only in terms of a number of casualties, but also in the form it takes. In such settings, the civilian population has been and still is subject to extortion, confinement, forced displacement, gender-based violence and recruitment of minors (this thesis contains one sub-chapter specifically related to child protection). What is really striking is that the number of civilian casualties linked to gangs' violence and states' responses to this violence might exceed those of major current armed conflicts.'[32] Marco Sassoli discusses the challenges of the implementation of International Humanitarian Law in daily global reality which is less state-centred.

> One of the inadequacies mentioned is precisely situations of armed conflicts with armed groups – when they are trans-national armed groups. In the present international environment, I am rather sceptical about the chances of obtaining consensus on new rules genuinely improving the protection for war victims. But let us assume we should revise the law applicable to the fighting between states and armed groups. If we want to revise International Humanitarian Law in a specific area, we must discuss with the actors, which, in the area of non-international armed conflicts,

[32] Annyssa Bellal, 'Gang violence in Colombia, El Salvador and Mexico', included in the War Report (2017) Geneva Academy, University of Geneva, Faculty of Law, 2017 available at www.adh-geneve.ch

> include the armed groups. No one would suggest revising the law of naval warfare without speaking with the navies.[33]

Emily Crawford presents a more restricted opinion in terms of how to identify civilians actively involved in hostilities and she excludes criminal gangs from the application of International Humanitarian Law. Civilians cannot be targeted under the rules of International Humanitarian Law but only if they are not part from hostilities.[34] The evolution of combat and armed conflict since the end of the Cold War has also affected the role of civilians in armed conflict. There are many situations in which civilians play 'a sort of military role such as the intermingling of high-level criminal activities like drug trafficking, alongside more conventional armed conflicts and the new emergence of computer network attacks -commonly known as cyber war a method of armed conflict.'[35] While Crawford excludes criminal gangs from the application of International Humanitarian Law per se, other authors make a distinction on a case-by-case basis. While Annyssa Bellal considers that the maras in El Salvador are a non-state armed group operating in an armed conflict, she has a different view on the gangs in Brazil.

> The legal classification of the ongoing violence between drug gangs and police forces in the favelas (slums) of Rio de Janeiro, Brazil, is debatable. However, despite the intensity of the violence in the city, The War Report considers that the armed groups involved (gangs and militias) do not meet the requisite organization criteria.[36]

The present thesis will address the organization factor in more detail in a different chapter.[37] But it is worth mentioning that this difference in criteria shows that no all-criminal groups can be considered non-state armed groups. As such, it is key to have

---

[33] Marco Sassoli. *The Implementation of International Humanitarian Law: Current and Inherent Challenges* (2007), University of Geneve, Yearbook of International Humanitarian Law, page 17.

[34] This is a point to be developed in detail during the analysis of the La Tablada case by the Inter-American Court of Human Rights in the chapter of the present thesis.

[35] Emily Crawford's book *Identifying the Enemy: Civilian Participation in Armed Conflict*, (2015), Oxford Press, develops a study related to the involvement of civilians in armed conflict (including but not limited to the application of International Humanitarian Law to the direct participation of civilians in a conflict).

[36] Annysa Bellal. *The War Report Armed Conflict in 2018* (April 2019), The Geneva Academy of International Humanitarian Law and Human Rights, page 73.

[37] Chapter VIII of this thesis with an analysis of the commercial insurgency concept.

in mind the importance of the already referenced organization factor (together with the intensity factor) in the analyses for that outcome.

Indeed, the concepts of 'organized armed group' and 'intensity' serve the objective of determining whether a situation is (or not) a non-international armed conflict. If both these requirements are met, the law of non-international armed conflict applies automatically. The *Tadic* jurisprudence [38] from the International Criminal Tribunal for the former Yugoslavia is relevant for purposes of conflict classification and one sub-chapter of this thesis is dedicated to its analyses. The Tadic case provides a clear guideline on which elements need to be present to have an internal armed conflict and an organised armed group.

This situation involving gangs and the applicability and interpretation of International Humanitarian Law presents similar questions to the on-going discussions such as large-scale counter-narcotics campaigns against drug cartels, the use of private military contractors in armed conflicts or in counter-piracy operations at sea. As a result of this trend, the concept of an armed conflict is becoming increasingly blurred.

> 'No event embodies the global security challenges of the twenty-first century more than the dramatic terrorist attacks of 11 September 2001 in New York City and Washington, DC. Within days of the attacks, the U.S. declared a global "war on terror"[39] and NATO had for the first time in its history declared a case of collective self-defence based on Article 5 of the North Atlantic Treaty. The military operations

[38] *Prosecutor v. Dusko Tadic*, ICTY, 14 July 1997 (general reference to this case law, not a specific paragraph). Duško Tadić was is a Bosnian Serb politician and former member of the paramilitary forces supporting the attack on the district of Prijedor. He was convicted of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the customs of war by the International Criminal Tribunal for the Former Yugoslavia (ICTY) for his actions in the Prijedor region. He was sentenced to 20 years of imprisonment. After serving his sentence until September 2000 in the Hague, he was transferred to a prison in Munich, Germany. He was granted early release from prison on 17 July 2008 and is living in Serbia.

[39] The term 'war on terror' has been used to describe military actions conducted by the U.S. against organizations and regimes identified as terrorist or sponsors of terrorism (including Iraq and Afghanistan, according to four U.S. Administrations -Bush, Obama, Trump and Biden-) during the period 2001-2021. The author of this term may have been NBC journalist, Tom Brokaw when he stated 'Terrorists have declared war on America' following the attack on the Twin Towers in New York on 11 September 2001. Matt Lauer, Katie Couric, Tom Brokaw, (11 September 2001). NBC Learn K-12. NBCUniversal Media. 11 September 2012. On 16 September 2001, former U.S. president George W. Bush used the phrase *war on terrorism* for the first time during a press conference: 'This is a new kind of—a new kind of evil. And we understand. And the American people are beginning to understand. This crusade, this war on terrorism is going to take a while. And the American people must be patient. I'm going to be patient.' Address to a Joint Session of Congress and the American People The White House, 20 September 2001.

> in Afghanistan and the capture and transfer of hundreds of suspects to detention centers like the US internment facility at Guantanamo Bay in Cuba raised a series of questions as to the nature and consequences of these operations under international law.'[40] The surge of non-state actors of a criminal (and not political) nature (El Salvador gangs/maras, Mexico drug cartels, the influence of drug-trafficking in Guinea Bissau[41], etc.) opens the door for a new classification and extension of the legal definition of 'organized armed group' and 'armed conflict'. This is supported by the abstract section of a recent paper on International Public Law about El Salvador: 'El Salvador is currently one of the most violent countries in the world with rates of violent death second only to Syria. With gangs running rampant and state security forces unchecked, the streets have become "urban killing fields" while the rest of the world has turned a blind eye to these atrocities. It is time for the international community to refocus on El Salvador and work towards a solution to this dire humanitarian crisis. To that end, it is imperative that the gang violence in El Salvador should be understood by the global community as an internal 'armed conflict' under International Humanitarian Law. By recognizing the violence in El Salvador as an 'armed conflict', international attention to resolving this human rights tragedy will increase, and Salvadoran gang leaders and government forces can be prosecuted internationally for war crimes and crimes against humanity.[42]

International case law is focused on non-state armed groups as result of a classic definition of an armed conflict (the law cases and judicial decisions of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Tribunal for Rwanda, etc.). National case law regulates the topic as a criminal problem and not from the perspective of a situation that may have escalated to the level of an armed conflict. This regulation is conducted through the relevant and applicable national criminal codes and penal cases of each country. The exception is the asylum/refugee claims jurisprudence which provides a different angle to the maras problem. There, in the asylum/refugee claims, is possible to see

[40] *International Humanitarian Law, A Comprehensive Introduction*, (August 2016) ICRC (different references across the document).
[41] 'Cocaine and Guinea-Bissau: How Africa's 'narco-state' is trying to kick its habit', BBC 28 May 2020.
[42] Kirsten Ortega Ryan 'Urban Killing Fields: International Humanitarian Law, Gang Violence, and Armed Conflict on the Streets of El Salvador' (2018), The George Washington University Law School, available on a digital format at at https://sciendo.com/article/10.2478/iclr-2020-0005.

that the case law reflects many points in common with refugee claims made because of armed conflicts.

The main research question is the following: *Can International Humanitarian Law and International Criminal Law be applied to a specific armed organized criminal group (the maras or gangs in El Salvador)?*

The present thesis will be based on compiling documentary research (no interviews will be conducted). Data on transnational criminal violence has the following sources: (a) international and government stats; (b) international organizations stats and (c) surveys conducted by non-governmental organizations. The most complete source of data on gang violence is coming from UNODC.[43] This office within the United Nations (UN) system produces on annual basis the Survey on Crime Trends and the Operations of Criminal Justice Systems, a matrix platform that includes the time-series date on crimes committed in a sample of countries going back to 1970.

This thesis will apply the following parameters in terms of methodology:

(i) Current figures (crime/murders per capita rates; economic indicators; internally displaced persons/refugees because of the gang violence vs. internal displaced persons/refugees during the armed conflict in El Salvador; etc.) and comparative analyses with the figures during the 1980–1992-armed conflict in El Salvador. This matrix will facilitate to argue from a factual point of view that the gang violence in El Salvador today is closer to an armed conflict than to a crime problem and, as such, it requires an International Humanitarian Law legislative framework.

(ii) Review of international and national case law and a study of the applicable comparative legislation to answer the following questions from a legal point of view: (a) Are the gangs/maras organized? (b) Do the gangs/maras challenge the state? (c) Do gangs/maras create with their actions and violence an armed conflict?

. Each chapter of the thesis will deal with one of the above-referenced foundational parts. The first chapter will outline the factual background of the mara's violence. The second chapter will outline the traditional legal framework (i.e., that criminal gangs have most usually been dealt with under domestic criminal law, but such approaches have been unsuccessful). The third chapter will outline why International Humanitarian Law can apply to the maras and review the most significant

[43] The United Nations Office on Drugs and Crime (or UNODC) is an organization within the United Nations system that was created in the year 1997 and its HQ is in Vienna, Austria.

international case law (i.e., non-state armed groups; *La Tablada* case from the Inter-American Court of Human Rights and the maras meeting the criteria of organization and violence under the *Tadic* criteria from the International Criminal Tribunal for the former Yugoslavia). The fourth chapter will build on the previous point and explain why International Criminal Law can also apply to the maras (with the possibility of being prosecuted for war crimes and crimes against humanity, again, on the grounds of organization and violence). The fifth chapter will undertake the analyses of refugee claims and demonstrate how persons fleeing gang violence are functionally like persons fleeing political/religious violence. The penultimate chapter will present an analysis of the why -that because organized gangs disrupt the sovereign functioning of the state to a degree functionally like that of an insurgency, they can be dealt with as armed insurgents, with the final chapter being conclusions and recommendations.

III) THE MARAS AS A CASE STUDY

> 'In 1986, the Los Angeles Police Department (LAPD) noted a dramatic increase in crime by street gangs made up of illegal aliens (among them Mara Salvatrucha). LAPD itself did not have the authority to act on a person's immigration status. So, they decided to enlist the aid of the federal Immigration and Naturalization Service that did have that authority and start the deportation process. The seed was planted then. Street gangs are not solely a police law enforcement problem. It is bigger than that. And we cannot arrest our way out of this.'[44]
>
> Tom Diaz, No Boundaries: Transnational Gangs

(a) Origins of the maras as gang violence

The huge presence of the two main maras, MS-18 and Mara Salvatrucha, in Central America, is linked to the U.S. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), part of a criminal law reform approved in the year 1994 by the U.S. Congress.[45] This piece of legislation was the direct result of a national deportation movement triggered by an LAPD initiative that allowed 'expedite removal' of non- U.S. citizens who have committed serious crimes. If an alien (a non-U.S. citizen) has committed one of the crimes included in the IIRIRA, then he or she is a candidate for the process of summary deportation. With the passage of this Act, gang members were instantly eligible to be sent out of the U.S. Risk avoidance is part of risk management and this approach seemed to follow that principle: trying to reduce or eliminate the problem in one country by just transferring it to another country. But this became in turn, grounds for gangs to take root and assert their position in a new country.[46]

---

[44] Tom Diaz, *No Boundaries: Transnational Latino Gangs and American Law Enforcement* (2009) The University of Michigan Press, page 46.

[45] It should be noted that the current U.S. President, Joe Biden, was co-sponsor of that legislation. The Violent Crime Control and Law Enforcement Act of 1994 (also known as the '1994 Crime Bill') is probably the most comprehensive crime bill in the recent U.S. history. The then U.S. Senator Joe Biden from the State of Delaware developed the Senate draft of this piece of legislation and received input for that purpose from the National Association of Police Organizations. The bill was passed by Congress and signed into law by President Bill Clinton. This Act is usually quoted as one to the elements that most contributed to mass incarceration among the black community in the U.S.

[46] The Immigration and Naturalization Service (later on replaced by the U.S. Immigration and Customs Enforcement -now known as 'ICE'-, the division in the Department of Homeland Security dealing with

The origin of the maras/gangs can be traced to the civil war in El Salvador between 1980 and 1992.[47] This was a time of high levels of violence in El Salvador. The country experienced low economic growth, political repression, the use of paramilitarily death squads, forced disappearances, the formation of an insurgency and numerous human rights violations. Because of these extreme conditions, a big flow of immigration from Central America to the United States took place. El Salvador armed conflict caused around 70,000 victims and a huge displacement of forced people (over a total population of almost six million).[48] With that said, although MS-18 and Mara Salvatrucha are a direct result of the armed civil conflict in El Salvador, it was created outside El Salvador, and not the other way around. *This is very important to clarify: the maras were imported into El Salvador from the U.S. As a million Salvadorans fled during the decade of the 1980s.*[49] Both MS-18 and Mara Salvatrucha were formed by Salvadorian refugees who settled in the U.S. (particularly in Los Angeles, California). Initially the gang was born as a form of protection within the Salvadorian community in different neighbourhoods.[50] Under this agenda, the

migration) claimed to have one of the most functional intelligence systems in the Western Hemisphere concerning criminal aliens (meaning those are in the U.S. illegally and have committed crimes). Following the de-briefing of gang members that were arrested, the INS (or ICE as indicated above) considered MS-13 as a 'spearheading alien, weapons, and narcotics smuggling operation'. It controls stash houses on both U.S. and Mexico sides of the border' and is 'in control of border smuggling corridors.' INS also believed that MS-13 may even 'working jointly with Colombian and Mexican Drug Trafficking Organizations possibly trading guns for drugs with Colombian cartels' and is 'providing security and enforcement services for narcotics and traffickers.' Op cit note 44 at page 20.

[47] *UN Security Council, From Madness to Hope – The 12 Year War in El Salvador: Report of the Commission on the Truth for El Salvador* (1993) United Nations (general reference to this source, not to a specific page).

[48] The term 'refugee' is usually used in the wrong manner, particularly by the media. As long as a person remains within the borders of his/her country, he/she is not a refugee but an 'internal displaced person'. The number of Salvadorian refugees (meaning those Salvadorians who left the country) in one year alone (1981) was approximately 304,800. *UNHCR, The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (2000) United Nations, available at https://www.unhcr.org/en-us/publications/sowr/4a4c754a9/state-worlds-refugees-2000-fifty-years-humanitarian-action.html.

[49] It is impossible to state with certainty how many Salvadoran refugees ended up living in the U.S. because many of them entered illegally. Metrics are difficult to collect. Undocumented immigrants are generally not likely to cooperate with a governmental census request (or they are likely to provide false information fearing of being targeted by immigration authorities. Likewise, it is impossible to state how many Salvadoran refugees went to Los Angeles. However, it is clear that the vast majority of them decided settle in Southern California (and particularly in Los Angeles). In 1987, the Urban Institute was reported to have estimated that there were between 500,000 and 850,000 Salvadorans in the U.S. Of these, the institute estimated that between 250,000 and 350,000 lived in Los Angeles. Judith Cummings The World of the Immigrant: Low-Paying Jobs and Overcrowded Housing, *The New York Times*, 13 April 1987.

[50] In 1989, the LAPD estimated Mara Salvatrucha and MS-13 membership between 150 to 500 people. As the reader can observe, this is a very small percentage compared to the total number of the Salvadoran population living in Los Angeles which was estimated by the Urban Institute's 1987 in 250,000 people. It was the violent behaviour of MS-13 (and not its numbers) what fuelled the initial

purpose of the maras was to provide a sense of security to the newcomers which in the words of Sonja Wolf:

> They were trapped in areas devoid of recreational facilities but sprawling with crime and gangs, these families not only struggled to overcome the trauma of the war but also faced culture shock, language barriers, discrimination, crowded living conditions, and underpaid jobs. Combined with fear of deportation, these strains often led to tension, child neglect, and domestic abuse. In response to difficult personal circumstances and gang harassment, some Salvadoran youth joined existing street gangs, notably MS-18 (born in the 1960s) or created their own gang, MS-13 or Mara Salvatrucha.[51]

It is important to note that most Salvadoran refugee claims during the civil war in El Salvador were neglected[52] until the settlement on the U.S. court case *American Baptist Churches v. Thornburgh*.[53] This was a case against the U.S. Immigration and Naturalization Service (INS), the U.S. Executive Office for Immigration Review (EOIR), and the U.S. Department of State (DoS) in the year 1985. The purpose of this judicial case was to address the claims of alleged discrimination against Central American refugees in asylum seeking processes[54]. This constituted a direct violation of the Refugee Act of 1980, which provided a common ground of interpretation for the review of asylum cases.[55] After five years, no court decision was reached. Instead, a settlement was agreed upon between the parties. The plaintiffs were able to secure *de novo* adjudication for many Guatemalan and Salvadoran migrants who were

---

international notoriety of the gang. Robert J. Bunker and John P. Sullivan *Studies in Gangs and Cartels* (2014) Routledge Taylor & Francis Group. Page 46.

[51] Sonja Wolf *Mara Salvatrucha: The Most Dangerous Street Gang in the Americas?* (2012) University of Miami, page 154.

[52] On the contrary, refugee claims from Nicaraguan citizens fleeing Nicaragua (the country was under the Sandinista revolution now) were more successful. See footnote 54 for more information.

[53] *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (general reference to this case law, not a specific paragraph).

[54] Asylum cases filed by Guatemalan or Salvadoran citizens were mostly rejected (unlike those from Nicaraguan citizens as mentioned above). The annual INS Fiscal statistics for the year 1984 reported for example, a three percent approval rate for Salvadoran migrants and two percent of less approval rate for Guatemalan migrants the same year. This was believed to constitute a discrimination policy against Guatemala and El Salvadorian applicants. It is worth mentioning that Nicaragua, at that time, was under a communist regime (the Sandinistas, whose leader, Daniel Ortega, is the current president of Nicaragua and being criticized for prohibiting and persecuting the opposition in the country) while El Salvador and Guatemala had governments which were favourable to the strategic interest of the U.S. in the hemisphere. INFS Fiscal Statistics for the year 1984, www.census.gov.

[55] Rosemary Bannan, 'The World as Sanctuary' (1986) Review of This Holy Ground: Church Sanctuary and Central American Refugees, pages 110-112.

granted work permits and temporary immunity from deportation until their individual cases were decided by U.S. immigration authorities. But those new arrivals (including those who arrived in the country after the lawsuit filing date) were not included in the settlement. By 1991 (when the settlement was reached), the armed conflict in El Salvador was almost concluded (and, by default, the basis of the asylum claims).

The Los Angeles Times stated that deportation policies widely contribute to the phenomenon of gang violence in Central America.[56] Indeed, before the mid-1990s, there was no gang activity in El Salvador. Only after the first rounds of deportations of gang members back to El Salvador, this situation starts to change dramatically for the worst. The peace accords prohibited the Salvadoran government to use the army for activities that needed to be carried out by the police (including fighting organized crime). The lack of an effective police force in El Salvador created a vacuum that was occupied and exacerbated by the deported gang members.[57] Between 1998 and 2005, the U.S. deported nearly 46,000 gang members to Central America.[58] As a result of the deportation process being intensified by U.S. authorities, almost overnight the Central American countries started to see a growth in gang violence triggered by the deported gangsters. This has been recently acknowledged by the United Nations through the Special Rapporteur on the human rights of internally displaced persons on her visit to El Salvador:

> While gangs have existed in El Salvador since the end of the civil war in 1992, reports suggest that gang membership has increased dramatically since the early 2000s as Salvadoran gang members were deported in significant numbers from the United States of America and continued criminal activities in El Salvador.[59]

Furthermore, Mr. Michel Forst, the Special Rapporteur on the human rights of internally displaced persons at that time, also acknowledged that the mass deportation contributed to exporting U.S. gang practices to Central America and the

[56] Robert J. Lopez, Rich Connell and Chris Kraul, 'Gang Uses Deportation to Its Advantage to Flourish in U.S.', October 30, 2005, *Los Angeles Times*.
[57] Thomas Bruneau, Lucia Dammer and Elizabeth Skinner *Maras: Gang violence and security in Central America* (2011), University of Texas Press, page 211.
[58] United Nations Office on Drugs and Crime (UNODC) figures (2007), page 46.
[59] Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to El Salvador; United Nations General Assembly, Human Rights Council, Third-eighth session, 18th June – 6 July 2018.

gang phenomena became more radical.[60] The immediate consequence was that these deportees installed in El Salvador a typical 'Los Angeles-style gang violence culture and dynamics'[61] to a post-conflict society that did not have the resources to cope with this new criminal modus operandi.[62] Gang culture has gone mainstream since the mid-80s through rap music and movies in which artists and characters are portrayed with tattoos, baggy jeans and using slang-street words as examples of that culture. 'All the stuff that was street related has become mainstream so now it's hard to tell the difference between the real and the fake'.[63] In order to understand what Los Angeles style gang violence is, it is also necessary to understand first the history of that gang violence in the U.S. in general and in California in particular. Research on gangs in the U.S. can be traced to the 19th century, when immigrants from all over the world began settling first in New York and then across the U.S.[64] In Southern California, members of the Crips and the Bloods, became very well-known, even internationally.[65] The Watts riots in 1965 triggered a (mostly white) massive middle-class urban flight to the suburbs leading to decay in the inner-city as a big percentage of the tax base was lost.[66] Then, as already indicated, a surge of immigration in U.S. from Central America, caused many arrivals to bond with each other for protection purposes. Finally, the growing crack cocaine problem in the U.S. during the 1980s led to increasingly violent confrontations fuelled by its high profit margins.[67] The gang culture[68] of Los Angeles took root by claiming territory in different, open and public

[60] Op cit note 59 at page 23.

[61] 'By the mid1980s, gang violence in Southern California had increased substantially compared to the 1960s and 1970s, and Los Angeles was known as the gang capital of the world. For example, Los Angeles went from 50,000 gang members in 450 different gangs in 1988 to 100,000 gang members and 750 different street gangs three years later in 1991. The emerging maras, together with gangs such as the Crips and the Bloods (easily identified by their colors, blue and red respectively, formed in Los Angeles in sixties and early seventies became involved in the crack cocaine trade. Gang population reached an all-time high in 1995 with more than 1,500 gangs in Los Angeles alone.' Op cit note 51 at page 22.

[62] L.A.'s gang culture proved to be a good source of income for the media business. Films like *Colors*, *Boyz N the Hood*, and *American Me* are considered cult-movies even today.

[63] Serjeant, Jill. Little glamour in L.A., gang capital of America, *Los Angeles Times*, February 8, 2007.

[64] History of Gangs in the United States available at 43455_1.pdf (sagepub.com).

[65] Josephine Metcalf, 'From Rage to Rape and Prison to Print: Social, Cultural and Commercial Contexts in the Emergence of Gang Memoires' (2009) European Journal for American Studies.

[66] Baltimore (in the U.S. state of Maryland, and Detroit (in the U.S. State of Michigan) are probably the best two modern examples of cities that enter into a progressive decadence (particularly in their inner-city spaces) following the departure of their tax bases from the urban belt to the counties.

[67] Crack cocaine or crack was a cocaine free base that could be smoked. It provided a powerful but also very short effect on addicts.

[68] Rodrigo Garcia, *Urban Politics: The Political Culture of Gangs in California* (2006) Author House. This book is a study of certain parallels that author has noted between street gang and bureaucratic structures and organizations (general reference to this source, not to a specific page).

urban spots such as parks, apartment buildings on social housing projects and, particularly, corner streets for drug dealing.[69] In fact, many gangs named themselves after streets such as Grape Street, Hoover, Street, MS-18 (for the 18th street) and Mara Salvatrucha or MS-13 (for the 13rd street).

Gang life may include moments of bonding, partying, and hanging out through what the mara members call 'La Vida Loca' (the 'crazy life' or the 'fast lane life' in Spanish). The gang affords a sense of family and provides some economic means to de-franchised youth but also hard rites of passage.[70] They publicly display their criminal affiliation through visible tattoos, hand signs, tagging of their turf, and special greetings.[71] As mentioned before, the role of mass media and social media in the promotion of gangs and gang culture is a key factor to understand how a gang culture from the U.S. moved to other countries in the world. From Leonard Bernstein's musical 'The Westside Story' as early as 1957 (introducing a gang thematic to a mainstream audience) to movies like 'Colors' (1988), 'Boyz 'n the Hood' (1991), and 'Blood in Blood out' (1993) to music, this visual narrative contributed significantly to that cultural proliferation. Along with the films, the visual and graphic features of a 'gang style' have become popular among young audiences around the globe. Furthermore, gang and part of the current youth culture are now connected through social media platforms that contribute to disseminating the same gang life, including for military purposes.[72] In this sense, a very interesting example of the influence of this gang culture can be seen in the Sierra Leonean armed conflict

[69] Adam Ryan Procell and Danny Procell, *Anatomizing the Gang Culture*. 2014 Beyond Reproach Publications. *A World of Gangs: Armed Young Men and Gangsta Culture* (2008) University of Minnesota Press, page 46.

[70] The last sentence of Christian Poveda's documentary 'La Vida Loca' shows different examples of those rites of passage in MS 18 and aggression usually associated to them. Mara candidates must endure being beaten up by several members of the gang for 18 seconds. Girls are put through the same initiation process or given the choice of being 'sexed in' (sleeping with another gang member) although this last option place them as second-class members in the gangs. This is also described by Jody Miller, 'Gender and victimization risk among young women in gangs', in Journal of Research in Crime and Delinquency, Vol. 35, No. 4 (1998), page 56.

[71] Wearing clothes of certain colours (like in Los Angeles with the red colour for the Bloods and blue colour for the Crips) allows militia members to recognize each other (in the same manner than uniforms in the case of the soldiers in armed forces) and to recognize the enemy.

[72] In its 2011 gang assessment, the U.S. Federal Bureau of Investigation (FBI) published that all branches of the U.S. armed forced were 'infiltrated' by gang members. Pictures of U.S. soldiers, even those deployed in active combat zones such as Iraq and Afghanistan, 'throwing gang hand signs' were becoming more and more common. The reported concluded that U.S. military saw gang members from more than fifty (50) different gangs in the Army, Air Force, Navy, and Marines. 'Through transfers, deployments and military training, the military-affiliated gang members have expanded their culture to new places, both at the national and international levels, undermining law enforcement initiatives to counter crime. Gang members with military experience presents a unique and high-risk threat due to their skills and their ability to transfer that know-how to fellow gang members.'

through this quote from a young militia commander in 2005 that illustrates how armed groups become gang 'LA-ised' in terms of being influenced by such 'gangsta-culture':

> When we were in the training camp, we just wanted to listen to Tupac Shakur music. We went singing 'West Side' and go on like the background fill-in in many rap songs. All the other soldiers made this name famous. We began to plait our hair and behave like American gangs. If you go to some towns in the countryside, you will see our name written on the walls. It was only when the government put charges against us that they started to call us West Side Boys. That is why we called ourselves West Side Boys. Yes! (he says the last words with emphasis as if tasting it with full satisfaction).[73]

Researcher Mats Utas[74] states how surprised he was about the similarities he found in his research between the activities of the Black Kings[75] and the combatant youths interviewed by this author during the postwar Freetown, Sierra Leone.[76] Many of the members of the West Side Boys militia were family members of the Armed Forces Revolutionary Council (AFRC)[77] soldiers and had grown up in military barracks or the surrounding neighborhoods in western Freetown.[78] In parallel with the Sierra Leone West Side Boys another two groups emerged in a completely different place on the other side of the world: the Tupac Outlaws and West Side Outlaws militia group in the Solomon Islands[79]. Furthermore, different reports indicated that in the

[73] Jennifer M. Hazen and Dennis Rodgers, *Global Gangs, Street Violence Across the World*, (2014) University of Minnesota, page 15.
[74] Mats Utas, 'Sierra Leona and Liberia War' (2008), Journal of Social Sciences and Management 1, Oxford: Berghahn Books, page 46.
[75] A gang from south Chicago.
[76] The Sierra Leone Civil War (1991–2002) was very well known for the systematic use of child soldiers. The two main actors were Sierra Leone Revolutionary United Front (supported by Charles Taylor, president of Liberia at that time, for which we was indicted by the Special Court for Sierra Leone at and sentenced in 2012 to fifty years in prison) against Joseph Saidou Momoh (president of Sierra Leone at that time). Myriam Denov, Child soldiers: Sierra Leone's Revolutionary United Front (2010) New York: Cambridge University Press (general reference to this source, not a specific page).
[77] The Armed Forces Revolutionary Council was formed by a faction of the Sierra Leone army who supported the Revolutionary United Front. The Special Court for Sierra sentenced some of the former Sierra Leone military (such as Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu) as guilty of acts of war, including the systematic use of child soldiers, collective punishments, rape and murder. Op cit note 76 at page 26,
[78] The name 'West Side Boys' was taken from the music of the already referenced U.S. rapper Tupac Shakur. As already indicated, in a tragic turn of events (and, to certain extent, a reflex of his lyrics), on 7 September 1996, Shakur was murdered as result of a drive-by shooting in Las Vegas, U.S.
[79] George Wehrfritz, 'Rebels of the Pacific, *Newsweek*, 16 August 2008.

Democratic Republic of Congo (DRC)[80] and Ivory Coast, rebel groups were reportedly using Tupac t-shirts as their uniforms. This gang culture represented the logic and reality of certain youth in war-ridden Sierra Leone. As indicated in one of the footnotes, lyrics from U.S. hip-hop have been the basis for such practices and sentiments. Being 'ready to die' –itself the title of a Notorious B.I.G.'s first album- has a central connotation for many revolutionary nationalist projects and Sierra Leone was not an exception. This is a feeling experienced by a youth that has emerged scarred from the experience of an armed conflict in Sierra Leone, in El Salvador and other torn-war jurisdictions.

In the case of MS-18 and Mara Salvatrucha, many of their members cover themselves in tattoos and replicate that same and referenced gang culture from U.S. Typical tattoos include drawings such as 'MS', 'Salvatrucha', the 'Devil Horns', and the name of their mara clique. Lately the maras have been abandoning this practice (face tattoos made gang membership easily identified) but kept other symbols and codes such as hand signs as a way of communication. While in the maras in the United States are not commonly affiliated under one command, in El Salvador the gang structure is more centralized.

Gangs in general are a violent and short-term alternative for de-franchised young people but this thesis aims to describe the reasons for which the maras are different from other gangs. Indeed, the maras have been labelled by Newsweek magazine in September 2005 as 'the most dangerous gang in America' and the among top five public enemies in terms of an organization. The presence of the maras in the U.S. is a blowback effect. [81] As indicated before, the maras are linked to the civil war in El Salvador. But the other epicenter of the maras roots is in Los Angeles from where the policy of deportation (back to Central America) of criminals started.[82] Los Angeles, has been often called the 'mother' of U.S. modern gang problem.[83] The gang culture

[80] Somini Sengupta, 'Mortal combat rages, mortal combat rules', *The New York Times*, 10 June 2003.
[81] 'Blowback' is a term originating from within the U.S. Intelligence community, denoting the unintended consequences, unwanted side-effects, or suffered repercussions of certain policy. For example, the term was used by the U.S. Central Intelligence Agency (CIA) officials to describe the Iranian Islamic Revolution in 1979 as the 'blowback' for the coup d'état in 1953 in Iran against Mohammad Mosaddegh (orchestrated by intelligence services of the U.S. and the United Kingdom) that lead to the government of the Shah Mohammad Reza Pahlavi (overthrown by Ruhollah Khomeini on 11 February 1979).
[82] During the year 2000, a monthly average of three hundred violent Salvadorian criminals were deported from the United States to El Salvador. Most were MS-13 or 18th Street members.
[83] As of April 2007, the FBI had identified MS-13 cliques in forty U.S. states (of the total fifty-one states in the country) and even in some Canadian cities. The transformation of the maras from a local

did not come to the United States from the south of its border but the other way around. It is then valid to ask how the initial approach was to counter this new form of crime. LAPD's first intensive anti-gang program started in 1977 and was supported by federal grant funding which evolved in a specialized a police gang unit in the early 80s.[84] In parallel, FBI agents started to work on the streets of Los Angeles with the local police after Los Angeles was labelled as the key location for the spread of the drug problem in the U.S:

> Street gangs are the primary retail distributors of illicit drugs in the U.S. The abuse of cocaine, heroin, marijuana, and synthetic drugs afflict over 33 million Americans, resulting in over 20,000 deaths in the United States in recent years. The total economic cost of drug abuse in the United States defined as negative health and crime consequences, as well as loss of potential productivity from disability, death, and withdrawal from the legitimate workplace – was estimated to be approximately U$D 180.9 billion in 2002.[85]

The American National Gangs Intelligence Center indicates three specific types of gangs in the United States: (i) street gangs, (ii) prison gang, and (iii) motorcycle gangs.[86] Numerous Los Angeles street gang members were actively involved in the crack cocaine trade, controlling it with 'murderous violence' but the FBI/LAPD task

---

street gang into a transnational gang within three decades was driven in by the U.S. initiative of deporting aliens involved in gang violence. For example, the Chicago metropolitan area is one of the largest gangs-related run illegal drug markets in the United States. It is a large retail market. It is also a hub of drug transportation, linked to the rest of the country by rail, air, and highway. Chicago (in the U.S. state of Illinois) is the U.S. largest trucking centre (and a key city for the supply chain in U.S.) and has the second busiest airport and the busiest rail and postal facilities in the country. The complex and experienced drug-trafficking organizations have exploited this infrastructure to turn Chicago into a vast transhipment point for drugs. Cocaine, heroin, marijuana, and other drugs are shipped up from Mexico through Texas and California and from there to Chicago. Then, from Chicago, drugs are moved out to other U.S midwestern and eastern retail markets. In parallel, in the south of the U.S., Miami is the gateway to the Americas and, as such, it has always been attractive to criminal organizations. Ibid at page 22.

[84] This was the genesis of the CRASH unit (Community Resources against Street Hoodlums) in 1979. Originally to be called TRASH –Total Resources against Street Hoodlums- the unit's name was changed to CRASH, amending the word Community for Total, after civic leaders objected to the implication that human beings, even gangsters, could be just 'trash'. In fact, the original idea behind CRASH to create a unit that could better policing gangs and instrument long-term approaches. These ideas were summarized up in the LAPD's program for CRASH, which aimed to 'stop crime before it happened', according to Daryl Gates –a controversial police chief who was replaced as result of the Rodney King/LA riots in 1992.

[85] U.S. Department of Justice, Federal Bureau of Investigation, 'FBI- Los Angeles', http://losangeles.fbi.gov/.

[86] Olivier Bangerter, 'Territorial gangs and their consequences for humanitarian players', International Review of the Red Cross (2010) Volume 92 Number 878 June 2010, page 391.

force concentrated most resources on two gangs: the Crips and Bloods.[87] Given the media over-focus with these two gangs and their perceived power in the business of crack and cocaine, the LA federal task force put all efforts on them while the maras were not targeted. Because of this decision, the maras were particularly well placed for the open space left by the Crips and Bloods in the drug trade with one important difference: they were not involved just in retail but also in wholesale trafficking through their connections with transnational criminal and drug-trafficking organizations. While Peru is the main source of cocaine reaching the U.S. and Canada, Mexico is the main transportation route[88]. Furthermore, Mexico is also the main supply of heroin and marihuana for the U.S.[89] Mexican organized criminal organizations reinforced their relationships with the maras as they 'outsourced' to the maras different 'drug retail' tasks such as the distribution, collection, and territorial enforcement. Los Angeles is today the 'national level drug distribution center for all major drugs of abuse –cocaine, heroin, marijuana, and methamphetamine, as well as other drugs.'[90] Furthermore, also in the U.S., the presence of gangs has extended to the military. The FBI announced that gangs have infiltrated every branch of the military, but particularly, the army. The report indicated that the military in U.S. has seen members from 53 gangs enlisting and, through transfers deployments, the military-affiliated gang members have expanded their culture and operations dramatically. This has allowed them to expand their culture and operations nationally and internationally, undermining in the process security and law enforcement efforts to combat crime.[91] The U.S. Department of Justice also indicated that:

[87] These are two gangs that comprise mainly black Americans and that area involved in drug trafficking and other criminal activities. The Bloods have between 7,000 and 30,000 members in the U.S. spread over 123 cities in 33 states. The Crips have 30,000 to 50,0000 members in the U.S. spread in 221 cities in 41 states. U.S. National Gang Assessment, 2015, page 11.

[88] Indeed, contrary to the common belief, Peru (and not Colombia) is the main source of cocaine into the U.S. and Canada. But Mexico is used as the main conduit platform for the cocaine trafficking into the U.S. (as Miami/Florida/Caribbean routes were in the 80s).

[89] Heroin is a drug from Asia: Afghanistan and the 'Golden Triangle' (Thailand, Laos and Cambodia). Originally introduced in the 20s as recreational drug but also for medicinal (anesthesia) purposes, heroin took a huge boost between 1967 and 1972 with the U.S. soldiers returning from the Vietnam War. The drug, at that time, was consumed mostly by low income (mostly black) communities in U.S. This is has completely changed now. Not only Mexico has replaced Asia as the main source of heroin into U.S. but also as result of the opioid pharmaceutical crisis, heroin is now a drug consumed by middle/high income (and mostly white) communities in U.S.

[90] Op cit note 85 at page 28.

[91] 'The FBI announces gangs have infiltrated every branch of the military', *Business Reader*, October 2011. The investigation started by an almost casual event: pictures of U.S. soldiers, deployed in combat zones during the wars of Afghanistan and Iraq, making gang related signs with their hands.

> It is evident that the drugs and violence associated with the street-gang subculture and the white supremacist movement have impacted and continue to impact all branches of the Nation's military forces. There are many instances in which ex-gang members, gang members, and gang associates join the armed forces to improve their lives. For the most part, almost all succeed in adapting to the discipline and military way of life. For others, however, the street-gang mentality is still part of the person. These enlisted men and women continue with their gang activities on a limited basis. Understanding that if caught they will lose their jobs, these gang members have kept their gang membership and activities secret. These gang members can and have recruited new members while on base. The types of military gang crime have included murder, attempted murder, drive-by shootings, hate crimes, vandalism, assault with a deadly weapon, simple assault, rape, robbery, burglary, weapons violations, and vehicle theft. Further, there have been numerous documented instances in which active military personnel have been involved in gang-related crimes off base. Some of these adult gang members have access to all types of military munitions. Within the last 6 years, the military has experienced and documented an increase in the theft of these items.[92]

The last developments related to the maras are taking place in the context of COVID-19 as gangs are 'taking advantage of the pandemic.'[93] The president of El Salvador, Nayib Bukele, said criminal gangs were using the lockdowns to increase their activities after more than fifty people were killed in just one weekend in April 2020. President Bukele, who won the elections in 2019, authorised not just the police but also the army to use lethal force to curb the violence.[94] According to his analyses, El Salvador's maras were taking advantage of the fact that the security forces had turned their attention towards curbing the spread of coronavirus and away from the gangs. 'The police and armed forces must prioritise safeguarding their lives, those of their companions and of honest citizens. The use of lethal force is authorised in self-defence or in defence of the lives of Salvadoreans,' the president said.[95] The explicit reference made by the president, the highest civil authority in the state, to the army,

[92] A Valdez, Police: The Law Enforcement Magazine (July 1997) Volume: 21 Issue: 7, pages 56-58
[93] 'El Salvador: Gangs taking advantage of pandemic'. *REUTERS*, 27 April 2020.
[94] The reader of the present thesis is reminded that the Peace Accords that ended the Civil War in El Salvador in 1992 effectively forbid the use of military forces for police related activities (such as combating crime). The maras violence changed this limitation.
[95] 'El Salvador authorizes use of lethal force against gangs', REUTERS, 26 April 2020 available on digital format at https://www.usnews.com/news/world/articles/2020-04-26/el-salvador-authorizes-use-of-lethal-force-against-gangs?context=amp

and not just the police, provides an idea of the magnitude of the problem. UNCHR also reported that the coronavirus lockdowns in Central America are exploited by criminal gangs.[96] Basically, confinement is being used to increase the maras control over local communities.[97] 'This includes the stepping up of extortion, drug trafficking and sexual and gender-based violence, and using forced disappearances, murders, and death threats against those that do not comply'.[98]

(b) Comparative analyses of different gangs

In line with the main argument, Dennis Rodgers and Robert Muggah mention that 'gangs are generally excluded from theoretical and policy debates on non-state armed groups. Rather, the acronym tends to be reserved to clusters of individuals who comprise rebel opposition groups, guerrillas, militia, or civil defence and paramilitary forces.'[99] Furthermore, there is a tendency to focus on non-state armed groups in the context of an armed conflict exclusively and this narrows the definition and the scope of review even further.[100] Traditionally, most gang research has been conducted in the U.S. Having said this, the gang problem is not circumscribed to Central American and U.S. It is present in other jurisdictions as well. However, it is important to present to the reader that not all gang violence is placed in a position to challenge the state.[101] Subsequently, not all gang violence can be subject to International Humanitarian Law and International Criminal Law. Gang violence in Central America and why International Humanitarian Law and Criminal Law apply to the maras may be more understood by presenting a comparative analysis of those cases like the maras and those gangs that simply do not reach that threshold. In this sense, it is possible to classify them according to their level of violence in three different

[96] Chronic violence, insecurity and now COVID-related restrictions have put tens of thousands of Central American citizens at risk of increased hardship and even death. UN press release 15 May 2020, available at https://www.ungeneva.org/en/coronavirus-lockdowns-central-america-exploited-criminal-gangs

[97] UN brief 15 May 2020 https://news.un.org/en/story/2020/05/1064172

[98] UNHCR spokesperson Andrej Mahecic press briefing in Geneva, 15 May 2020, available at https://www.unhcr.org/en-us/news/briefing/2021/6/60b5ede64/unhcr-urges-stronger-support-refugee-vaccinations-asia.html

[99] Dennis Rodgers and Robert Muggah, 'Gangs as non-state armed groups: The Central American case' (2015), The London School of Economics and Political Sciene, page 46.

[100] Michael Shifter, 'Countering Criminal Violence in Central America' (2012), New York: Council on Foreign Relations, references made in chapter VII of the document.

[101] One example of that is the Euro gang Program of Research, a network whose objective is to facilitate the systematic and comparative research on gangs employing common methods and definitions (see http://www.umsl.edu/ccj/eurogang).

groups. Furthermore, this chapter will also provide the reader with additional information for the notion that not all gangs are armed groups but only some of those gangs reach that level.

(i) First Generation Gangs

The first generation –or traditional street gangs- are primarily territory-centric (small territories, 'turf-centric').[102] They have a simple leadership, and its focus is on their own neighborhood areas or city blocks for purposes of petty cash gains and gang loyalty ties. When first generation street gangs engage in a criminal act, that crime undertaking is opportunistic, non-organized in scope and tends to be limited and localized. Most gangs in the world today fall within this first generation category int terms of gang classification.[103] This is the case of most gangs in Europe (with Sweden being an exception) as they tend to be small to medium sized, between ten to fifty members.[104] When it comes to organization, gangs in Europe do not have a hierarchy system or a formal organization.[105] Leadership is reported to be unstable and depending on each situation that involves a gang.[106] There is, however, one element that connects U.S., Central America and Europe when it comes to gangs: migration. Indeed, migration has become a common link to gangs, because gang members have been formed often as a result of people displacement.[107] Just like in the U.S., Europe has a long history of migration since the end of World War II involving trends of arrivals coming from multiple countries and cultures.[108] The differences between Europe and the U.S. in the social welfare system are reflected in

[102] According to Max Manwaring of Strategic Studies Institute, first-generation gangs are traditional street gangs with a turf orientation. When they engage in a criminal enterprise, it is largely opportunistic and local in scope. Second-generation gangs are engaged in business. Entrepreneurial and drug centred, they tend to pursue implicit political objectives. Third-generation gangs are primarily mercenary, but many seek to advance explicit political and social agendas. Thus, third-generation gangs find themselves 'at the three-way intersection among crime, war, and politics.' While this categorization may oversimplify, it is useful as a broad picture of gang structure and development emphasizing the complexity of the gang as illicit power in Haiti. Max Manwaring, 'New Realities of Twenty-First Century Asymmetric Conflict', 18 March 2020, Small Wars Journal, at the Small Wars website/blog available on digital format at https://smallwarsjournal.com/jrnl/art/new-realities-twenty-first-century-asymmetric-conflict.

[103] John P. Sullivan and Robert J. Bunker, 'Drug Cartels, Street Gangs, and Warlords', in Robert J. Bunker, ed. Nonstate Threats and Future Wars (2003) London: Frank Cass, page 45.

[104] Op cit note 102 at page 32

[105] Ibid at page 32

[106] Ibid at page 32

[107] The early American gang studies deal with Italian, Irish, Polish and Jewish communities that set foot ashore on the east coast.

[108] In 2015-2016, Germany received almost 1 million refugees from Syria. *The Economist*, 2016 Global Report.

the nature of the gang problem in both places.[109] The U.S. has levels of structural poverty (which are functional to violence) that simply do not exist in the majority of EU member states. Large and far-reaching territorial gangs are much less common in Europe than in the U.S. In the same way, gun crime (such as armed robbery) and gang related homicides are far less common in the Europe than in U.S. Gangs are, indeed, present in Europe, but they constitute a much softer phenomenon than in the U.S. Evidence of this is the fact that research on European gangs is very scarce in clear contrast with the long history of gang research in U.S.

Another interesting example is New Zealand. According to The Economist, New Zealand has more gang members than soldiers.[110] The New Zealand police has counted over 5,300 gang members or 'prospects' lining up to join one of New Zealand's twenty-five listed gang groups. This, altogether, makes gangs a bigger force than the New Zealand army.[111] However, as The Economist reports, 'this underworld only occasionally rears its head, with, say, a gunfire at a rugby game or, an assault outside a winery.'[112] It is possible to conclude then that numbers alone (the size of gangs, the number of affiliates), without being connected to an organized structure command projecting substantial levels of violence, is not enough to make a gang a non-state armed group.

The above scenario, however, can change. EUROPOL, the European Union (EU) agency that monitors crime, has detected a trend of escalating violence between gangs operating on the continent.[113] The development of new synthetic drugs and disputes over drugs supply routes into Europe are functional to the development of gangs, the agency said in a recent (January 2021) press release.[114] The online sale of synthetic

[109] In Sweden the maternity (and paternity) leave is paid and lasts for 480 calendar days. In the U.S. there is no federal (national) law on maternity leave. Each U.S. state regulates maternity leave. In the state of New York, paid maternity leave is limited to one month.
[110] 'New Zealand has more gangsters than soldiers', *The Economist*, 10th February 2018.
[111] The New Zealand Army is the land component of the New Zealand Defence Force and comprises around 4,500 Regular Force personnel. Op cit 110 at page 33.
[112] *The Economist*, 10th February 2018.
[113] The European Union Agency for Law Enforcement Cooperation (known as 'Europol') is the law EU enforcement agency which was created in 1998 with the objective of collecting criminal intelligence and counter organised crime and terrorism through communication and cooperation among all EU states. Europol has no executive powers, and its officials are not entitled to arrest suspects or act without prior approval from competent authorities in the member state where the arrest would take place. It HQ is in The Hague, the Netherlands. One of the main points of discussion between UK and EU following Brexit was the cooperation between UK policies and Europol once the UK left the EU as a member state.
[114] 'Organized Crime Fuels a Rise in Violent Crime in the EU', EUROPOL Press Release, 29 January 2021.

opioids creates new and unwelcome competition for heroin suppliers and can fuel crime violence.[115] These developments 'create the conditions for disruptive criminal business models, greater competition and associated conflict, with the potential for an increase in harms, including violence, associated with the drug market,' as reported by EUROPOL.[116] 'Drug market-related violence and intimidation is a growing concern in the EU. In addition to firearms, including automatic weapons, the use of hand grenades and explosives in the context of drug-related violence appears to be increasing.'[117] It should be noted, however, that even with these new paths of crime emerging, the level of gang violence in Europe is much lower than in the U.S.[118] In general, gun violence and gang-related homicides are not characteristics present in European street gangs. Gang violence is less motivated by inter-gang rivalry and 'commercial insurgency' (as defined in the thesis chapter VIII) but more by issues of identity, honor and maintaining certain gang status and reputation on the street.[119] This description is clearly not the case of the maras in Central America.

(ii) Second Generation Gangs

The second-generation gangs are a group organized for profits and ill-gotten gains. These gangs have a more centralized leadership, and members tend to focus and operate on drug trafficking. At the same time, they act in a much bigger geographical area that may include neighboring cities and other nation-states. Basically, they operate beyond their own neighborhood or 'turf' (a key difference with the first-generation gangs). Second generation gangs use the level of violence they consider necessary to protect their markets and suppress their competition but without reaching the levels of an armed conflict. Second generation gangs can have a link with and provide services to transnational criminal organizations and, in this context, these gangs have a more sophisticated and broader approach in order to reach

---

[115] EUROPOL Press Release, 11 October 2019. https://www.europol.europa.eu/newsroom/news/record-seizures-hit-synthetic-drugs-during-large-scale-joint-action-days-2019

[116] Op cit note 114 at page 33.

[117] Barry Hatton 'EU drug agency sees rising gang violence amid steady drug prices.' AP News, November 26, 2019.

[118] Malcom Klein, 'Gangs in the United States and Europe' (1996), European Journal on Criminal Policy and Research, page 255.

[119] Christian Pfeiffer, 'Juvenile crime and violence in Europe' in Michael Tonry, *Crime and Justice: A Review of Research* (1998), The University of Chicago Press, page 46.

their aims[120] As indicated, European gangs are mainly involved in forms of minor crimes such as street fighting, harassing people, vandalism and petty types of theft.[121] In other instances they are involved in a wide variety of delinquent behavior, including serious offenses like robbery.[122] But, in general, European gangs are mostly placed within the first generation gang level. The situation, however, is not uniform across the EU. An exception of this path is Sweden, a case that presents worrisome aspects and qualifies as a second-generation gang. 'Sweden will do whatever it takes, including sending in the army, to end a wave of gang violence that has seen a string of deadly shootings' were the words from Sweden Prime Minister Stefan Lofven in January 2018.[123] Sweden's murder rate is low compared to international figures, but gang violence has surged in recent years and Swedes are worried that the police are unable to cope with this new reality. In the year 2016 for example, 106 people were murdered in Sweden.[124] The Swedish media reported that during 2016 more than 300 shootings took place, mostly in battles between gangs over drugs, protection rackets and prostitution.[125] In fact, law and order was a major issue in the parliamentary elections in September 2016 with the growing concern about the rising crime rate and arguments linking this to a large increase in the numbers of immigrants. 'It would not be my first option to bring in the military, but I am prepared to do whatever is necessary to make sure that serious, organized crime is stamped out,' continued Prime Minister Lofven. This is a strong statement coming from one of the most liberal countries in the world. The government promised the police an extra 7.1 billion crowns ($880 million) through 2021, it has also passed laws on gun crimes and made it easier for the police to monitor private phone calls and emails, among other measures. The situation in Sweden shares the immigration context that is also present in the maras cases in U.S. and Central America.[126] In fact, a surge in gang violence tends to bring anti-immigration sentiments as part of the election in Sweden.

---

[120] Steven Metz and Raymond Millan, 'Future Wars/Future Battle Space: The Strategic Role of American Land-power' (2003) Carlisle, PA: Strategic Studies Institute (different references across the document)..

[121] Frank van Gemert, 'Gangs, Migration and Crime: The Changing Landscape in Europe and the USA' (2009), University of Amsterdam, page 399.

[122] Op cit 114 page 33

[123] Reported by Reuters, 17 January 2018.

[124] Sweden population is ten million.

[125] Reported by Reuters, 17 January 2018.

[126] Many of the gangs in Sweden are formed by first generation young people from immigrants. Danielle Lee Thompson, 'The Right of Sweden Democrats: Islam, Populism and the Swedish Exceptionalism', Brookings (2020).

One judicial case from the UK illustrates the second generation of gangs.[127]. In Athea Sonia Briton v. Secretary of State for the Home Department, the appellant claimed that she was afraid to return to Jamaica because her family members had been marked by gangs as police informers and because, in the past, her community was subjected to political violence at the hands of gangs associated with the two main political parties, the People's National Party and the Jamaican Labour Party.[128] The UK court accepted the asylum claim because it concluded that the law enforcement and security forces in Jamaica may be 'overzealous', this does not mean that they project a functional control in the prevention and prosecution of crime.

(iii)Third Generation Gangs

A clear example of third generation gangs is the gang activity during peacekeeping operations.[129] Peacekeeping operations are deployed to states that have suffered an armed conflict and the peacekeeping mission purpose is to consolidate the peace and assist in creating the necessary socio-economic and political conditions that would prevent a recurrence of armed violence.[130] In contexts of armed violence – where the infrastructure has been destroyed, lives have been lost and entire communities displaced- organized crime tends to be one item frequently overlooked and underestimated in terms of its potential to prevent the (re)building of a

[127] *Althea Sonia Briton v. Secretary of State for the Home Department* Court, House of Lords, Great Britain (UK). Case number, (2005) UKHL 71, paragraph 14.

[128] The Jamaica Labour Party (JLP) and the People's National Party (PNP) were and still are the two main political parties in Jamaica. One quote from Rivke Jaffe provides an interesting reflection: 'Kingston's urban rupture along lines of class and colour is cut through by violent political fissures, often referred to as "political tribalism". In Downtown Kingston, the two main political parties –the PNP and the JLP- had, and to some extent still have clientelist relationships with their constituencies through "garrison politics." In the 1960s and 1970s, both the PNP and JLP created party-loyal "garrisons" by concentrating supporters in new housing developments and distributing money, jobs and weapons through the community strongmen for "dons", as they came to be called, to protect and strengthen their political strongholds. As dons became increasingly incorporated into the governance of inner-city areas, their function expanded from mobilizing voters to realizing government objectives and projects in the inner city.' This political clientelism dynamic was functional to the establishment of gangs in Jamaica Rivke Jaffe, 'The hybrid state: Crime and citizenship in urban Jamaica' (2013), University of Amsterdam, available at https://dare.uva.nl/search?identifier=c6c10835-f4fb-4716-91d4-6d2ac0555f3d

[129] In August 2022, there are currently ten peace operations, one support operation, three logistics bases, and the support account that finances headquarters personnel who backstop them. Source Reliefweb 202, available at https://reliefweb.int/report/world/2022-un-peacekeeping-budget-signs-progress-or-fleeting-moment-consensus#:~:text=The%20new%20UN%20peacekeeping%20budget,them%20(see%20Table%201).

[130] Mariana Caparini, 'UN Police in Conflict Prevention', SIPRI Discussion Paper, June 2018.

sustainable, state.[131] Indeed, crime is linked to the consequences of an armed conflict with the weakened rule of law, a destroyed economy, high unemployment and demobilized former soldiers and insurgents who have knowledge of how to handle weapons.[132]

Maras belongs to the third-generation gang level. These gangs, at this stage, left behind the actions of first and second-generation level gangs as they expanded their geographical reach, as well as their profit-driven objectives. As time passes, the third generations gangs have developed into more sophisticated organizations with broader drug-related business, as well as transnational criminal networks involving, in some cases, a political agenda. They control territory and become de facto authority in a poorly state-run space.[133] As a consequence, the third- generation gangs and their leadership challenge the legitimate state monopoly on the government functions within a given 'jurisdictional' territory. The gang leader acts much the same as a warlord in that context. That is, once a gang leader has achieved total control of a specific area, then that leader effectively becomes a warlord into a sort of intrastate war. This unconventional type of conflict positions non-state actors directly against states (and the peacekeeping mission) and requiring a matching level of military power to subdue them. That, in turn, brings closer the relationship between gangs and insurgency as they share a common denominator: to replace the government from controlling a territory.[134]

In the year 2010, the UN Security Council drew attention and made an important emphasis to the threats presented by drug trafficking and transnational organized crime to international security in different regions of the world. Since then, the UN Security Council has increasingly quoted the link between drug trafficking and the financing of terrorism as well as illegal arms trafficking and the increasing incidence of kidnapping, cybercrime. The UN Security Council invited the UN Secretary-General to 'consider these threats as a factor in conflict prevention strategies, conflict

[131] An organized criminal group is defined as 'a group of three or more persons existing over a period of time acting in concert with the aim of committing crimes for financial or material benefit' by the United Nations Convention against Transnational Organized Crime.
[132] Christina Steenkamp, 'In the shadows of war and peace: Making sense of violence after peace accords' (2011), Conflict, Security & Development, vol. 11, no. 3, page 56.
[133] Steven Metz and Douglas V. Johnson II, 'Asymmetry and U.S. Military Strategy: Definitions, Background, and Strategic Concept's, Carlisle (2001), PA: Strategic Studies Institute, page 46.
[134] Ana Arana, 'The New Battle for Central America' (November-December 2001), Foreign Affairs, page 98.

analyses, and the planning and assessment of integrated peace missions'.[135] According to a study conducted in 2013, organized crime was found to have been mentioned in the mandates of only twelve of the twenty-eight peace operations.[136] Three years later, in 2016, another study examined different peace operations and stability operations since the mid-1990s. The conclusion of this study was that it took on average almost three years from the moment a mission was authorized to dedicate the allocation of necessary resources to deal with criminalized power structures (as that was not originally envisaged in the design of the peace operation). Modern UN peace operations face a triple challenge related to (a) the changing nature of an armed conflict (from inter-state to intra-state as shown before); (b) the lack of legitim political parties with whom discuss the new future framework for the country and (c) non-comprehensive mission mandates. There is a substantial difference between keeping the peace and enforcing or making the peace. Many peacekeeping missions have been deployed in fragile environments where there is 'little or no peace to keep'.[137] In these scenarios, non-state armed groups in the form of gangs and criminal organizations take advantage of weak condition of state institutions. Furthermore, organized crime and its methodology of corruption of government officials also present a threat to the post-conflict transition and, in the medium and long term, to governance and socio-economic development in war-thorn affected countries.[138] Indeed, the proceeds of the 'illicit economy' are much higher than those from the legitimate economy and provide resources for organized crime in general and gangs in particular as well as for political parties who maintain a sort of patronage network.[139] In many post-conflict contexts, the legacies of war (particularly at the level of the economy) continue to undermine peace mission efforts and the development of legitimate businesses and trade, social contracts and political institutions. Mandating a peace operation mission on the subject of organized crime depends on each context and reflects the political environment and will of the host state and its relations with

[135] United Nations, Statement by the President of the Security Council, S/PRST/2010/4, 24 February 2010.
[136] Walter Kemp, Mark Shaw and Arthur Boutellis, 'The elephant in the room: How can peace operations deal with organized crime?' (June 2013), International Peace Institute, New York, page 56.
[137] High-Level Independent Panel on Peace Operations, 'Summary', Uniting Our Strengths for Peace-Politics, Partnership and People, A/70/95-S/2015/446, 17 June 2015.
[138] Marie Chene, 'Organized crime and corruption' (28 May 2008), U4 Expert Answer, U4 Anti-Corruption Resource Centre and Transparency.
[139] Mats Utas, 'African Conflicts and Informal Power: Big Men and Networks' (2012) Nordic Africa Institute and Zed books: Uppsala and London and New York, page19.

the mission. The post-conflict societies are naturally more inclined to high levels of violence, but that violence may adopt different forms, derived from multiple causes and they can have a wide varying level of intensity.[140]

In post-conflict environments, former combatants and members of dismantled police and military institutions often become involved in organized crime or form new insurgencies.[141] Indeed, there is a considerable risk that people who had positions in the security sector during the armed conflict -both at the state level and at the non-state armed groups level– could take new roles in organized crime after the conflict had ended bringing all their expertise, experience and background. Criminal organizations flourish in the presence of a weak and very limited government authority.[142] It is important to mention that a complete lack of state institutions is not necessarily in the best interest of criminal organizations. Rather a very weak state (than a non-state at all) is the best environment for them. This minimal degree of state control provides criminal organizations a platform from where they can function and take complete control of a territory. Furthermore, the presence of a residual state, also keeps in check, to certain degree, no-state armed groups and/or opposite parties that otherwise could have presented a challenge to criminal organizations[143] Yet, despite its negative impact on any post-conflict transitional society, both for economy/political development and security, organized crime has consistently received a much lower degree of attention from researchers involved in peace operations compared to the research dedicated to traditional non-state armed groups in the same context. Given these essentials, any disarmament, demobilization and reintegration (DDR) project that does not succeed in inserting former combatants into sustainable new means of living through trade/skills/education that can be applied in a post-conflict scenario, run the risk of being overcome by criminal activity.[144] In El Salvador but also in other cases such as Iraq and East Timor, the demobilization of large numbers of combatants proved destabilizing to the whole DDR process. It

[140] For example, in Guinea Bissau, the peace operation mission mandate was expanded to include the implementation of measures to combat drug and human trafficking and organized crime. Op cit note 129 page 36.
[141] The disbandment of the Iraqi army (by the U.S. Administration) after the 2003 Iraq-U.S. war is a very good example.
[142] Daniel Odin Shaw, 'The Crime-Conflict Nexus: Connecting Cause and Effect' available at https://www.e-ir.info/2019/06/27/the-crime-conflict-nexus-connecting-cause-and-effect/
[143] Marina Capirini, 'UN Police and the Challenges of Organized Crime' (April 2019), Stockholm International Peace Research Institute, Discussion Paper, page 62
[144] Jessica Di Salvatore, 'Peacekeepers Against Ethnic and Criminal Violence: Unintended Consequences of UN Peacekeeping', PhD Dissertation, University of Amsterdam (2017), page 9.

completely overwhelmed the capacity of new governments to absorb them into the economy and this resulted in an increase in criminal violence.[145] Different studies in Colombia have found that the presence of criminal gangs undermines the DDR (of former combatants) and increases violence in approximately 158%, far more than those areas where without gangs.[146]

In Africa,[147] where the majority of peace operations are deployed today, Shaw has identified at least four types of organized crime: '(a) well-entrenched criminal organizations networks; (b) loose networks connecting local and external groups in the movement of contraband or resources, as seen in coastal drug trafficking; (c) armed groups or militias involved in smuggling and trafficking activities which also implicate state actors, as seen as across the Sahel or Horn of Africa; and (d) the emerging phenomenon of cybercrime.'[148] Organized criminal activities that involve political actors and drives political violence constitute the biggest concern for peace operations' planners. This is because organized crime serves as conduits for weapons and money for non-state armed groups that still have the capacity to deter the stabilization objective of the peace mission. As crime becomes more and more entrenched in politics and economics, crime then threats the effectiveness of peace building and its long-term objectives. In Mali, for example, a recent independent review by UN experts found that criminal organizations, have contributed to shape the conflict nature among armed groups and local communities by increasing the fighting among each other and providing monetary funding to them. [149] In the DRC, the involvement of organized criminal groups (located outside DRC) in natural resource extraction is fuelling armed conflict in eastern DRC (particularly in the North Kivu province).[150]/[151] Another study research with focus on Liberia concluded that daily contact of Liberian citizens with the uniformed military forces and members of the

[145] Op cit 144 at page 39.
[146] Olivier Kaplan and Enzo Nussio, 'Explaining recidivism of ex-combatants in Colombia' (2018) Journal of Conflict Resolution (2018), volume 65, no. 1, pages 1 to 4.
[147] With the exception of Southern Africa, all other African regions (West, East, Central and North) have a peace operation (or similar) as per 2021 data.
[148] Mark Shaw, 'Where in Africa is organized crime most serious' (11 July 2018), Institute for Security Studies.
[149] This is a finding of the independent strategic review on the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). UN Secretary-General's Report on Mali, S/2018/541, 6 June 2018.
[150] United Nations Environment Program, United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and Special Envoy of the Secretary-General for the Great Lakes Region,
[151] North Kivu is a province in the eastern side of DRC that borders Uganda and Rwanda. Its capital is Goma.

UN Mission in Liberia (UNMIL) reinforced a sense of security in the average person (who was targeted by gangs), and, subsequently, incentivized economic investment. This conclusion showed the positive impact that a peace operation can have as a deterrence force against crime and as a factor in strengthening the rule of law and state-building.[152] The 2016 UN Security Council Resolution renewing the mandate for MONUSCO in DRC stated that 'the linkage between armed groups, criminal networks and illegal exploitation of natural resources contributes to the insecurity in eastern DRC'[153]. This resolution also included different references in relation to the illegal resource exploitation underlining 'the importance of enhanced political and conflict-related analyses, including by collecting and analysing information on the criminal networks which support the armed groups, the monitoring of the implementation of the armed embargo and mining activities.'[154]

UN Security Council Resolution 2423 requested MINUSMA to work in coordination with applicable partners such as the United Nations Office for West Africa and the Sahel (UNOWAS) and UNODC, for a double objective: (a) to enhance its awareness of crime as a key source of violence in Mali (including but not limited to human trafficking, arms, narcotics and illegal exploitation of natural resources) and (b) to be better understand the crime influence beyond the Mali's borders, on the regional Sahel security environment, in order to formulate a more holistic strategy for the peace mission (brining stability not just to Mali but to the entire region).[155]

Another peacekeeping mission, MINUSCA, was granted a mandate that includes fighting organized crime in terms of illicit exploitation and trafficking of natural resources marking that there is room for international political will to address this issue.[156] Pursuant to UN Security Council Resolution 2127, MINUSCA was explicitly empowered to provide support to the Central African Republic to combat crime.[157] This is complemented with a panel of experts at the United Nations in charge of monitoring compliance with the sanctions imposed on armed groups exploiting natural resources.[158] MINUSCA is also mandated to take 'urgent temporary

[152] Robert Blair, 'International intervention and the rule of law after civil war: Evidence from Liberia' (2019), Cambridge University Press
[153] UN Security Council Resolution 2293
[154] Op cit note 153 at page 40.
[155] UN Security Council Resolution 2423
[156] MINUSCA is the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic.
[157] UN Security Council Resolution 2387
[158] UN Security Council Resolution 2387

measures' and pay particular attention 'to those engaging in or providing support for acts that undermine the peace, stability or security of the Central African Republic (CAR), including acts that threaten or impede the political process, or the stabilization and reconciliation process, or that fuel violence.'[159]

The case of Haiti and the involvement of the United Nations Stabilization Mission in Haiti (MINUSTAH) in gang control is paradigmatic. This includes UN Security Council Resolution 2243 of the year 2015 in which the UN Security Council condemned the grave violations against children affected particularly by criminal gang violence. Although not related to El Salvador, the 2007 Report of the Secretary-General on MINUSTAH does recognize the need for conceiving organized crime as a potential threat to a peace process and post-conflict society stabilization.[160] This research study describes the behaviour of violent gangs and institutionalized corruption and how this contributes to undermine the peace process in Haiti.

The gangs in Haiti are another example of a shift in the patterns of violence at the international level. They can be described as politically influenced rather than politically motivated. Although mostly criminal in nature, the Haitian gangs have been historically part of the political life the country. Gangs were used by different political parties in Haiti as paramilitary groups to counterweight to government security forces and control the population.[161] Also, as part of sort of a cultural phenomenon (which will be more explained as part of the sub-chapter on 'commercial insurgency'), gang leaders gained a sort of 'rock star' status in Port-au-Prince among de-franchised youth. Some local media catered to and fed this social status, creating a public profile and fostering reputations. The gangs' size, visibility and power were elements functionals to increase this public profile. The largest and most powerful of the roughly 95 gangs battling for supremacy is currently the so-called G9 (formerly the Fanmi ak Alye or G9 Family and Allies). The G9 was a group of nine gangs led

[159] UN Security Council Resolution 2387.

[160] United Nations Secretary General, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti', UN Doc. S/2007/503, 15 October 2007.

[161] The notorious Tontons Macoutes during the dictatorship of Francois 'Papa Doc' Duvalier (1957-1971) is probably the clearest example of a gang used as a paramilitary force for political purposes. The Macoutes were created specifically to counter any threat the military may pose to the dictator. The end of the Cold War also Haiti's strategic importance as neighbour to Soviet-supported Cuba -a situation that had brough some U.S. support to the Duvalier governments. Gangs in Haiti that have a political bent or history are comprised of 'militants" while those engage mostly in crime and intimidation are referred to as 'criminals. The term 'chimere' in Haitian Creole (or 'bandit') is widely used by the Haiti population in reference to people arrested and accused of gang affiliation during the post-2004 coup period.

by a former police officer Jimmy Cherizier (this thesis will revert again to this point). This alliance gave Cherizier control over all of Port-au-Prince's downtown as well as the critical cross junctions leading to the north and south, also the massive Cite Soleil and Bel Air slums. Cherizier has been under U.S. Treasury sanctions over his alleged involvement in the 2019 Bel-Air massacre while he was still a service police officer.[162]

From 2004, following the fall of Jean-Bertrand Aristide' government, armed gang controlled several part of Haiti's capital, Port-au-Prince, particularly in Cite de Soleil (the city's biggest slum), posing a threat to the country's fragile peace process.[163] Gangs engaged in kidnappings a source of revenue, extortion and drugtrafficking. Haiti disbanded its army as part of the restoration of democratic order in 1994 and the Haitian Police, the country's sole security force, was simply no match for the gangs[164]. MINUSTAH objective was to push the gangs outside the cities. This containment strategy aimed to move the gangs into smaller open field areas and deny them access to urban centers to conduct criminal activities.[165] Early that year (2004), gang attacks against UN forces were tentative, probing hit-and-runs. When MINUSTAH did not respond with the same aggression, gang attacks became much more aggressive, more frequent, and deadlier. By the end of 2004, attacks became more frequent, much larger, and better coordinated and sustained, in the manner of guerrilla urban warfare. Small-unit assault techniques included ambushes, coordinated arcs of fire, and heavier small arms. From there, MINUSTAH campaign against the gangs of Port-au-Prince became an example of effective enforcement of a peace mandate (peace-enforcement, a step beyond peace keeping)[166] against the

[162] Haiti: Situation Report: Gangs and the Haitian State. This document provides an analysis of the current situation and the implications for aid agencies. 12 November 2021. Haiti Situation Report: 30 September 2021, page 56. Vigil Insight is a published for USAID, UK Aid (from the UK Government) and H2H.

[163] Jean-Bertrand Aristide was elected president of Haiti for the first time in January 1991 and then deposed in September 1991 by a coup d'etait. Democratic rule was restored, and Aristide was president again between 1994-1996 and from 2001 to 2004. A second coup d'etait deposed him from power in February 2004. He was forced into exile in South Africa. Aristide returned to Haiti in 2011.

[164] After years of military interference in politics, including dozens of military coups, Haiti disbanded its military in 1995.

[165] MINUSTAH forces instrumented a coordinated assault operation on gangs in on the night of 24 January 2007. UN peacekeepers, by the Brazilian contingent, set a perimeter and mounted an attack on the Cité Soleil (which was controlled by a gang at that time). A heavy firefight started, and, at certain point, the International Committee of the Red Cross (ICRC) arranged a truce to evacuate the wounded. The UN forces eventually manage to capture the gang leader.

[166] Peacekeeping involves the activities designed to create the conditions that favour lasting peace. Peacekeeping under UN Charter Chapter VI missions are consent-based and, as such, they require the

gangs' violence.[167] It has also provided a blueprint for other peace operations and for national governments that face similar challenges from non-traditional non-state armed groups such as gangs.[168]

These UN operations against the gangs were backed up politically by the new president of Haiti, Rene Preval, who was looking to persuade gang leaders to surrender their arms and participate in the DDR program being implemented by the UN. Indeed, Preval met with gang leaders at the Port-au-Prince's presidential palace and tried to encourage them to give up their weapons. A surge in the number of kidnappings following that meeting (as an open challenge from the gangs to the president) and the increasing public demand for action mobilized President Preval to give a televised speech which he issued a public ultimatum to the gangs of 'surrender or die'. [169] MINUSTAH's most dramatic and violent engagements with gangs came soon after that turning point. Also, Mathias Pierre, minister of elections, named the gangs as essentially 'terrorist organizations that have taken over entire neighbourhoods and are using the local populations as human shields.'[170] Julien Bartoletti, the head of Doctors Without Borders in Haiti, said that Haiti should be considered 'as a war zone' as a result of the gangs' violence.[171] His organization was forced to shutter services at the hospital in Martissant this summer after it came under gang gunfire. At least three staff members have been kidnapped, one murdered and dozens are among the 20,000 Haitians who have fled due to gang threat.

A more comprehensive response to gang violence threating the legitimate state institutions requires a deep understanding of how gangs operate vis-à-vis different state functions (policing, justice, general administration, border/customs control, etc.) and what kind of effects their activities are likely to produce. The maras, like the gangs in Haiti, have evolved from a simple gang to serious a destabilizing force, threatening the very rule of law in El Salvador and reaching out to Honduras,

---

consent of the belligerent factions to operate. UN Charter Chapter VII (peace enforcement) missions, by contrast, do not need this consent. Op cit 160 at page 41.

[167] The United Nations Stabilization Mission in Haiti or MINUSTAH per its name in French, lasted from 2004 to 2017. The peace operation was led by Brazil.

[168] The report is based on field research in Haiti in September 2007 which the United States Institute of Peace Haiti Working Group reviewed the report at a public forum on November 28, 2007.

[169] 'U.N. Troops Fight Haiti Gangs One Street at a Time', *The New York Times,* 10 February 2007.

[170] Jim Wyss, 'Gangs Now Rune Haiti, filling a Vacuum Left by Years of Collapse. Criminal gangs decide who passes when and whereas they drive thousands from their homes', *Bloomberg*, September 2, 2021.

[171] Anthony Faiola, 'Haiti buries a president but its long -term crisis lives on', *Washington Post*, 23 July 2021.

Guatemala, Mexico, and U.S. with their violence. The gang structure is as follows: street gangs were hierarchical structures with recognizable leaders, lieutenants, and soldiers. Furthermore, there is another characteristic of Haitian gangs that is also shared by the maras: many of its members are young criminal deportees from the U.S. Having grown up in U.S. (mostly in Miami, Florida State) and often without economic means or the necessary French or Creole language skills, and sometimes without close family ties in Haiti, once deported they were lost in the country and easily recruited into gangs. Other authors have also identified the common patterns between the gangs in Haiti and the maras: 'A similar situation has occurred, albeit on a much larger scale, with the Mara Salvatrucha (commonly known as MS, Mara, and MS 13), a street gang that originated in Los Angeles and, as members, were deported for the United Nations, spread through Mexico and Central America. This group shares with the Haitian street gangs the severity and use of force, access to firearms and sophistication of organization and the shift towards organized crime.'[172]

A recent study addressed the issue if Haiti gang members are (or not) combatants. In the paper, an oral account of the definitions contained in the Third Geneva Convention was provided to young men who were members of gangs. They were told that a combatant is a person who conducts military operations according to the laws and customs of war, is part of the command, wears a fixed distinctive making visible from a distance, and bears arms openly. The outcome was disagreement over whether gang members were combatants or not as some gangs followed a strict and very vertical chain of command while others stated that their groups were more loosely organized in terms of ranks.[173] However, every single participant agreed that gangs had one top general leadership to whom they are accountable. One gang member stated:

> 'We are likely to violate the laws of war by doing crimes against the population. When we are in a war that is during times of peace. Sometimes this is just what the

[172] Athena Kolbe, 'Revisiting Haiti's Gangs and Organized Crime', (June 2013), HASOW (Humanitarian Action in Situations Other Than War), Discussion Paper 4, available at https://www.alnap.org/system/files/content/resource/files/main/hicn-wp-147.pdf

[173] Young boys acting as messengers and helpers were the only non-members whose designation was disputed during the interviews. Leaders referred to the boys as non-members and often pointed out that the group was paying for the boy's school fees or helping his mother buy food and define the relationship as one of mentorship and assistance. Rank and file gang members usually say that the boys were in training to be members, that they were 'like your little brothers' and they were future members.

> circumstances call for and we are forced to steal from the people and attack them. MINUSTAH, those are the combatants we were at war against in 2005. Instead of saying it is a war because the soldiers meet the criteria, we should say it is a war when the gangs are doing military operations. Because you can have an army that is in reserve for when you are attacked. I say that (the name of the gang) is our army.'

In parallel, two-thirds of the interviewed gang members were in favour of gangs, having the 'right' to initiate a 'war' if they were organized and politically motivated while less than three percent agreed with this assertion. In fact, the distinction seemed to be made in the opponent: was the opponent the government or another gang?

> 'If the government comes to hurt you, then this is political, and our gang is like our soldier. But if (name of the gang) gets into a conflict with another gang, then this conflict is likely personal or non-political.'[174]

Peace operations countering gang violence is the clearest example of third-generation gangs and clear evidence that gangs can constitute non-state armed group operating in an armed conflict.

[174] Op cit note 172 at page 44.

IV) THE MARAS AND THE TRADITIONAL LEGAL FRAMEWORK

(a) The maras under national criminal law and as a transnational criminal organization

> 'About two months after I joined MS 13, I got tattooed. Other MS 13 members did the tattoos. I have a 13 on my chin. This signifies my membership in MS 13. The three dots below the corner of my right eye signify the crazy life. The tear drops below the corner of my left eye signifies the memory of a friend (called "El Mago") who was killed by a rival gang. On my chest, I have tattoos for "M", "S", "Honduras", and "13". These mean that I belonged to MS 13, and I am from Honduras. On my right arm I have "MS" in Roman letters, and "Mi Vida Loca" which means my crazy life. On my right shoulder, I have tattoos of theater masks with sad and happy faces. To me this means that sometimes we are sad, like when somebody dies, and sometimes we are happy, like when we drink, dance, and find girls. On my left shoulder, I have a cross. On my left arm, I have "XIII", Roman numerals for 13. On my back, I have a tattoo that says "sureno", to means [sic] that I come from the South. On the ring and middle fingers of my right hand, I have tattoos of "N" and "Y" to show I was from New York. On the index, middle and ring fingers of my left hand, I have tattoos of "H", "L" and "S". The H means I was from Hempstead. The "S" is for "Salvatrucha," which represents the Salvadoran roots of the gang. The "L" was for "La Vida Loca", the crazy life. I got the tattoos for one week, a few each day.'
>
> Excerpt from *Castellano Chacon v. Immigration Naturalization Service,* United States Court of Appeals, Sixth Circuit, August 2003

Organized crime can assume different forms and even have a common symbiotic or parasite links or co-existence relationships with the state, undermining as result the state governance through corruption, influence on state officials and even reaching a 'state capture' scenario.[175] The biggest challenge presented by organized

[175] 'State Capture has become a buzzword in South Africa. It describes the way private individuals and companies have commandeered organs of state to redirect public resources into their own hands and have gutted those institutions responsible for protecting the country against such corruption. These

crime today is its huge potential (as result of its financial means) to erode legitimacy in the state governance and break the social contract which is necessary for any socioeconomic development. In the most extreme variations of this situation, organized crime starts then to cross the level that could be managed by law enforcement personnel and becomes a de facto insurgency. At the same time, the applicability of the law of armed conflict floats around with the following questions: has an armed conflict started? How this question is answered will largely determine whether the law of armed conflict does apply or not. Furthermore, that determination is the first and main entry point for all subsequent legal analyses related to the law of armed conflict. It is then necessary the development of different analytical parameters for answering that question when new situations (like the maras) are presented. The terms 'organization' of the non-state armed group and the 'intensity' of the violence between this group and its opponents have emerged as the key elements to determine if there is in concrete terms (a) an armed conflict and (b) non-state armed group. There are also the objectives and the character of crimes committed. Those two are quite important. The objectives shared by a criminal gang are completely different from those of warring factions in an armed conflict which, most often, carry a political agenda. Secondly, the ultimate crimes committed will be genocide, crimes against humanity and war crimes -crimes, which, as have been defined by international instruments, require the presence of specific elements. International Humanitarian Law distinguishes the application of its rules to isolated, sporadic and recurrent internal disturbances due to efforts to combat crime.

For comparative and illustrative purposes for the reader, this thesis will explain first how the maras are considered today under the legal doctrine that reduces gangs (including the maras) to a national law and a police problem. Once this is achieved, the thesis will proceed to assess if the maras are in fact a transnational criminal organization. In this sense, transnational organized crime refers specifically to the type of crime and crime structure that is carried out beyond national borders (including but not limited drug trafficking, human trafficking, weapons trafficking, cybercrime and money laundering). Transnational organized crime groups are

include the police, the prosecution authority, the tax collection service and even parliament itself.' The Mail Guardian, 11 July 2019. This phenomenon is better referenced in the State of Capture Report, released by the South African Public Protector Thuli Madonsela on 14 October 2016 and available om a digital format at https://www.sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016

networks that evolve and operate globally aiming to consolidate power, influence, and monetary gains. There is no single structure under which transactional organized crime functions as these organizations change from families to clans, from cells to networks but also may evolve into other more complex structures.[176] Considering the maras as an organized criminal organization can provide evidence of certain degree of organization, structure and command which are part of the relevant factors to determine if the maras are a non-state armed group according to the criteria set by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case.[177] ICTY stated that a non-international armed conflict is a situation of protracted armed violence between governmental authorities and organized 'armed groups' or between such groups within a State.[178] The subsequent jurisprudence of the ICTY has considered this prerequisite for the definition of the non-state armed group requirement.[179] This double criteria of (a) intensity and (b) organization have since been confirmed in different case law from the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and also in other international and domestic courts and

[176] One of the earliest examples of a more complex structure in organized crime in modern times is the Mafia Commission in U.S. created by Charles 'Lucky' Luciano during the time of the Prohibition (when alcohol sales were banned). The Commission took the features of a modern corporation with a board aiming to (a) control the main illegal activities in U.S.; (b) consolidate mafia power; (c) apply synergies in for new crime ventures (the Commission was created in 1931 and the Prohibition was repealed by Franklyn Roosevelt in 1934) beyond alcohol bootlegging and (d) an internal mechanism for the resolution of conflicts without the use of violence. There is no doubt that modern organized crime in U.S. was born as result of the alcohol prohibition and this brings valid questions about the debate on legalizing drugs. Milton Friedman, father of the Monetarist Economy School in Chicago and Nobel Prize on Economics Science in 1976, responded as follows when he was consulted on the issue of legalization of drugs in 1991: 'I see the U.S. with half the number of prisons, half the number of prisoners, a significant drop in homicides a year, much better living conditions in the inner cities. The same thing that happened under prohibition of alcohol it is happening now with illegal drugs. Prohibition was repealed when I was 21 years old, so I was a teenager during most of Prohibition. I was a witness of that. Alcohol was readily available. Bootlegging was common. Any idea that alcohol prohibition was keeping people from drinking was ridiculous. And in addition to that, we had the show of Al Capone and the gangsters, and the violence associated to this. Anybody with two eyes could see this was a bad deal, you were doing more harm than good.' Milton Friedman was also against conscription in the U.S. and fully supported the all-volunteer force in 1973 after the Vietnam War. Interview with Milton Friedman in 'Friedman & Szasz on Liberty and Drugs,' 1991, America's Drug Forum, available on a digital format at https://druglibrary.org/schaffer/Misc/friedm1.htm.

[177] *Prosecutor v. Tadic,* ICTY, Case No. IT-94-1-AR-72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction. This will be developed in the next section of this thesis (general reference to this case law, not to a specific paragraph).

[178] Op cit note 177 at page 49.

[179] *Prosecutor v. Haradinaj,* Case No. IT-04-84-T, Judgement, International Criminal Tribunal for the Former Yugoslavia, 3 April 2008: '(…) noting that the 'criterion of protracted armed violence has therefore been interpreted in practice, including by the Tadic Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration.' Op. cit. note 178 note at page 178,

tribunals, including the International Criminal Court (ICC). [180] Furthermore, an ICC Trial Chamber, noting that Article 8(2) (f) of the Rome Statute refers to 'protracted armed conflict between governmental authorities and organized armed groups or between groups', concluded that the term 'armed conflict' has been interpreted to in line with the above-mentioned double criteria of intensity and organization for a non-international armed conflict. Against this background, it is possible to argue that intensity and organization have gained widespread endorsement as the two minimum and main requirements for a Common Article 3 Non-International Armed Conflict.[181]

Historically, in terms of legislation, gangs have been a problem reduced to local, federal and/or national police agencies and departments as opposed to be considered a non-state armed group subject to International Humanitarian Law. The domestic legal view on gangs can be seen from (i) a national perspective and (ii) the receipt of international instruments and treaties in that national legislation. In the case of the maras, U.S. and Central America are the main countries where gang violence is legally defined in more detail as those are the two main jurisdictions where the maras conduct their activities.[182]

From a U.S. national perspective, in the year 1994, California State legislators approved a major change in the state's criminal law framework (commonly known as 'Three Strikes and You are Out').[183] As its name indicates, this law imposes a minimum sentence of twenty-five (25) years to life for three times repeat offenders of certain serious or violent felony convictions (including but not limited to homicide and armed robbery). In many cases, legislation comes as result of public pressure from society. The Californian State legislature passed the Three Strikes law after some several high-profile murders (committed by ex-felons) raised concerns in U.S. public opinion that convicts were being released from prison only to commit new

[180] *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 and Judgement, 14 March 2021, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgement 7 March 2014. (General reference to this case law, not to this specific paragraph).

[181] Different suggestions were made in order to try cover the definition gap vis-à-vis the Common Article 3 Non -International Armed Conflicts. For more information, please consult *International Committee of the Red Cross, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (2016).

[182] Even a jurisdiction as far from El Salvador as Australia has reported the presence of maras: MS-13, the world's deadliest gang has infiltrated Australia (news.com.au).

[183] The law was enacted as Chapter 12, Statutes of 1994 (AB 971, Jones) by the Legislature and by the electorate in Proposition 184.

crimes. This U.S. state-based[184] piece of legislation was complemented in 1996 at the federal level when the U.S. Congress passed the IIRIRA[185], whereby non-US citizens sentenced to one year or more in prison were to be deported their countries of origin. This piece of legislation is a key document for this thesis as it constitutes the starting point of the maras phenomenon: it was as result of this legislation that gang members were started to be deported back to Central America from the U.S.

In 1961 the U.S. Supreme Court concluded that just the membership in an organization that pursued unlawful objectives, including the use of violence to obtain its goals, was not enough for a criminal charge.[186] Only if the individuals in that organization specifically directed their actions within that organization to try to obtain the organization's goals through violence, then in that instance their membership could be criminalized as part of the referenced actions.[187] In this sense, the U.S. Supreme Court stated that the U.S. Constitution First Amendment does not permit a U.S. State 'to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'[188] Almost fifty years later, in 2010, the U.S. law case *Holder v. Humanitarian Law Project* the U.S. Supreme Court again expressly limited its holding to association with foreign organizations.[189]

Another aspect illustrating on how maras are being treated in the U.S. from a legal point of view is the federal 'enterprise theory' by which a criminal organization's entire structure is addressed and considered within the investigation's strategy. This is achieved through three major aspects of the enterprise theory which was originally designed to prosecute the mafia in U.S. This element provides additional evidence in terms of organization, structure and command as all aspects are necessary in order to

[184] The term 'state' on this sentence refers to the states of the United States (e.g., California, Florida, New Jersey, North Carolina, South Carolina, Texas, etc.) and not as a 'state' in the sense of a country.
[185] The IIRIRA or the 'Illegal Immigration Reform and Immigrant Responsibility Act' of 1996, Division C of Pub.L. 104–208, 110 Stat. 3009-546, enacted September 30, 1996, made major changes to the Immigration and Nationality Act of 1965.
[186] *Scales v. United States*, U.S. Supreme Court, 367 U.S. 203, 205–06 (1961), paragraph 205. This was a 1960 decision of the United States Supreme Court that upheld the conviction of Junius Scales for violating of the Smith Act on the basis on his membership in the Communist Party of the United States (CPUSA), available on a digital format at https://tile.loc.gov/storage-services/service/ll/usrep/usrep367/usrep367203/usrep367203.pdf
[187] Op cit. 186 at page 51
[188] Ibid at page 51.
[189] *Holder v. Humanitarian Law Project*, U.S. Supreme Court, 561 U.S. 1 (2010), paragraph 2. Thi was a case decided in June 2010 by the U.S. Supreme Court regarding the U.S. Patriot Act's prohibition on providing material support to foreign terrorist organizations (18 U.S.C. § 2339B). Eric Holder was the U.S. Attorney General at that time.

determine if the maras can be considered a non-state armed group under the parameters set by the *Tadic* case that this thesis will debate in detail. The first aspect is the statutory anvil –the several criminal laws that define as federal crimes the major kinds of criminal conduct in which a conspiracy charge may fall. The second aspect is the investigative techniques, tools, and supporting statutes that enable the federal government to infiltrate into a criminal organization, grasp its entire structure, and prosecute it as a whole structure. The third aspect is the draconian penalties the law provides for offenses under the organized crime statutes. It is worth to make a parallel between this 'enterprise theory' and that the concept of Joint Criminal Enterprise[190] which was specifically devised to capture (top political and military leadership) who do not necessarily have their hands drenched in blood but direct the commission of international crimes from behind the scenes.[191]

> A joint criminal enterprise does not have to be formally organized in a military, political, or administrative structure, rather, the existence of a common plan, design, or purpose that involves the commission of a crime is relevant. There is no need for the purpose to have been previously arranged or formulated; it may materialize extemporaneously and be inferred from the facts. To be liable under this theory, a person must have substantially assisted or significantly affected the furtherance of the goals of the enterprise, such as a by procuring weapons for the plan. Moreover, all co-perpetrators, including the accused, must have had the shared intent to perpetrate the crime.[192]

The above referenced statutory provisions are built on two pillars. The first pillar combines two similar, but slightly different statues aimed at broad based, violent and entrenched enterprises. These are the Racketeer Influenced and Corrupt Organizations

[190] Joint Criminal Enterprise (or 'JCE') is a mode of liability created by judges on the ICTY that allows the tribunal to bring charges against members of a group responsible for war crimes or crimes against humanity even if there is no evidence that the particular individuals physically participated in the crimes (*see* ICTY Appeals Chamber, *Milutinovic et al.*, 21 May 2003). JCE is distinct from the doctrine of conspiracy in U.S. criminal law in that actual perpetration of the acts is required, rather than just a meeting of the minds. Cornell Law School, Legal Information Institute https://www.law.cornell.edu/wex/joint_criminal_enterprise.

[191] Op cit note 178 at page 49.

[192] *Mrkšić et al*., ICTY, (IT-95-13/1), paragraph 4. The concept is also referenced by Sofia Lord, Joint Criminal Enterprise and International Criminal Court. A Comparison between Joint Criminal Enterprise and the Modes of Liability in Joint Comission in Crime under the Rome Statute; Can the International Criminal Court Apply Joint Criminal Enterprise as a Mode of Liability? page 5, available on a digital format at https://www.diva-portal.org/smash/get/diva2:661882/fulltext01.pdf

Act and the Violent Crimes in Aid of Racketeering Act.[193] The foundational element in each of these –known in practice as RICO and VICAR, respectively- is the existence of an 'enterprise' (or a 'group of individuals associated in fact') including a structure for making decisions and a core of persons who function as a continuing unit. Given this basis, the key elements are a variety of 'predicate acts' in which the continuing criminal activity of the enterprise are embodied. The second pillar of the statutory provision applies 'where the gravamen of the gang's activity involves a coherent drug distribution conspiracy.'[194] U.S. federal law is far more reaching than the U.S. state justice and, as such, there are more incentives to make gang members accountable before a court. Federal criminal statutes in U.S. offer a wider and more sophisticated set of offenses to build a charge of criminal conduct. U.S. federal law penalties are draconian compared to most U.S. state law penalties including not but limited to (a) the federal system offers no parole and (b) convicted gang leaders can be dispersed among different federal prisons (away from the state where the crime was committed). RICO cases also involve getting and maintaining a Title III wiretap (acceptable under the Federal Wiretap Act). Application for a warrant must be made to a federal judge, supported by a statement of 'probable cause' and an affidavit detailing the investigation to date and why less intrusive means will not work.

This U.S. legislation had a direct consequence in Central American countries who were confronted with the impact of massive deportations of gang members from U.S. As result of this process, in the mid-2000s, El Salvador, Guatemala, and Honduras started to fight back gang violence through a set of legislative proposals collectively called Mano Dura (which translated from Spanish means 'firm hand' or 'heavy-handed'). Mano Dura related legislation substantially increased sentences for 'gang membership or gang-related crime' and paved the way for mass incarceration of youth for illicit association. The law criminalized gang membership per se, allowed minors to be prosecuted as adults and the imposition of fines against any person 'found wandering about without an identity document in (…) any settlement, without justified cause or who is not known by the inhabitants.'[195] El Salvador's Mano Dura (Ley Anti-Mara or the Act) was enacted with the objective of 'establishing a special

[193] Racketeer Influenced and Corrupt Organizations Act (U.S. Code 18 [2006], 1961-68) and the Violent Crimes in Aid of Racketeering Act (U.S. Code 18 [2006], 1959).
[194] Agnifilio, Bliss, and Riordan, 'Investigating and Prosecuting Gangs' (2006), The U.S. Attorney Bulletin on Gang Prosecution, page 46.
[195] Decreto (Decree) No. 158/2003, Ley Anti-Maras (Anti-Gangs Act) 2003 last accessed from www.glin.gov/view.action?glinID=93702 on 1 November 2018.

and temporary legal regime to combat those groups known as maras or gangs.'[196] Article 1 criminalized gang membership per se and this was defined as a group of people that 'disrupts the public order and offends decorum or good customs.' The Act further enumerated specific criteria that established gang membership, including holding habitual meetings, using hand signs or symbols as a means of identification or, having tattoos. The Act also contained provisions that allowed the trial of juveniles as adults.[197] Following the enactment and implementation of this Act, hundreds of arrests were made of predominantly tattooed youth and charged with gang membership (a crime under the new law). However, in April 2014, El Salvador Supreme Court declared the Act unconstitutional and not in compliance with international human rights instruments binding El Salvador, including the Convention on the Rights of the Child[198] and the American Convention on Human Rights.[199] The El Salvador Supreme Court held that Articles 1 and 3 of the Act violated the constitutional right to due process. Furthermore, the El Salvador's Supreme Court considered that provisions that authorize arrest based solely on physical appearance or membership in a gang were unconstitutional because it was a clear situation of profiling that did not respect the legal principle of presumption of innocence (until proven guilty). Another example of a provision in the Act affecting the presumption of innocence principle was Article 29 that allowed the State to arrest with no charge any person (but specifically any gang deportee) entering the country whose history, appearance, or conduct may have indicated that he/she may have belonged to a mara.

[196] Ley Anti-Maras Act, Article 1.

[197] Ley Anti-Maras Act, Article 2, paragraph 3 which allows the State to prosecute as an adult any person from twelve to eighteen years of age if a Juvenile Court judge and the prosecutor believe that the defendant in question can understand the illicit nature of his or her conduct as an adult would have understood it.

[198] Office of the High Commissioner for Human Rights, Committee on the Rights of the Child, Concluding Observations, UN Doc (CRC/C/15/Add.232 (30 June 2004) '(…) expressing concern that the law allowed for the possibility of prosecuting a child as young as twelve as an adult and that it undermined the already existing Juveniles Offenders Act by introducing a dual system of juvenile justice).'

[199] El Salvador Sala de lo Constitucional de la Corte Suprema de Justicia (Constitutional Chamber of the Supreme Court of Justice) (Dec.52-2003/56-2003/57-2003) at Fallo 16; IV, 3, B (Apr. 1, 2004), referenced at https://curve.carleton.ca/system/files/etd/d83efc31-4579-4cf5-9d6c-79239b3d4197/etd_pdf/735a7141033c6994215e22c5661860ce/rivardpiche-buildingstatesunderminingpublicordersecurity.pdf. The United Nations Convention on the Rights of the Child (CRC) is an international human rights treaty from 1989. The Convention defines a child as any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation.). The CRC came into force in September 1990, after it was ratified by the required number of states. Twenty-one years later, in September 2021, only the U.S. has not ratified the CRC. The American Convention on Human Rights, also known as the Pact of San José, is an international human rights treaty adopted in 1969. It came into force in July 1978. The American Convention on Human Rights is widely referenced by Latin American courts in their rulings on constitutional law

Finally, El Salvador Supreme Court held that the Act further violated the Constitution and the Convention on the Rights of the Child because, in effect, it did not exempt children of any age from its application The El Salvador Supreme Court ruling stressed that the Act was not necessary because the El Salvador Penal Code already provided the necessary legal provisions to prosecute to gang crimes.

Despite the above adverse judicial decision, in July 2004 El Salvador Congress unanimously approved the so-called Super Mano Dura (or the Act II) anti-gang legislation, which included reforms increasing even more the penalties for gang membership.[200]Like the original legislation, this modified version of the Act established a special regime to crack down on gang violence. The main difference was that the Act II added a provision stating that the law would combat gang's 'criminal organized activities' [201]and not just gangs in general. The Act II still criminalized membership in or association with a gang by stating that the gangs were groups of people who 'through their actions' were affecting 'the public order, decorum and good customs' in a society.[202] Although the Act II did not contain any specific provisions penalizing the use of signs or tattoos to identify individuals with gangs, it was still considered that membership in a gang may be concluded from visible tattoos and/or usage of gang signs. Finally, regarding treatment of minors, while the Act II indicated twelve years as the minimum age for the application of its provisions, Act II also allowed a judge to determine whether a minor in the age bracket between twelve and eighteen years should be tried as an adult or not (as a compromise with the previous ruling of the El Salvador Supreme Court).

Considering the gangs as a simple criminal problem to be addressed by the police is a perspective that is not limited to national penal codes. There is also a normative source in terms of legislation for this angle. Numerous national and international instruments including but not limited to the United Nations Convention against Transnational Organized Crime (the United Nations Convention against Transnational Organized Crime and/or the Convention), evidence that transnational organized crime is a legal concept already regulated across the world in different sets of legislation. The Convention applies to the prevention, investigation, and prosecution of the offenses set and described in accordance with the Convention's articles 5, 6, 8, and 23

[200] Gang membership, as a crime, went from five years sentence under Act I to nine years sentence under Act II. El Salvador's Super Mano Dura legislation or Act II.
[201] Op cit 200 at page 55.
[202] Ibid at page 55.

including (a) participation in an organized criminal group; (b) money laundering; (c) corruption of domestic public officials; (d) obstruction of justice and (e) and to any serious crime as so long as the offense is transnational in nature and involves and organized criminal group. The Convention was adopted by a resolution of the UN General Assembly and has three supplementary protocols (the Palermo Protocols): (a) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; (b) Protocol against the Smuggling of Migrants by Land, Sea and Air and (c) Protocol against the Illicit Manufacturing and Trafficking in Firearms. The first protocol (the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, entered into force on 25 December 2003 and UNODC is responsible for its implementation. This protocol provides a guideline for states in terms of drafting comprehensive anti-trafficking national legislation. The protocol commits all ratifying states to prevent and combat trafficking in persons, protecting and assisting victims of trafficking and promoting cooperation among states to meet those objectives. The protocol defines the crime of crime of trafficking a human being as a situation that meets three conditions: act (i.e., recruitment), means (i.e., using force or deception) and purpose (i.e., for the purpose of forced labour). 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, or practices like slavery, servitude, or the removal of organs.

The objective of the Convention is to promote cooperation to prevent and combat transnational organized crime. It also indicates what signatory state members should do to address transnational organized criminal organizations (including but not limited to define and incorporate certain crimes into criminal codes as national law, and providing measures concerning international cooperation to counter organized crime of which UNODC is a clear example). While the Convention does not contain a specific a legal definition of organized crime, it does specify basic requirements needed to give signatory member states a guidance for its incorporation into national law and bringing, by extension, many common aspects with the ICTY jurisprudence

in *Tadic*. Article 2 contains meaningful explanations about the duty to criminalize participation in an 'organized criminal group' (Article 5). It stipulates that (for the purposes of the Convention):

a) 'Organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.
b) 'Serious crime' shall mean conduct constituting an offense punishable by a maximum deprivation of liberty of at least four years or more serious penalty.
c) 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offense and that does not need to have formally defined roles for its members, continuity or its membership or a developed structure.

A criminal association must exist as a structured functional group that was not just formed for the immediate commission of one specific crime (i.e., a crew of criminals put together to rob a bank and to be disbanded immediately after). This means that spontaneous and non-structured forms and types of group criminality are excluded from the concept and definition of criminal association.[203] The subjective element, the requirement of an organized structure being set 'in order to obtain, directly or indirectly, a financial or other material benefit' clearly indicates that organized crime is not driven by political motives but by profit. This is connected to the concept of 'commercial insurgency' and illustrates how maras are operating in the context of an armed conflict.[204] For example, in 2009 UNODC estimated that organized crime generated more than USD 800 billion in ill-gotten gains, the equivalent of 1.3 per cent of the global gross domestic product (GDP).[205] A estimate made eight years later (2017) put the financial figures of the value of organized crime in much more higher

[203] The 'First Generation Gangs' concept is explained further on as part of this thesis (see Chapter III of this thesis).
[204] 'Mexico's ongoing security crisis (related to narcotics) has been described as "an atypical armed conflict" that is carried out for profit in the style of guerrilla warfare and "narco gunmen attack like guerrillas using rocket-propelled grenades and belt driven machine guns yet do not possess an ideology. Cartels fight over territory, yet they are still clandestine, acting as ominous shadow powers.' Ioan Grillo, 'Narco war on TV screens', The Dissident Blog, 9th March 2013, last accessed from http://www.dissidentblog.org/en/articles/narco-war-tv-screens on 1 November 2018.
[205] United Nations Office on Drugs and Crime (UNODC), Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational (2017).

numbers: between USD 3.5 trillion and USD 4.5 trillion or six (6) per cent of the global GDP.[206] Organized crime also has a stronger impact on countries in the developing world.[207] This profit-driven motive plays a key role in the new forms of insurgency, particularly in jurisdictions with less means to combat them and where institutions are weak.

Gang and criminal group cohesion, recruitment and mobilization are also motivated by other factors including socialization, establishment of a group identity, and creating an 'us vs. them' mentality.[208] Similar definitions can be found in national legislation such as the California State in which 'criminal street gang' activity is described as 'any on-going organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of certain criminal acts' and 'having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.'[209].

El Salvador is party to the Convention. The activities of the maras come under the definition and scope of the Convention as its Article 2 defines an organized criminal group as a 'structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.' The maras are composed of large memberships and have been operating for years. In terms of organization, a criminal organization is required to be 'a group that is not randomly formed for the immediate commission of an offense and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.'[210] According to the Convention's Article 3, in order to be governed by the Convention, an offense must be 'transnational in nature', which means that: (a) it is committed in more than one State; (b) it is committed in one State but a substantial part of its preparation,

[206] Robin Cartwright and Cleland Bones, F., 'Trans-national organized crime and the impact on the private sector: The hidden battalions', The Global Initiative Against Transnational Organized Crime, Geneva, (2017).
[207] Raymond W. Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System* (2005), Wiley Press New Jersey, page 56.
[208] Jacqueline Scott *Children and Extreme Violence. Insights from criminology on child trajectories into and out of non-state armed groups* (2017) United Nations University, page 46
[209] U.S. State of California Penal Code, Section 186.2 (f).
[210] Op cit note 10 at page 8.

planning, direction or control takes place in another State; (c) it is committed in one State but has substantial effects in another State.

Groups such as insurgents are not covered by the scope of application of the Convention. [211]On the contrary, International Humanitarian Law applies to these groups.[212] The question is then whether a transnational crime organization can be considered a non-state armed groups as result of the violence inherent to its activities and its organization structure.

There are also circumstances in which criminal organizations support terrorist groups and/or paramilitary groups illustrating another combination of mixed patterns between crime and insurgency.[213] In this regard, when adopting the Convention, the UN General Assembly called upon all member states 'to recognize the links between transnational organized criminal activities and acts of terrorism, taking into account the relevant General Assembly resolutions, and to apply the Convention in combating all forms of criminal activity, as provided therein'. Furthermore, when complex criminal activities demand the inter-action of multiple roles, the different criminal actors are linked as part of a different links in a chain of command. For example, the entire action may be carried out by one gang, or by a combination of several cells and units that are independent but managed by a single gang coordinator or command. In this sense, the European Union legislation, Article 1 of the 2008 Framework Decision[214] on organized crime (with which countries in the EU must comply as part of their EU membership) approved a definition of the term 'criminal organization' very much in line with the definition of 'organized criminal group' in the Convention. Per this definition, the term is subsequently used (Article 2) as the basis for the description of the offense of 'participation in a criminal organization', which constitutes an aggravated circumstance due to that reason.[215]

The main objective of the Convention is 'dismantling organized criminal groups', and this purpose is reflected in the different provisions related to the prevention,

[211] The UNODC Digest recollects different case law on criminal cases around the world. In the case of Colombia, the UNODC Digest stated the potential links between criminal activities (particularly drug trafficking, extortion and kidnapping) and non-state armed groups such as the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC) and the National Liberation Army (*Ejercito de Liberación Nacional*, or ELN).
[212] UNODC (ed.), Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto, United Nations, New York (2004).
[213] U.S. Department of Justice 2011 Report, page 47.

[214] EU Council Framework Decision 2008/913/JHA of 28 November 2008 on criminal law.
[215] Ibid at page 8.

investigation and prosecution of crimes. Criminal offenses such as conspiracy and criminal association were already present in different legal systems before the Convention came into effect. The definitions considered of primary importance when the underlying criminal structure was the raison d'être of such organization. Whatever its specific form in national criminal laws, the offense of Article 5 of the Convention advances the criminal justice response beyond the material commission of (or the attempt to commit) an eventual offense and it 'proscribes participation in criminal groups' per se. In addition, this expanded criminal liability aims to make accountable not only the top head of a criminal organization (who plan, coordinate, and manage, but do not always participate in, the material commission of 'final offenses') but also other members who are necessary participants in non-violent activities (lawyers and accounts in money laundering constitute a typical example) that contribute to the criminal capacity of a group.

Probably the most concrete evidence of the growing role of the gangs in transnational organized crime (and beyond) is the U.S. Executive Order 13,581 of 2012 according to which the U.S. Treasury Department designated MS-13 as a significant transnational criminal organization, noting the gang's 'involvement in serious trafficking, murder, assassinations, racketeering, blackmail, extortion, and immigration offenses.'[216] The Transnational Criminal Organizations sanctions program implemented by the Office of Foreign Assets Control (OFAC)[217] began in 2011 when former U.S. President Barack Obama issued the referenced Executive Order 13,581. This document stated 'the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the growing threat of significant transnational criminal organizations.'[218] The conclusion was that the activities performed by transnational crime had reached the scope of organization and intensity necessary to affect and threaten national security.[219] U.S. Executive Order 13,773, issued in February 2017, directed U.S. federal law enforcement to strengthen efforts to combat transnational criminal organization, including criminal gangs.[220] This is

[216] Department of Treasury, 'Treasury Sanctions Latin America Criminal Organization', press release, October 11, 2012.
[217] The Office of Foreign Assets Control (OFAC) is a law enforcement agency of the U.S. Treasury Department. OFAC is in charge of the administration of economic and trade sanctions imposed by the U.S. government.
[218] U.S. Department of Treasury website, June 2020.
[219] U.S. Department of Treasury website, June 2020.
[220] Executive Order 13773, 'Enforcing Federal Law with Respect to Criminal Organizations and Preventing International Trafficking', 82 Federal Register 10691, February 9, 2017.

part of a joint-policy of the U.S. Treasury Department and the U.S. State Department through the Bureau of International Narcotics and Law Enforcement Affairs (INL) whose objective is to counter international crime, illegal drugs, and instability abroad (linked to transnational crime) by assisting other countries in strengthening their police, courts, and corrections systems. The ability of a government to designate domestic group as a 'terrorist' has different implications.[221] Freedom of association, even with political groups that oppose the current government (and perhaps particularly with groups that oppose the current government) is 'a basic mechanism of the democratic process,' and 'has assumed even greater importance . . . [as] the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.'[222] Moreover, 'a restriction of associational expression is likely to become, in practice, an effort to suppress a whole social or political movement.'[223]

These are elements of a process under which armed conflicts have become more complicated with the growing proliferation of new non-state armed groups –including rebels, militias, criminal groups and gangs like the maras, and violent extremist groups-which may fight each other and the state at different times.[224] This tendency is reflected in a corresponding expansion of the number of parties in an internal conflict: forty four per cent of contemporary armed conflicts involve between three and six opposing actors, while twenty two per cent of armed conflicts have more than ten (10) opposing forces.[225] In these sense, El Salvador's gangs, the maras, have been developing more complex vertical structures with defined member roles, and consolidated chains of command. The organizational chart of the maras involves local sub-groups within the gangs or clicas (cells), whose members typically include young people from a common neighbourhood. Furthermore, leadership roles within the mara hierarchy have become specific and defined, and each mara increasingly operates according to internal rules and orders. In addition, each hierarchical position in the maras is assigned very specific tasks. Lower rungs in the hierarchy (soldados or soldiers) patrol and defend the territory, while intermediate rungs (misioneros or

[221] David Cole, 'The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine', (2012) 6 Harvard Law Review, page 173.
[222] Thomas I. Emerson, 'Freedom of Association and Freedom of Expression' (1964) 74 Yale Law Review, pages 368.
[223] Thomas Healy, 'In a Time of Terror' (2009) 84 Notre Dame Law Review, page 66.
[224] World Bank data from 2017 (www.worldbank.org)
[225] Op cit 224 at page 61.

missionaries) are tasked with carrying out more important operations. Upper echelons include the so-called palabreros or primera palabra (heralds), and segunderos (second-in-command), who relay orders from mara leaders and ensure that they are carried to completion.[226] Above these are the mara leaders themselves (often called ranfleros). This division of labour has increased the maras' ability to carry out a higher level of violence intensity and constitutes another clear example of organization. Maras' activities were not organized around or limited to the local neighbourhood. Rather, maras have developed strategic agendas to carry out illicit businesses, including drug trafficking and extortion. The inner-circle structure of the mara (codes, tattoos, rites of passage, etc.) provides the basis for an analogy with the inner-circle structures of traditional non-state armed groups. For example, the maras are armed with AK-47 and Galil rifles (considered war weapons under the Salvadorian legislation), which points to another similarity between non-state armed groups 'in scenarios on low-intensity armed conflict.'[227] According to Phil Williams, 'of all the non-state armed groups, gangs are the most ubiquitous.'[228] They clearly present challenges to the state. The maras in Central America 'overwhelm the governments, the police and the legal systems with their violence and numbers. Moreover, they are becoming more professionalized and are developing in ways that increasingly resemble well-established criminal organizations and even non-state armed groups.'[229] Williams concurred with the observations in this thesis in terms of commercial insurgency as a new type of armed conflict: 'Their traditional motivations appear increasingly to be overlaid by a desire for ill-gotten gains –whether through contracting out to more established criminal and drug trafficking organizations (such as the narco-cartels in Mexico) or through direct involvement in for-profit-criminal activity.'[230]

[226] Laura Pedraza Fariñal Spring Miller and James L. Cavallaro *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador* (2010) Harvard Law School, page 46.
[227] Ibid at page 22.
[228] Phil Williams, 'Violent Non-State Actors and National and International Security' (2008) International Relations and Security Network, page 17.
[229] Op cit 228 at page 62
[230] Ibid at page 62

V) INTERNATIONAL HUMANITARIAN LAW AND THE MARAS

(a) Relevance of International Humanitarian Law in relation to gang-violence

It is established then that maras constitute an organized criminal organization, but can they be subject to International Humanitarian Law? This research appeals to varied sources of international obligations to prove that International Humanitarian Law and International Criminal Law can be applied to the maras as result of their gang violence. These sources include:

(I) International Humanitarian Law, including the four Geneva Conventions and their two Additional Protocols, other conventions relating to the conduct of warfare and the means and methods of warfare,[231] and rules of customary international humanitarian law.[232]

(II) International Criminal Law, including the Rome Statue of the International Criminal Court, the Convention on the Prevention and Punishment of the Crime of Genocide, and jurisprudence from international criminal tribunals,[233] as well as customary international law.

(III) International Refugee Law, including the Convention Relating to the Statue of Refugees and the Protocol Relating to the Status of Refugees, as well as other laws applicable to refugees.[234]

(IV) Standards, declarations, and resolutions, including resolutions of the UN Security Council and the UN General Assembly, specifically Security Council resolutions on children and armed conflict and country-specific resolutions, General Assembly resolutions on children's rights, the UN Basic Principles and Guidelines on the Right

[231] This includes the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction (1997); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1994); Hague Convention (II) with respect to the Laws and Customs of War on Land (1899); and Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907).

[232] Customary international law constitutes rules that arise from a general practice accepted as law and exist independently from treaty law.

[233] 'International criminal tribunal' include the ICC and other international tribunals prosecuting war crimes, crimes against humanity, and other crimes under international law.

[234] Including the Convention Governing the Specific Aspects of Refugees Problems in Africa (OAU Convention) (1969); Cartagena Declaration on Refugees (1984); and declarations by the UN General Assembly and the UN High Commissioner for Refugees Advisory Executive Committee.

to a Remedy and Reparations for Victims of Gross Violations of International Human Rights.[235]

In this chapter, the thesis will focus on the applicability of International Humanitarian Law. The question is how to apply this of source of international law to maras as gang violence is often considered a criminal rather than a conflict issue, which limits the international community's desire to apply the referenced law instruments. The Inter-American Court of Human Rights' ruling in the La Tablada case (that this thesis will analyse in detail later this chapter) reached a decision that supports the hypothesis according to which International Humanitarian Law can apply to the maras. The Inter-American Court of Human Rights stated that: '… it is important to understand that the application of Common Article 3 does *not* require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory …'.[236] The ICTY Trial Chamber in the Limaj case also indicated that 'some degree of organization by the parties will suffice to establish the existence of an armed conflict'.[237] These rulings (on which this thesis will return) already anticipate that the traditional concept of (internal or not) armed conflict must be reviewed and updated. In International Humanitarian Law, a non-international armed conflict is defined in Common Article 3 and Additional Protocol II of the Geneva Convention.

Piracy offers some interesting analogies vis-à-vis a UN Security Council Resolution from the year 2008. Robin Geiss states the following:

> (…) in times of transnational terrorism and transnational criminal networks states increasingly perceive state failure as a direct threat to their security interests. They will thus probably be even more inclined to partially fill the control gap and assume specific law enforcement functions in place of a disabled government to keep

[235] These include the UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law ('Basic Principles and Guidelines'), A/RES/60/147 (21 March 2006).
[236] *Juan Carlos Abella v. Argentina (Tablada Case),* Inter-American Court of Human Rights, No. 11.137, Report 55/97, paragraph 152.
[237] *Prosecutor v. Limaj*, ICTY, paragraph 89.

potential threats under control. Ongoing operations to repress piracy and armed robbery at sea off the coast of Somalia are a topical case in point.[238]

Like the maras, with a focus in El Salvador but with transnational reach as well, piracy is also one event that affects Somalia, but it has brought global security implications. Piracy has traditionally been viewed as a crime over which universal jurisdiction should be exercised and the fight against piracy has been seen as an act of law enforcement.[239] UN Security Council Resolution 1851 of 16 December 2008 explicitly recognized 'the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia …'[240] Pirates have been defined as *hostis humani generis*, the enemy of all mankind and the United Nations has codified much of the law in the United Nations Convention for the Law of the Seas (UNCLOS), which defines different types of piracy and ways to combat it.[241] It was in this context that the United Nations, by virtue of UN Security Council Resolution 1816 and followed by UN Security Council Resolutions 1846 and 1851, has defined and extended the legal basis for the exercise of enforcement and adjudicative jurisdiction by third parties with regard to the repression of piracy in the area. UN Security Council Resolution 1851 is of particular importance because besides being a world-wide binding legal document based on the regime of enforcement powers granted by UNCLOS, 1851 also refers to International Humanitarian Law: '… states may

[238] Robert Geiss, 'Armed violence in fragile states: Low-intensity conflicts, spill over conflicts, and sporadic law enforcement operations by third parties' (2009) International Review of the Red Cross, Volume 91 Number 873 March 2009, page 138.

[239]Douglas Guilfoyle, 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO regional counter-piracy efforts', International and Comparative Law Quarterly, Vol. 57, 2008, page. 696. Moreover, operative paragraph 5 of Security Council Resolution 1851 (16 December 2008) reflects this perception by encouraging states 'to effectively investigate and prosecute piracy and armed robbery at sea offences.

[240] UN Security Resolution 1851, 16 December 2008, preambular para 5. Similarly, preambular paragraph 7 of UN Security Resolution Res. 1816 (2 June 2008) took into account: 'the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters'

[241] The 1982 United Nations Convention on the Law of the Sea defines in Article 101 (Definition of Piracy): Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measure undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable International Humanitarian and Human Rights Law.'[242] The mentioned reference to International Humanitarian opens the possibility of reflecting how a similar approach could be applied for the maras in El Salvador. Basically, how to mobilize the international community (third parties conducting law-enforcement operations in the territory of a state where a non-international armed conflict is in progress) and resolve the maras problem. From one side, third states could be co-operating with El Salvador -as third states cooperate with the TFG in Somalia in accordance with Resolutions 1851- in countering the maras.[243] On the other hand, Resolution 1851 could be read in such a way that the piracy (a crime) and counterpiracy operations in and of themselves – independently of the ongoing conflict in Somalia – could eventually reach the threshold of a non-international armed conflict, thereby triggering the application of International Humanitarian Law. This is a point the present thesis wishes to hight: *like piracy (vis-à-vis this interpretation of UN Security Council Resolution 1854), maras' violence could also reach the threshold of a non-international armed conflict, thereby triggering the application of International Humanitarian Law.* Like with the maras' gang violence, here is possible then to see a connection between a situation such as piracy (that does not constitute an armed conflict per se) with International Humanitarian Law in the specific context of Somalia. This, however, will not be the case with piracy in order jurisdictions (such as in the Straits of Malacca)[244] as gang violence would not be considered an armed conflict in other jurisdictions where it has not reached the level of El Salvador.

As indicated above, two criteria are used to establish if a conflict can be considered armed conflict according to Article 1(2) of Additional Protocol II. First,

[242] Op cit 240 at page 65.
[243]UN Security Resolution 1872, 26 May 2009
[244] The Strait of Malacca's geography (a narrow stretch of water, 930 km in length, between the Malay Peninsula in Malaysia and the Indonesian island of Sumatra) makes it functional to piracy. The Strait of Malacca was and still is an important passageway between China and India, used heavily for commercial trade. The strait is on the route between Europe, the Suez Canal, the oil-exporting countries of the Persian/Arabian Gulf, and the busy ports of East Asia. Piracy predates on ship owners and the mariners who navigate the strait. In recent years, coordinated patrols by Indonesia, Malaysia, Thailand, and Singapore along with increased security on vessels have sparked a sharp downturn in piracy.

the hostilities must reach a minimum level of intensity, considered to be when the conflict is of a collective nature or when the government uses military force, rather than police, against the non-governmental or non-state group.[245] Second, the non-state armed groups must be deemed parties to the conflict, meaning that they count with organized forces.[246] Once again the 'organization' element is present. The Additional Protocol II of the Geneva Convention, which imposes a stricter standard than Common Article 3, asserts that non-state armed groups must be under responsible command and able to exercise such control over a party of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol. Following this line of argument and already mentioned in the first part of this thesis (Literature Review and Methodology) in the reference of 'War on Terror', there is a willingness in the international community to expand the use of International Humanitarian Law.[247] But, despite this position from different governments in Central America (refusing to apply International Humanitarian Law to a gang such as the maras), at the same time, the disruption of daily life caused by the widespread gang violence by the maras is increasingly similar to experiences of war. Many countries currently considered officially 'at peace' are going through high levels of armed violence and insecurity that those countries at war. In 2017, only two of the five countries with the world's highest reported rates of violent death were experiencing an active armed conflict: Afghanistan and Syria. The other three countries – El Salvador, Honduras and Venezuela- all face significant active gang violence and two of them (El Salvador and Honduras) are epicentersof maras' activities.[248] It is precisely this high level of violence that triggers migration flows and displacement, as has been experienced in 2015 from Syria to Western Europe but also from Central America's Northern Triangle (Guatemala, Honduras and El

[245] Factors used by international courts to assess the intensity of conflict include the number of casualties caused by the conflict; the number of civilians forced to flee combat zones; the occupation of territory, towns, and villages; and the mobilization of government forces to suppress the non-state armed groups.

[246] In the *Tadic* judgement, the ICTY provided factors relevant to determining whether an armed group has the required level of organization for a NIA. According to the ICTY, organized groups have a 'a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally, a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group.*'* Ibid at page 49.

[247] Peru states that there are on-going operations in the Vraem region against the Militarizado Partido Comunista del Peru and this 'conflict' is mostly criminal in nature. See Professor Alonso Gurmendi's article http://opiniojuris.org/2019/12/10/the-last-recognition-of-belligerency-and-some-thoughts-on-why-you-may-not-have-heard-of-it/

[248] Anna Applebaum and Briana Mawby, 'Gang Violence as Armed Conflict: A New Perspective on El Salvador' (2018) Georgetown Institute for Women, Peace and Security Policy Brief, page 2.

Salvador) to the United States at the present moment. In El Salvador gangs are increasingly placed against state forces –police and military forces- in a struggle to gain control over territory and population.[249] El Salvador's gangs, the maras, have contributed to El Salvador's status as one of the most violent countries in the world. El Salvador's homicides rates increased over the period 2012-2017 to surpass Colombia, South Africa, and Venezuela.[250] In 2015, El Salvador registered a homicide rate of 104 per 100,000 residents, the highest in the world for a country not at war.[251] *By this double definition, gang violence in El Salvador through the maras reaches the intensity and organization to be considered an armed conflict. This situation and these metrics invite to re-assess the traditional thinking of application of International Humanitarian Law.*

(b) International Case Law

(i) Non-state armed groups and gang violence

The definition of non-state armed actors has proven difficult owing to their many types and characteristics. A non-state armed group can be defined as an organization that is (i) willing and capable to use violence for pursuing their objectives and (ii) not integrated into formalized state institutions such as regular armies. Additional Protocol II to the 1949 Geneva Conventions (Additional Protocol II) addresses non-state armed groups in its article 1.1 as dissident armed forces or other organized armed groups who fight regular armed forces or against each other on the territory of one or several States. Non-state armed groups may be different in their goals, size, and methods. Non-state armed groups may include popular liberation movements, self-defence militia, and paramilitary groups established by state governments to expand their own interests. While some non-stated armed groups oppose governments, others are allied to them. Thomas, Kiser, and Casebeer asserted in 2005 that 'non-state armed groups play a prominent, often destabilizing role in

[249] Juan F. Fogelbach, 'Gangs, Violence, and Victims in El Salvador, Guatemala and Honduras' (2011) San Diego International Law Journal 12, no. 2, page 46; Donna DeCesare, 'The Children of War: Street Gangs in El Salvador' (25 September 2007), North American Congress on Latin America, page 56.

[250] Claire Mc Evoy and Gergely Hideg, 'Global Violent Deaths 2017: Time to Decide' (2017) Geneva: Small Arms Survey, page 46.

[251] Associated Press, 'A Day without Murder: No One is Killed in El Salvador for First Time in Two Years', Guardian, January 12, 2017. https://www.theguardian.com/world/2017/jan/12/el-salvador-homicide-rate-murder-two-years.

nearly every humanitarian and political crisis faced by the international community'.[252]

The ICTY and ICTR have set out and clarified the definition of armed groups in their case law (including the items related to the level of organization). While a certain level of organization is needed as a requirement [253](Limaj et al. case)[254], non-state armed groups do not need a vertical system of organization similar to those of regular armed forces to be considered as such (Musema[255] case).[256] The ICTY Trial Chamber found that an 'organized armed group'[257] must be characterized by: (a) the existence of a command structure and disciplinary rules within the armed group; (b) a HQ; (c) the capacity to exercise control over certain territory; (d) access to weapons and other military equipment as well as recruits and military training for them; (e) its ability to plan, and execute military operations, including troop movements and logistics; (f) the implementation of military tactics in the context of a strategy and; (g) the faculty to negotiate and conclude agreements such as cease-fire or peace accords

[252] The aim of their analysis is to conceptualize non-state armed groups and for this end authors uses an ecological parallel (the non-state armed group as a living organism) and an open-source theory which puts this organism in interaction with its environment. For analysis of the non-state armed groups, they propose a very interesting matrix of indicators: (1) environment in which it operates; (2) transforming or facilitating factors of spawning a non-state armed group; (3) performed functions of the non-state armed group; (4) life cycle of the non-state armed group; (5) different types of non-state armed groups and; (6) varieties of violence they use. The countermeasures are proposed at the end. All with many examples from various backgrounds (including Latin American). Troy S. Thomas, Stephen D. Kiser, William D. Casebeer, *Confronting Violent Non-State Actors* (2005) Lexington Books (general reference to this source, not a specific page).

[253] *Prosecutor v. Limaj et al case*, ICTY IT-03-66T, footnote 301 in paragraph 87.

[254] Fatmir Limaj was a politician from the Republic of Kosovo that served as Minister of Transport and Telecommunication. Limaj was arrested in 2003 and indicted by the ICTY with war crimes against Serbs and Albanians. Mr. Limaj was acquitted by the ICTY in November 2005 and two years later, in September 2007, the Appeals Chamber concurred that Mr. Limaj did not incur in any criminal responsibility for indictment charges.

[255] Alfred Musema was an official in the Ministry of Agriculture in Rwanda. Allegations were made according to which Mr. Musema participated in the systematic extermination of Tutsi internal displaced people who in 1994 (during the Rwandan genocide) fled to the region of Bisesero in Western Rwanda. In July 1994 Mr. Musema fled Rwanda following the military advance of the FPR (Front Patriotique Rwandais or Rwanda Patriotic Front), a non-state armed group whose members were mostly Tutsi refugees and led by Paul Kagame current president of Rwanda. Mr. Musema and his family managed to relocate to Switzerland and they were granted asylum. While living in Switzerland he was recognized and arrested. On 12 March 1996, the ICTR asked the Swiss authorities to decline jurisdiction for war crimes in the case of Musema in favor by the ICTR and Mr. Musema was transferred to the United Nations' prison complex in Arusha, Tanzania. He was charged with war crimes and entered a not guilty plea. In January 2000, the first Trial Chamber granted its ruling and declared Alfred Musema guilty of genocide, extermination as a crime against humanity and rape as a crime against humanity. He was condemned to life imprisonment, the maximum penalty provided for under the ICTR statute.

[256] *Musema Case*, ICTR-96-13-T, January 27. 2000, paragraph 250.

[257] *In the Haradinaj et al. Case*, ICTY, April 3, 2008, footnote 1431 paragraph 393.

when applicable. This set of requirements was re-confirmed in the *Boskovski*[258] case[259] by the ICTY and is consistent with the determination of the individual criminal responsibility of the members of non-state armed groups towards war crimes. The importance of this jurisprudence lies in the fact that it provides different tools to verify that those non-state armed groups do not act under the control or on behalf of the State party to the conflict or a foreign State. As per the test applied by the Appeals Chamber of the ICTY, the existence of an armed conflict for the purposes of application of Common Article 3 is focused on two elements that must be present: (i) the intensity of the armed conflict itself and (ii) the organization of the parties to that armed conflict. As a minimum, in a non-international armed conflict, this criterion is applied to differentiate between an armed conflict from (a) banditry, unorganized and short-lived insurrections, or (b) terrorist activities; as both are not subject to International Humanitarian Law.[260] This premise confirms the inherent link between the organisational requirement and the term 'party' as referred to in Common Article 3.

As a new type of actor in international relations, these groups provide an alternative to state governance and challenge the state's monopoly of violence. Phil Williams stated in 2008 that in the 21st century, gangs 'have become a pervasive challenge to nation-states'.[261] Williams argues that non-state armed groups are

[258] Ljube Boškoski was a Macedonian politician and former Minister of Internal Affairs of the Republic of Macedonia. He was detained in Croatia in August 2004 and charged by the ICTY and charged with war crimes during the Macedonia conflict in the year 2001 (an armed conflict involving ethnic Albanian members of the National Liberation Army or NLA and the Macedonian security forces). He was acquitted of all charges. He returned to Macedonia and re-started his political activities. He is currently serving an eight-year sentence for channeling illegal funding during the 2011 elections. Mr. Boskovski was added by U.S. to the sanctions under OFAC. In this sense, it is worth to mention that the maras are also targeted under OFAC by the United States.

[259] *Boskovski*, ICTY, IT-04-82-T, 10 July 2007, paragraph 197.

[260] Ibid at page 49.

[261] Although challenges posed by various kinds of violent armed groups initially appear highly diverse and unrelated to one another, in fact they all reflect the increasing connections between security and governance and, in particular, the relationship between poor governance and violent armed groups. In many cases, these groups are overtly challenging the state; in others they are cooperating and colluding with state structures while subtly undermining them; in yet others, the state is a passive bystander while violent armed groups are fighting one another. The mix is different, the combinations vary, and the perpetrators of violence have different motives, methods, and targets. In spite of their divergent forms, violent non-state actors share certain qualities and characteristics. These violent armed groups represent a common challenge to national and international security, a challenge that is far greater than the sum of the individual groups, and that is likely to grow rather than diminish over the next several decades. Mr. Williams focuses on the complex relationship between human security, crime, illicit economies, and law enforcement. He also seeks to disentangle the linkages between insurgency on the one hand and drug trafficking and organized crime on the other, suggesting that criminal activities help sustain an insurgency, but also carry certain risks for the insurgency.

stimulated by poor governance by the state but, in a cycle, they also contribute to the further undermining of the governance exercised by that same state. He explains that when weak states are 'unable to create or maintain the loyalty and allegiance of their populations, individuals and groups typically revert to or develop alternative patterns of affiliation'.[262] This causes the family, tribe, clan, or other group to become 'the main reference points for political action, often in opposition to the state'. Globalization has not only challenged individual state capacity to manage economic affairs, but it has also provided facilitators and force multipliers for non-state armed groups. This has been functional to non-state armed groups who, facilitated by globalization, are challenging nation-state borders and sovereignty claims.

To be considered as parties to the conflict, these groups have to fulfil some conditions, namely be (i) under a responsible command, (ii) exercise such control over a part of its territory to carry out sustained and concerted military operations and to implement this Protocol (Article 1.1). Those criteria aim at distinguishing armed conflicts from situations of internal disturbances or tensions in which confrontations are not organized, structured or planned by one or several identifiable commands. The objective of those criteria is also to recall that a non-state armed group that carries out military operations has obligations which include rules of conduct and respect for International Humanitarian Law in its own combat actions. Additional Protocol II compels all the parties to the conflict, whether State or non-state parties, to comply with the rules of International Humanitarian Law. In this sense, non-state armed groups are subject to legal commitments under international law that continue to evolve.[263] As a party to conflict, non-stated armed groups have obligations under International Humanitarian Law to protect children and other civilians. Similar to States who are parties in the conflict, non-state armed groups are specifically obligated to: (a) provide protection to, and collect and care for, civilians, the wounded and the sick; (b) provide care, aid, and education to children and prohibit the recruitment and/or use of children under the age of 15 years into armed forces or

---

Phil Williams, *Drug Trafficking, Violence, and Instability* (2008) Bibliogov Press, page Introduction VII.

[262] Ibid at page 62.

[263] The practice of the UN Security Council and its resolutions and reports acknowledge circumstances in which non-State armed groups are obliged to comply with human rights law. In this sense, we have UN Security Council Resolutions 1265 (1999), Preamble; 1193 (1998). Also, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children Armed Conflict (2000) is one of the few human rights treaties to explicitly refer to Non-State Armed Groups, prohibiting armed groups from recruiting or using persons under the age of 18 years in hostilities.

groups; (c) conduct hostilities in accordance with the obligations contained in Common Article 3 to the four Geneva Conventions.[264] Moreover, under International Criminal Law, individual members of non-state armed groups and others can be held criminally responsible for war crimes, crimes against humanity, and genocide. The international criminal responsibility of commanders will be evaluated with respect to the level of organization and control of such groups and their territorial control capacities. These criteria, however, do not modify the qualification of non-international armed conflict and the obligations attached hereto for the concerned State. If the level of organization of a non-state armed group is challenged, the State party will not be relieved from its obligations of respecting Common Article 3 and Additional Protocol II in its own military activities.

In its Manual on Humanitarian Negotiations with Armed Groups (2006), the UN Office for the Coordination of Humanitarian Affairs (OCHA) clarified the following elements for an evaluation: a non-state armed group (i) shall have the potential to employ weapons and the use of force to achieve political, ideological or economic objectives; (ii) is not within the formal military structures of States, State alliances or intergovernmental organizations; (iii) is not under the control of the State(s) in which they operate; (iv) have a group identity and; (v) is subject to a chain of command. Although a non-binding report, the definition in the OCHA Manual adds the ideas that armed groups are primarily motivated by political goals and operate outside effective State control.

Non-state armed groups, as formal parties in the armed conflict, enjoy the fundamental guarantees provided under International Humanitarian Law regarding their participation in hostilities. The status of non-state armed groups under International Humanitarian Law are affected by the evident asymmetry between them (the non-state armed groups) and the state. The government officials/state considers that these groups are only subject to domestic/national law because they are categorized (by the state) as criminals (and not as active belligerent parties). States are willing politically to use all available resources they to keep and/or restore public order against opposition groups. Civilians lose the protection granted by International Humanitarian Law when they directly participate in armed hostilities. However, it is important to emphasize that the non-recognition of the combatant status by the state

[264] UN Human Rights Council, Resolution 1991/71 (1991).

does not release non-state armed groups from compliance with their obligations under International Humanitarian Law as a party in the armed conflict.

Only states can sign and ratify international treaties, but they are still bound by International Humanitarian Law rules when they fight against a non-state armed group. Indeed, International Humanitarian Law distinguishes between the category of 'parties' and 'high contracting parties' to the conflict, the latter referring to states who had ratified international treaties such as the Geneva Conventions. In this sense, Common Article 3 to the Geneva Conventions applies in non-international armed conflicts and stipulates the obligations and rights for parties to the conflict. The application of the provisions of Common Article 3 does not imply an automatic mutual recognition between the state party of the non-state party to the conflict. However, International Humanitarian Law aims to set a proper relation between (a) the accountability of non-state armed groups and (b) the refusal of states to grant those non-state armed groups legitimacy/status. The most serious violations of International Humanitarian Law fall under the category of war crimes for which their perpetrators and superiors will be held responsible. Subsequently, war crimes and crimes against humanity include crimes committed (a) in all types of conflict, whether international or non-international, and (b) by members of states forces or by members of non-state armed groups.

This thesis considers that it is necessary to expand the debate on non-state armed groups beyond a narrow view of guerrilla and rebel groups fighting to take over the state and political purposes and objectives. Gangs like the maras clearly undermine the state authority by virtue of their violence but, unlike the traditional non-state armed groups, they are not motivated by a political objective, and they are not consciously seeking direct control of the state institutions. On the contrary, maras actions are driven by a profit driven angle which constitutes the basis of 'commercial insurgency' as this thesis will elaborate.

(ii) Les Specialis

Both International Humanitarian Law and International Human Rights Law may apply to a specific situation, then the question is whether one body of law would have pre-eminence over the other and this would a matter of lex specialis. The International Court of Justice (ICJ), in the Advisory Opinion on the Legality of the Threat or Use of

Nuclear Weapons[265] rule on the lex specialis principle.[266] There are now situations where an action may be allowed under the International Humanitarian Law but not under Human Rights Law. For example, Marco Sassoli and Laura Olson debate the relationship between International Humanitarian and Human Rights Law in a non-international armed conflict.[267] These authors seek to answer two questions which have become now more and more interlinked: (a) According to which branch of law may a member of an armed group be attacked and killed as result of his/her status? (b) May a captured member of an armed force or a non-state armed group be detained in a manner consistent to his/her status as a prisoner of war in international armed conflict or should he/she be detained as regulated by human rights? Commenting on the Soleimani case,[268] Professor Alonso Gurmendi (who participated in the review of this thesis) has stated that:

> (…) we can conclude that both International Humanitarian Law and International Human Rights Law are applicable at the same time, but – and here is the main takeaway – their tests for determining the lawfulness or unlawfulness of Soleimani's death would fundamentally differ. Under International Human Rights Law, Soleimani's death would be an arbitrary deprivation of life, because the strike occurred in violation of *jus ad bellum*. Under International Humanitarian Law, however, Soleimani's death occurred in the context of an international armed conflict between Iran and the U.S. As a member of Iran's armed forces, Soleimani was arguably a lawful target, subject to individualized attack always (which, in itself, of course, raises various questions). This means that the same strike is illegal under International Human Rights Law but legal under International Humanitarian Law. In

[265] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ REP. 226, paragraphs 24-25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, paragraphs 102-113 (July 9). The *Legality of the Threat or Use of Nuclear Weapons [1996] ICJ 2* is a case in which the ICJ issued an advisory opinion ruling according which there is no source of law, customary or treaty, that explicitly prohibits the possession or even use of nuclear weapons. The only requirement would be that the use of nuclear weapons must be in compliance with the law principles on self-defense and International Humanitarian Law.

[266] Lex specialis is a principle first defined by the ICJ in the already referenced Nuclear Weapons Case in order to explain the relationship between International Humanitarian Law and Human Rights Law.

[267] Marco Sassoli and Laura Olson, *The relationship between International Humanitarian Law and Human Rights Law where it matters: admissible killing and internment of fighters in non-international armed conflicts* (2009) Cambridge University Press, page 601.

[268] Qasem Soleimani was a military officer from the Islamic Republic of Iran who served in the Islamic Revolutionary Guard Corps. Soleimani was killed as result of a U.S. drone attack strike on 3 January 2020 in Baghdad, Republic of Iraq. As a retaliation, on 7 January 2020, Iran launched missiles against U.S. military bases in Iraq.

> short: this case, under these premises, breaks the logic of *lex specialis*, as originally understood by the ICJ. Simply put, the "test of what is an arbitrary deprivation of life" does *not* fall to be determined by the applicable *lex specialis*, but rather by an independent test, proper to International Human Rights Law itself.[269]

The divided opinion between authors and researchers who conceive *lex specialis* as a rule of exclusion or as a rule of co-application (International Humanitarian Law and International Humans Right Law applying jointly) can be seen in the Serdar Mohammed case argued before UK courts.[270] 'The answer to the general question will turn upon the precise relationship between human rights systems and International Humanitarian Law and on the extraterritorial scope of the particular human rights system under consideration […]. In certain circumstances International Humanitarian Law operates as a *lex specialis* to require the modification of general rules of International Human Rights Law.'[271]

Pablo Kalmanovitz wrote about the use and abuse International Humanitarian Law by Colombian authorities against BACRIMS.[272] Reflecting on the interplay between International Humanitarian Law and International Human Rights Law, Kalmonovitz said:

> On the one hand, defenders of what may be called the convergence thesis have emphasized the inclusion of basic rights protections in the so-called "Geneva instruments" of International Humanitarian Law, as well as the role of human rights bodies in interpreting and amplifying rights protections in International Humanitarian Law through juridical or quasi-juridical interpretation and pronouncements. In armed conflicts, it is said, human rights apply concurrently and in ways that strengthen the protective constraints of International Humanitarian Law. Critics of the convergence

[269] Alonso Gurmendi, 'The Soleimani Case and the Last Nail in the Lex Specialis Coffin', retrieved from Opinio Juris, 13 January 2020, available at http://opiniojuris.org/2020/01/13/the-soleimani-case-and-the-last-nail-in-the-lex-specialis-coffin/

[270] *Serdar Mohammed & Others v. Secretary of State for Defence*, UK Court of Appeal (Civil Division), 2015, paragraph 82. This case is about the detention by UK armed forces in Afghanistan of Mr. Mohammed. The UK Supreme Court ruled that the British military had the faculty to detain a subject pursuant to a UN Security Council Resolution that authorises the application of all necessary means if that specific detention was based on security reasons. However, the UK Supreme Court also ruled that procedural guarantees must be followed in compliance with Article 5(4) of the European Convention of Human Rights

[271] Op cit note 269 at page 74.

[272] BACRIM is an acronym for 'bandas criminales' (criminal gang) used in Colombia to define a drug trafficking, criminal gang that emerged following the demobilization of the United Self-Defense Forces of Colombia (AUC), a paramilitary group, in 2006.

> thesis, on the other hand, have protested that pressing human rights obligations on state forces misunderstands the nature of both IHL and IHRL, and generates misplaced and impossibly onerous demands on belligerents—ultimately and perversely, the effect of emphasizing convergence may be less, not more, human rights protection. The International Court of Justice's opinions on the matter have emphasized the distinct character of International Humanitarian Law—which according to the Court stands as lex specialis relative to the lex generalis of International Human Rights Law—while affirming the concurrent application of both regimes. In so doing, the Court reflected the unstable and dynamic interaction between the two regimes: different emphases and discursive purposes reveal converging or diverging dimensions of their complex relationship.

International Human Rights Law is reflected in the Universal Declaration of Human Rights but also in several international human rights treaties and in customary international law such as:

- The International Covenant on Economic, Social and Cultural Rights and its Optional Protocol
- The International Covenant on Civil and Political Rights and its two Optional Protocols
- The International Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol
- The Convention on the Rights of the Child and its two Optional Protocols
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families
- The International Convention for the Protection of All Persons from Enforced Disappearance
- The Convention on the Rights of Persons with Disabilities and its Optional Protocol

Why bringing International Human Rights Law to this thesis? International Human Rights Law and International Humanitarian Law are provisions present in situations of armed conflict, with their different protections complementing each other. However, there could be scenarios in which International Human Rights Law and

International Humanitarian Law regulate that scenario in a different way, producing different results. In such cases of conflicts of norms, international practice has established that, failing other means to interpret both norms in conformity, one of the principles of interpretation of norms could be applied is that of lex specialis. At the same time, International Humanitarian Law will not apply where its conditions of applicability are no fulfilled: where violence is insufficient to qualify as an armed conflict and where the non-state armed group is not properly organized. But this thesis considers that the gang violence in El Salvador qualifies as an armed conflict and maras are fully organized per the *Tadic* case threshold. *Taking into account the very young age of the gang members (with many members under 18 years of age), there is one instrument of International Human Rights Law that is relevant: the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.* The traditional approach has been to consider that only States are bound by the International Human Rights framework.[273] However, the UN Security Council has considered that under certain circumstances non-state actors can also be bound by International Human Rights Law 'and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights.'[274] For example, the UN Security Council in UN Security Council Resolution 1894 (2009), while recognizing that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law, reaffirmed that parties to an armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, and demanded that parties to an armed conflict comply strict with the obligations applicable to them under International Humanitarian Law but also human rights law and refugee law. The reasons for which this thesis is bringing International Human Rights Law into consideration is because there is one human rights treaty (in the view of the present thesis) that should be applicable to non-state armed groups (such as the maras) with no further discussion due to its nature as 'sui generis human rights treaty'. That treaty is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. From this perspective and

[273] International Legal Protection of Human Rights in Armed Conflict, United Nations Human Rights, Office of the High Commissioner, New York and Geneva 2011, page 23. Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, December 2016, page 20.
[274] International Legal Protection of Human Rights in Armed Conflict, United Nations Human Rights, Office of the High Commissioner, New York and Geneva 2011, page 24

following this introduction, in Chapter VIII, sub-chapter (e) will develop specifically the subject of children in the de facto armed conflict as result of gang violence. This thesis will now comment on La Tablada case, decided by the Inter-American Court of Human Rights, in which the application of International Humanitarian Law was validated to one specific situation in a country (Argentina) that was not experiencing an internal armed conflict.

(iii) La Tablada case

The Inter-American Court of Human Rights is, together with the Inter-American Commission on Human Rights, the main institution which was created by the Organization of American States (OAS) for human rights protection. It is the equivalent to the European Convention on Human Rights. Where an OAS state has accepted the jurisdiction of the Inter-American Court of Human Rights in accordance with Article 62 of the American Convention on Human Rights (ACHR), the Inter-American Court of Human Rights acts as "second instance", issuing binding decisions on cases submitted to it. In this regards, Article 62 states the following:

*"*a State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. (...). 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.*"*[275] It should be noted that neither the U.S. nor Canada has ratified the ACHR[276] but the ICJ has actually followed on the judgements of the Inter-American Court on Human Rights.[277]

[275] The American Convention on Human Rights, also known as the Pact of San José, is an international human rights instrument. It was adopted by many countries in the Western Hemisphere in San José, Costa Rica, on 22 November 1969. It came into force on 18 July 1978.

[276] The OAS states which have recognized the ACHR's jurisdiction are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela (status of ratifications is available at http://www.oas.org/juridico/spanish/firmas/b-32/html).

[277] The Inter-American Court of Human Rights' interpretation of the right to information on consular assistance as an individual right of arrested persons adopted in the advisory opinion Right to Information on Consular Assistance (Inter-American Court of Human Rights, The Right to Information

The Inter-American Court on Human Rights' ruling on La Tablada case[278]was about an armed confrontation that took place between armed individuals and the Argentine military on 23 January 1989. The Inter-American Commission on Human Rights sought to assess whether the recapture of the La Tablada base[279] was just a case of controlling 'internal disturbances' (such as ordinary crime through urban policing) or whether it constituted a non-international armed conflict related act within the scope of Common Article 3. In that process, the Inter-American Commission on Human Rights distinguished between internal disturbances and armed conflict by defining these two concepts.[280] The Inter-American Commission on Human Rights ruled that 'Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular state. Consequently, Common Article 3 does not apply to riots, mere acts of banditry or an unorganized and short-lived rebellion; as Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents.'[281] *La Tablada* case provides space for further thinking and interesting conclusions. The Inter-American Commission on Human Rights further determined that, in addition to Common Article 3, customary law principles applicable to all armed conflicts require from the involved parties the following: (a) to refrain from directly attacking the civilian population and (b) to distinguish (i) between civilians and combatants and (ii) between civilian premises and military objectives. To protect civilians from the impact of armed hostilities, customary law principles demand from the attacking party

---

on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of 1 October 1999, Series A, No.16) was subsequently confirmed by the ICJ in the La Grand and Avena cases (LaGrand [Germany v. United States], Judgment of 27 June 2001, ICJ Reports 2001, paragraph 466.

[278] *Juan Carlos Abella v Argentina*, Report No 55/97, Case 11.137, Inter-Am CHR 271, OEA ser.L/V/11.98, Doc 6 rev (1998) paragraph 156 *(La Tablada case).*

[279] A suburb in the Province of Buenos Aires, Argentina. The 1989 attack on La Tablada regiment was an assault on the Argentine army military premises in La Tablada, by armed members of Movimiento Todos por la Patria, a political party from the left. Approximately 35 people were killed and more than 50 injured during the confrontation. The MTP assaulted the army's premises under the alleged (later proven completely false) argument of preventing a military coup supposedly planned for same month of January 1989 by an ultra-right-wing faction of the Argentine military. This was not the case at all. In fact, in May 1989, the presidential elections took place in Argentina (the second time since the return of democracy to the country in 1983 following the 1976-1983 military dictatorship) and on 9th July 1989 the new elected president, Carlos Saul Menem, assumed the presidency.

[280] The Inter-American Commission on Human Rights defined 'internal disturbances' as different events including 'riots, isolated and sporadic acts of violence and other acts of a similar nature' Ibid at page 64.

[281] *Prosecutor v Germain Katanga Case*, ICC-01/04-01/07 Trial Chamber 7 March 2014, available at https://www.law.cornell.edu/women-and-justice/resource/the_prosecutor_v_germain_katanga

to take all necessary precautions to avoid the loss of civilian lives and damage to civilian property and infrastructure (such as schools, hospitals, etc.) including the so called 'collateral damage' attacks. The Inter-American Commission considered that the petitioners (the group that attacked the military premises in La Tablada) completely misunderstood the legal consequences and the application of these rules to the members of Movimiento Todos por la Patria (MTP) as participants in the assault. Basically, the petitioners saw themselves as civilians when they were active members in armed hostilities. Emily Crawford reviews the dilemma of how to identify and differentiate civilians from civilians who participate in hostilities.[282] As already quoted in this thesis, 'civilians are, under International Humanitarian Law, immune from targeting for as long as they refrain from taking direct part in hostilities. Once civilians take direct part, they can be targeted.' La Tablada ruling shares this point of view:

> Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack to the same extent as combatants. Thus, by virtue of their hostile acts, the Tablada's attackers lost the benefits of the above referenced legal protections in the attack as they were not considered civilians anymore. In contrast, International Humanitarian Law continued to apply in full force with respect to those peaceful civilians present or living in the vicinity of the La Tablada base at the time of the attack.[283]

When the MTP attacked the La Tablada base, the members of this group accepted the risk of a military response by the state (the Argentine state in this case). The fact that the Argentine military had superior personnel numbers and better fire power was not a violation of any rule of International Humanitarian Law. It was simply part of the dynamics of combat in an armed conflict. But this does not mean that either the Argentine military or the members of MTP had no limits in their respective choice of means of attacking and counterattacking the other. Indeed, both parties were required to conduct their military operations within the restraints and prohibitions imposed by International Humanitarian Law. In this sense, the petitioners alleged that the

[282] Ibid at page 15.
[283] Ibid at page 64.

Argentine military (and, subsequently, the Argentine state) violated two specific prohibitions applicable in armed conflicts, namely: (a) a refusal by the Argentine military to accept the attackers offer to surrender, equivalent to a denial of quarter; and (b) the use of weapons of a nature to cause superfluous injury or unnecessary suffering, specifically, incendiary weapons. The Inter-American Commission considered that the appropriate standard for judging the actions of those engaged in hostilities must be based on a reasonable assessment of the overall situation prevailing at the time the action. It should be noted that Argentine did not ratify until 1995 (six years after the attack) the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons annexed to the 1981 United Nation's Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious and to Have Indiscriminate Effects (a treaty that was referenced by the petitioners in the arguments). Moreover, Article 1 of the Weapons Convention states that the Incendiary Weapons Protocol applies only to interstate armed conflicts and to a limited class of national liberation wars. As such, this instrument did not apply directly to the armed actions that took place at the La Tablada. In addition, the Protocol does not make the use of such weapons unlawful by nature. Although it does prohibit their direct use against civilians (and, again, the members of Movimiento Todos por la Patria were not civilians from the moment they decided to attack the military regiment), it does not ban either their operational use against lawful military targets, which include members of non-state armed group (such as Movimiento Todos por la Patria). The Inter-American Commission concluded that the killing and/or wounding of the attackers which occurred prior to the cessation of hostilities that 24th January 1989 were indeed legitimately combat related and, thus, did not constitute violations of any norm International Humanitarian Law. However, the Inter-American Commission also emphasized, that the persons who participated in the attack on the military base were legitimate military targets if they actively participated in the combat. Those who surrendered, were captured and/or wounded and, consequently, ceased their participation in the combat, automatically fell within the jurisdiction of the Argentine state, who could no longer lawfully kill them. Subsequently, they were entitled to the guarantees of humane treatment set forth in both common Article 3 of the Geneva Conventions and Article 5 of the American Convention. The intentional mistreatment, much less summary

execution, of such wounded or captured persons constitute a particularly serious violation of both instruments.

It is very important to have a clear understanding of when a situation has escalated sufficiently to meet the requirements of organisation and intensity, as it is only then that the application of an armed conflict law is triggered.[284] *As described, an attacked against a military regiment (which was the first military action of the MTP) committed by a group of less than one hundred persons during thirty-six hours was considered governed by International Humanitarian Law. The reader then can compare this scenario against the situation in El Salvador with the endemic level of violence, victims and the number of gang members involved.* But this point has a wider dimension as well: since the vast majority of post-Cold War armed conflicts are non-international in nature there is a need for certainty on the content of the terms associated with such armed conflicts and the applicable regulatory framework.[285] The phenomenon of hybrid warfare or hybrid threats[286] makes this all the more important. For example, a state responding to a clear internal disturbance which does not satisfy the discussed threshold tests inherent in these concepts (intensity, organization) will have to operate within the law enforcement parameters. This remains the case even when the state deploys its military forces to assist the police in law enforcement situations.[287] However, if such a situation escalates to the point that it satisfies the

[284] Op cit note 36 at page 15.
[285] Ibid at page 64.
[286] A hybrid war is political conflict in which elements of conventional war, irregular wars, cyberattacks, diplomacy, etc. are used at the same time (but not necessarily resulting in a full armed conflict). The concept was developed by U.S. strategist Frank Hoffman. Examples quoted by Mr. Hoffman of 'hybrid wars' are China-Taiwan; the Pakistan-India border; the Saudi Arabia and UAE operations in Yemen, etc. Frank Hoffman (2007). *Conflict in the 21st Century: The Rise of Hybrid Wars* (2007), Arlington, Virginia: Potomac Institute for Policy Studies, page 46. The traditional Tadic test remains the correct type of assessment to determine whether Common Article 3 (the law of non-international armed conflict) applies to a situation. The minimum degrees of organisation and intensity under the organisational threshold and the intensity threshold must be fulfilled for the law of non-international armed conflict to regulate a situation, even one considered as hybrid in nature. It is possible that only certain situations related to or classified as falling under the terms 'hybrid threat' or 'hybrid warfare' may be governed by Common Article 3, or the situation might not fall within the scope of Common Article 3 application. The assessment will have to be made on a case-by-case basis.
[287] The disturbances and looting in LA after the Rodney King's trial can be quoted as a clear example of this situation. On March 3, 1991, Rodney King was beaten by LAPD officers after a car chase in L.A. during his arrest for speeding and driving under the influence of alcohol. The young readers of this thesis (and who were born before the year 2000) should remember that no internet existed in the year 1991 and, as such, 'viral videos' were not common. However, in perhaps a futuristic sample of what would be the norm years later (once social media platforms such as Facebook and You Tube were developed), a neighbour filmed the incident from his home and sent the footage to a local news station. The video footage was shown by news media around the world in a matter of hours and four officers were charged (and went to trial) for the use of excessive force. The four police officers were acquitted and this triggered a succession of riots in the city that were only stopped when the California

threshold requirements for (i) the concept of an 'organised' armed group and (ii) the concept of 'intensity'; then the law of non-international armed conflict becomes applicable and the military forces will operate within its parameters. A clear guidance for purposes of categorisation of a situation is vital from an operational perspective. The escalation of gang violence (as part of the list of hybrid threats or hybrid warfare or the existence of opposing 'shape-shifting armed groups') is one of the challenges facing those responsible for categorising an armed conflict. Furthermore, the interactions and associations among different organised armed groups may impair the ability of the state involved in an existing non-international armed conflict to assess whether an additional new organised armed group has joined the non-international armed conflict in question.

(iv) The Tadic case

As indicated, the applicability of International Humanitarian Law presupposes the existence of an armed conflict. According to the widely recognized definition made by the ICTY[288] such situation (an armed conflict) exists 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[289] Indeed, the rulings from the ICTY and the ICTR[290] on the applicability of the

---

Army National Guard and units from the U.S. Army, and the U.S. Marine Corps were deployed to re-establish control. The deployment of U.S. military forces in internal U.S. disturbances happened again in 2005 (deployment of the 82nd airborne division in New Orleans after Hurricane Katrina) and during 2020 in some cities following George Floyd's death. While the Army/Navy/Air-Force/Marines are under the control of the federal government and they are deployed at U.S. President sole decision, the U.S National Guards (one per each state) depend on the State Governor authority. As note of curiosity, the journal The Economist reported recently that the author of the video, George Holliday, has just passed away in September 2021. 'Obituary: George Holliday fortuitously filmed the beating of Rodney King. The Los Angeles plumber died on September 19th, aged 61'. *The Economist*, 2 October 2021.

[288] This thesis has made several references to the ICTY. The purpose of this footnote is to provide a definition of this tribunal for the benefit of the non-law scholar reader of the present thesis. The 'International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia', more commonly referred to as the ICTY, was a body of the United Nations established to prosecute serious crimes committed during the Yugoslav Wars, and to try their perpetrators. The tribunal was an ad hoc court located in The Hague, Netherlands. The Court was established by Resolution 827 of the United Nations Security Council, which was passed on 25 May 1993.

[289] Ibid at page 49.

[290] With the same purpose described in the foonote 288 (page 83), the purpose of this note is to provide a definition of the ICTR to the non-law scholar reader of this thesis. The 'International Criminal Tribunal for Rwanda', more commonly known as the ICTR (in French: *Tribunal pénal international pour le Rwanda*; Kinyarwanda: *Urukiko Mpanabyaha Mpuzamahanga Rwashyiriweho u Rwanda*) was an international court established in November 1994 by the United Nations Security Council in

international laws of war have been especially far reaching. Both Tribunals led to the creation of the Rome Statue in 1998[291] which now guides the work of the ICC. The *Tadic*[292] decision of the ICTY created an important precedent in the determination of whether a situation counts as an armed conflict or not. According to the ICTY ruling from 1995 there is an '(…) armed conflict whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within the State.'[293] The inclusion of the intensity element by reference to 'protracted armed violence' into the Rome Statute invites to reflection.[294] It is important to note that the ICTR also drew from the *Tadic* formula recalling that it is termed in the abstract, and whether or not a situation can be described as an armed conflict meeting the criteria of Common Article 3, is to be determined on a case-by-case basis.[295] More importantly, the ICTY started to set out possible indicators for determining the two constituent elements of a non-international armed conflict. In this sense, the ICTY has identified a check list of factors for an armed group to be considered 'organized', including the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits, and military training; its ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to define a military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as a ceasefire or peace accords.[296] Other indicative factors are 'the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and type of munitions fired; the number of

---

Resolution 955 in order to judge people responsible for the Rwandan genocide and other serious violations of international law in Rwanda, or by Rwandan citizens in nearby states, between 1 January and 31 December 1994.

[291] Rome Statue of the International Criminal Court, 17 July 1998.

[292] Duško Tadić (born 1 October 1955, SR Bosnia and Herzegovina, SFR Yugoslavia) was a Bosnian Serb politician, former SDS leader in Kozarac and a former member of the paramilitary forces supporting the attack on the district of Prijedor. He was convicted of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the customs of war by the ICTY for his actions in the Prijedor region, including the Omarska, Trnopolje and Keraterm detention camps. He was sentenced to 20 years of imprisonment.

[293] Ibid at page 49.

[294] Article 8, Paragraph 2 (f) of the Rome Statute of the International Criminal Court, 17 July 1998.

[295] *Prosecutor v. Rutaganda*, ICTR, Case No. ICTR-93-3, Trial Chamber Judgement, 6 December 1999, paragraph 85.

[296] *The Prosecutor v. Boskoski and Tarculovski*, ICTY, Case No. ICTY-IT-04-82-T, Judgement (Trial Chamber), 10 June 2008, paragraphs 194-205.

persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.[297]

The involvement of the UN Security Council is also an indication of the intensity of a conflict.[298] Furthermore, despite the lack of application of International Humanitarian Law, a state may choose to nevertheless engage an armed group in direct peace negotiations in order to advance humanitarian aims, like El Salvador chose to do in the case of maras.[299]/[300] Following the elements described above, the research question of this thesis requires an assessment (per the ICTR formulation)[301] in which each category is addressed point by point. This thesis will present an analysis of the why -that because organized gangs disrupt the sovereign functioning of the state to a degree functionally similar to that an insurgency, they can be dealt with as armed insurgents (even if their aims are not necessarily the same as armed insurgents but the outcome is the same -state disruption).

There is an importance difference between legal consequences of (a) adjudicating a non-state act to a state and (b) a failure of that state to comply with its own obligations (e.g., the duty of protecting its own population against gang violence or against terrorism). In this last case, the state will bear responsibility for the failure to exercise a proper due diligence (to comply with its own law obligations) rather than for the act itself. While the maras activities can't be attributed to the state, the lack of effective jurisdictional police power by the state in controlling areas dominated by the gangs provides the basis for an asylum claim. Indirectly, this proves the organization, violence intensity and operational capacity of the maras as controlling territory is a characteristic of non-state armed groups.

(c) Why it is relevant that International Humanitarian Law applies to the maras' gang violence

[297] Ibid at page 49.
[298] *Prosecutor v. Ramush Haradinaj et al*., ICTY, Judgement (Trial Chamber), Case No. IT-04-84, 3 April 2008, paragraph 394.
[299] Randal Archibold, 'Homicides in El Salvador dip and questions arise', *The New York Times*, 24 March 2012.
[300] This truce was established as a collaborative effort with the El Salvadoran government to attempt to reduce the number of gang related homicides. In early 2012, there were on average of 16 killings per day, but in late March that number dropped to fewer than five per day, and on 14 April 2012, for the first time in over three years, there were no killings in the country in one single day. The truce received criticism because it has been seen as the El Salvadoran government's forfeiting sovereignty to these gangs. Dudley, Steven. '. *Insight Crime*. Retrieved 23 April 2015.
[301] Op cit note 295 at page 84,

One of the most challenging questions facing International Humanitarian Law today is whether certain criminal organizations can be considered organized armed groups for purposes of the application of International Humanitarian Law and International Criminal Law. This thesis is only focused on the mars but is not limited to the question of whether the maras are organized and violent enough (per the criteria in the *Tadic* judgement for which thesis will dedicate one sub-chapter) to be considered a party to a conflict (and thereby warranting considering gang violence as a non-international armed conflict). This thesis also adds the element of the impact of the maras as being additionally and fundamentally determinative. *Because (a) the maras are a source of ongoing and active disruption to the sovereign function of the state in El Salvador (as the thesis will explain in Chapter VIII), (b) the maras project levels of violence equal to an armed conflict and (c) and because domestic criminal law enforcement has done little to abate such disruption (as the thesis will explain in Chapter VI); then an armed conflict matrix is a preferable one to dealing with that degree of violence.* To support this argument, as the thesis will develop in Chapter VII, parallels are made with international refugee law, demonstrating that, as many, if not more, persons are fleeing gang violence as refugees as they are armed conflicts, which warrants dealing with gang violence in the same way as armed conflicts. As such, this thesis considers that the maras' actions can be adequately regulated by International Humanitarian Law.

The clearer legal implication is the following: if International Humanitarian Law applies to gang violence in El Salvador, the law on war crimes committed in non-international armed conflict will apply as a matter of International Criminal Law. In a more operational level, this implication also means that the government authorities must have not just the political will to apply International Humanitarian Law to gang violence but also the knowledge, training and structure for that purpose. Pablo Kalmanovitz researcheda about the use abuse International Humanitarian Law by Colombian authorities against BACRIMS.[302] In his work, Kalmanovitz reconstructed two periods in the process of implementation of International Humanitarian Law by the Colombian armed forces.[303] According to Kalmanovitz, in the first period (1991-

[302] BACRIM is an acronym for 'bandas criminales' (criminal gang) used in Colombia to define a drug trafficking, criminal gang that emerged following the demobilization of the United Self-Defense Forces of Colombia (AUC), a paramilitary group, in 2006.
[303] Pablo Kalmanovitz, 'Entre el deber de proteccion y la necesidad militar: oscilaciones del discurso humanitario en Colombia, 1916-2016' (1 July 2018), Latin American Law Review, Issue 1, page 2.

2006), the armed forces were hostile to International Humanitarian Law, 'to the point of seeing a "judicial war" in action of both civilian courts supervising IHL compliance and of civil society organizations that publicly denounced breaches of law.' In the second period (2006-2016), the armed forces began to progressively appropriate International Humanitarian Law. For example, among the initiatives taken by Colombia during 2006-2016, Kalmanovitz quotes the introduction of the 'operational legal advisor' post (which is part of the Additional Protocol, Article 82 but had never been implemented by Colombia).[304] Kalmanovitz says that 'Only professional officers (of the armed forces) with a law degree can perform functions as 'operational legal advisor' and their activity will be to advise the commanders on the law compliance of one planned (military) activity and set the rules of engagement. In this way, a progressive deployment of lawyers with expertise in International Humanitarian Law in combat zones.'[305] This initiative in Colombia provides a blueprint that could be replicated in El Salvador. The thesis reverts to the idea of the 'operational legal advisor' in chapter VIII with the creation, introduction, and deployment of Child Protection Advisors (CPA) to deal with the high number of minors being recruited by the maras (in similar fashion as child soldiers).

The thesis will now review the International Criminal Law angle.

[304] 'The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.' Article 82 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[305] Op cit note 303 at page 86. The original text is in Spanish: '(…) creó la figura del "asesor jurídico operacional", que si bien está contemplada en el Protocolo Adicional I (art. 82) no había sido implementada en el país. Solo oficiales profesionales en derecho pueden actuar como asesores operacionales, siendo su función principal emitir conceptos al comandante sobre la legalidad de una operación planeada y establecer sus reglas de enfrentamiento. De este modo se dio un despliegue gradual de abogados expertos en DIH y DIDH en áreas de combate.'

VI) INTERNATIONAL CRIMINAL LAW AND THE MARAS

(a) Relevance of International Criminal Law in relation to gang-violence

International Criminal Law involves the most serious crimes in today's world but the concept of crimes against humanity has evolved following the decisions of international courts such as the ICC, the ICTY and ICTR. Furthermore, many states have also incorporated the legal type or concept of 'crimes against humanity' in their respective national law.[306] Still crimes against humanity have not yet been codified in one dedicated treaty of international law (this, in fact, will be one of the recommendations of the present thesis in the Conclusions chapter). The 1998 Rome Statute establishing the ICC (Rome Statue) reflects the consensus among the international community on this matter. It is also the treaty that offers the most extensive list of specific acts that may fall under the definition of crimes against humanity. The purpose of this chapter is double: (a) to develop the relevant implications of International Humanitarian Law applying in this type of situation (as the thesis has explained in the previous chapter), both in terms of the advantages and drawbacks this may create for the protection of human rights in armed conflict (in terms of targeting, as well as in terms of the application of the law on war crimes) and (b) to develop the relevant implications of the rules on crimes against humanity applying to these groups.

The main difference between crimes against humanity and war crimes has to do with the circumstances in which these two crimes are committed. War crimes violate international agreements that dictate what human rights should be respected during armed conflicts. Crimes against humanity, on the other hand, are crimes that are perpetrated against groups of people based on religion, race, political differences, and gender. Four elements distinguish war crimes from crimes against humanity. War crimes may only be committed during an armed conflict, whereas crimes against humanity can be committed both in times of war and of peace. Furthermore, a crime against humanity may be committed against nationals of any state, including that state's own nationals, if the state takes part in the attack. Whereas crimes against

[306] For example, in July 2015, the Congress in Argentina passed a specific legislation (Law 27156) that forbids pardons, amnesties, and the commutations of sentences for crimes against humanity.

humanity may only be committed against civilians, most war crimes may be committed against both civilians and enemy combatants. A crime against humanity must be committed as part of a widespread or systematic attack upon a civilian population; there is no such requirement for a war crime. An isolated act could qualify as a war crime, but not as a crime against humanity.

War crimes are serious violations of International Humanitarian Law, committed against a protected person or object (civilians, combatants placed out of combat such as in detention or being wounded, or those who have put down their arms, or civilian and cultural objects), or by unlawful weapons or means of warfare.[307] War crimes can only be committed during an armed conflict qualified accordingly under International Humanitarian Law. The very nature of the armed conflict (international or non-international) is key and fundamental to define the elements of the particular war crime.[308] War crimes can be committed by combatants/fighters, *as well as by civilians, as long as there is a sufficient link to the armed conflict.* This means that the act needs to have been 'closely' related to the armed conflict.[309] These are some examples of war crimes: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture of persons taking no direct part in hostilities; (b) committing outrages upon personal dignity, in particular humiliating and degrading treatment of persons taking no direct part in hostilities; (c) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (d) using unlawful means of warfare, such as prohibited chemical weapons and use of barrel bombings with indiscriminate effect; (e) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (f) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable

[307] War crimes are listed, inter alia, under Article 8 of the Rome Statute, under the 'Grave Breaches' provisions of the 1949 Geneva Convention and Additional Protocol I, common Article 3 and relevant provisions of Additional Protocol II, the Statute of the ICTY and the ICTR.

[308] Note that the assessment under Article 12(2)(a) QD and Article 17(1)(a) QD refers to the relevant international instruments defining the terms. Therefore, the assessment of whether or not an armed conflict takes place, as well as its nature, is based on international humanitarian law and may differ from the assessment in the context of Article 15(c) QD as defined in the *Diakité* judgment of the CJEU.

[309] The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed', *Prosecutor v Kunarac et al*., ICTY (Appeals Chamber), IT-96-23 and IT-96-23/1-A, judgment of 12 June 2002, paragraph. 58

purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (g) killing or wounding treacherously a combatant adversary; (h) discriminating practices by medical personnel with regard to treatment of wounded; (i) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable; (k) conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. *As indicated above, if we consider the maras' gang violence equal in level to an internal armed conflict, then by extension, International Humanitarian Law applies to gang violence and, by default, the law on war crimes also applies.*

Now, crimes against humanity are fundamentally inhumane acts, committed as part of a systematic or widespread attack against any civilian population. [310]/ [311]These are inhumane acts, which could reach this threshold when committed pursuant to or in furtherance of a State or an organisational policy. In this sense, Article 7 of the Rome Statute states as follows:

> 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: (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; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of

[310] Crimes against humanity are defined in international instruments, inter alia, Article 7 of the Rome Statute

[311] On 'widespread' and 'systematic', see for example, *Prosecutor v Dusko Tadic*, ICTY, IT-94-1-T, judgment of 7 May 1997, paragraph. 648; *The Prosecutor v Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, judgment of 2 September 1998, paragraph 580; ,*Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, ICTY, IT-96-23 & IT-96-23/1-A, 12 June 2002, paragraph.94; on 'civilian population' see *Prosecutor v Dusko Tadic (Opinion and Judgment)*, ICTY, IT-94-1-T, judgment of 7 May 1997, paragraph. 648; *The Prosecutor v Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, judgment of 2 September 1998, paragraph. 644

apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

In this regard, an 'attack directed against any civilian population' means a specific conduct aimed to instrument the commission of those acts referred to in paragraph 1 against any civilian population. It is important to mention that crimes against humanity do not need to be necessarily linked to an armed conflict and they can also occur in peacetime (see Article 7 (1) of the Rome Statute). Under International Criminal Law, a killing, a homicide, may fall under the definition of 'murder' as a crime against humanity if (a) the perpetrator of such act caused that human being life loss as part of a systematic plan to attack the civilian population, and (b) the perpetrator was fully aware that his or her conduct was part of that systematic plan of attack. Like in the previous case, the same article describes the following three elements which are present in the definition: (i) a physical element, (ii) a contextual element and (iii) a mental element. The physical element includes the commission of 'any of the following acts which have just referenced: (a) Murder, (b) Extermination, (c) Enslavement, (d) Deportation or forcible transfer of population, (e) Imprisonment, (f) Torture, (g) Grave forms of sexual violence, (h) Persecution, (i) Enforced disappearance of persons, (j) The crime of apartheid, (k) Other inhumane acts. A contextual element is present in this part: 'when committed as part of a widespread or systematic attack directed against any civilian population'. Finally, the mental element -present in the reference to 'with knowledge of the attack'- determines that crimes against humanity involve (a) a widespread coordinated violence in relation to the number of victims and/or (b) its extension over a wide geographic area and/or a methodical type of violence.

In contrast with genocide, crimes against humanity do not need to target a specific group. Instead, the victim of the attack can be any civilian population, regardless of its race, gender religion, political belief, etc. But the perpetrator must conduct his/her actions with full knowledge that his/her act is not a random act but part of an attack against the civilian population as mentioned above. The Rome Statute further defines an 'attack directed against any civilian population' as 'a course of conduct involving the multiple commission of acts against any to commit such attack.' This means that crimes against humanity can be perpetrated by government forces *but also by*

organized armed groups. This thesis considers, as part of drawing the distinction between war crimes and crimes against humanity referenced at the begging of this chapter, distinguishing from war crimes the crimes against humanity *when they occur under war conditions*. For example, torture, deportation, enslavement, rape is both the crimes against humanity and the war crimes. In respect to attack of the hostile part against civilians it is considered as a breach of the norms of the International Humanitarian Law and causes an element of war crimes. As indicated, two prerequisite is requested to interpret any act as a crime against humanity: (a) an act must be committed 'in a systematic or large-scale form' and (b) an act must be encouraged or led by a government or any organization or group. In this regard, a large-scale form of an attack includes the followings: (i) political purpose intended against certain civilians; (ii) establishment of the parallel institutions to pursue such politics; (iii) attracting the high rank political or military official quarters and; (iv) large-scale repetitive long-sustained in the same form act against certain civilians with a use of the strong financial, military *and other resources*. A systematic nature includes some features: (a) systematic nature is a certain action or ideology intended destruction, victimization or weakening of a certain community or society by representing a certain political purpose or plan; (b) committing and repetition of a large-scale criminal act against a group of civilians or sequence of the inhumane actions connected with each other; (c) preparing the significant public or special resources or use of them for military or other purposes; (d) attracting the high rank political or military official quarters in preparation, organization and performance of a plan.

On 3 March 2016 El Salvador ratified the Rome Statute banning statutory limitations to war crimes and crimes against humanity. This means that, as a matter of treaty law (which in many Latin American countries, including El Salvador, are at the same level of the Constitution), these international crimes cannot expire and be statutorily barred from criminal prosecution in El Salvador.[312] Based on (a) the

[312] Mexico, who has a serious drug related violence problem through the Cartels, is also part of the Convention. Mexico's Federal Criminal Code includes a section entitled 'Delitos Contra la Humanidad,' which, translated from Spanish, means Crimes against Humanity. This section contains two legal provisions: Articles 149 and 149-Bis. Article 149 describes a crime called 'Violación de los deberes de humanidad,' which, translated from Spanish, means "Violation of the Duties of Humanity." Article 149-Bis describes the genocide. Mexico's Federal Criminal Code is available on the Mexico House of Representatives' website, http://www.diputados. gob.mx/LeyesBiblio/pdf/9.pdf

intensity and patterns of violence committee in the country by the maras and (b) the systematic approach in the dynamics of that violence against the population; there is enough evidence and data to sustain that the murders, enforced disappearances and torture committed by the maras can constitute a crime against humanity per the above explained concepts. That is why is relevant that the ICC and other national courts have jurisdiction over the crimes perpetrated by these groups on universal grounds. This assessment then considers that the situation in El Salvador meets the legal definition of crimes against humanity as defined in the Rome Statue of the ICC.

The Harvard Law School International Human Rights Clinic analysed the attacks by the Haitian gangs on the population of Bel-Air[313] three years ago, in 2019, and concluded that these actions[314] meet the legal definition of crimes against humanity as articulated in the Rome Statute. Subsequently, the Harvard Law School International Human Rights Clinic assessed that the Haitian gangs can be held accountable under International Criminal Law. In connection with the 'third generation gangs' concept explained in chapter III. This sub-chapter of the thesis comments on this study as there are several points in common with the maras. The study from the Harvard Law School International Human Rights Clinic uses the definition of crimes against humanity articulated in the Rome Statute. As previously explained in this thesis, armed groups have constituted significant power and control over impoverished neighbourhoods in different cities in Haiti. Warring gangs with rule city areas using violence and terror to secure cooperation and exact bribes from the population. They also wield significant socioeconomic power by taking on quasi-governmental functions and serving as conduits for government and financial assistance in the areas they control. This situation brings an important implication: by controlling key segments of the population, gangs can deliver electoral support for politicians. The UN has observed that gang violence has specifically surged in impoverished neighbourhoods with large polling stations, where gangs can use terror to influence

[313] Bel Air is a neighbourhood of Port-au-Prince, in Haiti. According to UNICEF, 'it is a slum area of the city and suffers from poverty. Crime is widespread and kidnappings and killings have created panic among the local population.

[314] Between May and July 2020, Cherizier and allied gang leaders -now operating under the newly formed G9 alliance- coordinated simultaneous attacks across several neighbourhoods in Cite Soleil. They killed at least 145 civilians, raped women, and burnt homes in efforts to claim these areas.

electoral outcomes.[315] The attack unfolded as follows: On November 3, 2019, forty armed med led by Cherizier and two allied gang leaders, Wilson Pierre alias Ti Sonson and Alex alias Malkomprann, went to Bel-Air and offered residents money to remove the neighbourhood entry barriers (making the area, effectively, a gated community). The residents rejected this demand, noting that the barricades were erected as a part of a people's initiative to make the area safer. As result of this this, over the course of the next five days, the gangs carried out attacks that killed at least 24 people, injured five, and burned 28 residences and 11 vehicles. The attacks began on November 4, when Cherizier and his co-perpetrators returned to Bel-Air with 50 heavily armed men carrying automatic assault rifles. The assailants fired at residents and home and set fire to numerous vehicles and residences. The attack was reported on numerous radio stations as it was taking place, but the police did not deploy to intervene. Later in the day, a BOID (Brigade d'Operation et d'Intervention Departementale or Brigade for Operation and Departmental Intervention, a special unit of the Haiti's police) patrol vehicle exchanged fire with the attackers, causing the assailants to temporarily retreat. The BOID officers notified central command of the situation, but did not call for reinforcements, physically pursue the attackers, return to provide protection, nor take measures to investigate the attack or identify victims. In the middle of the night of November 5, Cherizier and his co-perpetrators returned to Bel-Air, again firing at civilian homes while residents slept inside, injuring at least one woman. A group of off-duty police officers residing in an adjacent neighbourhood opened fire in response, killing one of the gang leaders, Alex, in the shoot-out. On November 6, Cherizier, Pierre and their men returned to avenge Alex death's and killed two men and a 16-year old girl and set 26 homes ablaze. The UN expressed concern that this lack of accountability contributed to an increase in gang attacks throughout 2020, including the attack on Cite Soleil.

To assess whether crimes against humanity have taken place under the Rome Statute's definition, several elements must be present. First, the attack must involve at least one of the underlying crimes listed in Article 7(1) of the Rome Statute, such as murder or rape. Second, several contextual elements must also be met: the underlying crimes must be (a) committed as part of an attack directed against any civilian

[315] UN Security Council Resolution 1743, which urged MINUSTAH to reorient resources devoted to DDR, toward community violence reduction. UN Secretary General, United Nations Integrated Office in Haiti. 16, UN Doc S/2020/944 (September 25, 2020).

population; (b) that is widespread or systematic; and (c) that is pursuant to or in furtherance of a state or organizational policy. Based on these essentials, the Harvard Law School International Human Rights Clinic concluded that there was a reasonable basis to consider that all these elements were met, and the attacks in Bel-Air amount to crimes against humanity. The report uses the 'reasonable basis' standard because it is the one used by the ICC prosecutor to determine whether to open an investigation into a given situation, with a view to prosecuting the individuals who are personally responsible for committing the crimes. Going into a detailed assessment we have:

1)

The attacks involved qualifying acts of violence: To find that a crime against humanity has taken place, at least one of underlying crimes listed in Article 7(10 of the Rome Statute must be present. There is evidence that least four such crimes were perpetrated in the attacks Bel-Air: murder, rape, torture, and the persecution of groups based on their political identity. Each are analysed in turn:

2)

Murder: the Rome Statute and Elements of Crime define murder as the killing of more or more persons. In the Bel-Air attack of November 2019, Cherizier and his associates killed at least 24 people. Between May 23 and July 28, 2020, armed gangs led by G9 members killed at least 145 people in numerous attacks on and around Cite Soleil.

3)

Rape: this is another prohibited act under the Rome Statute. Rape requires the invasion, committed by force, threat of force, or coercion, of a person's body 'by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ.' Human rights groups have documented the use of rape as a tool to terrorize civilians in the Bel Air attacks and their testimonies are included in the report.

4)

The underlying crimes are a part of the attacks: to meet the requirements for crimes against humanity, the underlying crimes must be a part of the attack. The crime

cannot be an isolated act so far removed from an attack that, considering the context and circumstances, it cannot be reasonably be said to have been part of the attack. To determine whether a specific act of violence has an adequate nexus to the attack, an individualized inquiry is needed. For purposes of meeting the definition of crimes against humanity, however, it is enough to view the acts as whole to assess whether their 'characteristics, aims, nature, or consequence' demonstrate that they are objectively connected to the attack.' The acts enumerated above -murder, rape, torture, and destruction of property- make up the heart of the attacks on Bel-Air. These acts are not isolated or disconnected from the attacks, but rather appear to be carried out pursuant to a pre-established plan. This conclusion is reinforced by the fact that in each of the attacks, the perpetrators came to the sites of the attack together; they were sufficiently armed to cause widespread harm, and they worked together to inflict violence in a coordinated manner.

5)

The attacks were directed against a civilian population. The assaults on Bel-Air constitute attacks. The Rome Statute requires that the prohibited acts must be part of 'an attack directed against any civilian population'. An 'attack' refers to multiple commissions of prohibited acts that form a course of conduct or pattern of behaviour. It describes a series or overall flow of events as opposed to a mere aggregate of random acts. Second, the attacks must be directed at a civilian population, and this distinguishes crimes against humanity from attacks directed against 'armed forces and other legitimate combatants.' To meet this element, civilians must be the 'primary object of the attack' and not just incidental victims of the attack. This was the case in Bel Air.

6)

The evidence indicates that the events in Bel Air each meet the definition of an attack. The killings, rapes, and property destruction were carried out pursuant to a preconceived plan and followed a systematic pattern that formed an attack on the area. They took place over the course of three days. Hence, there was a pattern that indicates, not just merely random acts.

7)

The findings that crime against humanity have likely taken place in Haiti, and that state actors may be liable for the crimes, have important ramifications for accountability. Haiti is a party to the American Convention on Human Rights, which under Haiti Constitution becomes part of domestic law. Haiti has also accepted the binding jurisdiction of the Inter-American Court of Human Rights, takes with interpreting the American Convention. The Court has not only endorsed universal application of crimes against humanity but has also held that no statute of limitations applies to such crimes. The Haiti government therefore has a duty to investigate and punish those who are responsible for crimes against humanity. A finding of crimes against humanity also opens the door for other countries to prosecute perpetrators found outside of Haiti based on universal jurisdiction. [316] Finally, the situation could be referred to the ICC by the UN Security Council.[317]

(b) The 'political side' of the maras: peace truce, peace negotiations and amnesties

There is one more factor that contributes to characterize the nature of gangs vis-à-vis the government, state and political leaders and that is engaging in peace talks with the maras. Emily Crawford, speaking about the narco-cartels in Mexico, does not consider that armed groups could be a valid party of a peace process: 'Indeed, the notion that any of the cartels would be capable of speaking with one voice and being able to negotiate and conclude agreements such as cease-fire or peace accords' seems untenable.'[318] That is certainly not the case of the maras in El Salvador as they were engaged by the El Salvador's government for that specific purpose of 'peace talks' in order to implement a truce that could reduce crime levels.[319] The reference to peace talk provides the maras with a political dimension and confirms, implicitly, that there is, for all practical

[316]UN General Assembly 6th Commentary. The scope and application of the principle of universal jurisdiction: Summary of work (2018). Delegations generally stated that universal jurisdiction was an important, well-established principle of international law aimed at combating impunity which would be exercised in accordance with the principle of subsidiary. Basic Facts on Universal Jurisdiction, Human Rights Watch (October 19, 2009). Universal jurisdiction is the ability of the domestic judicial systems of a state to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals, or against one of its nationals.

[317] Rome Statute, note 32, Article 13(b) (granting the Security Council the power, acting under Chapter VII of the UN Charter, to refer to the ICC situations in which crimes under the jurisdiction of the court have taken place).

[318] Ibid at page 15.

[319] Maria Luisa Pastor Gomez, 'The political influence of the maras in El Salvador', Instituto Epanol de Estudios Estrategicos, 14 October 2020, page 9.

purposes, a de facto non-international armed conflict in the country.[320] In April 2012, the government of El Salvador and the maras (with Mara Salvatrucha and MS-18 as the main mara groups) gang leaders approved the referenced truce pact that allowed, inter alia, that certain gang leaders could be moved to different prisons (with a more relaxed internal system from the top restrictive/maximum security prisons). As result of this process, it was reported that the national murder rate decreased by thirty per cent (30%) despite the fact that the practice of extortion by gangs continued with no deterrence.[321] During the early months of 2013, other important national society member parties as well as international actors also adhered to the truce pact, such as the Organization of American States (OAS) and the Catholic Church in El Salvador.[322] However, by the second half of 2013, homicides rates began rising again and this progressively affected the political support for the truce. Finally, in June 2015 a different political party won the presidential elections and rejected to continue with the initiative of dialogue with the gangs.[323] In 2016, the gangs killed several bus drivers who had disobeyed the gangs' call for a bus transport strike. This action was taken by the maras allegedly to force El Salvador's government back to the negotiating table and re-start the 'peace talks.' This led to the decision of the government to send back gang leaders to isolation cells and to the previous top security prisons.[324]

---

[320] 'El Salvador's Gang Truce: Positives and Negatives', *Insight Crime*, 11 June 2013.Upon taking office in 2009, then-Salvadorean president Mauricio Funes initially sought to move away from mano dura and toward a focus on crime prevention. Two years into his term, crime rates remained at elevated levels and people became frustrated. Funes moved his minister of defense, David Munguia Payes, a retired general, to head the Ministry of Justice and Public Security. With Munguia Payes' backing, a Catholic bishop and a former legislator (who was the minister's aid in the Defense Ministry) brokered a secret truce between then MS-13 and 18th Street gangs in 2012. That year, Munguia Payes, agreed to transfer high-ranking gang leaders serving time in maximum-security prison to less secure prisons to facilitate negotiations. Munguia Payes denied his role in facilitating the truce until September 2012. Between the time the prison transfers took place and May 2012 (when Munguia Payes was removed from his post for unrelated reasons), the Salvadorean government reported that homicide rates dramatically declined. Gang leaders pledged not to forcibly recruit children into their ranks or to perpetrate violence against women. Gang leaders also turned in small amounts of weapons and offered to engage in broader negotiations. The initial apparent success of the Salvadorean truce led to Honduran government to consider a similar initiative.

[321] 'El Salvador's Gang Truce: Positives and Negatives', *Insight Crime*, 11 June 2013.

[322] Organization of American States (OAS), 'OAS Secretary General Highlights Results from the First Year of Gang Truce in El Salvador,' press release, March 11, 2013; Douglas Farah, 'Central America's Gangs Are all Grown Up,' Foreign Policy, January 19, 2016, page 1.

[323] 'El Salvador Homicides Skyrocket after Gang Truce Unravels', *Insight Crime*, 9 January 2015.

[324] Although some, including officials from the Organizational of American States, praised the truce, many others expressed skepticism, maintaining that disappearances increased after the truce took effect and gangs garnered media attention and political power. Gangs continued to conduct illicit activities using cell phones in the prisons and refused to give up control over their territories or to stop extortion. El Salvador's attorney general is investigating several officials who were involved in facilitating the truce for allegedly providing as much as U$D 25 million to gang leaders and their affiliates.[324] The truce began to unravel after then-president Funes withdrew support for the truce mediators and reduced

The case in El Salvador shows that not only the government as a state authority but also an international organization such as OAS have recognized the maras as a group in a peace process negotiation. This is a non-state party with whom negotiations could be conducted. A parallel can be made with the case of the Farabundo Marti National Liberation Front (FMLN) during the civil war in El Salvador during the 80s. In this sense, like the maras with its gang violence in last decade, the FMLN, as result of its participation in the armed conflict, was recognized in 1981 by the French and Mexican governments as a legitimate representative political force that should be invited to the negotiation table for a peace process.[325] Another example is the Frente Sandinista de Liberacion Nacional (FSNL)[326] which was recognized in 1980 by the Andean Pact.[327] The UN –Secretary General mentioned that the raise of well-armed non-state armed groups made it more difficult to negotiate an end to conflict.[328] The involvement of the maras as an active actor in the negotiation of a truce with all the main characteristics of a 'peace process' indicates two points: (I) a peace process assumes there is a conflict of such violence that affects the state structure and; (II) the recognition of the maras as non-state armed group and a political actor that needs to be brought into a peace negotiation. This is the result of the gained presence in the country by the maras,

communication between imprisoned gang leaders and gang members in the streets in mid-2013. By April 2014, average murder rates had risen to some nine to some nine murders per day; gang attacks on police also occurred with increasing frequency. These trends worsened in 2015, as El Salvador posted the world's highest homicide rate. Church leaders have voiced support for renewed dialogue with gang members; however, the Sanchez Ceren administration opposes negotiating with the gangs -directly or indirectly. Gang-police confrontations escalated after the government returned gang leaders involved in the truce to maximum-security prisons in early 2015. El Salvador's attorney general has recently begun investigating allegations of police involvement in extrajudicial killings that took place during and apparent massacre in March 2015. Until mid-2016, the Salvadorean government had struggled to quell violence among the gangs, which became more fragmented and powerful after the truce. Op cit. note 321 at page 98.

[325] 'Mediation and Dialogue in transitional processes from non-state armed groups to political movements/political parties', European Union Factsheet, November 2012.

[326] The Sandinista National Liberation Front (*Frente Sandinista de Liberación Nacional*, FSLN) is a socialist political party in Nicaragua. Its members are called Sandinistas after the name of its founder, Augusto César Sandino. The FSLN overthrew Anastasio Somoza DeBayle in 1979 establishing a revolutionary government. Somoza was killed in Asuncion, Paraguay, in 1980, by the same people would later become members of Movimiento Todos por La Patria (the group who attacked the La Tablada military garrison in 1989 as presented earlier in this thesis).

[327] The Cartagena agreement in May 1969 established the Grupo Andino or Andean Common Market. The main purpose of the treaty was to integrate the economies of Colombia, Ecuador, Peru, Bolivia, and Chile in common polices. Venezuela joined in 1973, and Chile withdrew in 1976 (August Pinochet's coup d'etait in Chile took place on 11 September 1973).

[328] United Nations press release, SG/SM/19975, 17 February 2020.

particularly vis-à-vis the territory they control, and how they have gradually won recognition over the public authorities.[329]

The implementation of peace negotiations should not be considered as the result of a temporary interest but as part of an integral holistic pacification process.[330] Oscar Martinez points out in a recent article in *The New York Times*, of the need of opening a dialogue to achieve peace in El Salvador but without demanding political favors of electoral support in return, and to bring the peace process to a positive conclusion That is, to turn dialogue into a state policy that looks after the general interest, if possible, with international mediators, and not into a partisan move.[331] Longer-term and proactive measures are also needed, complemented with economic and social policies aimed at fighting poverty and preventing violence. This must also include the education and teaching of sustainable trade and skills that could open the possibility for former gang members to go on in life in a productive manner and in accordance with the law. Engagement with non-state armed actors is subject to various factors as these groups are not the same in terms of forms and objectives and, subsequently, can't be addressed in the same manner. They may look to change the existing status quo; they may seek territorial dominance or simply; they may use physical and psychological (through fear and intimidation) violence for different reasons; and they may be political-oriented or, like in the case of gangs, simply profit driven.[332]

While maras may claim that they do not have a political motive or an ideology that aims to topple the Government, nor do they have an interest in creating a political force; Cantor notes that 'the supra-national gang structures of the MS-13 and MS-18 and local street gangs affiliated with one or other structure violently way to that of armed actors in an armed conflict.'[333] All these factors qualify as a direct threat to the sovereignty and stability of a state.

[329] Maria Luisa Pastor Gomez, 'The political influence of the maras in El Salvador', Instituto Epanol de Estudios Estrategicos, 14 October 2020, page 9.
[330] Claudia Hofmann and Ulrich Schneckener, 'Engaging non-state armed actors in state-and peace building: options and strategies', Volume 93 Number 883 September 2011, International Review of the Red Cross, page 5.
[331] Oscar Martinez, 'President Bukele, negotiating with El Salvador's gangs (but in a different way)', *The New York Times*, 16 September 2020.
[332] Claudia Hofmann and Ulrich Schneckener, 'Engaging non-state armed actors in state-and peace building: options and strategies', Volume 93 Number 883 September 2011, International Review of the Red Cross, page 9.
[333] David J. Cantor 'The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico' (2014) 33 Refugee Survey Quarterly 3, page 41.

There is one circumstance that may conspire against a peace negotiation with the maras. A peace negotiation may include an amnesty as a condition to reach a peace agreement. Yasmin Naqvi states that without the amnesty, 'it would be impossible, or at least much more difficult, to secure peace or to initiate or further the process of reconciliation which may be in conflict with a policy of unlimited prosecution.'[334] In this regard, the Inter-American Court on Human Rights has been very critic of amnesties.[335] In the framework of transitions to democracy in the 1980s (Argentina, Chile, Uruguay) amnesty laws were passed establishing immunity for past human rights violations. The Inter-American Court on Human Rights have not gone along that process. For example, the Barrios Altos case, the Inter-American Court on Human Rights found that the amnesty granted in Peru in 1995 was inadmissible:

> The Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate rights recognized by international human rights law.[336]

The Court accordingly established that the 1995 amnesty laws violated the rights of the victims' families and the survivors from being heard by a tribunal as contained in Article 8.1 of the ACHR and to judicial recourse as provided for in Article 25 of the ACHR. As such, the Inter-American Court of Human Rights may not be concerned with the political dimension of an amnesty as part of a peace process as it has not been concerned in terms of amnesty as part of transition to democracy process. Instead, the Inter-American Court of Human Rights focuses its rulings on the jus cogens nature of the rights the crimes involving the amnesty (e.g., prohibition of extrajudicial killings, prohibition of torture, etc.).

As this thesis stated earlier, in many Latin American countries (including El Salvador), the ACHR has the same rank as the Constitution. As result of this, the

[334] Yasmin Idem, she also considers that this was the argumentation used by the Constitutional Court of South Africa to justify the broad amnesties granted under the Promotion of National Unity and Reconciliation Act 34 of 1995.
[335] The term 'amnesty' comes from the Greek 'amnesia', meaning not remembering or oblivion.
[336] *Barrios Altos v. Peru*, Inter-American Court of Human Rights, Merits, Judgement of 14 March 2001, Series C, No. 75, paragraph 41.

Inter-American Court of Human Rights' jurisprudence gains immediate force at the national level as it is followed by national courts when exercising a constitutionality and conventionality control.[337] In this sense, the Argentina Supreme Court ruled in 2007: 'The judiciary must exercise a sort of conventionality control between internal legal norms which apply in concrete cases and the ACHR. In so doing, the judiciary must not only take into consideration the Convention, but also the interpretation which is made thereof by the Inter-American Court of Human Rights, the ultimate interpreter of the ACHR.'[338] This was in connection with the Mazzeo case in which the Argentine Supreme Court, following the Inter-American Court on Human Rights jurisprudence, declared that the year 1989 presidential pardons to the former military officers of the Juntas (during the 1976-1983 dictatorship in Argentina) and the guerrilla commanders was unconstitutional. Subsequently, the Argentine Supreme Court recognized the interpretative guidance of the Inter-American Court of Human Rights vis-à-vis the ACHR.

This brings one more question: can an amnesty be granted for war crimes and crimes against humanity without being questioned, on legal grounds, by international courts? This is a dilemma that peace process may have to face as Yasmin Naqvi states: '(…) the notion of remedial or retroactive justice for victims of war crimes and crimes against humanity often has to be balanced against the need of the territorial State to deal effectively and progressively with past atrocities and not to provoke or maintain further violence. In these circumstances a restorative justice approach incorporating limited amnesties, focusing on the normative rather than the punitive objectives of criminal law, may be the more appropriate model.'[339]

Remedial justice may be characterized as the legal means to recover a right or to prevent or obtain redress for a wrong. On the contrary, retributive justice focuses on the need to punish the wrongdoer for illegal acts committed.[340] If an amnesty for the maras was to be considered as invalid and never to be accorded international recognition, this may eliminate a tool for aiding gang violence and facilitate

[337] The constitutionality control seeks to establish the prevalence of the Constitution of each state over other domestic rules. The conventionality control doctrine aims to strengthen the supremacy of human rights treaties over domestic law – constitutions included – of those states which are parties to them.
[338] *Mazzeo Julio Lilo y otros*, Argentine Supreme Court, judgement of 13 July 2007, Jurisprudencia Argentina 2007-III-573, paragraph 21.
[339] Yasmin Naqvi, Amnesty for war crimes: defining the limits of international recognition. (2003) International Review of the Red Cross, September 2003, Vol. 85 No. 851, page 583.
[340] K. Avruch and B. Vejarano, 'Truth and reconciliation commissions: A review essay and annotated bibliography', The Online Journal of Peace and Conflict Resolution, Vol. 4.2, 2002, page. 34.

reconciliation. South Africa is probably the most well-known example of a reconciliation process in the recent history through the Promotion of National Unity and Reconciliation Act 34 of 1995 that set a mechanism granting a broad amnesty for those who had committed politically motivated crimes during the apartheid regime. Now, the apartheid is defined by the Rome Statue as inhumane acts of a character similar to other crimes against humanity "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime". But this definition is post-1995. Before the 1995, the UN General Assembly, on 30 November 1973, defined the crime of apartheid as 'iinhumane acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.' This definition is contained in the 1973 United Nations International Convention on the Suppression and Punishment of the Crime of Apartheid which was the first binding international treaty which declared the crime of apartheid and racial segregation under international law. So here we have an amnesty process linked to a crime that was declared as such under international law and today it is officially included in Rome Statue. Furthermore, there is a case law, the AZAPO case, in which the South African Constitutional Court reviewed the amnesty process in South Africa. In that case, the applicants requested that section 20(7) of the referenced Promotion of National Unity and Reconciliation Act to be declared unconstitutional.[341] This section permitted the committee on amnesty established by the National Unity and Reconciliation Act to grant amnesty in respect to any act, omission or offense provided (i) that the applicant concerned had made a full disclosure of all relevant facts, and (b) provided further that the relevant act, omission or offense was associated with a political objective and (c) committed prior to 6 December 1993. As a result of the granting of amnesty, the perpetrator was relieved from criminal or civil liability. The State or any other body, organization or person that would ordinarily have been vicariously liable is also relieved from liability. The constitutionality of the section was upheld by the South African Constitutional Court. It was conceded that the section limited the applicants' right to

[341] Section 20(7) permits the committee on amnesty established by the Act to grant amnesty in respect to any act, omission or offence provided that the applicant concerned has made a full disclosure of all relevant facts, and provided further that the relevant act, omission or offence was associated with a political objective and committed prior to 6 December 1993.

"have justiciable disputes settled by a court of law, or . . . other independent or impartial forum". However, it the South African Constitutional Court also considered that the epilogue to the interim Constitution sanctioned the limitation on the right of access to court. The South African Constitutional Court also considered the argument that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) authorizing amnesty for perpetrators constituted a breach of the Geneva Conventions of 1949. The Court held that it was doubtful whether the Geneva Conventions and their Additional Protocols applied at all to the conflict. In any case, Additional Protocol I was not binding on South Africa and Additional Protocol II encouraged the authorities in power to grant amnesties after the end of hostilities. The South African Constitutional Court held further that international law distinguished between international *and non-international armed conflicts. For the latter category there was no obligation to prosecute those who might have performed acts of violence or other acts which would ordinarily be characterized as serious violations of human rights.* Hence, this thesis considers the process in South Africa could represent a potential blueprint for El Salvador in an eventual peace negotiation that includes an amnesty for the maras.

The other option (but more complicated) would involve the UN Security Council. In this case, the peace process/amnesty would be brokered (or given approval) by the UN Security Council for purposes maintaining the peace under Chapter VII of the UN Charter. As such, the challenge or non-recognition of the amnesty by a third state would constitute a threat to international peace and security. But this will constitute a very high threshold and difficult to implement. Having said that, Article 16 in the Rome Statute gives the UN Security Council the faculty to defer proceedings before the ICC for twelve months by passing a resolution (which may be renewed) under the referenced Chapter VII of the UN Charter. Subsequently, this represents a sort of recognition (by the States signatories of the Rome Statute) that the prosecution of crimes against humanity has limits. Yasmin Naqvi makes an interesting reflection: 'This provision signals that peace and justice do not always coincide and that where they appear to be in conflict, the objective of securing and maintaining peace will prevail.'[342] At the same time, the ICTY elaborated on the consequences of breaching

[342] Yasmin Naqvi, idem. V. Gowlland-Debbas, 'The role of the Security Council in the new International Criminal Court from systemic perspective', in L. Boisson de Chazournes, page 23. 'The

a jus cogens norm in the Furundzija case concerning the crime of torture.[343] The ICTY ruled that 'every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.' The term 'entitled' can be understood as the right (but not the obligation) of States to prosecute those accused of jus cogens crimes. The statutes of both the ICTY and the ICTR are silent on the possibilities for these tribunals to recognize amnesties but considering that they were established by UN Security Council resolution, it would be possible to refer to the already mentioned arguments (about the UN Security Council). A possibility then to consider for an eventual peace process involving the maras a mix between (a) a limited amnesty combined with an effective truth commission.

(c) Why it is relevant that International Criminal Law applies to the maras' gang violence

As indicated in Chapter V, because (a) the maras are a source of ongoing and active disruption to the sovereign function of the state in El Salvador , (b) the maras project levels of violence equal to an armed conflict and (c) and because domestic criminal law enforcement (and the national courts) has done little to abate such disruption; then an armed conflict matrix is a preferable one to dealing with that degree of violence. Subsequently, if International Humanitarian Law applies to gang violence in El Salvador, the law on war crimes committed in non-international armed conflict will apply as a matter of International Criminal Law. This is the main reason for which the maras should also be dealt under International Criminal Law, with the possibility of being prosecuted for war crimes and crimes against humanity, again, on the grounds of organization and violence. To support this argument, as the thesis will develop in Annex II, parallels are made between ICTY jurisprudence and the Geneva Conventions with specific criminal acts committed by the maras and reported by the media. This was based on the analyses made by the Harvard Law School International Human Rights Clinic with the crimes committed by the gangs in Haiti.

The ICTY and ICTR set out and clarified the definition of armed groups in their case law. They have clarified the elements linked to the level of organization. For

International Legal System in Quest of Equity and Universality, Liber-Americorum Georges Abi-Saab, Martinus Nijhoff Publishers, Kluwer Law International, 2001, pages 629-650.

[343] *Prosecutor v. Anto Furundzija*, ICTY, IT-95-17/1-7, 10 December 1998, paragraph 150.

example, they have contended that while a certain level of organization is required (Limaj *et al. case*, ICTY, IT-03-66-T, 30 November 2005, paragraph 89), non-state armed groups do not need a hierarchical system of military organization similar to those of regular armed forces to be considered as such (*Musema Case* , ICTR-96-13-T, 27 January 2000, paragraph 257). In the *Haradinaj et al. Case* (3April 2008, paragraph 60), the ICTY Trial Chamber found that an "organized armed group" must be characterized by: (1) The existence of a command structure and disciplinary rules and mechanisms within the group; (2) The existence of a headquarters; (3) The fact that the group controls a certain territory; (4) The ability of the group to gain access to weapons, other military equipment, recruits and military training; (5) Its ability to plan, coordinate and carry out military operations, including troop movements and logistics; (6) Its ability to define a unified military strategy and use military tactics and; (7) Its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords. Those criteria were confirmed and developed in the *Boskovski and Tarculovski case* (ICTY, IT-04-82-T, 10 July 2007, paras.194-195). The important point is the following: the criteria set out in these decisions are mainly linked with the determination of the individual criminal responsibility of the members of non-state armed groups towards war crimes. *Consequently, they concern International Criminal Law rather than International Humanitarian Law.*

Another reason this relevance is that domestic courts may lack the infrastructure and resources to conduct a judicial process. International criminal courts can assist in this regard. Furthermore, if military related means are instrumented to deal with the maras, International Criminal Law may provide a higher standard and guidance to prevent human rights abuses.

On the other side, as presented in the previous sub-chapter, the maras were part of a political peace process. Subsequently, the main drawback of including the maras in the referenced legal framework (International Criminal Law) is the potential obstacle that this may present for a political arrangement, such as peace agreement, that may include an amnesty vis-à-vis the jurisprudence of the Inter-American Court of Human Rights on the subject. Another drawback is that local populations and governments may perceive the automatic application of International Criminal Law as surrendering sovereignty. In this regard, the principle of complementary followed by the ICC provides that states have the primary responsibility to investigate and prosecute

international crimes, and only when they are inactive, unwilling, or unable to genuinely investigate and prosecute the ICC may exercise its jurisdiction.

Finally, the maras/gang violence provides a new context to reformulate the fact that there is no treaty codifying the different crimes against humanity and undertake the task of drafting a new one. Currently crimes against humanity are codified under the Rome Statute and that is the only permanent court with jurisdiction over such crimes. Furthermore, not all states have incorporated crimes against humanity into their respective national legislation. This legal vacuum reduces the chances to hold perpetrators accountable at the national level. A crime against humanity-based treaty could certainly enhance accountability by expanding the jurisdictional powers to include recourse to the ICC and obligating states to prevent, protect, and punish such crimes. This treaty would represent an excellent opportunity to recognize the new forms of armed conflict described in this thesis, such as 'commercial insurgency' which are present in today's world. The International Law Commission has provisionally drafted certain articles that could serve as a model for a potential 'Convention on Crimes against Humanity'. The International Law Commission was established by the UN General Assembly in the year 1947 with the objective of 'initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification'. These draft articles replicate the Rome Statute's definitions of crimes against humanity. Furthermore, the treaty could also boost the application of International Criminal Law in fragile states in which the national legal system is dysfunctional or no longer effectively exists by providing an internationally accepted framework as a common denominator to regulate the conduct of the parties. This also could be an opportunity to expand the categorization of crimes against humanity such as this thesis mentioned during the introduction.

VII) REFUGEE CLAIMS AND THE MARAS

(a) An assessment of refugee claims how persons fleeing gang violence are functionally like persons fleeing armed conflicts violence

This chapter presents and analyses of refugee claims and aims to demonstrate how persons fleeing gang violence are functionally like persons fleeing political/religious violence. Case law from national courts can contribute to confirm that maras is an organized non-state armed group whose level of violence merit the application of International Humanitarian Law. As mentioned in the Introduction of this thesis, the case law related to maras is in connected to refugee claims. Although gang violence is a present on daily basis in many parts of the world, most of the specific gang-based case law involving the maras is from U.S. But with one feature: the majority are related to asylum cases. Basically, people are forced to leave their home country as they want to flee from the violent reach of the maras. The intention here is not to analyse the merits or conditions for a refugee claim but how the arguments of refugee claims vis-à-vis gang violence present unequivocally parallels with the arguments are made in those refugee claims linked to an armed conflict. The same reasons invoked by applicants in refugee claims related to armed conflicts (for example, the Afghan refugees fleeing the Taliban) are also invoked by applicants in refugee claims related to the maras' gang violence. In this sense, the word 'persecution' comes straight from U.S. immigration law and is mentioned in its definition of the term 'refugee.'[344] That persecution should come from either a country's government or other authorities or groups that the government is unable to control, such as guerrillas or, like in Central America in general and El Salvador in particular, the maras. Reviewing the statute, a 'crime against humanity' constitutes any of the above referenced acts when committed as part of a widespread or systematic attack directed against any civilian population. In the refugee claims is possible to see the systematic attack of maras against specific 'social groups' as this constitutes the legal basis for the petition. Linking then 'social groups' refugee-based claims with the maras may provide evidence that the maras are, in fact, committing crimes against humanity in Central America. It is then important to analyze this scenario.

Given the inconsistency across the world in treatment of gang-related violence claims, the UNHCR issued a Guidance Note in March 2010 on Refugee Claims

[344] Op cit note 185 page 50.

Relating to Victims of Organized Gangs (the 'Guidance Note'). The objective of the Guidance Note is to address whether victims of criminal gangs or activities associated with those criminal groups may qualify as people in need the protection guaranteed by the1951 Convention relating to the Status of Refugees and its 1967 Protocol. The Guidance Note also provides a complete detail of international legal protection for gang-related asylum claims, including a specific definition of what group may constitute a 'gang;' typology of victims targeted by gangs and a legal basis for such purpose. What is a 'gang' in the context of the UNHCR guidelines? UNHCR indicates that a 'gang' refers to: '(a) Relatively durable, predominantly street-based groups of young people for whom crime and violence is integral to the group's identity; (b) Organized criminal groups of individuals for whom involvement in crime is for personal gain and that constitutes their primary occupation and (c) armed type groups involved in criminal activities.'[345] The maras clearly qualify as a gang under the UNHCR definitions.

Per the Guidance Note, people fleeing gang-related violence must prove a 'well-founded fear' or persecution because of political opinion, race, religion, nationality or 'a member of a particular social group'. In the maras-related asylum claims the applicants have been able to prove a 'well-founded fear' as result of maras' gang violence and the inability of the state to protect them from such violence. But proving as well that this fear is as result of being part of one of the protected grounds (race, religion, nationality, political opinion, or membership in a social group), a requirement known as the nexus requirement, has been more difficult. A general fear of gang violence or recruitment by the gangs is insufficient for the nexus requirement. Rather, the applicant must prove that he/she was specifically targeted for gang membership due to his or her membership to one or more of the protected grounds. In the case of gang-related violence in Central America (where race nationality, religion and political opinion are not applicable issues vis-à-vis the maras' gang violence), this only leaves membership to a particular social group as the basis for the claim. Furthermore, as described before, the persecution must be (i) at the hands of the government or (ii) from a third non-governmental party that the government is unable (or does not want) to control. That third non-governmental party is the maras in this case and, subsequently, the definition of 'social group' acquires a key importance in a

[345] UNHCR issued a Guidance Note in March 2010 on Refugee Claims Relating to Victims of Organized Gangs.

potential connection to crimes against humanity.[346] By definition, in gang-related claims, for the victims, the persecution by the maras involves non-state actors. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (the 'UNHCR, Handbook') states that persecution may 'emanate from sections of the population that do not respect the standards established by the laws of the country concerned'.[347] The UNHCR Handbook further provides the following: 'Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection'. That is clearly the case of the maras in Central America. State protection is certainly not effective when 'the police fail to respond to request for protection or the authorities refuse to investigate, prosecute or punish (non-state) perpetrators of violence with due diligence.'[348] In El Salvador, gangs 'exercise extraordinary levels of social control

[346]Until the year 2009, U.S. courts rejected asylum requests applications based on gang violence on the grounds that the state (from the where the applicant was fleeing, such as El Salvador) was trying to counter on gang violence and, as such, there was a level of protection granted to the applicant. U.S. courts systematically held that the violence was more a 'personal problem' rather than 'police negligence' or a situation that the state was 'unable or unwilling' to control. Most claims were linked to Central America with the maras, but U.S. courts also received claims connected to gangs in Albania, Jamaica, and the Russian Federation. A different approach was taken following the decision in *Ramos v. Holder* (2009). The U.S. Seventh Circuit ruled that former gang violence can be basis for attacks against a particular social group in society. From that moment, U.S. jurisprudence presented several examples of persecution by the maras of people on account of membership to a social group but not all of them with the same conclusion. U.S. courts reviewed the specific circumstances of each case vis-à-vis the 'social group" definition. *Ramos v. Holder*, 589 F.3d 426, U.S. 7th Cir. Court (2009). A summary of the decision (according to which a former gang membership can be considered as being part of a social group for asylum purposes) available on a digital format at https://caselaw.findlaw.com/us-7th-circuit/1499189.html.

But, one year earlier, in *Santos-Lemus v. Mukasey* (2008), the 9th Circuit Court rejected the request of asylum as the Court concluded that the applicant, Mr. Santos-Lemus, did not establish a well-founded fear based on his mara membership. The Court ruled that 'a young man in El Salvador resisting gang violence unstoppable by the police,' did not have sufficient grounds for being considered part of a social group (part of the Court decision was based on the fact that the family of the applicant remained unharmed in El Salvador once he left the country). *Santos-Lemus v. Mukasey*, 542 F.3d 940, 9th Circuit Court (2008). A summary of the decision is available on a digital format at https://caselaw.findlaw.com/us-9th-circuit/1166115.html.

In the case *Lopez-Soto v. Ashcroft*, (2004), the 4th Circuit Court denied the asylum petition made by a Guatemalan former mara member. The applicant argued that gang violence was a wide problem in Guatemala and that, at the family level (a) his own older brother was murdered because he refused to join the mara and (b) that his own cousin was murdered by the maras after Mexican authorities deported him back to Guatemala; but the Court rejected the argument that the family group constituted a particular social group under 8 U.S. C. S. 1101 (a) (42) (A). *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235, 4th Circuit Court (2004). A summary of the decision is available on a digital format at https://caselaw.findlaw.com/us-4th-circuit/1235620.html

[347] The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

[348] UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked ¶ 22, U.N. Doc. HCR/GIP/06/07 (2006).

over the population of their territories. Despite the formal existence of an anti-gang legal framework, if the police and judiciary are not entirely functional contributes to creating a high level of impunity for crimes in El Salvador.'[349] UNHCR has filed different amicus curiae in refugee claims cases because the organization had a direct interest in the proceedings as the claims are connected with UNHCR's mandate of providing international protection to refugees.[350] While plaintiffs have to consent to the filing of the proposed amicus brief, the UNHCR does not take position directly on the merits of plaintiffs' claims.[351] The main point to be concluded from the UNCHR amicus briefs is that gang violence committed by non-state actors not only can form the basis for an asylum case but also the basis for crimes against humanity. 'El Salvador is suffering a hidden tragedy of people who have had to leave their homes because of the high levels of gang-related violence,' said in 2017 the UNCHR Special Rapporteur Cecilia Jimenez-Damary, who examined the human rights of internally displaced persons. 'The problem is more significant and widespread than the Government is currently accepting. The Government needs to acknowledge the full extent of internal displacement and act to tackle it and the gang violence which is driving it. I urge the Government to intensify its efforts to help and protect these people. Gangs dominate territories and populations through threats, intimidation and a culture of violence that infects whole communities and everyday activities, movements, interactions, and relationships. Killings are commonplace and extortion is widespread. If people are under threat from gangs, they and their families leave their homes to seek safety elsewhere.'[352] The UNCHR Special Rapporteur further noted the need for more data to assess the full scope of the problem. The exact number of

[349] UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador at 12, U.N. Doc. HCR/EG/SLV/16/01 (2016).
[350] Statute of the Office of the UNHCR. U.N. Doc. A/RES/428(V) (Dec. 14, 1950). Preamble and Article 35 of the *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 (the *1951 Convention*) Article 2 of the *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (the *1967 Protocol*).
[351] The document included a standard disclaimer of the United Nations according to which (a) no person or entity other than UNHCR and its outside counsel authored amicus curiae; (b) no other person or entity provided any funding related to it (in order to guarantee independence) and (c) that the amicus brief did not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law (including but not limited to the Convention on the Privileges and Immunities of the United Nations that covers UNHCR as an integral part of the UN).
[352] 'El Salvador: UN expert urges Swift action on hidden tragedy of people fleeing gang violence', 21 August 2017, available on a digital format at https://www.ohchr.org/en/press-releases/2017/08/el-salvador-un-expert-urges-swift-action-hidden-tragedy-people-fleeing-gang

people leaving El Salvador is unknown but estimates place this number in the several thousands.

One of the refugee cases from 2009 (referenced only as RRT Case No. 0906782) decided not in the U.S. but in Australia (showing the reach of the maras violence) is quoted as follows:

> Many academics and political analysts conclude that the problem of gangs is the second most important sociological phenomenon of violence since the civil war. Central American experts suggest that forty per cent of all homicides that occur today in El Salvador involve a gang member as the victim or the perpetrator. Not surprisingly, both delinquency and citizen security have become predominant concerns for most Salvadorans. The hard-line law enforcement approach has not had the desired effect of curbing gang violence or reducing recruitment. One should not forget that this is a small country of just 21,000 square kilometres which contributes to the reach of the maras. In fact, former President Saca admitted that the fight against the gangs would take around 25 years.[353]

The difference between a refugee and an asylee is the way they arrive to the receiving country; in the U.S., refugees apply for refugee status abroad and arrive to the receiving country as an approved refugee, while asylees can apply for asylum affirmatively when they arrive at a port of entry or defensively when have already apprehended by immigration officials for entering the U.S. without documentation. Affirmative asylum applications are processed by the United States Citizenship and Immigration Services (USCIS) arm of the Department of Homeland Security (DHS) and defensive applications are processed by DHS's judicial branch, the Executive Office for Immigration Review (EOIR). Affirmative asylum applications can be made immediately at a port of entry, such as a border crossing station or a marine entry, or can be made voluntarily within one year of initial authorized entry into the U.S. If someone has been detained or placed in removal proceeding and applies for defensive asylum in front of an EOIR judge then the applicant must pass a 'credible fear' interview, where a judge determines the veracity of a persecution claim. If the claim is deemed credible, the applicant can receive asylum status. If the claim is denied, the applicant will likely be deported back to their native country. Asylum applicants from the Northern Triangle nations apply for defensive asylum much more often that affirmative asylum,

[353] 0906782 (2009) RRTA 1063 (24 November 2009) available on a digital format at https://www.refworld.org/docid/4b5708f42.html

and defensive asylum claims are significantly less likely to be approved. Data from the DHS shows that in 2017, affirmative asylum applicants from El Salvador had a 17.98% approval rate while defensive asylum applicants had a 3.76% approval rate.[354] Similar data is reported for applicants from Guatemala and Honduras, with 16.58% and 15.98% approval rates for affirmative applications, respectively, and 4.41% and 4.72% approval rates for defensive applications. The fact that defensive applications from all three Northern Triangle nations have a significantly lower approval rate than affirmative applications is important because applicants from all three countries are significantly more likely to apply for defensive asylum than affirmative asylum. In fact, in 2017 defensive asylum applications from El Salvador, Guatemala, and Honduras made up 75.79%, 63.55% and 73.90% of all asylum claims, respectively, from each nation. A possible factor in the low approval of defensive asylum applications is that non-citizens in immigration court are not afforded the right to counsel; data from Syracuse University's Transactional Records Access Clearinghouse (TRAC) shows that between 60% and 80% of those appearing in immigration court who have never been detained are represented by counsel, compared to 10% to 30% of those appearing in immigration court who have been detained appearing with counsel.[355]

Gang violence has led to the recognition of a new type of victim of persecution that can be seen in different national jurisprudence on the same subject. In fact, the available national case law related to gangs and its potential classification as non-state armed actors involve refugee claims. There is no case law in which the maras are considered as a subject of International Humanitarian Law (hence, one of the reasons for the present thesis exploring this point). As indicated, most of the case law involving maras are refugee claims related cases. But this has a strong connection with the main point of this thesis: it was as result of the civil armed conflict in El Salvador and the refugees fleeing from El Salvador to the U.S. that the maras were born. In this sense, most of the reviewed refugee claims case law describes gang violence in El Salvador in a level equal to an armed conflict (including the El Salvador's civil armed conflict between 1980-1992). Hence, gang violence became a ground for refugee status in the same way that the armed conflict in the 80s was considered a ground for that same status.

[354] U.S. Department of Homeland Security. Office of Immigration Statistics. Annual Flow Report: Refugees and Asylees: 2017.

[355] Transactional Records Access Clearinghouse (TRAC) – Comprehensive, Independent, and Nonpartisan Information on Federal Enforcement, Staffing and Funding. October 16, 2017; quoted by Jane E. Dowd, 'A Credible Fear: The Politics of Gang Violence in Northern Triangle', City University of New York (CUNY), May 2019, page 14.

VIII COMMERCIAL INSURGENCY: THE MARAS DISRUPTING THE SOVERIGN FUNCTIONING OF THE STATE TO A DEGRE SIMILAR TO AN INSURGENCY

(a) Commercial Insurgence

This thesis considers that the disruption of sovereign functions in El Salvador as results of gang violence is a valuable contribution to knowledge. In this sense, the present chapter provides an analysis of the why, that because organized gangs disrupt the sovereign functioning of the state to a degree functionally similar to that an insurgency, they should be dealt with as armed insurgents (even if their aims are not necessarily the same as armed insurgents but the outcome is the same -state disruption).

The term 'commercial insurgence' was first mentioned in an almost visionary study by Steven Metz[356] in December 1993, almost thirty years ago.[357] In 'The Future of Insurgency', Steven Metz provided a very interesting conceptual analyses under the term commercial insurgency which since then has gained further acceptance providing the stage for new forms of armed conflict which are driven by wealth and not by the desire of political change.[358] Thanks to internet, all of sudden de-franchised masses have recognized the extent of their deprivation. As result of social media, personal satisfaction is increasingly being defined by material possessions. Victor Perera's description of de-franchised young people living in urban settings can be seen throughout the developing world: 'Rap, Hollywood, baseball, Big Macs, TV returns in shop windows are more of what they know U.S. culture, refracted through the glittering shards of a thousand spent and shattered dreams.'[359] Metz's concept of a commercial insurgency provides an angle through which it is possible to understand that the maras are not just operating in the context of an armed conflict but that the maras' violence is creating a new kind of armed conflict. In the modern world, the most common

[356] Steve Kent Metz, (born June 30, 1956) is an author and professor of national security and strategy from the U.S. at the U.S. Army War College. He specializes in insurgency and counterinsurgency, the African security environment, and future warfare. From 1993 to 2020 he worked with the U.S. Army War College Strategic Studies Institute (SSI) serving as Senior Research Professor. The doctorate candidate has included this specific footnote as he has taken the "commercial insurgency" concept from Steve Metz's concept.

[357] Steve Metz, *The Future of Insurgency Strategic Studies Institute* (1993) US Army War College.

[358] 'Some federal officials were now describing the drug activity there (in Mexico) as a 'commercial insurgency' and arguing for a strategy like those used to counter insurgency.' Hillary Clinton's remarks related to Mexico and drug trafficking (BBC, September 2010).

[359] Victor Perera, *Rites: A Guatemalan Boyhood* (1994) Mercury House, page 46.

manifestations of this new armed conflict are probably the 'narco-insurgency' in Guinea Bissau in West Africa and the cartels networks in Mexico. The defining feature is the expansion of the criminal activity into a fundamental security threat to the state. This dynamic of violence often glorifies and references 'the power of guns through music, video games and movies that idolize criminal violence or that of gangs.[360] The almost prophetic analyses of Metz in 1993 was acknowledged twenty years later, in 2013, through a USAID report on drug trafficking in Africa:

> In general, there is little stigma associated with wealth acquired through trafficking. In fact, the lifestyle choice is frequently celebrated in music, TV shows and movies influencing youth attitudes. Limited economic opportunities especially for the large number of unemployed youths, wealth disparity, the weakening of the traditional social fabric, and a norm of informal and unregulated economic activities may all reduce any stigma with money earned through drug trafficking. Some drug traffickers are idolized for their enormous wealth without questioning, or caring, how they acquired it. The 'fast and easy' money and the material possession it can afford conform to the flashy materialism or 'bling bling' culture that is gaining increased appeal among some African youth.[361]

Organized crime can be conceived as competing with peace operations to shape the post-conflict political economy of the state. In this sense, the present thesis will specifically discuss the case of Haiti and how the Haitian gangs are today the main obstacle for the UN peace mission in the country. Organized criminal groups are interested in corrupting state law enforcement structures in order to ensure a permissive environment for illicit activities. While contemporary approaches to state-building are top-down- based, probably a more bottom-up approach placed in programs managing rehabilitation of former gang members is needed. In this regard, peace operations are increasingly engaged in direct confrontation with organized crime actors and other non-state sources of authority. As such, like classic armed groups, gangs present a challenge to the state that merits a review of traditional conceptions of International Humanitarian Law.

[360]Olivier Bangerter 'Territorial gangs and their consequences for humanitarian players' (2010) International Review of the Red Cross, Volume 92 Number 878, pages 392 – 393.

[361] During the Sierra Leone conflict the world took notice of the problematic around blood diamonds. In an irony of the destiny, many of the diamonds illegally extracted by young miners in Sierra Leone were used in the production of hip-hop videos coming from the U.S. and watched by those some young people. This was happening while, in parallel, these diamonds were fuelling the conflict. As indicated in a previous foot note, conspicuous consumption and flamboyant use of money are symbols of the hip-hop/rap culture inter-linked with the gang culture and they constitute two of the most criticized aspects of this music genre.

(b) Do the maras challenge the state?

Thomas Bruneau provides the following classification in terms of the national security challenges associated with gangs: they (gangs) erode government capacity through violence, challenge the legitimacy of the state, act as a surrogate or alternative government authority in some communities, overtake the informal economic sector, and infiltrate police and non-governmental organizations to advance their goals, demonstrating political ambitions.[362] These characteristics are all descriptive of gang behaviour in El Salvador.

Gangs do not look for a direct confrontation with the state as this is classically understood in the sense of a confrontation aiming to depose and replace such government through a revolution. Profit, and not politics, is the main driving force behind maras' actions but this non-political objective nevertheless creates a direct challenge to the state and the effective rule of law by the government authority.[363] This challenge to the state can be seen from economic and territorial angles. As noted earlier, the total cost of violence, represented mainly in the amount that households must spend to extra security and the lost income of people deterred from working, is nearly 16% Gross Domestic Product (GDP), the highest spending level in Central America.[364] These are numbers like economic losses as result of an armed conflict. In this sense, there is a substantial amount of research that finds that an armed conflict in general and civil wars have a large and big impact on macroeconomic indicators such as GDP and trade.[365] The Institute for Economics and Peace estimates that conflict and violence had a monetary impact of $13.6 trillion in 2015. In 2016 this impact was even higher, at $14.3 trillion, or 12.6% of global GDP.[366] The insecurity fuelled by violence can create cost increases in labour and transport that slow economic development. For instance, a study on the 2007 Kenyan presidential election found that electoral violence raised

[362] Thomas C. Bruneau, 'The Maras and National Security in Central America', Strategic Insights 4, no. 5 (May 2005), page 6.
[363] https://www.crisisgroup.org/latin-america-caribbean/central-america/62-mafia-poor-gang-violence-and-extortion-central-america
[364] 'Crime in El Salvador. The gangs that cost 16% of GDP' The Economist May 21st, 2016.
[365] Paul Collier, *Breaking the Conflict Trap: Civil War and Development Policy*, World Bank (1999). Alberto Abadie and Javier Gardeazabal, 'The Economic Costs of Conflict: A Case Study of the Basque Country', American Economic Review, Vol 93 No. 1 (2003), page 31.
[366] Data from World Humanitarian Data and Trends report by the UN Office for the Coordination of Humanitarian Affairs (OCHA).

labour costs up by 60% and contributed to a loss in foreign direct investment.[367] Another study concluded that insecurity caused by Somali pirates in the Gulf of Aden and the Indian Ocean led to an increase in shipping freights of approximately 15% [368] A study on the effects of Burundi's civil war on health found the conflict stress situation reduced child height significantly.[369] In the same way, a study on the long term impacts of the 1967–70 civil war in Biafra (Nigeria) that killed one to three million people, considers that exposure to violence led to chronic poor health in both children and adolescents. These effects are estimated to have reduced the income of those people most affected in approximately1.5–3% per year of conflict exposure.[370]

One clear example of the growing influence of gangs in El Salvador is the de-facto 'taxation' they conduct in the form of extortion.[371] In any modern society, tax is a necessary charge to fund the basic running of state and finance public expenditures. Failure to pay that taxation, along with evasion of or any form of resistance to taxation, is punishable by law. Taxation is part of the jurisdictional power of the state in a territory. The maras conduct their one 'taxation' system in that same territory. Racketeering is a leading source of income. Extortion is used by the maras to finance their criminal undertakings (including but not limited to buy weapons and support the families of jailed gang members). According to a 2015 poll conducted by the University Institute of Public Opinion in San Salvador, nearly one in every four Salvadorans mentioned they had been a victim of extortion and/or they know someone

[367] Christopher Ksoll, Rocco Macchiavello and Ameet Morjaria, 'The Effect of Ethnic Violence on an Export-Oriented Industry' (2009) No 8074, CEPR Discussion Papers from C.E.P.R. Discussion Papers. This paper researches the effects of ethnic violence on companies that are focused in exports of different products. The author explains the negative impact in Kenyan exports as result of the political violence following the contested 2007 election in Kenya. The ICC indicted different Kenyan political figures as result of such political violence, page 2.

[368] Timothy Besley, Thiemo Fetzer, Hannes Mueller, 'The Welfare Cost of Lawlessness: Evidence from Somali Piracy' (2014) Journal of the European Economic Association, page 24.

[369] Tom Bundervoet, Philip Verwimp, and Richard Akresh. 'Health and Civil War in Rural Burundi, Journal of Human Resources' (2009) vol. 44, issue 2. This paper researches the impact of Burundi's civil war on children's health status (including malnutrition, height and illness), page 537.

[370] Richard Akresh, Sonia Bhalotra, Marianella Leone and Una Okonkwo Osili, 'War and Stature: Growing Up during the Nigerian Civil War', American Economic Association, Vol 102 N3 May 2012. The Nigerian civil war of 1967-70 started following the secession of the Igbo-dominated south-eastern region from the federal structure of the country. Their aim was to create a separate state known as Biafra. It was usually considered as the first civil war in Africa and the predecessor of many intra-state conflicts (particularly during the 1990s.), page 5.

[371] MS-13's annual revenue in El Salvador has been estimated at USD 32 million. Oscar Martinez, 'Killers on a Shoestring: Inside the Gangs of El Salvador,' *The New York Times*, 20 November 2016. Bryan Avelar, 'The Bus Route That Institutionalized Extortion in El Salvador', *Insight Crime*, 13 December 2016.

who has been victim of such extortion.[372] The system (also known as 'renta' or 'rent' in Spanish) is applied to school students, street vendors, merchants, neighbours and, particularly, bus drivers.[373] An estimate indicates that El Salvador's bus drivers and fare collectors are forced to pay gangs between $18 to $26 million a year. [374]

The second important factor is the 'authority' mandate correlated with physical presence and impact. Gangs aim to keep control over the areas in which they operate. El Salvador's has currently one of the highest murder rates in the world[375] and this is largely due to different fights between gangs for control of territory.[376] The conflict dynamics between the gangs and the state security forces have a direct consequence on the daily lives and business of local citizens with the homicide level in 2015 being much higher than during the civil war during the 1980s.[377] In this sense, a study made by the El Salvador's Ministry of Defence Ministry concluded that approximately fifteen percent of the country's inhabitants work directly for the main 'armed groups' across the country. Furthermore, the study (maybe without understanding the consequence of that action) specifically use the term 'armed groups' to describe the violence

[372] Fact-box: Six reasons why El Salvador became one of the world's murder capitals, Reuters, 11 May 2016. Extortion is a key source of revenue for the maras. The extortion schemes go from USD 2 to USD 20 per day depending on the size of the targeted business. According to the El Salvador Central Bank, the money that has to be diverted from business to gangs, either through extortion or contracting private security, combined with the cash flow lost as result of violence, amounts to the incredible figure of $4 billion per year, about 15 percent of the country's GDP, according to a report from the El Salvador's Central Bank (El Salvador Central Bank data 2016). Today, in many Salvadoran neighbourhoods, a person can't cross move from one sector to another without being affected by the feud of rival gangs' territory. For example, when driving into another neighbourhood, visitors often have to flash their lights or roll windows down to indicate their presence to the gang that controls it and request permission to enter. Tariq Zaid, A Nation Held Hostage, The New York Times, 30 November 2019.

[373] A former bus driver was the subject of the refugee claim in Australia involving the gangs. The applicant feared that if he were to return to El Salvador, he will be killed by the maras. He stated in this application that they would target him for extortion primarily because he is a bus driver. The Australian court recognized the private bus drivers in El Salvador as 'a particular social group' together with the public transport and truck drivers being targeted by the maras as result of that specific social condition in terms of ways of living. *RRT Case No. 0906782, RRTA 1063*, Australia, Refugee Review Tribunal, 24. Nov. 2009, http://www.unhcr.org/refworld/docid/4b5708f42.html

[374]Norma Roumie, 'Gangs and the Culture of Violence in El Salvador (What role did the U.S. play?), The Great Lakes Journal of Undergraduate History, Volume 5 Issue 1 Article 3, 2017.

[375] 82 murders per 100,000 habitants (UNODC, 2016 stats) which is equal to almost three (3) times the murder rate in South Africa (34 murders per 100,000 habitants).

[376] Op cit. note 375 at page 116.

[377] During the Civil War in El Salvador the country experience 16 dead per day. In 2015, as result of gang violence, El Salvador experience 18 dead per day. UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador. United Nations High Commissioner for Refugees, March 2016, HCR/E/SLV/16/01.

instrumented by the maras. [378] Hence, just by seeing that study conclusion, it is possible to argue that the state and government of El Salvador have been considered in practice the maras as an 'armed group'. The same referenced report also concluded that maras are believed to pursue a strategy of exclusive control over their home territories, using violence to displace the state authority in the form of police and military. Within its 'conquered' territory (from a few blocks to entire neighbourhoods), the maras try to control the expand the reach of their criminal enterprises (such as extortion to merchants, drug selling, etc.) that sustained their modus operandi.[379] Another study (dated December 2011) conducted by the Salvadoran National Police mapped the territories controlled by the maras across the country and estimated that gangs had 9,000 members in prison and 27,000 members and affiliates on the streets.[380] That would reach the number to 36,000 people being part of the mara membership. For comparison purposes, at the height of El Salvador's civil war, the rebel Frente Farabundo Marti Para la Liberacion Nacional (Farabundo Marti National Liberation Front – FMLN) had less than 10,000 troops. This is further confirmed by the International Committee of the Red Cross:

> 'The largest gangs extend far beyond the limits of their own origin. Two extreme cases may be cited: according to some estimations, in Timor-Leste the gangs outnumber the police, the army, and the United Nations mission taken together. In the same line, the MS 13 from El Salvador, is said to have 30,000 members in the United States and 20,000 to 40,000 others in El Salvador. In both cases, the gang phenomenon has clearly assumed a dimension that goes far beyond of most guerrilla forces.'[381]

[378] Hugo Van Offel, Gregory Roudier and Santiago Avalos *Salvador: un Etat sous controle* ARTE, 30 January 2016 last accessed from https://info.arte.tv/fr/salvador-un-etat-sous-controle on 1 November 2018.

[379] David J. Cantor 'The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico Refugee' (2014) Survey Quarterly, No. 33.

[380] Douglas Farah, *Central American Gangs and Transnational Criminal Organizations, The Changing Relationships in a Time of Turmoil* (2013), International Assessment and Strategy Center, page 45.

[381] The largest gangs in Timor-Leste comprise approximately 10,000 members. In comparison, the Timor-Leste army includes 1,500 regular soldiers and 1,500 reserves. In addition to that, the police count with 3,000 members and the United Nations Integrated Mission in Timor-Leste (UNMIT) 1,552 men in uniform plus a thousand staff civilians. United Nations Department of Peacekeeping Operations (UNDPKO) quoted by Olivier Bangerter in 'Territorial and their consequences for humanitarian players', Volume 92 Number 878, International Review of Red Cross, June 2010, pages 392-393.

The paper from the International Committee of the Red Cross continues to confirm the hypothesis of this thesis: 'In some countries the level of violence matches, or even exceeds, that observed during a non-international armed conflict, with extremely high homicide rates. To give an example, the homicide rate per 100,000 inhabitants worldwide may be estimated as 7.6% in 2017. But it was as high as 61.7% in El Salvador in the same year. These figures may be compared with those of countries in conflict in the same region, such as Colombia where the homicide rate was 38.8 in 2008.'[382]Given the similar levels of gang membership in neighbouring Honduras and Guatemala, the gang forces in Central America are likely more than 100,000 in numbers.

(c)Do the maras create with their actions and violence an armed conflict situation in El Salvador?

Armed groups work in different ways. From a strict legal point of views, not all groups can be recognized as an active party to an armed conflict. Only those groups who are armed and cause violence enough intensity and possess enough organisation for purposes of an armed conflict can be seen under that angle. There are three elements that must be present. First, an armed group must be part of a structure, a collective group with specific features that distinguishes and differentiates the armed group from its own individual members. Second, the group must have a level of organization in terms of logistics, members/manpower, weapons, ammunitions, etc.; all coordinated in one common effort of sustained violence. And third, the group needs to have a minimum level of discipline and the ability to follow strategies and tactics.

Once an armed group is an active party to an armed conflict (or engaged in military related actions such as the MTP in La Tablada case), its members are accountable for war crimes. Under article 7(2) (a) of the Rome Statute of the ICC, a crime against humanity requires a 'state or organizational policy' behind the crimes. If an armed group has the capacity to instrument criminal acts and to commit an attack against a civilian population in accordance with objectives of that armed group, then these acts may amount to crimes against humanity. All perpetrators must be accountable. When assessing human rights obligations of non-state armed groups, the first question should be whether, and to what extent, the state (in whose territory the group is localized)

[382] Ibid at page 23.

would be able to hold accountable the members of that non-state armed group for human rights violations that they may have committed. If the state is not capable to do that (because, for example, the state has lost control over significant parts of its own territory), then it is possible to argue then that we have additional valid reasons to demand that armed groups must respect human rights.

As presented in the introduction, the reference to the metaphor 'combating criminals' is not new. Former U.S.-President Richard Nixon declared a 'war on drugs' in 1971 and, since then, the expression is widely used by the media to define different actions designed to hamper the narcotics trade.[383] In this context, the maras phenomena generates domestic (El Salvador) and regional (Central America, Mexico, and U.S.) instability and insecurity that ranges from personal violence to 'commercial insurgency'. Due to their criminal activities and security challenges, the gangs reduce the state ability to effectively control its national territory and, by default, the maras contribute to erode the sovereignty of the state. Subsequently, in answering whether the maras' violence creates an armed conflict, the maras can't be described or reduced to a police problem. On the contrary, the maras can be seen through the traditional concepts of war and armed conflicts.[384]

'War' is historically a state-centric and state-based concept which today needs to be updated for purposes of analysing modern scenarios of armed conflicts involving neither conventional military confrontations between states (an inter-state war)[385] nor insurrections aiming to overthrow a government and replace it with a new regime (an

[383] The 'war on drugs' (referenced in the introduction of the present thesis) is an initiative directed by the U.S. federal government aiming to reduce of the illegal drug trade in the United States. The reference to 'war on drugs' was made on June 18, 1971, by President Richard Nixon during a message to Congress which he declared drug abuse as the internal 'public enemy number one' of the U.S. The initiative was received substantial support and funding during the Ronald Reagan's Administration (January 1981 – January 1989).

[384] Max G. Manwaring makes a very interesting comment: 'The common denominator that can link gangs to insurgency is that some gangs and insurgents' ultimate objective is to depose or control the governments of targeted countries. In the case of the gangs this is motivated by criminal profits purposes while in the case of insurgents this is motivated by political purposes. As a consequence, as they share the same objective, the "Duck Analogy" applies. That is, third generation gangs look like ducks, walk like ducks, and act like ducks –a peculiar breed, but ducks nevertheless!' Max G. Manwaring, 'Street Gangs: The New Urban Insurgency', March 2005 available at www.carlisle.army.mil/ssi.

[385] Recent examples of 'classic war" are the Falklands/Malvinas War (1982), the Iran-Iraq War (1980-1988), the Gulf War (1990-1991), the Iraq War (2003) and, most recently, the Ukraine-Russia War (2022). In the same way, one of the most dramatic and 'classic' examples of 'civil war' is the Spanish Civil War (1936-1939).

intra-state or civil war).[386]/[387] As mentioned before, international armed conflicts between states have declined since the end of Cold War, with the result that most armed conflicts today are of intra-state nature.[388] The number of civil or intra-state (which also necessarily means non-international) armed conflicts has substantially increased since the beginning of the 1990s. The International Committee of the Red Cross noted that the number of 'non-international armed conflicts' has more than doubled between 2001 and 2015, from fewer than 25 to over 60.[389] According to the UN Secretary General, the number of countries experiencing armed conflicts was in its highest in the last decade (2010-2020) since the end of the Cold War, with 'low intensity conflicts' increasing 60 per cent over the past ten years.[390] Unlike the conventional inter-state wars, civil wars between governments from one side and rebels, insurgents or other irregular forces from the other side did not have a comprehensive legal context until 1949. International Law[391] distinguishes between war, civil war and armed hostilities short of war.[392] In this sense, the term 'short of war' is reserved to describe crisis situations between states which are caused by measures such as blockades, sanctions and other uses of state power that did not produce a final state of war' as a legal condition.[393] This is when engaging the maras in a peace process reaches a different dimension as the state recognize them as something much more complex and political

[386] Thomas Hammes, *The Sling and the Stone: On War in the 21 Century* (2006) Zenith Press (general reference to this source, not a specific paragraph).
[387] Op cit note 384 at page 119.
[388] Kendri Dupuy 'Trends in armed conflict, 1946-2017' (2018) Conflict Trends no. 5, Peace Research Institute Oslo, page 3.
[389] International Committee of the Red Cross (ICRC), The Roots of Restraint in War (ICRC, Geneva, December 2018). The ICRC defines a non-international armed conflict as 'protracted armed confrontations occurring between governmental armed forces and the forces of one or more-armed groups, or between such groups arising on the territory of a State (party to the Geneva-Conventions). The armed confrontation must reach a minimum level of intensity and the parties involved in conflict must show a minimum of organizations.' ICRC, 'How is the term armed conflict defined in International Humanitarian Law?', ICRC Opinion Paper, March 2008 available at https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm#:~:text=International%20humanitarian%20law%20distinguishes%20two,or%20between%20such%20groups%20only.
[390] United Nations, Secretary General's remarks to the Security Council on cooperation between the United Nations and sub-regional organizations: the role of states, regional arrangements and the United Nations in the prevention of conflicts, 6 December 2018.
[391] World War II marked the highest point of wars of aggression. After this conflict, UN Charter specifically prohibited the use of force (ius contra bellum). Ian Brownlie, *International Law and the Use of Force by States*. (1963) Oxford: Clarendon Press, page 45.
[392] Derek Jinks, The Temporal Scope of Application of International Humanitarian Law in Cotemporary Conflicts. Background paper for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law (January 27.29, 2003) Cambridge, page 1.
[393] Karl Joseph Partsch, 'Armed Conflict' (1992) Encyclopedia of Public International Law, Vol. I, Elsevier, Amsterdam (1992), page 18.

than just a crime problem to be addressed by the police. This also represents a wider range of potential scenarios under which organized violence is occurring as part of a 'fourth generation warfare'.[394] A 'formal declaration of war' of a government towards non-state armed groups actors can be interpreted as an implicit recognition of a state of belligerency and, subsequently, this is one of the reasons for which state/government officials avoid using such terms in their public statements. Recognition of belligerence does grant status.[395] Situations of such as insurrections against the state's authority are usually described as 'disturbances' and considered 'to be completely beyond the remit of international humanitarian concern'.[396] If a government is not capable of controlling an internal rebellion, then there is a possibility that these rebels could be recognized as insurgents, even though such 'a unilateral act established only a factual relationship between the recognizing state and non-state actor. Indeed, this has not created yet legal rights and duties, unless specifically agreed upon.'[397] Subsequently, the applicable government treats the insurgents as common criminals according to its own laws.[398] By putting 'their relations with the insurgents on a regular, although clearly provisional basis',[399] third states could protect in a better way their nationals (located in the country where the insurgents operate) as well as any political and economic interest affected by the armed hostilities. Unlike the recognition of an insurgency, the recognition of the state of 'belligerency' does create definite legal rights and obligations. As mentioned above, this recognition forces the state apply the laws of (state) war and thus to demand that the non-state actor also respect them. Third states in the dispute would issue such a declaration to turn applicable the law of neutrality.[400] This is usually the case when the belligerents are conducting typical governmental functions (e.g., providing health care, running schools, etc.) in the territory that they control and for which they are in a position to be accountable by International Criminal Law. Common Article 3 to the

[394] Op cit note 386 at page 119.
[395] Jean Pictet, Commentaries on the Geneva Conventions of 12 August 1949. Volume III: Geneva Convention relative to the Treatment of Prisoners of War. Geneva, ICRC (1960) (different references along the document).
[396] Op cit. note 395 at page 121.
[397] Eibe H. Riedel, 'Recognition of Insurgency', R, Bernhardt, Encyclopedia of Public International Law, Vol. IV, Elsevier, Amsterdam (2000), page 56.
[398] Lindsay Moir, *The Law of Internal Armed Conflict*, (2007). Cambridge, Cambridge University Press.
[399] Hersch Lauterpacht, *Recognition in International Law* (1947) Cambridge University Press.
[400] Belgium and the Netherlands during World War I is an example (although that neutrality was violated by Germany when invaded Belgium). In international law, neutrality is defined as a specific status of state that has the right "to remain apart, from and not be adversely affected by, the conflict. On the other hand, there is the duty of non-participation and impartiality".

1949 Geneva Conventions was the first international treaty provision that applied to armed conflicts 'not of an international character occurring on the territory of the High Contracting Party'.[401] In December 1948, just before the adoption of the four 1949 Geneva Conventions, UN member states agreed on the Universal Declaration of Human Rights. The preamble of this document reminds states of the 'scourges of war' and condones rebellion against tyranny and oppression as last resort.[402] The emergence of so-called 'drug wars' (as mentioned earlier in this thesis) in settings as diverse as Brazil,[403] Jamaica[404], Mexico[405] and other countries suggests a link with the figure of a non-international armed conflict through a new kind of armed conflict. Government authority being shifted from the state to 'para-states' (non-state actors/non-state armed groups or criminal organizations) creates a new base of power. As such, criminal gangs and cartels could be acting as de-facto new state vis-à-vis the territory the states hold.

(d) Maras and the use of children in the gang violence: child protection as a tool for counterinsurgency: from the Street Without Joy to the Mercy Street

The result of a survey indicated that sixteen percent of youth gang members were younger than 15 years of age and thirty-four percent were between the ages of 15 and 17.[406] That makes half of the total number of maras members. Basically, the maras are recruiting children for purposes of instrumenting gang violence. These children, and in practice, are soldiers if we consider gang violence as an armed conflict. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 'is considered a sui generis rights treaty.'[407] Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in

[401] Jelena Pejic, 'The Protective Scope of Common Article 3: More Than Meets the Eye', International Review of the Red Cross, vol. 93 (2011), page 55.
[402] Adopted by UN General Assembly Resolution 217 A (III), 10 December 1948.
[403] Sven Peterke, 'Urban Insurgency, Drug War and International Humanitarian Law: The Case of Rio de Janeiro', Journal of International Humanitarian Legal Studies, vol. 1 (2010), page 11.
[404] Amnesty International, 'Jamaica: A Long Road to Justice?', Human Rights Violations under the State of Emergency (2011) London, available at https://www.amnesty.org/en/documents/amr38/002/2011/en/
[405] Patrick Gallahue, 'Mexico's War on Drugs – Real or Rhetorical Armed Conflict' (2011) Journal of International Law of Peace and Armed Conflict, vol. 24) and Carlos Bergal, 'The Mexican Drug War: A Case for a Non-International Armed Conflict' (2011), Fordham International Law Journal, vol. 34.
[406] https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/96natyouthgangsrvy/surv_6a.html
[407] Jean Marie Henckaerts and Cornelius Wiesner, 'Human Rights Obligations of Non-State Armed Groups: a Possible Contribution from Customary International Law?', in R. Kolb and G. Gaggioli (eds.). Research Handbook on Human Rights and Humanitarian Law 146 (2013), available on a digital format at https://www.semanticscholar.org/paper/Human-Rights-Obligations-of-Non-State-Armed-Groups%3A-Henckaerts-Wiesener/6ad45e32d334482583805ad83a824e3ab4178308

Armed Conflict states: '(1) Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. (2) States Parties shall take all feasible measures to prevent such recruitment[408] and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.' Article 4(1) clearly imposes a legal obligation on non-state armed groups not to recruit or use in hostilities persons under 18 and this has been supported by different scholars.[409] This sub-chapter aims to provide a potential blueprint or model in terms of how child protection should be addressed in a strategy to counter the maras.[410] If the maras are considered an example of 'commercial insurgency', this sub-chapter explains how child protection can be part of a counterinsurgency strategy as the maras are not only present in the urban centers of Central America but also in the countryside. Conflict programming refers to projects that seek to address the causes and/or consequences of violent conflict, and fragility programming refers to programs that address the sources of fragility (e.g., through strengthening the effectiveness and legitimacy of relationships between society and governing structures, building capacity of civil society to engage government, or promoting the rule of law). Child protection is part of conflict programming. In this sense, for example in Haiti the UN 'is particularly worried about the recruitment of minors within the gangs, one of the six serious violations of the rights of the child'.[411] The UN in Haiti 'condemns the armed gang violence ongoing since April 24 that is affecting the communities in the north and northeast of Port-au-Prince, which has killed dozens of Haitians and injured and displaced thousands of others.' A similar situation is

[408] Recruitment refers to the 'compulsory, forced and voluntary conscription or enlistment of children of any kind of armed force or armed group' whereas use in hostilities mean the use of children 'by an armed force or armed group in any capacity, including but not limited to (… their use) as fighters, cooks, porters, messengers, spies or for sexual purposes'. 2007 Paris Principles on the Involvement of Children in Armed Conflict, paragraphs 2.1 and 2.4.

[409] Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', 31(4) Human Rights Quarterly 934 (2009), page 961, where it is stated 'With these provisions, the Child Soldiers Protocol creates international law to govern NSAGs as well as states parties'. Holly Cullen, 'The Role of International Law in the Elimination of Child Labor' (2007) page 118, where it is stated 'Article 4 of the Optional Protocol places an absolute obligation on non-state forces not to recruit children'. Rachel Stohl, 'Children in Conflict: Assessing the Optional Protocol', 2(2) Conflict, Security & Development 135 (2002), page 138, where she states, 'while governments are allowed to recruit under-18s into their militaries, non-state groups are prohibited from doing so'.

[410] Part of the considerations made in this section is derived from an article written by the thesis student (Jorge Claudio Lema Pose) published in South Africa in the year 2013. Jorge Claudio Lema Pose, 'The Real Face of La Vida Loca: Child Protection, the Maras and their link with the civil conflict in El Salvador', The Thinker, Volume 47, 2013, page 6.

[411] Tweet from the UN Integrated Office of the United Nations in Haiti and reported by Al Jazeera.

takin place in El Salvador with the maras. At the same time, ccounterinsurgency is also part of that same conflict programming as this quote from David Kilcullen shows:

> In a counterinsurgency there is also an enemy aid officer out there, running programs in direct competition with ours. The Taliban run agricultural teams to help farmers get the most out of the poppy crop, for example, along with local law courts and taxation programs and business advice start-up firms in the drug cultivation, gem smuggling, and timber smuggling business that the Taliban exploit. The presence of a competing aid program fundamentally changes the game, making everything a competitive political endeavour. Counterinsurgency is an umbrella term that describes the complete range of measures that governments take to defeat insurgencies. But make no mistake: counterinsurgency is war, and war is inherently violent.[412]

During the First Indochina War, Street Without Joy or *La Rue Sans Joie* was the name given by troops of the French Far East Expeditionary Corps to the stretch of Route 1 from Huế to Quảng Trị and later on described in the famous BernardFall's book on counterinsurgency. During the Vietnam War, the Street without Joy became a stronghold and a base for the Vietcong. In the last years, as result of the armed conflicts in Afghanistan and Iraq, there has been a growing interest on counterinsurgency (COIN) as well as a review of Vietnam. Indeed, due to the new and evolving nature of armed conflict since the end of the Cold War, military personnel in peace operations are asked to perform a multitude of non-military tasks including the negotiating of peace settlements, reconstruction of social/school and medical infrastructure and carrying out disarmament, demobilization, reintegration, and rehabilitation (DDR) programs. Trends such as the urbanization in underdeveloped states, as well as the proliferation of more lethal weapons, point to a future dominated by chaotic global insecurity and conflict rather than confrontation

[412] David Kilcullen, Counterinsurgency (2010) Oxford University Press, page 44.

between the armies and navies of nation states.[413] In this context, the plight of children affected by new forms of armed conflict such as gang violence in El Salvador should be a key concern for contemporary peace operations and pacification programs. This thesis considers the maras operating in Central America as an organized non-state armed group and their level of violence permits the use of force against them (including military force). However, while the right to use force is clear, the ability to do so is difficult because they camouflage themselves within the civilian population as there the application of force against them is even more difficult[414]. The purpose of this sub-chapter is to explain how child protection can be inserted into a COIN strategy to counter the maras that operate in the countryside of Central America (and not in the urban centres) taking as a model a revised version of the Combined Action Platoon (or CAP) during the war in Vietnam. It is a return to the Street without Joy in today's world, but our intention is to move from the Street Without Joy to the mercy street.

Perhaps the best definition of insurgency is 'War of the Flea', the title of a 1965 book on revolutionary warfare by Robert Taber. 'The guerrilla fights the war of the flea", he wrote, "and his military enemy suffers the dog's disadvantages: too much to defend, too small, ubiquitous and agile enemy to come to grips with'.[415] COIN requires a multidisciplinary approach through different practices (sociology, anthropology, etc.) including child protection. COIN has also certain principles: (a) personnel involved in counterinsurgency must understand the social and cultural aspects on the ground; (b) it is a long-term commitment and needs a legitimate local partner (e.g., a credible government); (c) security, rule of law and development are

[413] John Nagl; Let's win the war we are in, JFQ, issue 52, 1st quarter 2009, page 20.
[414] The tattoos are a clear give-away of the maras. Due to this reason, the maras are starting to drop the tattoos practices for other less conspicuous forms of recognition (such as specific handshakes or hand gestures).
[415] Robert Taber; War of the Flea: The Classic Study on Guerrilla Warfare, New York: L. Stuart, 1965

essential; (d) the counterinsurgency effort must separate the insurgents from the population. In an insurgency campaign the fight is asymmetrical and the way to defeat insurgents is to attack them at the source of his strength (the population). Hence, the defeat of the insurgents is achieved by winning the population and not by physically destroying the opposite force. The application of purely military measures may not by itself restore peace and orderly government because the fundamental causes of the condition of unrest may be economic, political and/or social. In small wars the goal is to obtain decisive results with the least application of force and the consequence minimum loss of life. Above all, tolerance, sympathy, and kindness should be the keynote of our relationship with the mass of the population.[416] One of the most frequent quoted cases of success in COIN is the Malayan Emergency, an integrated British civil-military campaign to counter the insurgency by restoring governance and political legitimacy in Malaya. The goal of the Malayan Emergency was to help the government establish a free, independent, and united country which is politically and economically viable. Sir Robert Thompson, one of the architects of this counterinsurgency effort, following a visit to Vietnam, advised US Marine Lieutenant General Victor Krulak that: 'The people's trust is primary. It will come hard because they are fearful and suspicious. Protection is the most important thing you can bring them. After that come health and then many things such as land, prosperity, education and privacy to name a few.'[417] Working closely with Robert Thompson (by them the Permanent Secretary of Defense for Malaya) was General Gerald Templer (appointed by Winston Churchill in 1952 as the British High Commissioner in Malaya to deal with the Malayan Emergency). Templer remarked that the answer [to the

[416] Small Wars Manual, United States Marine Corps, 1940 (general reference to this source, not a specific page)
[417] Fraser Fowler; USMC's Combined Action Platoon: A counter-insurgency success in Vietnam and why it failed to derail US military strategy, Canadian Army Journal Vol. 12.1 (Spring 2009)

uprising] lies not in pouring more troops into the jungle, but in the hearts and minds of the people.[418] As such, COIN effort should move from an enemy-centric approach to a population-centric approach. If the insurgent access to the population is cut, then, by default, the insurgent's access to manpower, suppliers and intelligence would also be cut. As Mao noted, the people are like water and the army is like fish. A quote from David Galula is more than clear: 'Essential though it is, the military action is secondary to the political one, its primary purpose being to afford the political power enough freedom to work safely with the population.'[419] Talking about the pacification of Algeria, Galula proceeds to explain: 'On the insurgent side, a small group of leaders aim at overthrowing the existing order. They choose the population as their major strategic objective, because their assets then become immediately exploitable, and thus they balance the odds against them.' Hence, success in counterinsurgency is all about winning trust from the population, the real terrain of the war. However, winning trust (and all counterinsurgency programs) takes time and time is an ally of the insurgent. The crucial point is then how to apply the 'winning trust' concept into practice. Subsequently, child protection could be a part of a broader COIN strategy and an extra tool in the counterinsurgency kit for any population-based campaign.

COIN, like all forms of war, is fought with an eye on post-conflict and stabilization structures. There is a tendency in post-conflict agendas to implement top-down programs (building police, law courts, ministries, etc.) with state-based institutions, while placing bottom-up programs in second place. But this approach should be complemented at the ground level in terms of no less socially important

[418] It is important to realize that, although he was a general, this appointment was emphatically a civilian one. This is a remark made by Frank Ledwige in 'Losing Small Wars (British Military Failure in Iraq and Afghanistan)' (Yale University Press, 2011), a very interesting book in which the military counter-insurgency British efforts in Basra (Iraq) and Helmand (Afghanistan) are discussed (in criticized) in detail.
[419] David Galula, Counterinsurgency Warfare (Theory and Practice) (1964) RAND, page 283.

functions such as security, mediation, dispute resolution and development that could be measured and recorded. A good bottom-up platform is a revised version of the CAP in the context of a child protection program as it provides indicators for community inter-action and ownership from the beginning in the context of civilian-military cooperation. A sort of 'bunker/trench/static mentality' does not go with COIN. In his book *Learning to Eat Soup with a Knife*, John Nagl, presents the importance of an organizational culture as way to adapt to new situations during armed conflicts by comparing the counterinsurgency practices of the British army during the Malayan Emergency from 1948 to 1960 and the US in Vietnam and he concluded that the British army was a better learning organization.[420] Coming back to The Economist report, in Afghanistan's violent Helmand province, an American special-forces captain –with broad experience of counterinsurgency- analysed his furtive Taliban enemies thus: 'They're cowards. Why they do not they step up and fight like men?" Apparently, he had no considered how he may fight if he had no armour, no radio an ancient rifle and the sure knowledge that if he fought like a man, he would be obliterated in minutes.'[421] Patrolling an area on foot and talking to local people (or social patrolling) creates a natural contract between the military personnel, the population and representatives of humanitarian organisations. CAP represents a step further in that social patrolling with the US Marines living and fighting side-by-side with the Vietnamese people and an effective and around-the-clock alternative blueprint to the 'search and destroy' massive concept on the ground. CAP demanded a residential approach –living in your sector, near the population. Moreover, CAP fits on the fact that the population, unlike the insurgents who are difficult to find, is fixed and easily identifiable because people are tied to their homes, business, farms, tribal

[420] John Nagl; Learning to Eat Soup with a Knife, Counterinsurgency Lessons from Malaya and Vietnam (2002) The University of Chicago Press, page 59.
[421] *The Economist*, December 17th – 23rd, 2005

areas and so on. Once the CAP had settled in an area, the next task was to build trusted networks.[422]

CAP was part of the Marine Corps experience in counter-guerrilla warfare history in Nicaragua, Haiti, and the Dominican Republic. A typical hamlet's CAP was a thirteen-man Marines squad in villages, to support, train and fight with existing Vietnamese units defending their own homes. Michael Peterson reported that the Marines survival depended upon building a trustworthy rapport with the Popular Forces and villagers and Marine leaders were quick to realize this.[423] CAP platoons were only implemented where the village or district chief could generate the PF platoon to serve alongside the Marines. Again, Sir Robert Thompson noted that 'the use of CAPS is quite the best idea I have seen in Vietnam and it worked superbly' as the Marines realized that the maintenance and protection of the villagers in their village (and not as internally displaced people) and their support were essential to the control over an area.[424] The local population knew the Marines were committed to them and trust developed from the personal contact of living together. The concept of combining a squad of marines with local forces and assigning them a village to protect proved to be a force multiplier and a gradual expansion outward from selected areas.

But where does child protection and CAP fit into an internal armed conflict produced by extreme gang violence in El Salvador? This is extremely important taking into consideration how many minors are recruited into the maras. First,

[422] Another counterinsurgency structure during the war in Vietnam was the Civil Operations and Revolutionary Development Support (CORDS). Initiated in 1967, CORDS was designed to provide basic services to the populace and as a way of assisting the South Vietnamese government to extend its reach into helmets and villages, by bolstering its ability to deliver basic services. As such, it represented an important mean of restoring the legitimacy of the government in the affected areas.
[423]Michael Peterson, The Combined Action Platoons: The U.S. Marines' Other War in Vietnam, (1989) Praeger Publishers, page 21.
[424] Andrew Krepinevich, The Army and Vietnam (1986) John Hopkins University Press, page 101.

children's issues are increasingly being reflected in peace negotiations and accords and peacekeeping missions have been called upon to support the child-conscious aspect of peace agreements. Examples of this new dynamic are the Lomé Peace Agreement for Sierra Leone in 1999 and the New Comprehensive Ceasefire Agreement for Darfur in 2006. As a result, Child Protection Advisors (CPA) could be deployed in police/military operations against the maras and included in their overall strategy as well as field tactics.[425] Second, before the year 1999, there were no UN Security Council Resolutions that dealt specifically with children affected by armed conflict. , it was after a UN General Assembly Resolution[426] (and not a UN Security Council Resolution) with the Machel Report (published in August 1996) that brought worldwide attention to the issues affecting children living in conflict zones. This was one of the first comprehensive human rights assessments of children affected by war using the Convention of the Rights of the Child (CRC) as the guiding framework of analyses. Since then, the UN Security Council has adopted six significant resolutions on this topic that represent an important pillar in the international normative protection for children and they should be understood as instruments to compel parties to the conflict to adhere to international protections standards.[427] These resolutions are not confined to the actions of the warring parties but call on all actors that might influence or affect the conflict to take measures to provide protection for children (e.g. the Security Council, other UN bodies, Member States, corporate actors, regional organizations, and international financial institutions). The observations and recommendations contained in the resolutions also reflect the growing awareness of

[425] One of the objectives of the peace mission should be creating capacity building. An adequately funded national Child Protection unit, with local personnel and staff, will be the institution to which the community could have recourse after the closure of a peacekeeping operation.
[426] UN General Assembly Resolution 48/157
[427] United Nations Security Resolutions 1261 (1999), 1314 (2000), 1379, 1460, 1539 (2004) and 1612 (2005)

the impact of armed conflict on children, the increased importance attached to their protection, and the significant progress that, at least in terms of rhetoric, has been made in this regard.[428] The most important of these resolutions towards our topic is UN Security Resolution 1261 that highlighted that the personnel involved in United Nations peace-making, peacekeeping and peace-building activities should have appropriate training on the protection, rights and welfare of the children and urged States and relevant international and regional organizations to ensure that appropriate training is included in their programs for personnel involved in similar activities. This was later complemented by United Nations Security Resolution 1612 in which the UN Security Council urged 'troop-contributing countries to take appropriate preventive action including pre-deployment awareness training'.[429] UN Security Council Resolution 1612 also represented a critical element of the collective efforts of the international community to secure the application of international protection standards for children as it was by this resolution that the UN Security Council implemented a mechanism to monitor and report on violations which has broken new ground in terms of the institution of practical measures towards the ending of impunity of violating parties.[430] The monitoring and reporting mechanism established by the UN Security Council Resolution 1612 (MRM) consists of the three (3) activities of monitoring, reporting of-and response to six grave violations against

[428] In an un-precedent move, signifying the importance of the issue of war-affected children, a 14-year-old former child soldier addressed the Security Council in November 2001on the occasion of the Security Council annual debate on children and armed conflict. In May of the following year, three young people from war-affected countries (Timor-Leste, Liberia, and Bosnia Herzegovina) also addressed the Security Council during its session on children and armed conflict held prior to the General Assembly's special session on children. Ibid page 123.

[429] UN Security Council Resolution 1612 (2005)

[430] UN Security Council role by the General Assembly in 2007 Omnibus resolution on the Rights of the Child (OP 44 Re. 62/141): "Notes with appreciation the steps taken regarding UN Security Council Resolution 1612 and the efforts of the UN Secretary-General to implement the monitoring and reporting mechanism on children and armed conflict in accordance with that resolution, with the participation of and in cooperation with national Governments and relevant UN and civil society actors, including at the country level, as well as the work carried out by the UN Child Protection Advisers in peacekeeping operations."

children in situations of armed conflict.[431] These violations (identified by the UN Security Council) are the following: (i) killing or maiming; (ii) recruitment or use of child soldiers[432]; (iii) rape and other forms of sexual violence; (iv) abduction; (v) attacks against schools or hospitals; (vi) denial of humanitarian access.

Now, which are the implications on the field of the above concepts? A CAP team could be complemented with CPAs that respond to a child protection program. CPAs would serve as direct advisers on the protection of children and help to ensure that the protection of children's rights is a priority throughout the counterinsurgency campaign and that the children's interests are not put aside in the political agenda. CPAs could coordinate closely with relevant United Nations agencies (particularly UNICEF and the UN High Commissioner for Refugees), national authorities and non-governmental organizations to avert or halt child rights violations as well to enforce UN Security Council resolutions.

The primal violence associated with conflicts decimates human relationships. The re-establishment of a normal life culture after such conflicts requires new and innovative programs. Peace-building activities can contribute to the construction of such civic culture through community-oriented policing, development, and child protection. Being on the street and interested in people leads to trust. Culturally aware and sensitive peacekeepers will become concerned neighbours who want their

[431] The Six Grave Violations against Children During Armed Conflict: The Legal Foundation. Office of the Special Representative of the Secretary General for Children and Armed Conflict, October 2009.
[432] International legal standards and practice that, in general, children who were recruited and/or used by armed forces or groups and are implicated in the commission of crimes while they were still under the age 18 should be considered primarily as victims and therefore not be criminally prosecuted for such crimes. See Article 26 regulating exclusion of jurisdiction over persons under eighteen: Rome Statute on the International Criminal Court, paragraphs 8.6, 8.7, 8.9; UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33 (29 November 1985)

assigned communities to prosper.[433] Communication is a constant challenge in any intercultural endeavour and even more under the stress of violent conflict or its aftermath among cultural states. The war peace transition that peacebuilding supposed to accompany is not played out on battlefields but at the very heart of the state-society linkage, in the triple crossroads of political links (the state), social links (the community) and domestic links (family and child protection) that characterise most modern conflicts. An operational approach requires to implement a valid and reliable system to monitor, regularly report on and publicize the needs of children and to evaluate the impact of the response which would be used for a functional advocacy policy. The child protection unit of the counterinsurgency mission shall carry out the assessment of the situation of children on the ground. Drawing upon data compiled in the preparedness phase, this situation analyses will determine the exact nature of the crisis, including potential developments, implications for the rights of the children and the required programmatic response, operational modalities, and security. During armed conflicts and in accordance with international legal standards, the child protection unit of the peacekeeping should work directly or through partners aiming to: (a) monitor, report on and advocate against the recruitment and use of children in any capacity during armed conflicts; (b) seek commitments from parties to refrain from recruitment and using children; (c) negotiate the release of children who were recruited, and introduce demobilization and reintegration programmes and (d) coordinate mine-risk education at schools.

Some of the actions to take as part of the child protection planning should be:

- Analyse and strengthen a country/regional-based child protection network for gathering, vetting and compiling information on child rights violations and

[433] These can achieve through very simple ways. In Haiti, for example, unloading garbage in front of houses and communities was a common technique of repression. As such, ensuring that a neighbourhood remains clean is a power symbol of "normal life" and contributes to build trust.

developing an appropriate response to these violations and developing an appropriate response to these violations (this network should bring together all stakeholders concerned with child protection in close relation with CPAs that form part of the peacekeeping operation).

- Register children and parents during movement of population (internal displaced people, refugees) before leaving on the spots as they board vehicles; rosters of children and parents should be given to drivers and staff should be in place at destination to cross-check and reunite children and parents.
- Set up child-friendly spaces.
- Provide professional support to children suffering symptoms of psychological distress, including intrusive flashbacks of the stress event, nightmares, withdrawal, and inability to concentrate.
- Emergency environments increase the vulnerability of girls and women to sexual and emergency violence (e.g., lack of privacy in refugee camps, poorly located latrines). The goal should be prevention of the abuse, immediate support for survivors and long-term care to promote integration and reduce stigmatization in the communities. Sexual violence as a form of gender-based violence is not inevitable and must always be prevented, including conflict and post-conflict.

Through a child protection program in the context of CAP, we can win the family trust which is then replicated through the population in the sector and drive the maras away. Child Protection related measures must be budgeted in the aid funding during the relief and reconstruction phase. A tandem CPA and CAP falls into the ‘strategic corporal’, that soldier who should be mentally agile and though enough to quickly transitions from humanitarian operations to urban combat without losing the goodwill

of the local people. Indeed, adaptation is a key element of any counterinsurgency campaign. Intellectual curiosity and constructive critic are essential factors in changing patterns of organizational behaviour. In this sense:

> Forces that learn COIN effectively have generally developed COIN doctrine and practices locally; regularly challenged their (own) assumptions, both formally and informally; learned about the broader world outside the military and requested outside assistance in understanding foreign political, cultural, social and other situations beyond their experience; promoted suggestions from the field; fostered open communications between senior officers and their subordinates; coordinated closely with governmental and non-governmental partners at all command levels; (and) proved open to soliciting and evaluating advice from the local people in the conflict zone. These are not always easy practices for an organization to establish. Adopting them is particularly challenging for a military engaged in a conflict. However, learning organizations defeat insurgencies; bureaucratic hierarchies do not.[434]

Child protection responds perfectly to that challenge.

[434] Petraeus, David; Amos, James F.; Nagl, John A.; *The U.S. Army/Marine Corps Counterinsurgency Field Marine* (2007), University of Chicago Press, page Introduction III

XI) CONCLUSIONS

The following are the conclusions from the present thesis:

Conclusion 1: Gang violence in El Salvador has reached the threshold of an armed conflict according to the standards outlined by International Humanitarian Law and the current debates on modern armed conflict.

Gang violence in El Salvador towards its state and society has reached the threshold defined by Common Article 3. Part of the community of law practitioners often consider and classify gang violence as a domestic criminal issue, a simple police problem. This, subsequently, limits the international community's willingness to provide any assistance. But in the case of El Salvador, gangs are increasingly involved against state forces in a fight to gain control over territory and population with a level of violence that has surpassed police capacity. During the year 2017, only two (Syria and Afghanistan) of the five countries with the world's highest reported rates of violent death were in a situation of a formal armed conflict as these are traditionally understood. The other three countries in this top five list (El Salvador, Venezuela, and Honduras) experience a substantial gang violence dynamic with El Salvador having the second-highest rate of violent death in the world after Syria in the same year of 2017.[435] In this sense, in El Salvador, in 2015, the attorney general's office began using a law against terrorism to capture and prosecute gang members.[436] Hence, it is important to have in mind that not all criminal groups are non-state armed groups and/or have the capacity to execute a degree of organized violence (despite some of them being organized criminal groups such as the mafia) that would achieve an armed conflict level. Soon after that, El Salvador's Supreme Court of Justice ruled that gangs are in a condition similar to a terrorist threat on the basis that gangs were absorbing power that belonged to the state and replacing the state authority in that territory.[437] These two elements are a reflex of a situation that is much closer to an armed conflict in practice than to a criminal/police situation.

[435] https://reliefweb.int/report/world/global-violent-deaths-2017-time-decide
[436] Michael Lohmuller, 'El Salvador Now Using Anti-Terrorism Law to Tackle Gangs', Insight Crime, August 12, 2015, www.insightcrime.org/news/brief/el-salvador-now-using-anti-terrorism-law-tackle-gangs/.
[437] Associated Press, 'El Salvador Supreme Court Declares Gangs Terrorist Group', VOA, August 24, 2015,www.voanews.com/a/ap-el-salvador-supreme-court-declares-gangs-terrorist-groups/2931229.html.

The ICRC has recognized that certain 'red zones' of urban violence in different jurisdictions are clearly much higher than the ICRC recorded data on violence in war-affected areas. According to the ICRC, 'this profile would become even more clear-cut if we were able to zoom in on homicide rates in specific intra-urban areas (such as shanty towns) or vulnerable social groups. Then, homicide rates would rise to 500-plus levels. In short, modern cities in countries at peace are often the theatres of *de facto* warfare. There is a limited number of violent urban areas in war torn regions. These are, however, special cases – and not the most violent ones. Still, the prime focus of counterterrorist and counterinsurgency strategic thinking in conventional military and security circles is on these scenarios of urban low-intensity warfare'.[438] As an example of this, Médecins Sans Frontières (MSF) has stated that they operate in the following urban scenarios in which: (a) Urban warfare conflicts such as Mogadishu, Kabul, Baghdad, Tripoli, etc.; (b) Urban violence-gang related violence such as the maras and drug cartels in a spiral of permanent confrontation with law enforcement agents for the control of territory (e.g., Port-au-Prince, San Salvador); (c) De-franchised populations living in poor and vulnerable conditions; (d) Emergencies: epidemics and natural disasters which also include the influx of internal displaced people and refugees.[439]

Because urban violence (the second scenario mentioned by MSF) in its most extreme forms can have a similar impact and reach the intensity of warfare, then, by default, urban violence (like in El Salvador) cannot be put aside and reduced to a crime action without seeing all its implications. Crime is essentially a legal concept. Gang violence of the type seeing in El Salvador makes blurred and non-clear the distinction between crime and an armed conflict. The concept of 'commercial insurgency' perfectly illustrates the argument that urban violence can be considered an 'undeclared' armed conflict due to its far-reaching economic, social and political consequences. In summary, a new kind of war. In this new context, the armed conflict is not motivated by politico-ideological reasons but by monetary factors as the main drivers. This constitutes the basis of the 'commercial insurgency' concept. Following this, the main applicable parties in this new kind of armed conflicts are not formally organised military groups or rebels such as guerrillas but criminal

[438] 'Urban violence and humanitarian challenges', Joint Report, Directed by Pierre Apraxine, Anne Duquenne, Sabine Fetta and Damien Helly (2013) ALNAP, page 14.
[439] Elena Lucchi, Operational Advisor, MSF, European Union Institute for Security Studies, EUISS-ICRC Colloquium, Brussels, 19 January 2012, page 27.

organizations and gangs that contribute, with their actions, to erode the social fabric and de-legitimize the state authority. 'Urban violence has a perverse political and policy impact. It reframes the conventional urban paradigm of progressive modernity and inclusive non-violent politics. It leads to fractured citizenship and the systematic distortion of democratic governance and rule of law.' As indicated above, the situation makes difficult to draw the line between a law enforcement/policing context and an armed conflict context when we are in presence of gang violence. Not enough resources and time have been dedicated by researchers in the scholar community dedicated to international law in order to identify the applicable international legal framework to El Salvador's extreme gang violence (and how to counter it). For this reason, the present thesis has provided the background, data and implications for International Humanitarian Law and Criminal Law.

Conclusion 2: Common Article 3 can be applied to the gang violence in El Salvador. Gang violence in El Salvador has a level of intensity and organization equal to an armed conflict making Common Article 3 applicable to the maras.

Two criteria are applied to assess if a conflict could be considered 'non-international armed conflict' as opposed to an in-country disturbance or tension such as a violent general strike. First, the hostilities must reach a minimum level of intensity. For example, the government applies direct military force, rather than police tactics, against the nongovernmental group. Second, the nongovernmental group must be deemed 'parties to the conflict'. Common Article 3 does not refer to the term 'organised armed group' but to the term 'party'. Due to the lack of a detailed definition in Common Article 3, it is necessary to apply general rules of treaty interpretation, judiciary decisions and scholarly doctrine in order to examine who can be considered under the referenced Common Article 3 a party to a conflict which does not have an international character.

If an armed conflict exists, then International Humanitarian Law applies. If an armed conflict does exist (or it is not recognized as such), it must be assessed whether the armed group can be categorized within the context of International Humanitarian Law. The question of what criteria are required to establish the accountability of armed groups in accordance with International Humanitarian Law is key for this purpose. Armed groups that do not count with an organized structure of command can't considered armed groups under International Humanitarian Law. The fact that

certain violence projected by certain groups (even in the context of an intra-state conflict) nowadays do not reach the legal threshold for 'armed conflicts' (and the application of International Humanitarian Law) means that these groups can't be addressed as combatants. In that case, these groups must be countered and dealt under a law enforcement (police) framework (and not International Humanitarian Law). In the context of a peace operation, this law enforcement framework remains the applicable legal framework to engage with such groups unless their violence (like in the case of Haiti) is organized and reaches a level that would make them qualified as non-state armed group.

Global organized crime has expanded substantially since the end of the Cold War due to globalization and new information technologies.[440] In this context, as referenced across this thesis, the primary goal for gangs and other criminal groups is not to overthrow the government or to seize state power but to continue their illicit economic activities.[441] Criminal groups are often much bigger and complex structures than armed groups in the state economy: a recent study estimates that of USD 31.5 billion in illicit profits generated in conflict-affected areas, only four per cent is being used to fund non-state armed groups and insurgent movement.[442] Yet clear distinctions can be difficult to make among the two parties because armed groups resorts to criminal activities for purposes of financing their activities and criminal groups provide assistance to them in a symbiotic relationship.[443]

Conclusion 3: The considerations in the ICTY *Tadic* ruling can be applied to the maras in El Salvador.

The jurisprudence of the ICTY provides significant guidance as to when a non-international armed conflict is said to exist. In *Tadic,* the Appeals Chamber of the ICTY held that a non-international armed conflict exists whenever there is 'protracted armed violence between governmental authorities and armed groups or between such

[440] Kirstin Bjelopera and Jerome Finklea 'Organized crime: an evolving challenge for US law enforcement', Congressional Research Service 7-5700, 6 January 2012 and United Nations Office for Drugs and Crime, The Globalization of Crime: A Trans-national Organized Crime Treat Assessment (2010) UNODC.
[441] Op cit note 2 at page 2.
[442] Global Initiative Against Transnational Organized Crime, Statement to the UN Security Council, Paper Briefing 'UN Peacekeeping Operations: Police Commissioners', Geneva, 6 November 2018.
[443] The drug dealing executed by the FARC in Colombia is one example.

groups within a State.'[444] The ICTY in *Tadic* mentioned two elements that must be present to distinguish a situation of violence from isolated acts of violence and, subsequently, be classified as a non-international armed conflict. Those two elements are the intensity and the organization of the armed group. Further jurisprudence from the ICTY applied the *Tadic* criteria in other cases as ICTY considered the number of factors relevant for assessing the 'intensity' element such as (i) the number, duration and intensity of confrontations; (ii) the number of casualties; (iii) the type of weapons and military equipment used; (iv) the number of persons and type of forces partaking in the fighting; (v) the extent of material destruction; and (vi) the number of civilians fleeing combat zones.[445] In the same way, the ICTY also considered different factors for the organization element such as: (i) the existence of a command structure and disciplinary rules and mechanisms within the group; (ii) the fact that the group controls a certain territory; (iii) the ability of the group to access weapons, military equipment, recruits and military training; and (iv) its ability to plan, coordinate and carry out military operations. All these factors, both for the intensity and organization elements, are present in the maras and its gang violence in El Salvador.

Conclusion 4: The maras in El Salvador constitute a non-state armed group accountable for crimes under International Criminal Law

There is no universally accepted definition of non-state armed groups.[446] In order to narrow the concept, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) has identified non-state armed groups as those who have the 'potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate.'[447] Following this definitions, the maras can be considered as a non-stated armed group described as a type of violent actor that operates in non-urban and (mostly) urban settings, with a structure and organization, and high levels of gang violence. As criminal organizations are present in an

[444] *Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisprudence), ICTY, IT-94-1, 2 October 1995, paragraph 70.
[445] *Prosecutor v. Haradinaj et al*. (Trial Judgement), ICTY, IT-04-84-T, 3 April 2008, paragraph 49.
[446] Ibid at page 2.
[447] UN Office for the Coordination of Humanitarian Affairs (OCHA), Humanitarian Negotiations with Armed Groups. A Manual for Practitioners, January 2006 (general reference to this source, not a specific paragraph).

increasing number of armed conflicts, this may make states more open to the idea of creating a specific humanitarian framework regulating such conflicts such as the *lex pacificatoria* or law of peace mentioned earlier in this thesis.

Under International Criminal Law, non-state actors can also commit crimes against humanity and be accountable for such conduct. The actions of the gangs can fit in with the legal definition of crimes against humanity. The gangs qualify as an 'organization' under the Rome Statute because of their hierarchical structure, its control over territory, and its capability to conduct violent attacks against civilians. Importantly, investigating, and prosecuting crimes against humanity requires the examination of the criminal responsibility up the chain of command, so it can include those who (a) either gave orders or those (b) who failed to take action to prevent or punish crimes that they knew (or should have known) were being committed. The maras have pursued a policy of controlling territory and, during this strategy, the gangs have committed a brutal string of atrocities that follow identifiable patterns and can qualify as international crimes under the Rome Statute. The gang's commission of numerous acts of murder, disappearance, and torture in a widespread and systematic way provides the basis for their accountability under International Criminal Law.

Conclusion 5: Organized crime violence and transnational crime are becoming a new form of non-international armed conflict.

UNODC refers to transnational organized crime as a 'globalized illegal economy' because the global reach out of criminal activity in pursuit of profits.[448] The U.S. National Security Council defines transnational criminal organizations as 'self-perpetuating associations operating across national borders that use violence and corruption, and exploit transnational commerce and communications, to protect and disguise their illicit, profit driven activities.'[449] These definitions are vital to understand the nexus between criminal and political violence and how they operate together. The ability of criminal organization to project themselves beyond national borders allows them to (a) consolidate their positions in markets where the profit margins are bigger; (b) have logistics and decision making platforms where the inherent risks are lower; (c) the use of multiple jurisdictions makes the work of law

[448] UNODC website: https://www.unodc.org/toc/en/crimes/organized-crime.html
[449] National Security Council, 'Strategy to Combat Transnational Organized Crime: Definition', White House, 2013.

enforcement more complicated as complicated as criminal organizations become more difficult to track; (d) apply synergies in terms of the best tactics to neutralize law enforcement actions.

A recent quantitative analysis of global violence indicates that only one out to ten killings is the result of terrorism or armed conflict, and that more than three-quarters of worldwide fatalities occur in non-conflict settings under the traditional definition.[450]

The criminal nature of gangs has contributed to exclude them from International Humanitarian Law debates and on non-state armed groups. Indeed, the term has been traditional confined to armed militias and guerrillas. Yet gangs' actions are very similar to the acts of these groups. As Manwaring argues:

> Rather than trying to depose a government with a major stroke or in a prolonged revolutionary war, as some insurgents have done, gangs and their allies more subtly take control of a territory and people one street or neighbourhood at a time or one individual, business, or government office at a time. Its putative objective is to neutralize, control, or depose governments to ensure self-determined (non-democratic) ends.[451]

Gangs can become from political forces, 'at the three-way intersection among crime, war, and politics.'[452] Furthermore, there are clear national security implications linked to gangs as they reduce the capacity of a government to exercise it authority; act as 'proxy state' (becoming the de facto government) in some communities; control the informal and over the counter sector of the economy) and manipulate police and governmental officials through bribery or intimidation.[453] These characteristics are all descriptive of the maras' modus operandi in El Salvador. A RAND study concluded that:

---

[450] ICRC Report on War 2018 (different references along the document).
[451] Op cit note 102 at page 32.
[452] Max G. Manwaring, *A Contemporary Challenge to State Sovereignty: Gangs and Other Illicit Transnational Criminal Organizations in Central America, El Salvador, Mexico, Jamaica, and Brazil* (Carlisle, PA: Strategic Studies Institute, 2007).
[453] Thomas C. Bruneau, 'The Maras and National Security in Central America,' Strategic Insights 4, no. 5 (May 2005), page 56. The phrase (in Spanish) 'o plata o plomo' refers to the choice given by narcos in Colombia to government officials: they had to choose between money (plata) or plomo (a bullet).

> While political violence, conflict, and war appear to be declining, transnational criminal violence may not be, especially in certain regions such as the Americas, West and Southern Africa, where it remains widespread. As a result, some scholars have speculated that rather than declining over time, political violence in certain areas is simply morphing into a new criminal form that shares many common aspects with insurgent parties.[454]

Organized crime is not only expanding across the world but also diversifying its activities (with an increase emphasis in cyber-attacks) with destabilization effects.[455] Countries with weak institutions and non-consolidated rule of law are particularly fragile and open to organized crime. Furthermore, a nexus between organized crime and elements of government through corruption contributes to undermine that same rule of law, the judicial system, the evolution and building of institutions and overall government.[456]

Political violence has different motivations but usually its main objective is to change the government, to install a new paradigm in the state-society relationship. Criminal organizations may join forces with parties that have a political agenda but, in general, they do not have the political motive that typically drives political violence, and almost always indicate profit as its primary objective. Transnational criminal groups partnering with terrorist organizations for opportunistic reasons (e.g., selling weapons) is an example of this trend.[457] Within those transnational criminal groups, we can identify non-conventional armed groups as those groups (e.g., maras, drug cartels) that can be designated as such because the levels of violence they project

---

[454] Stephen Watts, Bryan Frederick, Jennifer Kavanagh, Angela O'Mahony, Thomas S. Szayna, Matthew Law, Alexander Stephenson, Colin P. Clarke, 'A More Peaceful World? Regional Conflict Trends and U.S. Defense Planning (2013)', Rand Corporation, page 136.

[455] In its 2010 report The Globalization of Crime: A Transnational Organized Crime Threat Assessment, UNODC considered that human trafficking (the flow of illegal immigrants) from Latin America to the U.S. produced approximately $6.6 billion annually in illicit gains.

[456] The World Bank considered that approximately $1.8 billion a year is used to bribe government officials in different levels of the public administration. The World Bank reports as follows: 'This causes an array of economic distortions and damage to legitimate economic activity. The price of doing business in countries affected by high levels of corruption and organized crime is also rising as companies' budget for additional security costs, adversely impacting foreign direct investment in many parts of the world. Further, transnational criminal organizations, leveraging their relationships with state-owned entities, industries, or state-allied actors, could gain influence over key commodities markets such as gas, oil, and precious metals, along with potential exploitation of the transportation sector.' World Bank Report 2017.

[457] U.S. National Security Council, National Organizational Crime: A Growing Threat to National and International Security, https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/threat

(comparable to wars). The presence of organized crime in state fragility scenarios is growing and should be a factor of concern for the global community. Colombia's five decades of civil war is a good example of how criminal activities and their related violence can be placed within political conflict as the parties' resort to (for example) drug trafficking and kidnappings.[458] This comes together with a systematic and methodical degradation of institutions in the three powers -executive, legislative and judicial– of today's society.

[458] Marcela Giralda Munoz and Jose Serralvo, 'International Humanitarian Law in Colombia: Going One Step Beyond', International Review of the Red Cross, November 2020, available on a digital format at https://international-review.icrc.org/articles/international-humanitarian-law-colombia-going-step-beyond-ir912

ANNEX I: ELEMENTS OF INTERNATIONAL CRIMINAL LAW RELEVANT SECTIONS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Part 2 of the Rome Statute of the International Criminal Court - Jurisdiction, Admissibility and Applicable Law

Article 5 - Crimes within the jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community. The Court has authority in accordance with this Statute with respect to the following crimes:

a. The crime of genocide;
b. Crimes against humanity;
c. War crimes;
d. The crime of aggression.

Article 6 - Genocide[459]

For the purpose of this Statute, "genocide" means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a. Killing members of the group;
b. Causing serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group.

[459] The term ‘genocide’ derives from the Greek genos (race or tribe) and Latin cide (to kill), and literally means ‘killing of a race’.

Article 7 - Crimes against humanity

1. 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:
    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;
    g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
    h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
    i. Enforced disappearance of persons;
    j. The crime of apartheid;
    k. Other inhumane acts of a similar character intentionally cause great suffering, or serious injury to the body or to mental or physical health.
2. For the purpose of paragraph 1:
    a. ‘Attack directed against any civilian population’ means 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;
    b. ‘Extermination’ includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

c. ‘Enslavement’ means the exercise of any or all the powers attached to the right of ownership over a person and includes the exercise of such power while trafficking in persons, women and children;
d. ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
e. ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
f. ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
g. ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
h. ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
i. ‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.

Article 8[2] - War crimes

1. The Court shall have jurisdiction in respect of war crimes when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, ‘war crimes’ means:
    a. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
        i. Willful killing;
        ii. Torture or inhuman treatment, including biological experiments;
        iii. Willfully causing great suffering, or serious injury to body or health;
        iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
        v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
        vi. Willfully depriving a prisoner of war or other protected person of the right to a fair and regular trial;
        vii. Unlawful deportation or transfer or unlawful confinement;
        viii. Taking of hostages.
    b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
        i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
        ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

v. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended, and which are not military objectives;

vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

vii. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

viii. The transfer, directly or indirectly, by the Occupying Power of parts of its civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

ix. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

x. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his

or her interest, and which cause death to or seriously endanger the health of such person or persons;

xi. Killing or wounding treacherously individuals belonging to the hostile nation or army;

xii. Declaring that no quarter will be given;

xiii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

xiv. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

xv. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

xvi. Pillaging a town or place, even when taken by assault;

xvii. Employing poison or poisoned weapons;

xviii. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

xix. Employing bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

xx. Employing weapons, projectiles and materials and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

xxi. Committing outrages upon personal dignity, humiliating and degrading treatment;

xxii. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced

sterilization, or any other form of sexual violence also constitutes a grave breach of the Geneva Conventions;

xxiii. Utilizing the presence of a civilian or another protected person to render certain points, areas or military forces immune from military operations;

xxiv. Intentionally directing attacks against buildings, materials, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

xxv. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

xxvi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

c. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

   i. Violence to life and person, murder of all kinds, mutilation, cruel treatment and torture;

   ii. Committing outrages upon personal dignity, humiliating and degrading treatment;

   iii. Taking of hostages;

   iv. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

d. Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances

and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

e. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
    i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
    ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
    iii. Intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
    iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
    v. Pillaging a town or place, even when taken by assault;
    vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constitute a serious violation of article 3 common to the four Geneva Conventions;
    vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
    viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

ix. Killing or wounding treacherously a combatant adversary;

x. Declaring that no quarter will be given;

xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

xiii. Employing poison or poisoned weapons;

xiv. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

xv. Employing bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions.

f. Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraphs 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 8 bis[3] - Crime of aggression

1. For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of

an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, ‘act of aggression’ means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
    a. The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation using force of the territory of another State or part thereof;
    b. Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
    c. The blockade of the ports or coasts of a State by the armed forces of another State;
    d. An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
    e. The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
    f. The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
    g. The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

ANNEX II: ELEMENTS OF INTERNATIONAL CRIMINAL LAW ICTY CASE LAW THAT CAN BE APPLICABLE TO THE MARAS IF GANG VIOLENCE IS CONSIDERED AN ARMED CONFLICT

The Geneva Conventions do not define what an 'armed conflict' is, apart from a reference to the notion that 'war' is implicitly considered as the legally formalized state of armed conflict. Given this lack of definition and the fact that the term armed conflict is used in the Conventions and Protocols to refer to inter-state and intra-state situations, the Appeal Chamber of the ICTY stated, based on a transversal examination of the four Geneva Conventions, including their Common Article 3 and the two additional Protocols, that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within the state. Simply stated, the ICTY confirms that the phenomenon of war can be apprehended by the law regardless of whether it is internal to the state or across its borders. As stated in this thesis and part of the doctrine, criminal armed groups, although different from political armed groups, can also fall under the definition of armed groups if justified by their own level of organization and scope.[460]

Crimes against humanity are among the gravest crimes under international law. They are not considered just against the individual victims but the entire humanity. Crimes against humanity are prohibited under customary international law and are considered jus cogens, a peremptory norm from which no derogation is permitted. They are therefore prohibited internationally regardless of whether a state has affirmatively joined a treaty that outlaws such crimes.

Like in the case of Haiti's gangs and the study conducted by the Harvard Law School International Human Rights Clinic, this Annex II will compare the actions of the maras (as reported by the media, scholars and government officials/institutions) and assess how they can meet the requirements of the Rome Statute.

[460] International Council on Human Rights Policy Ends & Means: Human Rights Approaches to Armed Groups 5 (1999), quoted by Alejandro Lorite Escorihuela in Humanitarian Law and Human Rights Law: The Politics of Distinction, Michigan State Journal of International law, Vol. 19:2, 2010.

A) General elements for crimes,[461]

(1) the existence of an armed conflict (element 1)

armed conflict required[462]

armed conflict defined[463]

duration of international humanitarian law[464]

(2) there must be a nexus between the conflict and crimes alleged (element 2)[465]

Overall control test applies[466]

[461] *Prosecutor v. Naletilic and Martinovic*, ICTY, Case No. IT-98-34 (Trial Chamber), March 31, 2003, paragraph 176: 'Article 2 of the Statute deals with grave breaches of the Geneva Conventions of 1949. The applicability of Article 2 of the Statute is subject to four prerequisites: an armed conflict must exist; there must be a nexus between this conflict and the crimes alleged; the armed conflict must be international in scope; and the persons or property subject of grave breaches must be defined as 'protected' in the Geneva Conventions.'

[462] *Prosecutor v. Kordic and Cerkez*, ICTY, Case No. IT-95-14/2 (Trial Chamber), February 26, 2001, paragraph 22: 'Articles 2 and 3 of the Statute set forth provisions which reflect the laws of war; plainly a pre-condition to the applicability of these Articles is the existence of an armed conflict in the territory where the crimes are alleged to have occurred.'

[463] *Prosecutor v. Kunarac, Kovac and Vokovic*, ICTY, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), June 12, 2002, paragraph 56: 'An "armed conflict" is said to exist 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'

[464] *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paragraph 70: 'International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.'

[465] *Kordic and Cerkez*, ICTY, (Trial Chamber), February 26, 2001, paragraph 969: '[I]n order for a particular crime to qualify as a violation of international humanitarian law under Articles 2 and 3 of the Statute, the Prosecution must also establish a sufficient link between that crime and the armed conflict. In this regard, the Appeals Chamber has held that: Even if substantial clashes were not occurring in the [specific region] at the time and place the crimes were allegedly committed . . . international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.' *Prosecutor v. Blaskic*, Case No. IT-95-14 (Trial Chamber), March 3, 2000, paragraph 111: '[I]t is imperative to find an evident nexus between the alleged crimes and the armed conflict as a whole. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, it is sufficient that: 'the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."'

[466] *Tadic*, ICTY, (Appeals Chamber), July 15, 1999, paragraph 146: 'The Appeals Chamber has concluded that in general international law, three tests may be applied for determining whether an individual is acting as a *de facto* State organ. In the case of individuals forming part of armed forces or military units, as in the case of any other hierarchically organised group, the test is that of overall control by the State.' *Kordic and Cerkez*, ICTY (Trial Chamber), February 26, 2001, paragraph 299: *Tadic* 'established that an armed conflict, which is otherwise internal, is internationalised if a foreign state exercises 'overall control' over the military forces of one of the parties to that conflict.' *Prosecutor v. Mucic et al.*, ICTY (Appeals Chamber) Case No. IT-96-21, February 20, 2001, paragraph 207: 'The 'overall control' test set forth in the Tadic Appeal Judgement is . . . the applicable criteria for determining the existence of an international armed conflict.'

(3) Overall control test satisfied where a state has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operation support[467]

(4) The person or property at issue must be 'protected' (element 4)[468]
Protected persons are defined[469]

(5) Underlying offenses
-Wilful killing is defined[470]

Maras' actions that qualify for this offense: The U.S. gang assessment considers that Mara Salvatrucha, better known by its acronym MS-13, is one of the largest and most violent transnational criminal organizations in the world. MS-13 members have typically engaged in a wide range of violent and criminal activity including, drug distribution, murder, rape, prostitution, robbery, home invasions, immigration offenses, kidnapping, carjacking/auto thefts, and vandalism. More recently there has been a rise in MS-13 engaging in human trafficking. MS-13 is found throughout the Americas, but they traffic differently in the United States and the Northern Triangle countries of El Salvador, Honduras, and Guatemala. Members of MS-13 seek out

[467] *Tadic*, ICTY, (Appeals Chamber), July 15, 1999: '[C]control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts." "[I]f the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.' .

[468] *Naletilic and Martinovic*, ICTY, (Trial Chamber), March 31, 2003, paragraph 176: The fourth requirement for applicability of Article 2 of the Statute is 'the persons or property subject of grave breaches must be defined as 'protected' in the Geneva Conventions.'

[469] *Blaskic*, ICTY, (Trial Chamber), March 3, 2000, footnote 256 referenced in paragraph 126: '[I]n those situations where civilians do not enjoy the normal diplomatic protection of their State, they should be accorded the status of protected person.'

[470] *Blaskic*, ICTY, (Trial Chamber), March 3, 2000, paragraph 3: 'For the material element of the offence, it must be proved that the death of the victim was the result of the actions of the accused.'

vulnerable young girls using violence and other coercive tactics to intimidate the girl into having sex for money to help financially support the gang. Runaways are also appealing to the MS-13. Family problems, transitions from foster care and economic problems are some of the reasons that unaccompanied minors run away from their homes. Many of the unaccompanied minors may have experienced sexual abuse, exploitation, or physical abuse in their home countries or during their migration to the United States and even more suffer from poverty and lack of a stable social network. These are all factors that make young girls more susceptible to human trafficking.[471]

-Rape[472]

Maras' actions that qualify for this offense: Coming to El Salvador and the maras, data on sexual violence and femicide in El Salvador demonstrates the alarming extent to which gang members use rape to terrorize local communities and the degree to which this practice forms a part of gang culture. According to an Associated Press investigation, members of the Mara Salvatrucha (MS13) and Barrio 18 gangs in El Salvador typically subject their girlfriends to gang rape and even killings, in addition to kidnapping and abusing women and girls who are not affiliated with the group. Official figures indicate that 239 women and girls have been killed so far this year in El Salvador and that by mid-October, 201 had disappeared. In addition, between January and August, 361 women -of which two-thirds were minors- reported being raped. Associated Press also reported that these figures only represent a fraction of the actual totals because victims are afraid to report crimes perpetrated by gangs.[473]

-Wilfully causing great suffering or serious injury to body or health[474]

- requires showing of serious mental or physical injury, although need not be permanent or irremediable[475]

[471] https://archives.fbi.gov/archives/news/stories/2008/january/ms13_011408
[472] Article 3, Sections (II)(d)(i)(7)(b) and (II)(d)(ii), and Article 5, Section (IV)(c)(vi), ICTY Digest.
[473] Report details how El Salvador gangs use rape as weapon. https://insightcrime.org/news/brief/el-salvador-gangs-rape-sexual-violence-femicides/
https://www.nbcnews.com/news/latino/el-salvador-gangs-brutal-sexual-violence-against-girls-women-n242556
[474] *Blaskic*, ICTY, (Trial Chamber), March 3, 2000, paragraph 156: 'This offence is an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health. This category of offences includes those acts which do not fulfil the conditions set for the characterisation of torture, even though acts of torture may also fit the definition given. An analysis of the expression 'wilfully causing great suffering or serious injury to body or health' indicates that it is a single offence whose elements are set out as alternative options.'

-Extensive destruction of property not justified by the military (or similar) necessity[476]

Maras' actions that qualify for this offense: There is no room for ambiguity in El Salvador's Mara Salvatrucha (MS-13) street gang; under the motto 'Kill, Rape, Control,' they've wrested control of much of the country along with its rival gang, Barrio 18. [477] The World Health Organization (WHO) estimates that any country with a rate of more than 10 homicides per 100,000 inhabitants is experiencing a homicide

---

[475] *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, paragraph 244: 'This crime is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual's human dignity are not included within this offence.' *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, paragraph 340: 'The Commentary to Article 147 of Geneva Convention IV describes the offence of wilfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological experiments are carried out. It could be inflicted for other motives such as punishment, revenge or out of sadism, and could also cover moral suffering. In describing serious injury to body or health, it states that the concept usually uses as a criterion of seriousness the length of time the victim is incapacitated for work…. This offence includes those acts that do not fulfil the conditions set for torture even though acts of torture may also fit the definition given. [S]erious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to led to a normal and constructive life.'

[476] *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, paragraph 575: '[T]wo types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances; and ii) property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory when the destruction was not absolutely necessary by military operations. The Chamber holds that Article 2(d) of the Statute requires the destruction to be extensive regardless of whether the property is characterised as carrying general protection or is protected because it is situated on occupied territory. A single act may, in exceptional circumstances, be interpreted as fulfilling the requirement of extensiveness, as for instance the bombing of a hospital.''[A] crime under Article 2(d) of the Statute has been committed when: i) the general requirements of Article 2 of the Statute are fulfilled; ii) property was destroyed extensively; iii) the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or; the extensive destruction not absolutely necessary by military operations regards property situated in occupied territory; iv) the perpetrator acted with the intent to destroy this property or in reckless disregard of the likelihood of its destruction.'

Kordic and Cerkez, (Trial Chamber), February 26, 2001, paragraph 226: '[T]he crime of extensive destruction of property as a grave breach comprises the following elements, either: (i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or (ii) Where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and (iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.' *Blaskic*, ICTY, (Trial Chamber), March 3, 2000, paragraph 157: 'An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful, and wanton. The notion of 'extensive' is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.'

[477]https://www.washingtonpost.com/archive/local/2004/10/16/teen-gang-member-gets-15-years-in-machete-attack/5135e305-e458-4c98-bc22-9723908a6282/

https://www.independent.co.uk/arts-entertainment/photography/sin-salida-el-salvador-gang-photos-b1959369.html

epidemic. That is the case in El Salvador, Honduras, and Guatemala because of gang violence. The Mara gangs have established themselves on the ground as an alternative authority to the state that exacts 'taxes. Failure to pay that 'tax' automatically means injury or death for individuals and destruction of property for businesses. In that sense, small businesses and residents are charged with 'rent' or 'housing'. Extortion is also used on delivery companies, street vendors, families that receive money transfers from abroad or that have their own work-related earnings, and on persons perceived to be disloyal to the Mara. The Maras impose tacit codes of conduct on inhabitants, and if the latter reject those, they suffer violence. If the victim refuses to play along or there is a delay in payment, a member of the family is kidnapped or killed as a means of pressure or simply retaliation. Refusing to collaborate also means death, as does accidentally trespassing on a rival gang's territory. In Honduras, for example, small enterprises generate between 60% and 70% of employment and the annual amount of extorted money they pay is estimated at 200 million dollars. In Tegucigalpa alone, 1,500 small shops closed down between 2016 and 2017, representing 30% of this kind of business in the Honduran capital. In El Salvador, 72% of small businesses are victims of extortion, which amounts to daily losses of 20 million dollars.

In summary, applying the same approach taken by the Harvard Law School International Human Rights for Haiti, under Article 7 of the Rome Statute, there is a reasonable basis to conclude that the maras actions in terms of (a) wilful killing defined, (b) rape, (c) wilfully causing great suffering or serious injury to body or health and

causing great suffering or serious injury to body or health and (d) non justified extensive destruction of property, amount to crimes against humanity. These are not random actions but part of a gang pattern. The intensity of violence is higher than during the armed conflict in El Salvador in the 80s and constitute both widespread and systematic attacks against the civilian population.

BIBLIOGRAPHY

Agnifilio, Bliss, and Riordan, 'Investigating and Prosecuting Gangs', The U.S. Attorney Bulletin on Gang Prosecution, May 2006

Alejandro Lorite Escoriehuela, 'Humanitarian Law and Human Rights Law: The Politics of Distinction' (2011) Associate Professor, Department of Law, American University in Cairo, Michigan State Journal of International Law

Alberto Abadie and Javier Gardeazabal, 'The Economic Costs of Conflict: A Case Study of the Basque Country', American Economic Review, Vol 93 No. 1 March 2003

Ana Arana, 'The New Battle for Central America', Foreign Affairs, November-December 2001

Andrew Krepinevich, The Army and Vietnam (1986) John Hopkins University Press, page 101

Anna Applebaum and Briana Mawby, 'Gang Violence as Armed Conflict: A New Perspective on El Salvador', Georgetown Institute for Women, Peace and Security Policy Brief, November 2018

Anne-Marie La Rosa and Caroline Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law' (2008) International Review of the Red Cross, No. 870

Anthea Roberts, Law making by Non-state Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale International Review 107, 108

Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law, (2008). Cambridge University Press

Antonio Cassesse, International Law (2005), Oxford University Press

Annysa Bellal, The War Report Armed Conflict in 2018. The Geneva Academy of International Humanitarian Law and Human Rights, April 2019

Annysa Bellal, The War Report Armed Conflict in 2014. The Geneva Academy of International Humanitarian Law and Human Rights, April 2019

Barry Hatton, 'EU drug agency sees rising gang violence amid steady drug prices.' AP News, November 26, 2019

Beatrice Pouligny, Peace Operations Seen from Below: UN Mission and Local People (2006), Kumarian Press Inc

Bryan Alvear, 'The Bus Route That Institutionalized Extortion', December 13, 2016, https://www.insightcrime.org/news/analyses/bus-route-institutionalized-extortion-el-salvador/

Carlos Bergal, 'The Mexican Drug War: A Case for a Non-International Armed Conflict' (2011) Fordham International Law Journal, vol. 34

Caroline Mala Corbin, 'Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda' (2017) 86 Fordham Law Review 455

Christina Steenkamp, 'In the shadows of war and peace: Making sense of violence after peace accords' (2011) Conflict, Security & Development, vol. 11, no. 3

Christine Bell, On the Law of Peace: Peace Agreements & the Lex Pacificatoria (2008), University Press

Christopher Ksoll, Rocco Macchiavello and Ameet Morjaria 'The Effect of Ethnic Violence on an Export-Oriented Industry (2009) No 8074, CEPR Discussion Papers from C.E.P.R. Discussion Papers

Christopher Pfiffer, 'Juvenile crime and violence in Europe' (1998) The University of Chicago Press

Claudia Hofmann and Ulrich Schneckener, 'Engaging non-state armed actors in state- and peace building: options and strategies', Volume 93 Number 883 September 2011, International Review of the Red Cross

Claire Mc Evoy and Gergely Hideg, 'Global Violent Deaths 2017: Time to Decide', (2017) Geneva: Small Arms Survey

Colin M. Suffolk, 'A New Strategy to End Gang Violence: Classifying Certain Offenses Committed in the Context of Gang Violence as Acts of Terrorism' Harnsgate, Transnational Law Review; Summer 2016, Vol. 39 Issue 2, June 2016

Daniel Odin Shaw, 'The Crime-Conflict Nexus: Connecting Cause and Effect' (2019) E-Ir-Info

David Cantor, The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico Refugee (2014) Survey Quarterly, No. 33

David Cole, 'The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine' (2012) 6 Harvard Law Review

David Galula, Counterinsurgency Warfare (Theory and Practice) (1964) RAND

David Kilcullen, Counterinsurgency (2010) Oxford University Press

David Skarbeck, The Social Order of the Underworld: How Prison Gangs Govern the American Penal System" (2014), Oxford University Press

David Kretzmer, Target killing of suspected terrorists: extra-judicial execution or legitimate means of defence? (2005) in European Journal of International Law Vol. 16, No. 2

Dawn Steinhoff, Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups' (2009), 45 Texas University Law Review

Dennis Rodgers and Robert Muggah, 'Central as non-state armed groups: The Central American case' (2015) The London School of Economics and Political Science

Derek Jinks, The Temporal Scope of Application of International Humanitarian Law in Cotemporary Conflicts. Background paper for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003

Derik Brinkerhoff, 'Rebuilding Governance in the Failed States and Post-Conflict Societies: Core Concepts and Cross-Cutting Themes' (2005) Public Administration and Development

Dianne Webber, 'Preparing to Commit Domestic Terrorist Activity: Does the United States Have Adequate Tools to Stop This?' (2018) 34 Amsterdam University Law Review

Donna DeCesare, 'The Children of War: Street Gangs in El Salvador', North American Congress on Latin America, September 25, 2007

Douglas Farah, The Transformation of El Salvador's Gangs into Political Actors (2012), Center for Strategic & International Studies.

Douglas Farah, Central American Gangs and Transnational Criminal Organizations, The Changing Relationships in a Time of Turmoil (2013), International Assessment and Strategy Center

Frank Hoffman, Conflict in the 21st Century: The rise of hybrid wars (2007) Arlington Virginia: Potomac Institute for Policy Studies.

Frank Ledwige in 'Losing Small Wars (British Military Failure in Iraq and Afghanistan)' (Yale University Press, 2011)

Edward Orozco Flores, God's Gangs: Barrio, Ministry and Gang Recovery (2013), NYU Press

Eibe Riedel, 'Recognition of Insurgency', Rudolf, Bernhardt, Encyclopedia of Public International Law (2000) Vol. IV, Elsevier, Amsterdam

Emily Crawford, Identifying the Enemy: Civilian Participation in Armed Conflict (2015) Oxford University Press.

Elena Lucchi, Operational Advisor, MSF, European Union Institute for Security Studies, EUISS-ICRC Colloquium, Brussels, 19 January 2012

Evan Ellis, Drugs, Gangs, Transnational Organized Crime and Malgoverned Spaces in the Americas (2015), Air & Space Power Journal

Fraser Fowler; USMC's Combined Action Platoon: A counter-insurgency success in Vietnam and why it failed to derail US military strategy, Canadian Army Journal Vol. 12.1 (Spring 2009)

Frank van Gemert, 'Gangs, Migration and Crime: The Changing Landscape in Europe and the USA' (2009) University of Amsterdam

Gerard Van Offel and Roudier and S. Avalos Salvador: un Etat sous controle ARTE, 30 January 2016

Hal Brands, Crime, Violence and the Crisis in Guatemala: A Case Study in the Erosion of the State (2015), Cross Reach Publications

Hersch Lauterpacht, Recognition in International Law (1947) Cambridge University Press

Ian Brownlie, International Law and the Use of Force by States. (1963) Oxford: Clarendon Press

Hugo Van Offel, Gregory Roudier and Santiago Avalos Salvador: un Etat sous controle ARTE, 30 January 2016

Jacqueline Scott, Children and Extreme Violence. Insights from criminology on child trajectories into and out of non-state armed groups (2017), United Nations University

Jaime Manzano Lorenzo, 'Negotiating humanitarian access with Armed Non-State Actors in conflict-affected communities in El Salvador: The case of las mara' (2016) Uppsala University

James Cockayne, Peace Operations and Organized Crime (2008), Geneva Centre for Security Policy

Jean Pictet, Commentaries on the Geneva Conventions of 12 August 1949. Volume III: Geneva Convention relative to the Treatment of Prisoners of War. Geneva, ICRC, 1952

Jelena Pejic, 'The Protective Scope of Common Article 3: More Than Meets the Eye', International Review of the Red Cross, vol. 93, 2011

Jennifer Hazen, Understanding gangs as armed groups (2010), International Review of the Red Cross

Jennifer M. Hazen and Dennis Rodgers, Global Gangs, Street Violence Across the World (2014) University of Minnesota

Jens David Ohlin and Larry May, Necessity in International Law (2016), Oxford International Press.

Jens David Ohlin, The Duty to Capture, Cornell Law Faculty Publications (2013).

Jerry Langton, Gangland, The Rise of the Mexican Cartels from El Paso to Vancouver (2012), John Wiley & Sons Canada Ltd

Jessica Vaughn, MS-13 Resurgence: Immigration Enforcement Needed to Take Back Our Streets (2018), Center for Immigration Studies

Jessica Di Salvatore, 'Peacekeepers Against Ethnic and Criminal Violence: Unintended Consequences of UN Peacekeeping' (2017) PhD Dissertation, University of Amsterdam

John Nagl; Learning to Eat Soup with a Knife, Counterinsurgency Lessons from Malaya and Vietnam (2002) The University of Chicago Press

John Nagl, Let's win the war we are in, JFQ, issue 52, 1st quarter 2009

John P. Sullivan and Robert J. Bunker, 'Drug Cartels, Street Gangs, and Warlords', (2003) Frank Cass

Jorge Claudio Lema Pose, 'The Real Face of La Vida Loca: Child Protection, the Maras and their link with the civil conflict in El Salvador', The Thinker, Volume 47, 2013

Josephine Metcalf, 'From Rage to Rape and Prison to Print: Social, Cultural and Commercial Contexts in the Emergence of Gang Memoires', 2009 European Journal for American Studies

Joshua Kleinfeld, 'Skeptical Internationalism: A Study of Whether International Law Is Law' (2010) Fordham Law Review, Volume 78, Issue 5

Juan F. Fogelbach, 'Gangs, Violence, and Victims in El Salvador, Guatemala and Honduras' (2011) San Diego International Law Journal 12, no. 2

Karl Joseph Partsch, 'Armed Conflict', R. Bernhardt (ed), Encyclopaedia of Public International Law (1992) Vol. I, Elsevier, Amsterdam

Katie Dilts, 'One of These Things Is Not Like the Other: Federal Law's Inconsistent Treatment of Domestic and International Terrorism' (2019) 50 U. PAC. L. REV. 711, 713

Kendra Dupuy and Siri Rustad, 'Trends in armed conflict, 1946-2017' (2018) Conflict Trends no. 5, Peace Research Institute Oslo

Kirsten Ortega Ryan, 'Urban Killing Fields: International Humanitarian Law, Gang Violence, and Armed Conflict on the Streets of El Salvador' (2018) The George Washington University Law School

Kirstin Bjelopera and Jerome Finklea, 'Organized crime: an evolving challenge for US law enforcement' (2010) UNODC.

Khaled A. Beydoun, 'Lone Wolf Terrorism: Types, Stripes, and Double Standards' (2018) 112 Nor western University Law Review 1213

Laura Pedraza Fariña, No Place to Hide: Gang, State, and Clandestine Violence in El Salvador (2010), International Human Rights Clinic, Human Rights Program, Harvard Law School

Lauren Brooke Eisen, Inside Private Prisons: American Dilemman in the Age of Mass Incarceration (2017), University of California Press

Liliana Bernal Franco and Claudia Navas Caputo, 'Urban Violence and Humanitarian Action in Medellin' (2013) Brighton, UK: Households in Conflict Network.

Liliana Muscarella, 'Means to an uncertain end: the politics of International Law in FARC-Colombia conflict' (2010) Council of Hemispheric Affairs

Lindsay Moir, The Law of Internal Armed Conflict (2007) Cambridge, Cambridge University Press

Malcom Klein, 'Gangs in the United States and Europe' (1996) European Journal on Criminal Policy and Research

Marcela Giralda Munoz and Jose Serralvo, 'International Humanitarian Law in Colombia: Going One Step Beyond', International Review of the Red Cross, November 2020

Marco Mezzera, Michael Pavicic and Leontine Specker, 'Governance Components in Peace Agreements: Fundamental Elements of State and Peace Building? Nederlands, Institut voor Internationale Betrekkingen (2009)

Marco Sassoli and Laura Olson, 'The relationship between International Humanitarian Law and Human Rights Law where it matters: admissible killings and interment of fighters in non-international armed conflicts' (2009) Cambridge University Press

Margarita Peñate, Estimación del Costo Económico de la Violencia en El Salvador 2014 (2016), El Salvador Central Bank

Maria Luisa Pastor Gomez, 'The political influence of the maras in El Salvador', Instituto Epanol de Estudios Estrategicos, 14 October 2020

Marie Chene, ‘Organized crime and corruption’ (2008) Anti-Corruption Resource Centre for Transparency

Marina Capirini, ‘UN Police and the Challenges of Organized Crime’, Stockholm International Peace Research Institute, Discussion Paper, April 2019

Mark Shaw, ‘Where in Africa is organized crime most serious’, Institute for Security Studies, 11 July 2018

Mats Utas, ‘Sierra Leona and Liberia War’, Journal of Social Sciences and Management 1 (2008) Oxford: Berghahn Books

Max. G Manwaring, **‘**New’ Realities of Twenty-First Century Asymmetric Conflict, Small Wars Journal, March 2020

Max G. Manwaring, A Contemporary Challenge to State Sovereignty: Gangs and Other Illicit Transnational Criminal Organizations in Central America, El Salvador, Mexico, Jamaica, and Brazil (2007) Carlisle, PA: Strategic Studies Institute

Max G. Manwaring, ‘An Interview with General John R. Galvin, U.S. Army, Ret.’, former NATO Commander and Dean on the Fletcher School of Law and Diplomacy, August 6. 1997, in Max G. Manwaring and John T. Fishel, eds., Toward Responsibility in the New World Disorder (1998) London: Frank Cass

Max G. Manwaring, ‘Peace and Stability Lessons from Bosnia’, Parameters, Winter 1998-1999; Max G. Manwaring, ‘The Experience in Bosnia-Herzegovina: Challenges for Now and the Future’, in Anthony James Joes, ed., Saving Democracies: U.S. Intervention in Threatened Democratic States (1999) Westport, CT: Praeger

Maria Santacruz Giralt and A. Concha-Eastman, Barrio Adentro: La Solidaridad Violenta de las Pandi*llas* (2001) San Salvador: Instituto Universitario de Opinión Pública (IUDOP)

Marcy Wheeler and Dylan Roof ‘Should Be Tried as a Terrorist: America’s Disturbing Double-Standard on Political Violence (and Why It Matters’), SALON July 24, 2015

Michael Peterson, The Combined Action Platoons: The U.S. Marines’ Other War in Vietnam, (1989) Praeger Publishers

Michael Shifter, ‘Countering Criminal Violence in Central America’ (2012) New York: Council on Foreign Relations

Norma Roumie, ‘Gangs and the Culture of Violence in El Salvador (What role did the U.S. play?)’ (2017) The Great Lakes Journal of Undergraduate History, Volume 5

Nathan Carpenter, 'The Ad Hoc Federal Crime of Terrorism: Why Congress Needs to Amend the Statute to Adequately Address Domestic Extremism' (2018) 92 ST. JOHN'S L. REV. 393, 395

Olivier Kaplan, and Enzo Nussio, 'Explaining recidivism of ex-combatants in Colombia', Journal of Conflict Resolution, volume 65, no. 1 (2018)

Olivier Bangerter, Territorial gangs and their consequences for humanitarian players (2010), International Review of the Red Cross, Volume 92 Number 878

Patrick Gallahue, 'Mexico's War on Drugs – Real or Rhetorical Armed Conflict', (2011) Journal of International Law of Peace and Armed Conflict, vol. 24

Paul Collier, Breaking the Conflict Trap: Civil War and Development Policy (1999) World Bank

Phil Williams, Drug Trafficking, Violence, and Instability (2008) Bibliogov

Phil Williams, 'Violent Non-State Actors and National and International Security', (2008) International Relations and Security Network

Phillip Alston, O., Non-State Actors and Human Rights (2005) Oxford University Press.

Raymond Baker, Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System (2005) Wiley: New Jersey

Rivke Jaffe, 'The hybrid state: Crime and citizenship in urban Jamaica' (2013) University of Amsterdam

Robert Blair, 'International intervention and the rule of law after civil war: evidence from Liberia' (2019) Cambridge University Press

Robin Cartwright. and Cleland Bones, F., 'Trans-national organized crime and the impact on the private sector: The hidden battalions', The Global Initiative Against Transnational Organized Crime, Geneva, December 2017

Robert J. Bunker and John P. Sullivan Studies in Gangs and Cartels (2014) Routledge Taylor & Francis Group

Robert Bunker, Criminal Insurgencies in Mexico and the Americas: The Gangs and Cartels Wage War (2013), Routledge

Robert Bunker, Studies in Gangs and Cartels (2014), Routledge Taylor & Francis Group

Robert Muggah, 'Rethinking the Intensity and Organization of Violence in Latin America and the Caribbean', Reinventing Peace, 12 March 2021

Rodrigo Garcia, Urban Politics: The Political Culture of Gangs in California (2006) Author House

Robert Taber; War of the Flea: the Classic Study on Guerrilla Warfare, (1965), New York: L. Stuart

Rosemary Bannan, 'The World as Sanctuary' (1986) Review of This Holy Ground: Church Sanctuary and Central American Refugees, 1986

Sonja Wolf Mara Salvatrucha: The Most Dangerous Street Gang in the Americas? (2012), University of Miami

Stephen Watts, Bryan Frederick, Jennifer Kavanagh, Angela O'Mahony, Thomas S. Szayna, Matthew Law, Alexander Stephenson, Colin P. Clarke, 'A More Peaceful World? Regional Conflict Trends and U.S. Defense Planning (2013), Rand Corporation

Steve Metz, The Future of Insurgency Strategic Studies Institute (1993), US Army War College

Steven Metz and Douglas V. Johnson II, 'Asymmetry and U.S. Military Strategy: Definitions, Background, and Strategic Concept's, Carlisle, PA: Strategic Studies Institute, 2001

Steven Metz and Raymond Millan, 'Future Wars/Future Battle Space: The Strategic Role of American Land-power', Carlisle, PA: Strategic Studies Institute, 2003

Sven Peterke, 'Urban Insurgency, Drug War and International Humanitarian Law: The Case of Rio de Janeiro' (2010) Journal of International Humanitarian Legal Studies, vol. 1

Timothy Besley, Thiemo Fetzer, Hannes Mueller, 'The Welfare Cost of Lawlessness:

Evidence from Somali Piracy', Journal of the European Economic Association, 2014

Tom Bundervoet, Philip Verwimp and Richard Akresh, 'Health and Civil War in Rural Burundi' (2009) Journal of Human Resources.

Tom Diaz, No Boundaries, Transnational Latino Gangs and America Law Enforcement (2009), University of Michigan

Tom Hadden and Colin J. Harvey, 'The law of internal crisis and conflict' (1999), in International Review of the Red Cross, Vol. 81, No. 833

Thomas Bruneau, Lucia Dammer and Elizabeth Skinner *Maras: Gang violence and security in Central America* (2011) University of Texas Press

Thomas C. Bruneau, 'The Maras and National Security in Central America', Strategic Insights 4, no. 5 (May 2005)

Thomas I. Emerson, Freedom of Association and Freedom of Expression (1964) 74 Yale Law Review 1

Thomas Healy, Brandenburg in a Time of Terror (2009) 84 NOTRE DAME L. REV. 655

Thomas Hammes, The Sling and the Stone: On War in the 21 Century (2006) Zenith Press

Thomas Bruneau, Lucia Dammer and Elizabeth Skinner Maras: Gang violence and security in Central America (2011), University of Texas Press

T. W. Ward, Gangsters without Borders: An Ethnography of Salvadoran Street Gang (2013), Oxford University Press

Tung Yin, 'Were Timothy McVeigh and the Unabomber the Only White Terrorists? Race, Religion, and the Perception of Terrorism', 4 ALA. C.R. & C.L. L. REV. 33 (2013)

Victor Perera, *Rites: A Guatemalan Boyhood* (1994) Mercury House

Virginia Pagne Fortna, Does Peacekeeping Work? (2003), Princenton University Press.

Walter Kemp, Mark Shaw and Arthur Boutellis, 'The elephant in the room: How can peace operations deal with organized crime?', International Peace Institute, New York, June 2013.

Newspaper articles

Associated Press:

Associated Press, 'El Salvador Supreme Court Declares Gangs Terrorist Group', VOA, August 24, 2015, www.voanews.com/a/ap-el-salvador-supreme-court-declares-gangs-terrorist-groups/2931229.html

Associated Press (reported from The Guardian) 'A Day without Murder: No One is Killed in El Salvador for First Time in Two Years', Guardian, January 12, 2017. https://www.theguardian.com/world/2017/jan/12/el-salvador-homicide-rate-murder-two-years

Agence France Press:

Eduardo Ferreira, 'Strife torn Ivory Coast bans camouflage as fashion statement', Agence France Press, 13 November 2002

Businessweek:

'City of Coffins: In gang-plagued El Salvador, a cluster of businesses is taking advantage of the abundant resources at hand: lumber, skilled craftsmen, and murder victims', 11 March 2019, Bloomberg Businessweek

Business Insider:

‘The FBI announces gangs have infiltrated every branch of the military’ by Jay Balfour Johnson 22 October 2011

Insight Crime:
Insight Crime, ‘The Bus Route That Institutionalized Extortion in El Salvador’, Insight Crime, 13 December 2016

Insight Crime ‘El Salvador Now Using Anti-Terrorism Law to Tackle Gangs’, August 12, 2015

Insight Crime, ‘El Salvador Homicides Skyrocket after Gang Truce Unravels’, 9 January 2015

Insight Crime, ‘El Salvador’s Gang Truce: Positives and Negatives’, 11 June 2013

Los Angeles Times:
Serjeant, Jill. Little glamour in L.A., gang capital of America, Los Angeles Times, February 8, 2007

Robert J. Lopez, Rich Connell and Chris Kraul, ‘Gang Uses Deportation to Its Advantage to Flourish in U.S.’, Los Angeles Times, 30 October 2005

Mail & Guardian:

‘State Capture’, 11 July 2019

Newsweek:
‘MS-13’, by Michele R. McPhee, 22 June 2018, Newsweek

George Wehrfritz, ‘Rebels of the Pacific, Newsweek, 16 August 2008

Reuters:
El Salvador: Gangs taking advantage of pandemic’. Reuters, 27 April 2020

The Guardian:

Sibylla Brodzinsky, Watts, Jonathan (23 June 2016). “Colombia and FARC rebels sign historic ceasefire deal to end 50-year conflict". The Guardian, 24 June 2016

The New York Times:
Oscar Martinez, ‘President Bukele, negotiating with El Salvador’s gangs (but in a different way)’, The New York Times, 16 September 2020

‘MS-13, Trump and America's Stake in El Salvador's Gang War’, The New York Times, 10 December 2018

‘How to reinvent policing in America’, by Ben Austen, July/August 2018, The New York Times

‘Trump is Making MS-13 Stronger’, by Oscar Martinez, 19 February 2018, The New York Times

Liz Robbins ‘Trump targets MS-13’, The New York Times, 31 January 2018

Oscar Martinez, ‘Killers on a Shoestring: Inside the Gangs of El Salvador,’ The New York Times, 20 November 2016

‘F.B.I is Treating Rampage as Act of Terrorism’, 5 December 2015, The New York Times

‘Tools of war for Policing in Counties Across the U.S.’, 16 August 2014, The New York Times

‘Homicides in El Salvador dip and questions arise’, by Randal Archibold, 24 March 2012, The New York Times

‘U.N. Troops Fight Haiti Gangs One Street at a Time’, The New York Times, 10 February 2007

Somini Sengupta, ‘Mortal combat rages, mortal combat rules’, The New York Times, 10 June 2003

Judith Cummings The World of the Immigrant: Low-Paying Jobs and Overcrowded Housing, The New York Times, 13 April 1987

The New Yorker:
‘The Migrant Kidnapping Crisis: Central American families trust smugglers to get their children to the United States’ by Sarah Stillman, 27 April 2015, The New Yorker

The Economist:
‘Obituary: George Holliday fortuitously filmed the beating of Rodney King, The Los Angeles plumber died on September 19th, aged 61, 2nd October 2021

‘Urban Violence: Monrovia on Lake Michigan (An anti-violence programme in Chicago applies lessons from war-torn Africa)’, 4th May 2019, The Economist

‘Violent Crime: How do you police America’s most murderous city?’, 29th September 2018, The Economist

‘Crime and Punishment’, 10th March 2018, The Economist

‘Gangs in New Zealand: Bigger than the army’, 10th February 2018, The Economist

‘Gangs and Immigration: A horrible MS (The federal government may inadvertently be helping MS-13 with its recruiting)’, 5th August 2017, The Economist

‘Homicide in Baltimore: On murderous streets’, 1 July 2017, The Economist

‘Rethinking Prison’, 27th May 2017, The Economist

‘Failing Jails: Los Angeles/LA’s jails are still overcrowded, and sometimes brutal’, 8th April 2017, The Economist

‘Prisons: The incarcerated workforce’, 18th March 2017, The Economist

‘Brazil’s prisons’, 7th January 2017, The Economist

‘Recruiting police offices’, 7th January 2017, The Economist

‘El Salvador: The country needs a new peace accord’, 21st January 2017

‘Crime in El Salvador: The gangs that cost 16% of GDP’, 21st May 2016, The Economist

‘Mexico’s El Chapo and long arm of lawless’, 18th July 2015, The Economist

‘Jailhouse Nation: 2.3 million reasons to fix America’s prison problem’, 20 June 2015, The Economist

‘Drug smuggling in Africa’, 17th January 2015, The Economist

‘Crime in Latin America: A broken system’, 12th July 2014, The Economist

‘Drugs trafficking in the Caribbean’, 24th May 2014, The Economist

‘Narconomics’, 28th July 2012, The Economist

‘South Africa/Gang warfare: The Government is unsure how to tackle the present plague of gang violence’, 11th August 2012, The Economist

The Wall Street Journal:
Robbie Whelan, ‘Why Are People Fleeing Central America? A New Breed of Gangs Is Taking Over’. The Wall Street Journal. November 2, 2018

TIME:
‘What it’s like to be a Cop in America: One Year after Fergusson’ by Karl Vick, 24 August 2015, TIME

‘The Tragedy of Fergusson’ by David von Drehle and Alex Altman, 1 September 2014,

Government and International Organizations Papers
Amnesty International, ‘Jamaica: A Long Road to Justice? Human Rights Violations under the State of Emergency. London, 2011

Country Advice: El Salvador (Mara 18 Gang), Australian Government, Refugee Review Tribunal, 2 April 2012

The Legitimacy of the State in Fragile Situations, Commissioned by Norad and French Ministry of Foreign and European Affairs, NORAD, 2009

EU Council Framework Decision 2008/913/JHA of 28 November 2008 on criminal law

EUROPOL Press Release, 11 October 2019

Global Initiative Against Transnational Organized Crime, Statement to the UN Security Council, Paper Briefing 'UN Peacekeeping Operations: Police Commissioners', Geneva, 6 November 2018

Manual on Humanitarian Negotiations with Armed Groups (2006), the UN Office for the Coordination of Humanitarian Affairs (OCHA)

Office of the High Commissioner for Human Rights, Committee on the Rights of the Child, Concluding Observations, UN Doc (CRC/C/15/Add.232 (30 June 2004)

Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to El Salvador, 23 April 2018, United Nations,

Report of the Secretary-General on the Protection of Civilians in Armed Conflict, delivered to the Security Council, 30 March 2001, United Nations

Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to El Salvador; United Nations General Assembly, Human Rights Council, Third-eighth session, 18th June – 6 July 2018

Research and Evaluation on Gangs and Gang Violence, U.S. Department of Justice (Office of Justice Programs, National Institute of Justice), 30 November 2002

State of Capture Report released by the South African Public Protector Thuli Madonsela on 14 October 2016

United Nations Security Council Resolution 2293
United Nations Security Council Resolution 2423
United Nations Security Council Resolution 2387

UN brief 15 May 2020 https://news.un.org/en/story/2020/05/1064172

UN Secretary-General's Report on Mali (2018)

UNHCR spokesperson Andrej Mahecic press briefing in Geneva, 15 May 2020

UNHCR Guidelines on International Protection No. 2: Membership of a Particular Social Group' Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 1 May 2002, United Nations High Commission for Refugees

UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador at 12, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 15, 2016)

UN Human Rights Council, Resolution 1991/71 (1991)

United Nations Office on Drugs and Crime (UNODC) Research and Trends Analyses Branch, Global Study on Homicide, 2013.

U.S. State of the Union Address to Congress accessed from https://www.whitehouse.gov/sotu/

Central America and Mexico Gang Assessment, April 2006, USAID

U.S. Department of Treasury, 'Treasury Sanctions Latin America Criminal Organization', press release, October 11, 2012

U.S. Department of Justice, Federal Bureau of Investigation, 'FBI- Los Angeles', http://losangeles.fbi.gov/

U.S. Dept. of Justice, Motorcycle Gangs, 15 April 2014

U.S. Executive Order 13773, 'Enforcing Federal Law with Respect to Criminal Organizations and Preventing International Trafficking', 82 Federal Register 10691, February 9, 2017

National Security Council, 'Strategy to Combat Transnational Organized Crime: Definition', 2013, White House

National Gang Threat Assessment 2019, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2018, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2017, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2016, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2015, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2014, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2013, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2012, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2011, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2010, U.S. National Gang Intelligence Center.
National Gang Threat Assessment 2009, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2008, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2007, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2006, U.S. National Gang Intelligence Center
National Gang Threat Assessment 2005, U.S. National Gang Intelligence Center

United States Marine Corps, Small Wars Manual, 1940

USAID, Central America and Mexico Gangs Assessment (2006)
Racketeer Influenced and Corrupt Organizations Act (U.S. Code 18 [2006], 1961-68) and the Violent Crimes in Aid of Racketeering Act (U.S. Code 18 [2006], 1959)

Law Cases

ICJ:

Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion, 8 July 1996
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, 9 July 2004.

ICC:

Prosecutor v Germain Katanga Case, ICC, No ICC-01/04-01/07 Trial Chamber 7 March 2014
Prosecutor v. Lubanga, ICC, No. ICC-01/04-01 – 14 March 2014

ICTY:

Prosecutor v. Anto Furundzija, ICTY, IT-95-17/1-7, 10 December 1998
Prosecutor v. Boskoski et al. ICTY, 2008
Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment), ICTY, IT-96-23 & IT-96-23/1-A, 12 June 2002
Prosecutor v Dusko Tadic (Opinion and Judgment), ICTY, IT-94-1-T, judgment of 7 May 1997
Prosecutor v. Dusko Tadic, ICTY, 38 ILM 1518, 1541, December 1999
Prosecutor v Kunarac et al., ICTY (Appeals Chamber), IT-96-23 and IT-96-23/1-A, judgment of 12 June 2002
Prosecutor v. Limaj et al case, ICTY, IT-03-66T
Prosecutor v. Haradinaj, ICTY, 2008
Prosecutor v. Ramush Haradinaj et al., ICTY, Judgement, 2008

ICTR:

Prosecutor v. Rutaganda, ICTR, Case No. ICTR-93-3, Trial Chamber Judgement, 6
Prosecutor v Jean-Paul Akayesu, ICTR-96-4-T, judgment of 2 September 1998

Inter-American Court of Human Rights:

Juan Carlos Abella v Argentina, Inter-American Court of Human Rights, Report No 55/97, Case 11.137, Inter-Am CHR 271, OEA ser.L/V/11.98, Doc 6 rev (1998) para 156 (*La Tablada* case)
Barrios Altos v. Peru, Inter-American Court of Human Rights, Merits, Judgement of 14 March 2001, Series C, No. 75

Argentina case law:

Mazzeo Julio Lilo y otros, Argentine Supreme Court, judgement of 13 July 2007, Jurisprudencia Argentina 2007-III-573

El Salvador case law:

Sala de lo Constitucional de la Corte Suprema de Justicia (Constitutional Chamber of the Supreme Court of Justice) (Dec.52-2003/56-2003/57-2003) at Falla 16; IV, 3, B (Apr. 1, 2004) last accessed from www.pddh.gob.sv/docs/doc00001.pdf on 1 November 2018

UK case law:
Althea Sonia Briton v. Secretary of State for the Home Department, Court, House of Lords, Great Britain (UK). Case number (2005) UKHL 71
Serdar Mohammed & Others v. Secretary of State for Defence, UK Court of Appeal (Civil Division), 2015

U.S. case law:
American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991)
Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 U.S. 4th. Circuit Court (2004)
Holder v. Humanitarian Law Project, U.S. Supreme Court, 561, U.S. 1 (2010)
Ramos v. Holder, 589 F.3d 940, U.S. 9th Court Circuit (2009)
Santos-Lemus v. Mukasey, 542 F.3d 940, U.S. 9th Circuit Court (2008)
Scales v. United States, U.S. Supreme Court, 367 U.S. 203, 205–06 (1961)

Main Legislation:
Argentine Law 27156

El Salvador Ley Anti-Maras (Act I Mano Dura) and Ley Anti-Maras II (Act II Super Mano Dura)
Decreto (Decree) No. 158/2003, Ley Anti-Maras (Anti-Gangs Act) 2003

Mexico Federal Criminal Code

U.S. Racketer in Influenced and Corrupt Organizations Act

U.S. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

U.S. State of California Penal Code

1951 Convention Relating the Status of Refugees

United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2001)