

NOTE

“KILL, RAPE, CONTROL”: GENDER-BASED VIOLENCE BY GANG MEMBERS IN EL SALVADOR AS CRIMES AGAINST HUMANITY UNDER INTERNATIONAL CRIMINAL LAW

Elizabeth Garrison

ABSTRACT

In the Northern Triangle countries (El Salvador, Honduras, and Guatemala), gang violence, particularly against women, girls, and LGBTQ+ persons, results in gross violations of human rights and is a major driver of forced displacement. Gang members systematically use gender-based violence, including rape, femicide, kidnapping, sexual slavery, and persecution of LGBTQ+ persons, to exert territorial control over the local population. However, the international community has failed to recognize both the severity and systemic nature of gender-based violence by gang members. This Note—which focuses on El Salvador, but has implications for the rest of the Northern Triangle countries—argues that gender-based violence by transnational gangs should be considered crimes against humanity under international criminal law because it constitutes a widespread systematic attack against the civilian population. Furthermore, this Note identifies concrete steps the international community can take to hold gang leaders individually responsible for gender-based violence not only in El Salvador, but in Honduras and Guatemala as well. The International Criminal Court should individually prosecute gang leaders for crimes against humanity. In addition, the UN Human Rights Council should establish an independent international fact-finding mission on gender-based violence by gang members in the Northern Triangle countries. Finally, this Note considers the potential ramifications under the Draft articles on Prevention and Punishment of Crimes Against Humanity.

ABSTRACT	137
I. INTRODUCTION	139
II. GENDER-BASED VIOLENCE BY GANG MEMBERS IN EL SALVADOR	142
A. Background on Gang Violence in El Salvador	142
B. Overview of Gender-Based Violence in El Salvador	143
III. GENDER-BASED VIOLENCE AS CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW	146
IV. GANG MEMBERS COMMIT ACTS OF GENDER-BASED VIOLENCE AS PART OF A WIDESPREAD OR SYSTEMATIC ATTACK AGAINST THE CIVILIAN POPULATION	152
A. The Legal Standard for a Widespread or Systematic Attack Against the Civilian Population Under Article 7 of the Rome Statute	152
B. Gender-based Violence by Gang Members Constitutes a Widespread or Systematic Attack Against the Civilian Population under Article 7 of the Rome Statute because Gang Members Commit Gender-based Violence in Furtherance of an Organizational Policy	154
C. Specific Acts of Gender-based Violence by Gang Members that Constitute Crimes Against Humanity	156
1. Sexual Crimes Committed by Gang Members Under Article 7(1)(g)	157
2. Gender-based Persecution Committed by Gang Members Under Article 7(1)(h)	159
3. Other Acts that Qualify as Crimes Against Humanity Listed in Article 7(1) that have a Gendered Dimension	161
V. CONCRETE STEPS THE INTERNATIONAL COMMUNITY CAN TAKE TO ADDRESS CRIMES AGAINST HUMANITY BY GANG MEMBERS	165
A. Investigating and Prosecuting Gang Members under the ICC	165

1. Potential Benefits of an ICC Investigation for Addressing Gender-based violence by Gang Members in El Salvador	168
2. Admissibility under the ICC: El Salvador is Unwilling and Unable to Investigate and Prosecute Gender-based Violence by Gang Members.	171
3. Gang Leaders Can be Prosecuted by the ICC for Gender-based Violence Committed by Gangs Under the Doctrine of Command Responsibility Under Article 28(a).....	174
B. Establishing a UN International Fact-finding Mission	177
C. Recognizing Gender-based Violence by Gang Members as Crimes Against Humanity Would Trigger State Obligations Under the Proposed International Treaty on Crimes Against Humanity.....	179
VI. CONCLUSION.....	182

I. INTRODUCTION

In the Central American Northern Triangle countries (El Salvador, Guatemala, and Honduras), transnational gangs, such as MS-13 and MS-18, exert significant territorial control over local communities and operate as *de facto* governments.¹ These gangs systematically use gender-based violence, including rape, femicide, enforced prostitution, sexual slavery, kidnappings, and targeting of LGBTQ+ persons, to instill fear in the community and force civilians to comply with the gang's authority.² In El Salvador, Guatemala, and Honduras, the national governments consistently fail to investigate or prosecute gender-based violence by gang

1. See *Life under Gang Rule in El Salvador*, INT'L CRISIS GRP. (Dec. 10, 2018) [hereinafter ICG Report 2018], www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador [https://perma.cc/XS68-XU2H].

2. See discussion *infra* Section IV.

members.³ Under the current approach within international human rights law (IHRL), the international community has condemned State governments for failing to prevent gender-based violence by gang members.⁴ However, this approach fails to adequately recognize the systemic nature and the severity of gender-based violence by gang members and has not prompted international action to hold gangs accountable for ongoing human rights abuses.

Therefore, this Note, which focuses on gang violence in El Salvador, argues that instances of gender-based violence by transnational gangs should be recognized as crimes against humanity under international criminal law because such a designation will allow the international community to address gender-based gang violence more effectively. Recognizing instances of gender-based violence by gang members as crimes against humanity will bring international attention to how gang members explicitly target women, girls, and LGBTQ+ persons on a massive scale, as well as prompt the international community to implement monitoring mechanisms to document human rights abuses by gang members. In addition, this approach will allow the International Criminal Court (ICC) to prosecute individual gang

3. In El Salvador, approximately 75% of femicide cases are never prosecuted and only 5% of all violence against women cases result in conviction. See WOMEN & GIRLS EMPOWERED, WOMEN'S ECONOMIC EMPOWERMENT IN EL SALVADOR: BARRIERS, OPPORTUNITIES, AND A PATH FORWARD 20 (Oct. 2019), <https://grameenfoundation.org/documents/elsalvador-women-economic-empowerment-barriers-opportunities-path-forward-full-10-2019.pdf> [https://perma.cc/GS8M-3J3G]. Similarly in Honduras, more than ninety percent of reported femicides go unpunished and the criminal justice system ignores widespread violence against women. See Vienna Herrera, *Femicide in Honduras: Women Dismissed by Their Own Government*, CONTRACORRIENTE (Dec. 19, 2022), <https://contracorriente.red/en/2020/08/08/femicide-in-honduras-women-dismissed-by-their-own-government> [https://perma.cc/CPS6-MU26]. In Guatemala, while the police received 11,449 complaints for physical or sexual violence against women in the first ten months of 2015, there were only 527 convictions. See THE ADVOC. FOR HUM. RTS., GUATEMALA: VIOLENCE AGAINST WOMEN, ¶ 19 (Nov. 2017), https://www.theadvocatesforhumanrights.org/Res/guatemala_violence_against_women-march_2017.pdf [https://perma.cc/4WJ6-5Q8B].

4. For example, in its November 2022 country review of El Salvador, the UN Committee Against Torture expressed concern at the high rates of gender-based violence in El Salvador. See Comm. Against Torture, *Concluding Observations on the Third Periodic Report of El Salvador*, ¶ 28–29(a), U.N. Doc. CAT/C/SLV/CO/3 (Dec. 19, 2022).

members and leaders for sexual and gender-based crimes.⁵ Finally, this recognition may place additional obligations on State governments to protect victims of gender-based violence under the proposed Draft articles on Prevention and Punishment of Crimes Against Humanity, which is currently being considered by the UN General Assembly.⁶ It is important to recognize these crimes as crimes against humanity because, historically, violence against women, girls, and gender non-conforming persons has been taken less seriously or entirely ignored under both international human rights⁷ and international criminal law.⁸

In the following Parts, this Note will further explain why gender-based crimes by gang members in El Salvador constitute crimes against humanity under international criminal law and the potential ramifications of recognizing them as such. Part II will provide background on gender-based violence by gangs in El Salvador. Part III will identify the legal standard for gender-based crimes against humanity under international criminal law and international human rights law. Part IV will argue that acts of gender-based violence by gang members qualify as crimes against humanity because they constitute a widespread systematic attack against the civilian population. Finally, Part V will explore concrete steps the international community can take to address crimes against humanity by gang members.

5. See discussion *infra* Section V.A on the admissibility of gender-based violence by gang members in El Salvador under the ICC.

6. See *UN Decision to Advance Crimes Against Humanity Treaty*, HUMAN RIGHTS WATCH (Nov. 18, 2022), <https://www.hrw.org/news/2022/11/18/un-decision-advance-crimes-against-humanity-treaty> [<https://perma.cc/C8LM-RPCZ>].

7. For instance, the international human rights framework on the prohibition against torture was primarily designed in response to violence that disproportionately affects men and often overlooks the unique experiences of women, girls, and LGBTQ+ persons. See Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 5–8, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

8. Before the establishment of the International Criminal Tribunal of Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR) in 1993 and 1994 respectively, sexual and gender-based violence was not formally criminalized under international criminal law. See Tanja Altunjan, *The International Criminal Court and Sexual Violence: Between Aspirations and Reality*, 22 GERMAN L.J. 878, 878–93 (2021).

*II. GENDER-BASED VIOLENCE BY GANG MEMBERS IN EL
SALVADOR*

This Part provides an overview of gender-based violence by gang members in El Salvador. Section A will briefly explain the origin and nature of gang violence in El Salvador, and Section B will highlight how gang violence contributes to the high levels of gender-based violence in El Salvador and is a major cause of displacement from the Northern Triangle countries.

A. Background on Gang Violence in El Salvador

Gang violence in the Northern Triangle countries is a transnational phenomenon resulting from migration patterns from the United States to Central America. The two main *maras*, or transnational gangs, in the Northern Triangle countries are the *Mara Salvatrucha* (MS-13) and the 18th Street (MS-18) gang. MS-13 and MS-18 originated in Los Angeles in the 1960s.⁹ In 1996, the United States passed the Illegal Immigration Reform and Immigrant Responsibility Act and deported almost 46,000 convicts and 160,000 undocumented immigrants to Central America, with the Northern Triangle countries receiving over 90% of these deportations from the United States.¹⁰ Many of these deportees were members of the MS-13 and 18th Street gangs.¹¹ In the late 1990s, mass deportations of gang members destabilized El Salvador, which was already struggling to recover from a twelve-year civil war.¹²

Since the 2000s, the *maras* have massively expanded and have exerted significant territorial control in the Northern Triangle countries, particularly in poor communities. Specifically, estimates show that *maras* maintain a presence in approximately 247 out of

9. See Dennis Rodgers & Robert Muggah, *Gangs as Non-State Armed Groups: the Central American Case*, 30(2) *CONTEMP. SEC. POL'Y* 1, 5 (2009).

10. See *id.* at 6.

11. See *id.*

12. See, *El Salvador's Politics of Perpetual Violence*, INT'L CRISIS GRP. (Dec. 19, 2017) [hereinafter ICG Report 2017], <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/64-el-salvadors-politics-perpetual-violence> [<https://perma.cc/E8TD-SL3H>].

the 262 municipalities in El Salvador.¹³ In 2017, the International Crisis Group (ICG) reported that the *maras* had an estimated support base of 500,000, approximately 8% of El Salvador's population, making them the largest criminal organization in Central America.¹⁴ Gangs exert control over communities by charging local businesses and households *renta*, or continued payment to the gang, to be permitted to live or operate within the gang's controlled territory.¹⁵

The extensive presence of gangs significantly contributes to violent crime in El Salvador. According to the ICG, the country suffered at least 93,000 murders between 1993 and 2017, over half of which were attributed to gang violence.¹⁶ With a murder rate of 103 per 100,000 people in 2015, El Salvador became the country with the highest murder rate in the world.¹⁷ As the next Section discusses, this high level of gang violence has a disproportionate effect on women and girls and is a major driver of forced displacement from the Northern Triangle countries.

B. Overview of Gender-Based Violence in El Salvador

In El Salvador, violence against women is pervasive, and perpetrators of gender-based violence operate with virtual impunity. In 2019, sixty-three percent of girls ages fifteen to nineteen and seventy-two percent of women ages thirty to forty reported having suffered sexual violence.¹⁸ According to the United Nations, the violent death rate for women in El Salvador was 13.49 deaths per 100,000 women in 2018, which was one of the highest

13. See Cecilia Jimenez-Damary (Special Rapporteur on the Human Rights of Internally Displaced Persons), *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on her Visit to El Salvador*, ¶ 5, U.N. Doc. A/HRC/38/39/Add.1 (Apr. 23, 2018) [hereinafter Report of the Special Rapporteur on Internally Displaced Persons].

14. See ICG Report 2017, *supra* note 12, at 1.

15. See ICG Report 2018, *supra* note 1, at 3.

16. See ICG Report 2017, *supra* note 12, at 1.

17. See ICG Report 2018, *supra* note 1, at 2.

18. See U.S. DEP'T OF STATE, EL SALVADOR 2021 HUMAN RIGHTS REPORT, § 6, at 26 (2022), https://www.state.gov/wp-content/uploads/2022/02/313615_EL-SALVADOR-2021-HUMAN-RIGHTS-REPORT.pdf [<https://perma.cc/P8HA-FWR3>].

in the world.¹⁹ In 2021, El Salvador had one of the highest rates of femicide (i.e., the killing of women because of their gender) in Latin America with 2.4 cases per 100,000 women.²⁰ These troubling statistics likely underestimate the true scope of violence against women and girls in El Salvador because of underreporting.²¹

The extensive presence of gangs significantly contributes to the high levels of gender-based violence in El Salvador. Gang members target school-aged girls and force them into sexual relationships.²² If the girls refuse, gang members retaliate against them and their families using violence.²³ Gang members also use threats of violence to force women and girls to become prostitutes or to visit gang leaders in prison for conjugal visits.²⁴ There are many documented instances of gang members kidnapping and raping women as punishment for not being able to pay the gang's *renta*, refusing to comply with the gang's authority, or being related to someone who is an enemy of the gang.²⁵ Gang members also specifically target LGBTQ+ individuals, especially transgender

19. See *Un 67% de las mujeres ha sufrido algún tipo de violencia en El Salvador* [67% of women have suffered some type of violence in El Salvador], NOTICIAS ONU [UN NEWS] (Apr. 17, 2018), <https://news.un.org/es/story/2018/04/1431372> [<https://perma.cc/VXJ3-82GX>].

20. See *ECLAC: At Least 4,473 Women Were Victims of Femicide in Latin America and the Caribbean in 2021*, UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA & THE CARIBBEAN (ECLAC) (Nov. 24, 2022), <https://www.cepal.org/en/pressreleases/eclac-least-4473-women-were-victims-femicide-latin-america-and-caribbean-2021> [<https://perma.cc/H3WT-4XXV>].

21. See *WOMEN & GIRLS EMPOWERED*, *supra* note 3, at 20.

22. See Comm. on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of El Salvador*, ¶ 27(b), U.N. Doc. CRC/C/SLV/CO/5-6 (Nov. 29, 2018).

23. See Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of El Salvador*, ¶ 26, U.N. Doc. CEDAW/C/SLV/CO/8-9 (Mar. 9, 2017).

24. See Urmila Bhoola (Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences), *Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences, on her Mission to El Salvador*, ¶ 33, U.N. Doc. A/HRC/33/46/Add.1 (Aug. 3, 2016) [hereinafter Report of the Special Rapporteur on Contemporary Forms of Slavery].

25. See *Thousands of Girls and Women are Fleeing Rape, Sexual Violence and Torture in Honduras, El Salvador and Guatemala*, CTR. FOR GENDER & REFUGEE STUD. (2015), https://cgrs.uclawsf.edu/talking_points_and_stories [<https://perma.cc/9XYU-ZJXJ>] (last visited Feb. 15, 2023).

women, because they are perceived as being particularly vulnerable and easy targets for exploitation.²⁶

This high level of gender-based violence by gang members is a significant driver of displacement from the Northern Triangle countries. In 2015, the UN Refugee Agency—the UN High Commissioner for Refugees (UNHCR)—interviewed hundreds of women fleeing El Salvador, Guatemala, Honduras, and Mexico.²⁷ Eighty-five percent of the women interviewed lived in neighborhoods controlled by gangs, and sixty-four percent of the women described being targets of direct threats and attacks by gang members among the primary reasons why they fled the country.²⁸ Although sixty-nine percent of the women tried to move to other parts of their home country and remained in hiding to escape gang violence, gang members were able to track where they moved, and the women and their children continued to experience similar levels of violence.²⁹

In summary, gender-based violence is pervasive in El Salvador and affects every aspect of daily life. Because of the extensive presence of gangs, women, girls, and LGBTQ+ persons cannot move freely within their own neighborhoods without experiencing constant threats of sexual and gender-based violence.³⁰ Since the Salvadorian government consistently fails to prosecute gender-based violence, victims of gender-based violence by gang members often have no choice but to flee the country and make the treacherous journey to the United States in hopes of

26. See “Every Day I Live in Fear”: Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, HUMAN RIGHTS WATCH (Oct. 7, 2020) [hereinafter HRW Every Day I Live in Fear Report], https://www.hrw.org/report/2020/10/07/every-day-i-live-fear/violence-and-discrimination-against-lgbt-people-el-salvador#_ftn52 [<https://perma.cc/R23Z-AEWG>].

27. See U.N. HIGH COMM’R FOR REFUGEES (UNHCR), WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 4 (2015), <https://www.unhcr.org/media/women-run> [<https://perma.cc/5SRH-4L9F>].

28. See *id.* at 4.

29. See *id.* at 5.

30. For example, many parents will not allow young girls to go to school because they fear they will be targeted by gang members. See Report of the Special Rapporteur on Internally Displaced Persons, *supra* note 13, at 23–24; Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Eighth and Ninth Periodic Reports of El Salvador, ¶ 32(c), U.N. Doc. CEDAW/C/SLV/CO/8-9 (Mar. 9, 2017).

finding safety.³¹ As will be discussed in Part IV, these acts of violence against women, girls, and LGBTQ+ persons constitute a widespread or systematic attack against the civilian population and should therefore be considered crimes against humanity. To provide the legal framework for this designation, the following Part will discuss the legal standard for crimes against humanity under international criminal law and international human rights law.

III. GENDER-BASED VIOLENCE AS CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Although States are the primary actors under international law, individuals do bear some responsibility.³² The three primary bodies of international law that govern abuses of individual rights are IHRL, international humanitarian law (IHL), and international criminal law.³³ IHRL governs the obligations of States to protect and uphold individual human rights, and IHL governs State obligations to protect civilians during armed conflict.³⁴ In contrast to IHRL and IHL, international criminal law does not apply to State actors but rather governs individual criminal responsibility for internationally recognized crimes.³⁵ The four main crimes under international criminal law are genocide, war crimes, crimes against

31. See UNHCR, *supra* note 27, at 15–25.

32. See generally Simone Gorski, *Individuals in International Law*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2013).

33. In general, IHL only applies to armed conflict. See generally U.N. Secretariat, Off. High Comm'r. Hum. Rts. (OHCHR), *International Legal Protection of Human Rights in Armed Conflict*, 5, U.N. Doc. HR/PUB/11/01 (Jul. 1, 2012), https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf [<https://perma.cc/M3KV-7DTP>]. Because gang violence in the Northern Triangle countries is not considered to rise to the level of an armed conflict, this Note does not discuss the application of IHL to gender-based violence by gang members. See generally ANNYSSA BELLAL, *THE WAR REPORT: ARMED CONFLICTS IN 2017*, at 64 (2018) (indicating that gang violence in the Northern Triangle countries is not considered an armed conflict despite the high levels of violence).

34. See generally OHCHR, *supra* note 33.

35. See generally Claus Kreß, *International Criminal Law*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2009).

humanity, and ethnic cleansing.³⁶ This Note focuses specifically on crimes against humanity.

Under customary international law, crimes against humanity refer to specific crimes committed in the context of a large-scale attack targeting civilians, including murder, torture, sexual violence, enslavement, persecution, and enforced disappearance.³⁷ State or non-State actors can perpetuate crimes against humanity.³⁸ Unlike war crimes, crimes against humanity can be committed during war or peacetime.³⁹ While there is not a dedicated treaty on crimes against humanity, there is an absolute prohibition on crimes against humanity. This prohibition follows from the principle of *jus cogens*, which posits that the obligation not to commit crimes against humanity is so fundamental to the norms of international law that no State under any circumstances can object to or violate the rule.⁴⁰ Therefore, States have a universal obligation to prevent and punish crimes against humanity because large scale attacks that specifically target civilians are an affront to the fundamental dignity and freedoms of every human being.⁴¹

The Rome Statute of the International Criminal Court (the Rome Statute) provides the most recent and extensive articulation of crimes against humanity.⁴² The ICC is the court of last resort for the prosecution of serious international crimes including genocide, war crimes, and crimes against humanity.⁴³ One of the most

36. See Marco Sutto, *The 'Core' International Crimes*, CENTER OF EXCELLENCE FOR STABILITY POLICE UNITS (CoESPU), no. 3, 2020, at 64, <https://www.coespu.org/articles/core-international-crimes> [<https://perma.cc/524C-B8MV>].

37. See *Crimes Against Humanity*, TRIAL INT'L, <https://trialinternational.org/topics-post/crimes-against-humanity> [<https://perma.cc/FJ66-NK49>] (last visited Mar. 25, 2024).

38. See *id.*

39. See *id.*

40. See generally Guido Acquaviva & Fausto Pocar, *Crimes Against Humanity*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2022).

41. See *id.*

42. See Altunjan, *supra* note 8.

43. See Claire Klobucista, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS (Mar. 28, 2022), <https://www.cfr.org/background/role-international-criminal-court> [<https://perma.cc/S8FH-FVY2>]. "Court of last resort" is a term used to describe how the ICC is intended to compliment rather than to replace domestic court systems, meaning that the ICC only has jurisdiction over a case if national courts are unable or unwilling to try the case. See Julia Grignon, Marco Sassòli & Antoine

significant contributions of the Rome Statute is its recognition of gender-based crimes. The Rome Statute is the first international instrument to explicitly recognize various forms of sexual and gender-based violence as crimes against humanity or war crimes.⁴⁴ According to Article 7(3) of the Rome Statute, “the term ‘gender’ refers to the two sexes, male and female, within the context of society.”⁴⁵ This definition explicitly recognizes that gender is socially constructed, and that gender-based crimes are often motivated by patriarchal gender norms.⁴⁶ Therefore, gender-based crimes against humanity are not limited to sexual crimes committed against women but also include gender-based persecution against women, girls, men, boys, and LGBTQ+ persons.⁴⁷

Under Article 7 of the Rome Statute, sexual and gender-based crimes may be charged as crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁴⁸ Article 7(2)(a) defines an “[a]ttack directed against any civilian population” as a series of crimes committed “against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁴⁹ An individual act, such as rape, can still be considered a crime against humanity if it

Bouvier, *International Criminal Court*, HOW DOES LAW PROTECT IN WAR?, casebook.icrc.org/a_to_z/glossary/international-criminal-court [https://perma.cc/T8W3-PM5K] (last visited Mar. 25, 2024).

44. Office of the Prosecutor of the International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, ¶ 25 (June 2014) [hereinafter OTP Policy Paper on Gender-Based Crimes], <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [https://perma.cc/8USG-8F35].

45. Rome Statute of the International Criminal Court art. 7(3), July 17, 1998, 187 U.N.T.S. 90 [hereinafter Rome Statute].

46. See OTP Policy Paper on Gender-Based Crimes, *supra* note 44, at 3–4.

47. See *id.* at 3 (stating in the definition of “Gender-based crimes” that these crimes are not limited to sexual crimes); see also Office of the Prosecutor of the International Criminal Court, *Policy on the Crime of Gender Persecution*, ¶ 5 (Dec. 7, 2022) [hereinafter OTP Policy on Gender Persecution], <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> [https://perma.cc/V9PF-TART].

48. See Rome Statute, *supra* note 45, art. 7(1).

49. See *id.* art. 7(2)(a).

is committed as part of a widespread or systematic attack against the civilian population.⁵⁰

Under Article 7, there are three main ways gender-based crimes may constitute crimes against humanity. First, Article 7(1)(g) sets out specific sexual crimes that qualify as crimes against humanity, including “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”⁵¹ Second, Article 7(1)(h) states that “[p]ersecution against any identifiable group or collectivity” based on “gender” in connection with any crimes listed in Article 7(1) can also qualify as a crime against humanity.⁵² Third, other specific crimes listed as crimes against humanity in Article 7(1) such as murder, torture, enslavement, deportation or forcible transfer of the population, enforced disappearances, and other inhumane acts of a similar character may also have a gendered dimension to them.⁵³ For example, the definition of enslavement under Article 7(2)(c) specifically includes trafficking in women and children.⁵⁴

Article 21(3) of the Rome Statute requires the ICC’s application of international criminal law to be consistent with IHRL, so it is important to address the relevant provisions of IHRL when interpreting what constitutes crimes against humanity.⁵⁵ Prosecuting gender-based crimes as crimes against humanity is consistent with IHRL. Under IHRL, States have an obligation to prevent, investigate, prosecute, and punish private actors for

50. See Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgement, n.311 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999)(citing Prosecutor v. Mrkšić et al., Case No. IT-95-13-R61, Trial Chamber ¶ 30 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 1996)).

51. Rome Statute, *supra* note 45, art. 7(1)(g).

52. *Id.* art. 7(1)(h).

53. For example, the Rome Statute suggests that the crime of enslavement may have particular impacts on women and children. See *id.* art. 7(2)(c) (“‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular *women and children.*”)(emphasis added). For a list of specific acts that constitute crimes against humanity, see Rome Statute, *supra* note 45, art. 7(1).

54. See *id.* art. 7(1)(g).

55. See *id.* art. 21(3).

gender-based violence.⁵⁶ When States fail to exercise due diligence in holding perpetrators of gender-based violence accountable, it is as if the State sanctions or encourages those acts of violence.⁵⁷ Therefore, failure to exercise due diligence that would prevent gender-based violence amounts to a human rights violation by the State.

Under IHRL, gender-based violence can be considered torture or inhumane and degrading treatment. Torture is defined as the intentional infliction of severe pain and suffering on an individual for a prohibited purpose including discrimination of any kind.⁵⁸ Under IHRL, the prohibition against torture applies to both State and private actors, and States can be held liable for acts of torture committed by private actors when the State fails to adequately prevent and punish these acts.⁵⁹ In many cases, gender-based and sexual violence, such as rape, rises to the level of severe physical or mental pain and suffering sufficient to qualify as torture.⁶⁰ Because inflicting severe pain and suffering for a discriminatory purpose is prohibited under IHRL, the purpose element for torture is always fulfilled if the act is gender specific.⁶¹ Furthermore, gender-based violence is considered to be perpetrated with the

56. For example, under the Convention Against Torture (CAT), States are obligated to exercise due diligence to prevent, investigate, prosecute, and punish private actors who commit torture or ill-treatment. This standard also applies to “States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.” Comm. Against Torture, *General Comment 2 Implementation of Article 2 by State Parties*, U.N. Doc. CAT/C/GC/2, ¶ 18 (Jan. 24, 2008).

57. *See id.* (“Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture [including gender-based violence] facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission.”).

58. *See* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading#article-1> [<https://perma.cc/K5TU-T42S>].

59. *See* Manfred Nowak (Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment), *Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc A/HRC/7/3, ¶ 31 (Jan. 15, 2008) [hereinafter Report of the Special Rapporteur on Torture].

60. *See id.* ¶ 36.

61. *See id.* ¶ 30.

“consent and acquiescence” of the State government when the State fails to prevent, prosecute, and provide remedies for victims of gender-based violence.⁶² Therefore, States have an absolute obligation to prevent acts of gender-based violence under the prohibition against torture and cruel, inhumane, and degrading treatment.

States also have an obligation under IHRL to eliminate discrimination against women in all its forms,⁶³ including gender-based violence by private actors.⁶⁴ This obligation to prohibit gender-based violence against women is now universally applicable to all States under customary international law.⁶⁵ State parties will be held liable for gender-based violence conducted by private actors if these States fail to prevent, investigate, and punish perpetrators of gender-based violence.⁶⁶ Therefore, States have an absolute obligation to prohibit gender-based violence under the principle of non-discrimination under IHRL.

In conclusion, acts of gender-based or sexual violence are crimes against humanity under international criminal law when they are committed as part of a widespread or systematic attack against a civilian population.⁶⁷ This is consistent with principles of IHRL, which consider gender-based violence as a violation of the universal prohibitions against torture⁶⁸ and gender discrimination.⁶⁹ The following Part will apply the definition of crimes against humanity under Article 7 of the Rome Statute to acts of gender-based violence by gang members in El Salvador.

62. *See id.* ¶ 131.

63. *See* Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19 Violence Against Women, U.N. Doc. A/47/38, ¶ 10 (1992) [hereinafter CEDAW General Recommendation 19].

64. *See id.* ¶ 6.

65. *See* Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 35 on Gender-Based Violence Against Women, updating General Recommendation No. 19, ¶ 2, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017) [hereinafter CEDAW General Recommendation 35] (“The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law.”).

66. *See id.* ¶ 24(b).

67. *See* Rome Statute, *supra* note 45, art. 7(1).

68. *See* Report of the Special Rapporteur on Torture, *supra* note 59, ¶ 32.

69. *See* CEDAW General Recommendation 35, *supra* note 65, ¶ 24(b).

*IV. GANG MEMBERS COMMIT ACTS OF GENDER-BASED VIOLENCE
AS PART OF A WIDESPREAD OR SYSTEMATIC ATTACK AGAINST
THE CIVILIAN POPULATION*

Acts of gender-based violence by gang members qualify as crimes against humanity under international criminal law because they are committed as part of a widespread or systematic attack against the civilian population. Section A will discuss the legal standard for a widespread or systematic attack against the civilian population under Article 7 of the Rome Statute. Section B will discuss why acts of gender-based violence by gang members constitute a widespread or systematic attack against the civilian population under Article 7 of the Rome Statute. Finally, Section C will discuss specific acts of gender-based violence that constitute crimes against humanity.

*A. The Legal Standard for a Widespread or Systematic Attack
Against the Civilian Population Under Article 7 of the Rome Statute*

Under Article 7 of the Rome Statute, criminal acts may be prosecuted as crimes against humanity when they are committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁷⁰ In order to be considered an “attack directed against any civilian population” the acts must be committed “pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁷¹ A “policy to commit such an attack” requires that the organization “actively promote or encourage such an attack against a civilian population.”⁷²

The ICC has held that non-State actors may qualify as organizations for the purposes of Article 7(2)(a).⁷³ However, to

70. Rome Statute, *supra* note 45, art. 7(1).

71. *Id.* art. 7(2)(a).

72. INT’L CRIM. CT., ELEMENTS OF CRIMES ¶ 3 (2013) [hereinafter ICC Elements of Crimes], <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> [<https://perma.cc/A33J-8XNT>].

73. See OTP Policy Paper on Gender-Based Crimes, *supra* note 44, n.31 (citing Situation in Kenya, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 92 (Mar. 31, 2010); Prosecutor v. Ruto et al., ICC-01/09-01/11-373, Decision on the

qualify as an organization, the group should possess the characteristics of a “State or quasi-State,” such as

(a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.⁷⁴

A policy does not need to be conceived at the highest level to be considered a State or organizational policy.⁷⁵ To qualify as an organizational policy, the policy a) must be thoroughly organized and follow a pattern; b) must be conducted in furtherance of a common policy involving public or private resources; c) can be implemented by groups who govern certain territory or by an organization that has the ability to commit a widespread or systematic attack against the civilian population; and (d) does not need to be explicitly defined or formally instituted.⁷⁶ Furthermore, the acts need not be a military attack to qualify as a “widespread or systematic attack” against the population.⁷⁷ Relatedly, the acts do not have to occur during an armed conflict to be considered crimes against humanity,⁷⁸ although it is arguable that the level of violence gang members in El Salvador cause could be considered a non-international armed conflict under humanitarian law.⁷⁹

Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 184–185 (Jan. 23 2012)).

74. Situation in Kenya, ICC-01/09-19-Corr, Dissenting Opinion of Judge Kaul ¶ 51 (Mar. 31, 2010).

75. See Situation in the Republic of Cote d’Ivoire, ICC-02/11, ¶ 45 (Oct. 3, 2004).

76. See *id.* ¶ 43.

77. See ICC Elements of Crimes, *supra* note 72, at 3.

78. See TRIAL INT’L, *supra* note 37.

79. See Kirsten Ortega Ryan, “Urban Killing Fields:” *International Humanitarian Law, Gang Violence, and Armed Conflict on the Streets of El Salvador*, 20 INT’L & COMPAR. L. REV. 97, 97–126 (2020). In this Note, Ryan argued that gang violence in El Salvador should be considered a Non-International Armed Conflict (NIAC) under international humanitarian law because of the intensity of violence in El Salvador and the organized nature of gang violence. See *id.* This would allow for gang members to be prosecuted for war crimes and create pathways for humanitarian interventions. See *id.* Similarly, a policy paper from the

B. Gender-based Violence by Gang Members Constitutes a Widespread or Systematic Attack Against the Civilian Population under Article 7 of the Rome Statute because Gang Members Commit Gender-based Violence in Furtherance of an Organizational Policy

Gangs in El Salvador qualify as organizations under Article 7(2)(a) because they exert significant territorial control over the areas they occupy, and they have the hierarchical structure and capacity to implement large-scale attacks on the civilian population. Gangs operate as quasi-States because they effectively control over ninety-four percent of El Salvador's municipalities.⁸⁰ Gang leaders use the chain of command within their organization to control movement within the gang's territory by operating check points civilians must pay to pass through⁸¹ and killing civilians who accidentally cross from one gang's territory into another's.⁸² Gang leaders also use the hierarchical chain of command to extort local businesses and community members—costing the Salvadorian economy approximately \$4 billion a year.⁸³

Therefore, gangs, as quasi-State organizations, exert significant control over the civilian population, from civilian movement within gang territories to the operation of businesses. One key tactic gangs employ to maintain control is gender-based violence. Gang members routinely kidnap young women and girls to be gang members' girlfriends or to force them into

Georgetown Institute for Women, Peace, and Security argued that Gang violence in El Salvador reaches the intensity and organization to be considered an armed conflict and called for the Woman, Peace, and Security framework to be applied to solving the conflict. See ANNA APPLEBAUM & BRIANA MAWBY, *GANG VIOLENCE AS ARMED CONFLICT: A NEW PERSPECTIVE ON EL SALVADOR* (Georgetown Institute for Women, Peace, and Security eds., 2018). However, the consensus is that gang violence in El Salvador does not qualify as a NIAC because gangs do not have the level of structural organization required to be considered an organized non-governmental armed group, although it is a close call. See BELLAL, *supra* note 33.

80. See ICG Report 2018, *supra* note 1.

81. See *id.*

82. See U.S. DEP'T OF STATE, *supra* note 18, §2(e), at 18.

83. See Molly O'Toole, *Micro-extortion by gangs is costing El Salvador millions of dollars a year, \$10 at a time*, QUARTZ (June 17, 2017), <https://qz.com/1008580/micro-extortion-by-gangs-is-costing-el-salvador-4-billion-a-year-10-at-a-time> [<https://perma.cc/8SQ3-PG33>].

prostitution.⁸⁴ In addition to kidnapping, gang members often attack and rape women— causing serious injury and sometimes death—to assert their masculinity and power.⁸⁵ These intentional acts of violence against women and girls constitute an organizational policy for purposes of Article 7 because they follow a consistent pattern of abuse; are conducted to further the gang’s objective of instilling fear in the civilian population to exert their authority; and are implemented by an organization, i.e., the gangs, that effectively govern gang-controlled neighborhoods.

Though this Note has focused, up until this point, on gender-based violence against women and girls in the broader Salvadorian context, gender-based violence against female gang members and women who are associated with a given gang is also present and used as means to maintain internal hierarchy. Whereas male gang members undergo severe beatings to formally become initiated, women are often forced to undergo an initiation ritual known as the *trencito* (little train) where they are raped by several gang members.⁸⁶ Unlike their male counterparts, female gang members are not allowed to have romantic or sexual relationships outside of the group.⁸⁷ If a female member does have a boyfriend within the gang, she may be pimped out by her partner to leaders for sex.⁸⁸ Domestic violence by gang members against their girlfriends or wives is also extremely common, and there are many accounts of gang members threatening to have the gang kill their partner and their relatives if they try to leave the relationship.⁸⁹

84. See Expert Declaration on Gang Violence in El Salvador from Eric Hershberg, Professor Emeritus, American University, to the Center on Refugee and Gender Studies (CRGS), U.C. Hastings ¶ 69 (Apr. 21, 2022)(on file with the CRGS, U.C. Hastings).

85. See *id.*

86. See Floor Keuleers & Natasha Mulenga Hornsby, *Women in El Salvador’s Gang War*, INT’L CRISIS GRP. (Aug. 4, 2022), <https://facesofconflict.crisisgroup.org/women-in-el-salvadors-gang-war> [<https://perma.cc/5CFM-AQEP>].

87. See *id.*

88. See *id.*

89. Although it is beyond the scope of this Note, it is important to highlight that many acts of gender-based violence by gang members occur within the context of intimate partner violence. For example, one woman reported how she was forced to become a gang member’s girlfriend when she was 15 years old and suffered years of horrendous physical and sexual abuse. See THE ADVOCS. FOR HUM. RTS., EL SALVADOR STAKEHOLDER REPORT FOR THE UNITED NATIONS PERIODIC REVIEW, ¶ 18 (2019),

In summary, the *maras* in El-Salvador, such as MS-13 and MS-18, qualify as organizations for the purposes of Article 7 because they have a hierarchical structure and exert significant territorial control over civilian populations. Gangs have the means and the capability to carry out widespread attacks against the civilian population. Gangs systematically commit acts of gender-based violence in furtherance of an organizational policy to exert control over the civilian population and to maintain gender hierarchies within the gangs themselves. Therefore, acts of gender-based violence by gang members qualify as crimes against humanity under international criminal law. The next Section will describe in greater detail specific acts of gender-based violence committed by gang members that constitute crimes against humanity.

C. Specific Acts of Gender-based Violence by Gang Members that Constitute Crimes Against Humanity

There are several gender-based crimes committed by gang members that fall under Article 7(1) of the Rome Statute. Below, the first Section will discuss specific sexual crimes committed by gang members that qualify as crimes against humanity under Article 7(1)(g) of the Rome Statute. Then, the second Section will discuss how gender-based persecution against transgender women and homosexuals can constitute crimes against humanity under Article 7(1)(h) of the Rome Statute. Finally, the third Section will discuss other crimes committed by gang members that have a gendered dimension which qualify as crimes against humanity under Article 7(1) of the Rome Statute.

https://www.theadvocatesforhumanrights.org/Res/el_salvador_ahr_submission_for_website_3%202.pdf [<https://perma.cc/4L5F-LY4R>]. Another woman described how her gang-member boyfriend became increasingly violent forcing her to flee the country with her child to find safety. See Report of the Special Rapporteur on Internally Displaced Persons, *supra* note 13, ¶ 27. Although this pattern of using domestic violence to control intimate partners may not rise to the level of an organizational policy within the gang to be considered crimes against humanity, controlling women and their bodies is consistent with the gang's internal *machismo* culture and helps gangs control their territory by forcing women within the community to be in abusive relationships with them. See generally *How Toxic Masculinity and Machismo Creates Gang Culture*, SAFETY FIRST FOR GIRLS (SAFIGI) (May 31, 2018), <https://www.safetyfirstforgirls.org/post/how-toxic-masculinity-and-machismo-creates-gang-culture> [<https://perma.cc/85CF-8FBW>]. It is worth exploring in future research how international human rights and criminal law apply to systemic intimate partner violence within non-state organizations.

1. Sexual Crimes Committed by Gang Members Under Article 7(1)(g)

Gang members in El Salvador commit various sexual crimes such as rape, sexual slavery, enforced prostitution, and kidnappings which qualify as crimes against humanity under Article 7(1)(g) of the Rome Statute. According to Article 7(1)(g), “[r]ape, sexual slavery, enforced prostitution . . . or any other form of sexual violence of comparable gravity” can be considered crimes against humanity if committed as a systematic attack against the population.⁹⁰

Gangs systematically use sexual violence to exert control over women’s bodies and instill fear in the community. For example, young girls are extremely vulnerable to gender-based violence and are targeted to become girlfriends of gang members.⁹¹ Girls as young as twelve years old are designated as “brides” and are forced to enter sexual relationships with gang members.⁹² If they refuse to comply, the gangs threaten to kill them and their families.⁹³ Women and girls who refuse the sexual advances of gang members are “especially targeted for violence in order to send a message to others that compliance is expected from all of them.”⁹⁴

One of the most common forms of sexual exploitation is forcing women and girls to provide sexual services to gang

90. Rome Statute, *supra* note 45, art. 7(1)(g).

91. “One woman reported that three members of the MS-13 gang, including the local leader, demanded that the woman leave school, break up with her boyfriend, and become the leader’s girlfriend. The gang members threatened her brother at gunpoint and later physically assaulted him. She was forced to go into hiding to escape the threats and violence.” THE ADVOCS. FOR HUM. RTS., *supra* note 89, ¶ 23.

92. See Comm. on Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of El Salvador, U.N. Doc. CRC/C/SLV/CO/5-6, ¶ 27(b) (Nov. 29, 2018). At its periodic review of El Salvador in 2018, the UN Committee on the Rights of the Child expressed deep concern at “the vulnerability of girls, aged from 12 years onwards, known as ‘brides’, to being targeted by maras for sexual purposes.” *See id.*

93. See Comm. on the Elimination of Discrimination Against Women, Concluding observations on the combined eighth and ninth periodic reports of El Salvador, U.N. Doc. CEDAW/C/SLV/CO/8-9, ¶ 26 (Mar. 9, 2017). In its 2017 periodic review of El Salvador, the UN Committee on the Elimination of Discrimination of Women was “alarmed at reports of the sexual exploitation of young women and girls by criminal gangs under threats of homicide against them and their families.” *See id.*

94. CGRS, *Expert Declaration: Mneesha Gellman on Gender-Based Gang Violence in El Salvador*, ¶ 23 (Jan. 2021) (source on file with author).

members in prison.⁹⁵ Gang members threaten to kill women and their families if they refuse to make repeated conjugal visits to gang leaders in prison.⁹⁶ Often, these women are forced to smuggle telephones or weapons into the prison.⁹⁷ Young girls are specifically selected at schools as “gifts” for gang leaders.⁹⁸ There are also reports of gang members forcing women into sexual and domestic slavery by breaking into their homes, killing all of their male family members, and forcing them to have sex with gang members.⁹⁹

Gang members also use sexual violence as punishment when civilians do not comply with the gang’s authority. For instance, when an individual refuses an order from gang members, the gang will rape and kill their female family members in retaliation.¹⁰⁰ Gangs also use threats of physical violence to force women to carry out crimes such as smuggling drugs into prison¹⁰¹ or assisting with kidnappings.¹⁰²

Finally, gang members use sexual violence to extort money from the civilian population. Gang members will use threats of sexual and physical violence to force women into paying higher

95. See Report of the Special Rapporteur on Contemporary Forms of Slavery, *supra* note 24, ¶ 33. After visiting El Salvador in 2016, the UN Special Rapporteur on contemporary forms of slavery described how “[g]ang members reportedly threaten women and their families with violence or death in order to force them to repeatedly make conjugal visits to gang leaders and members in prisons . . . In some situations, women and girls are reportedly forced to comply with a regular schedule of conjugal visits compiled by gangs.” *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. For example, in one report, two women were brutally raped by several gang members for having family members in the armed forces. See Agnes Callamard (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on her Mission to El Salvador*, ¶ 73, U.N. Doc. A/HRC/38/44/Add.2, (Dec. 7, 2018).

101. One woman reported that gang members threatened to kill her daughter if she refused to carry drugs into a maximum-security prison. See Keuleers & Hornsby, *supra* note 86.

102. Another woman reported that when she refused to help gang members commit a kidnapping, she was raped and forced to flee her home. See Report of the Special Rapporteur on Internally Displaced Persons, *supra* note 13, ¶ 27.

renta for living in a gang-controlled neighborhood.¹⁰³ Gangs also kidnap women and girls to force their families to pay them.¹⁰⁴ These are all examples of how gangs use sexual violence to instill fear in the community and extract money from the local population. Forcing young girls into prostitution, using rape as punishment for disobeying the gangs, and threatening acts of sexual violence to force civilians to pay money to the gang are all sexual crimes that are committed as part of a widespread attack against the civilian population, and therefore, constitute crimes against humanity under Article 7(1)(g).

2. Gender-based Persecution Committed by Gang Members under Article 7(1)(h)

Another example of how gangs use gender-based violence to attack the civilian population is gender-based persecution against LGBTQ+ persons, particularly transgender women, gay men, and lesbian women. Gender-based persecution against LGBTQ+ persons qualifies as a crime against humanity under Article 7(1)(h) of the Rome Statute. Under Article 7(1)(h) “persecution against any identifiable group or collectivity” based on “gender” is a crime against humanity when committed as part of a systematic widespread attack against the civilian population. Relatedly, Article 7(2)(g) defines “persecution” as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”¹⁰⁵ When perpetrators target LGBTQ+ persons because their sexual preferences or gender expression do not conform to traditional gender norms, it constitutes gender-based persecution.¹⁰⁶ Although the ICC has generally focused on prosecuting sexual violence, it is also important to

103. For example, one woman described how when she was fifteen years old, she was forced to pay *renta* to MS-13 and after her friend was shot and killed, a gang member threatened to kill her and her mother if she failed to pay higher *renta*. *See id.*

104. For example, one account described how gang members “kidnapped a 15-year-old girl and her friend and kept them hostage for five months, during which they were sexually abused and raped daily. The girl was released only after a family member found her and paid the gang.” THE ADVOCS. FOR HUM. RTS., *supra* note 89, ¶ 23.

105. Rome Statute, *supra* note 45, art. 7(2)(g).

106. *See* OTP Policy on Gender Persecution, *supra* note 47, at 3.

recognize that gender-based persecution can be considered a crime against humanity under Article 7.¹⁰⁷

Gang violence against LGBTQ+ persons qualifies as gender-based persecution under Article 7(2)(g) because gang members in El Salvador systematically deprive LGBTQ+ persons of their fundamental rights and freedoms because of their gender identity or sexual orientation. Acts of gang violence against LGBTQ+ persons include targeted killings, assault, rape and sexual violence, torture, kidnappings, and extortion.¹⁰⁸ This discriminatory violence deprives LGBTQ+ persons of their fundamental right to life and security, leaving many LGBTQ+ persons no choice but to comply with gang members' threats, hide in their homes, or flee the country.

There are various reasons why gang members intentionally target LGBTQ+ persons. For example, LGBTQ+ persons are particularly vulnerable in El Salvador, and the gangs know that the police will not protect them. While LGBTQ+ people commonly face violence and discrimination in El Salvador, El Salvador has never convicted anyone on hate crime charges.¹⁰⁹ When LGBTQ+ persons go to the police for help, they are usually ignored and further victimized by the police.¹¹⁰ Police often blame LGBTQ+ persons for being victims of violence.¹¹¹ There is even a risk that if the police get involved they will arrest and abuse the LGBTQ+ person because of their sexual orientation or gender identity.¹¹²

Gang members also specifically target LGBTQ+ persons to commit crimes for the gang because they know they often live

107. *See id.* at 4.

108. *See* HRW Every Day I Live in Fear Report, *supra* note 26, n.452 (citing U.S. DEP'T OF STATE, HONDURAS 2019 HUMAN RIGHTS REPORT 1-2 (2019), <https://www.state.gov/wp-content/uploads/2020/02/HONDURAS-2019-HUMAN-RIGHTS-REPORT.pdf> [<https://perma.cc/QQ3C-AT72>]).

109. *See Anti-LGBT Persecution in El Salvador, Guatemala, Honduras: US Barriers to Asylum Block Path to Safety*, HUM. RTS. WATCH (Oct. 7, 2020, 12:00 AM) [hereinafter HRW Anti-LGBT Persecution Report], <https://www.hrw.org/news/2020/10/07/anti-lgbt-persecution-el-salvador-guatemala-honduras> [<https://perma.cc/7DEU-RRR4>].

110. *See* GEO. L. HUM. RTS. INST. FACT-FINDING PROJECT, UNIFORMED INJUSTICE: STATE VIOLENCE AGAINST LGBT PEOPLE IN EL SALVADOR 10 (2017).

111. *See* HRW Every Day I Live in Fear Report, *supra* note 26, at 45 (recounting the story of Priscila P.).

112. *See* GEO. L. HUM. RTS. INST. FACT-FINDING PROJECT, *supra* note 110, at 31-34 (recounting the story of Alex Pena).

alone and are rejected by their families. For example, one transgender woman reported that gang members forcibly recruited her to store drugs and guns in her home and beat and burned her when she refused to comply.¹¹³ Furthermore, transgender women are common targets for engaging in the forced sale of drugs¹¹⁴ because they are isolated and vulnerable. Gangs also often specifically extort, harass, and attack transgender women because they are sex-workers or because the gangs believe they are sex-workers due to their gender expression.¹¹⁵ Finally, gangs target LGBTQ+ persons for not conforming to gender norms¹¹⁶ or to punish them for being in a homosexual relationship with a gang member.¹¹⁷

These widespread attacks against LGBTQ+ persons constitute gender-based persecution and should be considered crimes against humanity because they are committed as part of the gang's strategy to exert control over the neighborhoods they inhabit. Gangs know that LGBTQ+ persons are particularly vulnerable because of their gender identity or sexual orientation and intentionally try to force them to commit crimes or pay higher *renta* because of this perceived vulnerability. In summary, gender-based persecution against LGBTQ+ persons by gang members should be considered a crime against humanity because gangs deprive LGBTQ+ persons of their fundamental rights and freedoms because of their gender identity or expression as part of a widespread systematic attack against the civilian population.

3. Other Acts that Qualify as Crimes Against Humanity Listed in Article 7(1) that have a Gendered Dimension

In addition to the specific sexual and gender-based crimes listed in Article 7(1)(g)–(h), gang members commit other crimes that qualify as crimes against humanity under Article 7(1) that have a gendered dimension. For example, gang members commit

113. See HRW Every Day I Live in Fear Report, *supra* note 26, at 54 (recounting the story of Pricila P.).

114. See *id.* at 54, 57 (recounting the stories of Pricila P. and Yésica N., respectively).

115. See *id.* at 57 (recounting the story of Laura I.).

116. See *id.* at 137 (recounting the story of Sandra C., a twenty-four year old lesbian from San Miguel); see also THE ADVOCS. FOR HUM. RTS., *supra* note 89, ¶ 27.

117. See HRW Every Day I Live in Fear Report, *supra* note 26, at 50–51 (recounting the story of Ramón L.).

murder, enslavement, torture, and forced displacement as part of a widespread attack against the civilian population. These crimes have disproportionate and unique effects on women, girls, and LGBTQ+ persons and should be examined through a gender-sensitive lens when classifying them as crimes against humanity.

Many of the acts of sexual violence and gender-based persecution may rise to the level of intentionality and severity to qualify as torture under Article 7(1)(f). Article 7(2)(f) defines “torture” as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person . . . under the control of the accused.”¹¹⁸ Under IHRL, the purpose and intent elements of torture are always fulfilled “if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality.”¹¹⁹ In general, many acts of gender-based violence also meet the severity element of torture because they cause victims significant pain and suffering.¹²⁰ In previous cases, tribunals have recognized that rape and sexual violence amount to torture under international criminal law.¹²¹ Similarly here, gang members intentionally use sexual and gender-based violence to inflict severe physical, psychological, and mental suffering on victims.¹²² Victims are often under the control of the gangs when these crimes are committed because they are taken by gangs to secluded locations or cannot leave because multiple gang members overpower them.¹²³ Therefore, there are many instances of gender-based violence by gang members that should appropriately be considered torture under international criminal law.

118. Rome Statute, *supra* note 45, art. 7(2)(f).

119. Méndez, *supra* note 7, ¶ 8.

120. See Report of the Special Rapporteur on Torture, *supra* note 59, ¶ 36 (“The case law presented here has, without exception, emphasized the severe pain and suffering endured by victims of rape.”).

121. See *generally* Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, (Int’l Crim. Trib. for Rwanda Sep. 2, 1998); Prosecutor v. Mucić, IT-96-21-Abis, Judgment, (Int’l Crim. Trib. for the Former Yugoslavia Apr. 8, 2003).

122. See UNHCR, *supra* note 27, at 4.

123. See HRW Every Day I Live in Fear Report, *supra* note 26 (recounting the story of Maria I.).

Similarly, many of the sexual crimes committed by gang members may rise to the level of slavery-like practices and could be considered enslavement under Article 7(1)(c).¹²⁴ Article 7(2)(c) defines “enslavement” as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”¹²⁵ For example, forcing young women and girls to become gang members’ sexual partners, be gifts for gang leaders, and make multiple conjugal visits to gang leaders in prison constitutes slavery-like practices.¹²⁶ There are also instances of gang members invading women’s homes, killing their male family members, and forcing the women into domestic and sexual servitude.¹²⁷ Gang members forcibly recruiting women and children into the gang also constitutes a slavery-like practice because once they are recruited they experience various kinds of exploitation, though not necessarily sexual in nature, and are not allowed to leave.¹²⁸ When gang members use sexual violence to exercise ownership over women and girls, it should be considered enslavement under international criminal law in order to adequately recognize the full extent of the harm to the victims.

Gang members also use sexual violence and threats of sexual violence to forcibly displace people from their homes, which can be considered a crime against humanity under Article 7(1)(d).¹²⁹ Under Article 7(2)(d), “forced displacement” is defined as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present in.”¹³⁰ In one instance, gang members raped a transgender woman who was unable to pay rent to the *mara* controlling a particular neighborhood and threatened further violence in the event of future nonpayment.¹³¹ There are multiple instances in which

124. See Rome Statute, *supra* note 45, art. 7(1)(c).

125. *Id.* art. 7(2)(c).

126. See Report of the Special Rapporteur on Contemporary Forms of Slavery, *supra* note 24, ¶ 33.

127. *Id.* ¶ 34.

128. *Id.* ¶ 35.

129. See Rome Statute, *supra* note 45, art. 7(1)(d).

130. *Id.* art. 7(2)(d).

131. See HRW Every Day I Live in Fear Report, *supra* note 26, at 51–53 (recounting the story of Maria I.).

women and their families were forced to flee their homes because of threats of sexual violence by gang members.¹³² Gender-based violence by gang members has significantly contributed to thousands of women fleeing El Salvador.¹³³ Therefore, it is important to consider the gendered aspect of forced displacement by gang members in El Salvador.

Another crime against humanity committed by gang members with a gendered dimension is femicide, or the intentional killing of women because of their gender. Femicides qualify as crimes against humanity under Article 7(1)(a) of the Rome Statute, which specifies that murders may constitute crimes against humanity when committed as part of a widespread attack against the civilian population.¹³⁴ El Salvador has one of the highest rates of femicide in the world, with at least 468 femicides in 2017 and one femicide being committed almost every eighteen hours.¹³⁵ While systemic intrafamilial violence is also a prominent factor, gang violence significantly contributes to the high femicide rate. From 2012 to 2013, the Salvadorian government negotiated a gang truce which caused a noticeable decrease in the number of femicides. However, after the truce broke down in 2015 and 2016, the number of femicides almost doubled with 573 and 524 cases, respectively.¹³⁶ Gang members who kill women are rarely brought to justice because of the failure of the Salvadorian judicial system to prosecute gender-based violence. Between 2013 and 2016, the Salvadoran government opened 662 femicide cases but only five percent resulted in a conviction.¹³⁷ Therefore, gang members can kill women with virtual impunity. When investigating murders by gang members as crimes against humanity under Article 7(1)(a), it is important to examine how murders of female victims may be specifically motivated by their sex or gender. In conclusion, other

132. See Report of the Special Rapporteur on Internally Displaced Persons, *supra* note 13, ¶ 27.

133. See UNHCR, *supra* note 27, at 2.

134. See Rome Statute, *supra* note 45, art. 7(1)(a).

135. See Denise N. Obinna, *Seeking Sanctuary: Violence Against Women in El Salvador, Honduras, and Guatemala*, 27 *VIOLENCE AGAINST WOMEN* 806, 815 (2020).

136. See Report of the Special Rapporteur on Internally Displaced Persons, *supra* note 13, ¶ 28.

137. See Molly O'Toole, *El Salvador's gangs are targeting young girls*, *THE ATLANTIC* (Mar. 4, 2018), <https://www.theatlantic.com/international/archive/2018/03/el-salvador-women-gangs-ms-13-trump-violence/554804> [perma.cc/88N5-D7D3].

crimes committed by gang members, such as murder, torture, enslavement, and forced displacement that constitute crimes against humanity include gender-based violence. When appropriate, it is important to identify when acts of gender-based violence rise to the level of other crimes under international criminal law to fully capture the nature of the crime and to adequately seek justice for the victims.

*V. CONCRETE STEPS THE INTERNATIONAL COMMUNITY CAN
TAKE TO ADDRESS CRIMES AGAINST HUMANITY BY GANG
MEMBERS*

As Part IV established, instances of gender-based violence by gang members in El Salvador should be considered crimes against humanity under international criminal law. It is important to recognize these crimes as crimes against humanity because it will draw greater international attention to gender-based violence by gang members in the Northern Triangle countries and hopefully put greater pressure on State governments to address the issue. This Part recommends three ways the international community can address crimes against humanity by gang members. Section A analyzes how the ICC can investigate and prosecute gang members and leaders for crimes against humanity. Section B suggests that the UN Human Rights Council establish an independent international fact-finding mission to document gender-based violence by gang members. Finally, Section C explores the potential obligations of States to prevent gender-based violence by gang members under the proposed international convention on crimes against humanity that is currently being considered by the UN General Assembly.

A. Investigating and Prosecuting Gang Members under the ICC

The UN Security Council should refer the issue of gender-based violence by gang members in El Salvador to the ICC so gang leaders can be investigated and prosecuted for crimes against humanity. As established above in Section IV, instances of gender-based violence by gang members in El Salvador qualify as crimes against humanity. The following Sections will 1) provide the potential benefits of an ICC investigation in the context of El Salvador, 2) examine why gender-based crimes against humanity

by gang members are admissible under the ICC because El Salvador is a party to the Rome Statute and is unwilling and unable to investigate and prosecute gender-based violence by gang members, and 3) discuss how gang leaders can be held individually responsible under the doctrine of command responsibility. Although this Note focuses specifically on El Salvador, the same analysis applies to countries with similar gang violence concerns, such as Guatemala and Honduras, because they are both parties to the Rome Statute¹³⁸ and are unwilling and unable to investigate and prosecute gender-based violence by gang members.¹³⁹

The ICC is a permanent, independent, international court that investigates, prosecutes, and tries individuals charged with the most egregious crimes under international law.¹⁴⁰ As noted above, the ICC only has jurisdiction over the following crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁴¹ A State can accept the ICC's jurisdiction over these crimes by becoming a party to the Rome Statute.¹⁴² A case can appear before the ICC if: 1) a State party refers the case to the Office of the Prosecutor;¹⁴³ 2) the UN Security Council refers the case to

138. Guatemala deposited its instrument of accession to the Rome Statute on April 2, 2012, and Honduras deposited its instrument of ratification of the Rome Statute on July 1, 2002. *See Guatemala*, INT'L CRIM. CT., <https://asp.icc-cpi.int/states-parties/latin-american-and-caribbean-states/guatemala> [<https://perma.cc/3MVW-LZEW>] (last visited Mar. 18, 2024); *Honduras*, INT'L CRIM. CT., <https://asp.icc-cpi.int/states-parties/latin-american-and-caribbean-states/Honduras> [<https://perma.cc/S6JA-BGDH>] (last visited Mar. 18, 2024).

139. Women's organizations in Honduras report that more than ninety percent of reported femicides go unpunished and the criminal justice system ignores widespread violence against women. While over 7,041 reports of murder, infanticide, parricide, and homicide filed between 2008 and 2019 had female victims, only thirty cases of femicide have been prosecuted since 2019. *See Herrera, supra* note 3. In Guatemala, while the police received 11,449 complaints for physical or sexual violence against women in the first ten months of 2015, there were only 527 convictions. Impunity for domestic violence was even higher, with 29,128 reports in the first seven months of 2015 and just 141 convictions to date two months later. *See THE ADVOCS. FOR HUM. RTS., supra* note 3.

140. *See* INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 9 (2020) [hereinafter Understanding the ICC], <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> [<https://perma.cc/57UU-DMU5>].

141. *See supra* Part III; Rome Statute, *supra* note 45, art. 5.

142. *See* Rome Statute, *supra* note 45, art. 12.

143. *See* Rome Statute, *supra* note 45, art. 13(a).

the Office of the Prosecutor;¹⁴⁴ or 3) the Office of the Prosecutor initiates an investigation on the office's own motion and receives authorization from the Pre-Trial Chambers.¹⁴⁵ Once a case is referred to the ICC, the Prosecutor's office will determine whether the ICC has jurisdiction over the alleged crimes and contact the relevant State party if they intend to initiate an investigation.¹⁴⁶ During an investigation, the Prosecutor's office will collect evidence from reliable sources, and if they find sufficient evidence that a specific individual bears criminal responsibility, they will request the Pre-Trial Chamber to issue summonses to appear or warrants of arrest.¹⁴⁷ Since the ICC does not have a police force, it is the responsibility of the State party to enforce the warrant for arrest, which they are legally obligated to do under the Rome Statute.¹⁴⁸ Once the individual is arrested by the State authorities, they are sent to the ICC and held at the Detention Center in the Hague.¹⁴⁹ Then, the Pre-Trial Chambers have a hearing to confirm the charges.¹⁵⁰ Once the charges are confirmed, the Trial Chambers will hold a trial where the prosecution and the defense can present their case.¹⁵¹ If the individual is convicted, the ICC may impose a penalty of up to a lifetime prison sentence that would be served in the perpetrator's home country. The ICC may also impose other penalties such as fines or forfeiture of proceeds from the crime.¹⁵²

One of the biggest potential challenges for an ICC prosecution of Salvadorian *maras* is that the ICC depends on the cooperation of the Salvadorian government to arrest gang members. Critics may argue that an ICC prosecution will be ineffective because the Salvadorian government is not capable of arresting gang members; however, the Salvadorian government is capable of arresting gang members. Between March and December 2022, the Bukele administration put over 100,000 people in prison as part of a

144. *See id.* art. 13(b).

145. *See id.* arts. 13(c), 15.

146. *See* Understanding the ICC, *supra* note 140, at 31.

147. *See id.* at 32.

148. *See id.* at 36; *see also* Rome Statute, *supra* note 45, art. 89(1) ("State Parties shall ... comply with requests for arrest or surrender.").

149. *See* Understanding the ICC, *supra* note 140, at 36.

150. *See id.* at 40.

151. *See id.* at 42.

152. *See id.* at 46.

crackdown against gang violence.¹⁵³ Although it can arrest gang members, the Salvadorian government ignores gender-based violence and does not allocate sufficient resources to protect victims and ensure that these claims are investigated properly.¹⁵⁴ Therefore, if the ICC were to charge gang leaders and members with gender-based crimes against humanity, El Salvador would be able to make the arrests and would be obligated to do so under the Rome Statute.¹⁵⁵

1. Potential Benefits of an ICC Investigation for Addressing Gender-based violence by Gang Members in El Salvador

There are three main reasons why an ICC investigation or prosecution would be beneficial to address gender-based violence by gang members in El Salvador. First, an ICC prosecution adopts a more gender-sensitive and victim-oriented process than the Salvadorian domestic court system currently employs. The ICC is recognized as one of the first international legal bodies to address gender-based violence.¹⁵⁶ The Prosecutor's office has a policy of performing gender-based analysis when investigating crimes,¹⁵⁷ providing gender-sensitivity training to staff members,¹⁵⁸ and using designated experts to help investigate sexual and gender-based crimes.¹⁵⁹ While securing convictions has been challenging,¹⁶⁰ the Prosecutor's office has made significant progress in investigating and charging gender-based crimes. For

153. See Tara John, *El Salvador has arrested 2% of its adult population in its war on gangs. Other countries are taking note*, CNN (Dec 15, 2022), <https://www.cnn.com/2022/12/15/americas/el-salvador-war-on-gangs-bukele-intl-latam> [<https://perma.cc/Z3UL-X6CB>].

154. See discussion *infra* Section V.A.2.

155. See Rome Statute, *supra* note 45, art. 89(1) ("State Parties shall . . . comply with requests for arrest or surrender.").

156. See INT'L FED'N FOR HUM. RTS. (FIDH) & WOMEN'S INITIATIVES FOR GENDER JUST. (WIGJ), ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED CRIMES AT THE ICC: AN ANALYSIS OF PROSECUTOR BENSOUDA'S LEGACY 5 (2021), <https://reliefweb.int/report/world/accountability-sexual-and-gender-based-crimes-icc-analysis-prosecutor-bensouda-s-legacy> [<https://perma.cc/7522-BPUS>].

157. See OTP Policy Paper on Gender-Based Crimes, *supra* note 44, ¶ 2.

158. See *id.* ¶ 15.

159. See *id.* ¶ 14.

160. See Yvonne Dutton & Milena Sterio, *Prosecuting Gender Persecution at the ICC: Definitions, Policies, and Practices*, 46 *FORDHAM INT'L L.J.* 575, 595-96 (2023).

example, between 2014 and 2018, nearly fifty percent of the ICC's criminal charges were for sexual or gender-based crimes.¹⁶¹ Charging gang members with gender-based crimes through the ICC alone—as opposed to domestic courts—will be a significant step forward for El Salvador given the low numbers of charges for gender-based crimes brought in the country. In addition, the ICC allows victims to participate in the judicial proceedings against their attackers¹⁶² and has special measures in place to protect the identity and confidentiality of victims,¹⁶³ which is currently not possible in the Salvadorian court system. Because local authorities in El Salvador ignore gender and sexual-based violence, an ICC investigation of gang members will have a valuable impact because it will end impunity for gang members who perpetrate gender-based crimes¹⁶⁴ by creating a mechanism where these crimes will be investigated and the guilty will be held accountable.

Second, an ICC investigation will put international pressure on the Salvadorian government to take gender-based violence more seriously and implement the necessary reforms to effectively investigate gender-based crimes and protect victims. As the former president of the ICC explained, “even where the ICC’s intervention is required, it does not necessarily have to lead to trials before the ICC. An ICC investigation may instead prompt the relevant national authorities to investigate the alleged crimes in an expeditious manner and to prosecute the suspected perpetrators in domestic courts.”¹⁶⁵ During the preliminary investigation period, the Office of the Prosecutor can use the threat of launching a formal ICC investigation to prompt national authorities to take action to investigate the crimes themselves.¹⁶⁶ For example, the ICC played

161. *See id.* at 594.

162. *See* Rome Statute, *supra* note 45, art. 68(3).

163. *See* Understanding the ICC, *supra* note 140, at 54.

164. One of the purposes of establishing the ICC is “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” Rome Statute, *supra* note 45, pmb1.

165. Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, 49 U.N. CHRON., no. 4, 2012, <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> [<https://perma.cc/Q3SN-7GWV>].

166. *See ICC Prosecution Can Spur National Justice*, HUM. RTS. WATCH (May 3, 2018), <https://www.hrw.org/news/2018/05/03/icc-prosecutor-can-spur-national-justice> [<https://perma.cc/BD3J-6AXD>].

a critical role in prompting the government of Guinea to investigate crimes against humanity committed by Guinea's security forces against civilian protestors in the September 28 Stadium Massacre in 2009.¹⁶⁷ After the ICC announced that the situation was under preliminary examination, Guinea's minister of foreign affairs traveled to the Hague one week later to meet with the Office of the Prosecutor.¹⁶⁸ Four months later, just days before the ICC was scheduled to first visit Guinea, the government created a three-judge panel to investigate the crimes committed on September 28.¹⁶⁹ As such, an ICC investigation may have a similar effect in El Salvador by prompting the country to implement measures to investigate and prosecute gender-based crimes by gang members through the national court system. A preliminary ICC investigation could have this effect because the Salvadorian government will likely want to avoid the international scrutiny of the ICC launching a formal investigation.

Finally, an ICC investigation creates a pathway for victims of gender-based violence by gang members to receive reparations through the ICC Trust Fund for Victims. Article 79 of the Rome Statute called for the establishment of a trust fund to benefit the victims of crimes that fall within the jurisdiction of the ICC.¹⁷⁰ In 2002, the Assembly of State parties to the Rome Statute created the Trust Fund for Victims to provide reparations, which include mental health services, physical rehabilitation, and material support for victims of crimes against humanity which fall under the jurisdiction of ICC.¹⁷¹ The Trust Fund for Victims can provide reparations to victims even if the ICC investigation does not result in a conviction.¹⁷² For example, after the ICC opened an investigation into alleged war crimes and crimes against humanity in the Central African Republic, the Trust Fund for Victims

167. See HUM. RTS. WATCH, *PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE LESSONS* (2018), <https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and> [<https://perma.cc/35YT-HTVQ>].

168. See *id.*

169. See *id.*

170. See Rome Statute, *supra* note 45, art. 79.

171. See *id.*; see also *About Us*, THE TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/about/vision> [<https://perma.cc/GH2C-4NZN>] (last visited Feb. 17, 2024).

172. See *Understanding the ICC*, *supra* note 140, at 55.

launched a five-year reparations program in February 2021 to provide medical and psychological care, food, housing, education, and economic support to victims of sexual violence and their families in Bangui.¹⁷³ As of December 2022, the Trust Fund for Victims program has delivered direct services to 8,484 individuals, including 6,777 survivors of sexual or gender-based violence, in the Central African Republic.¹⁷⁴ If the ICC investigates gang leaders for gender-based violence in El Salvador, the Trust Fund for Victims can implement a similar reparations program and provide aid and services directly to victims of these crimes.

2. Admissibility under the ICC: El Salvador is Unwilling and Unable to Investigate and Prosecute Gender-based Violence by Gang Members.

The ICC has jurisdiction over gender-based crimes committed by gang members in El Salvador because El Salvador is unwilling and unable to investigate and prosecute these crimes. Since the ICC is not intended to interfere with or replace national courts, the ICC “can only intervene where a State is unable or unwilling to genuinely carry out the investigation and prosecute the perpetrators.”¹⁷⁵ To determine whether a State is unwilling to investigate or prosecute a specific case, the ICC considers whether the State has adopted a national policy shielding the perpetrator from criminal liability;¹⁷⁶ whether there is unjustified delay in the proceedings that is “inconsistent with the intent to bring the person concerned to justice;”¹⁷⁷ and whether the proceedings are being conducted independently or

173. See *Central African Republic Background*, THE TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/locations/central-african-republic> [<https://perma.cc/EX2Q-HNEJ>](last visited Feb. 17, 2024).

174. See THE TRUST FUND FOR VICTIMS, CENTRAL AFRICAN REPUBLIC 6 (2022), https://www.trustfundforvictims.org/sites/default/files/Updated%20info-CAR-MBQ3-Q4%202022_0.pdf [<https://perma.cc/KCV9-Q33Y>].

175. Understanding the ICC, *supra* note 140, at 6.

176. See Rome Statute, *supra* note 45, art. 17(2)(a).

177. *Id.* art. 17(2)(b).

impartially.¹⁷⁸ To determine whether a national court is unable to investigate or prosecute a particular case, the ICC considers “whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”¹⁷⁹

Focusing on the specific context of El Salvador, gender-based violence by gang members is admissible under the ICC because El Salvador is a party to the Rome Statute,¹⁸⁰ and it is unwilling and unable to prosecute or investigate gender-based crimes. While El Salvador does have laws that prohibit certain forms of gender-based violence,¹⁸¹ these laws are largely unenforced due to prevalent patriarchal norms that promote male domination and treat women and girls as property.¹⁸² Six out of ten Salvadorian women over the age of fifteen have experienced some form of sexual violence in their lifetime;¹⁸³ yet, the Salvadorian government has failed to effectively prosecute violence against women. Approximately seventy-five percent of femicide cases are never prosecuted, and only five percent of all violence against women cases result in convictions.¹⁸⁴ The judicial system gives little credibility to female victims’ statements—resulting in a low conviction rate and impunity for perpetrators.¹⁸⁵

Salvadorian women face significant barriers to reporting violence to the police and accessing the judicial system. While Salvadorian women’s organizations estimate that sixty-eight

178. *See id.* art. 17(2)(c).

179. *Id.* art. 17(3).

180. El Salvador deposited its instrument of ratification of the Rome Statute on March 3, 2016. *See El Salvador*, INT’L CRIM. CT., <https://asp.icc-cpi.int/states-parties/latin-american-and-caribbean-states/El-Salvador> [<https://perma.cc/YFK9-X49W>] (last visited Feb. 15, 2024).

181. *See* THE ADVOCS. FOR HUM. RTS., *supra* note 89, ¶¶ 10–14.

182. *See* Expert Declaration from Eric Hershberg to CRGS, *supra* note 84, ¶ 66.

183. *See* THE ADVOCS. FOR HUM. RTS., EL SALVADOR’S COMPLIANCE WITH THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 3 (2022), https://www.theadvocatesforhumanrights.org/Res/ElSalvador_CAT_AHR.pdf [<https://perma.cc/59WF-6E3F>].

184. *See* WOMEN & GIRLS EMPOWERED, *supra* note 3, at 20.

185. *See* Inter-Am. Comm’n on Hum. Rts., *Access to Justice for Women Victims of Sexual Violence: Education and Health*, OEA/Ser.L./V/II., doc 65, ¶ 150 (Dec. 28, 2011), <http://www.oas.org/en/iachr/women/docs/pdf/SEXUALVIOLENCEEducHealth.pdf> [<https://perma.cc/NF5C-GJ6L>].

percent of women older than the age of fifteen suffered sexual violence, only 5.3% sought help due to women's distrust of government institutions.¹⁸⁶ Women are often reluctant to come forward against their abusers because of societal pressures, lack of faith in the justice system, and fear of retribution from male relatives or gang members for going to the police.¹⁸⁷ Many women are discouraged from reporting gender-based violence because of widespread social acceptance of domestic violence and sexual assault,¹⁸⁸ as well as the social perception that domestic laws are not enforced and cases will not be adequately investigated and prosecuted.¹⁸⁹ Institutional bureaucracy and lack of judicial guarantees are also significant barriers to access to justice for women.¹⁹⁰

When women do come forward to the police, the police fail to take action to investigate the complaint or to protect the victims and their families.¹⁹¹ Furthermore, victims of gender-based violence put themselves and their families in danger when they report crimes to the police because gang members may be able to identify them.¹⁹² An ineffective court system allows perpetrators to find out when victims have gone to the police, thus making it easier for the perpetrators to seek retaliation against those victims.¹⁹³ Many Salvadorian women also reported that local police were often connected with gang members, and that information reported to the police was not kept confidential.¹⁹⁴ Therefore, gender-based crimes by gang members are admissible under the ICC because the Salvadorian government is unwilling and unable to investigate and prosecute these crimes. The UN Security Council

186. See U.S. DEP'T OF STATE, *supra* note 18.

187. See WOMEN & GIRLS EMPOWERED, *supra* note 3.

188. See U.S. DEP'T OF STATE, EL SALVADOR 2016 HUMAN RIGHTS REPORT, §6, at 21 (2017), <https://www.state.gov/wp-content/uploads/2019/01/El-Salvador-1.pdf> [<https://perma.cc/P46W-G2EL>].

189. See *id.* §6, at 21–22.

190. See THE ADVOCES. FOR HUM. RTS., EL SALVADOR: COMPLIANCE WITH THE INTERNATIONAL COVENANT ON ECONOMIC AND SOCIAL RIGHTS (CESCR) ¶ 17 (2022), https://www.theadvocatesforhumanrights.org/Res/ElSalvador_CESCR_AHR.pdf [<https://perma.cc/5MK6-98UJ>].

191. See THE ADVOCES. FOR HUM. RTS., *supra* note 183, ¶ 13 (referencing interviews conducted between 2018–2022).

192. See THE ADVOCES. FOR HUM. RTS., *supra* note 89, ¶¶ 20–21.

193. See THE ADVOCES. FOR HUM. RTS., *supra* note 183, ¶ 14.

194. See *id.* ¶ 13 (referencing interviews conducted between 2018–2022).

should refer the issue of gender-based violence by gang members in El Salvador to the ICC so gang leaders can be investigated and prosecuted for crimes against humanity.

3. Gang Leaders Can be Prosecuted by the ICC for Gender-based Violence Committed by Gangs Under the Doctrine of Command Responsibility Under Article 28(a)

Gang leaders should be held individually liable for gender-based crimes committed by their subordinates under the doctrine of command responsibility. Under Article 28(a), “[a] military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of [the ICC] committed by forces under his or her effective command and control, or effective authority and control as the case may be.”¹⁹⁵ Article 28(b) further states that “[w]ith respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates.”¹⁹⁶ The distinction between the generic term “superior” from a military commander or government official indicates that individual criminal responsibility also applies to civilian superiors in positions of authority.¹⁹⁷ A superior is individually criminal responsible when they knowingly order or fail to take reasonable steps to prevent or punish such crimes by persons under the superior’s authority.¹⁹⁸ For the purposes of Article 28, a superior does not need to be a member of the military or the government but can be a civilian in a position of authority.

Gang leaders qualify as superiors under Article 28 because they exercise effective authority and control over their subordinates. The two largest gangs in El Salvador, MS-13 and MS-18, are organized into *clicas*, which are units that control a

195. Rome Statute, *supra* note 45, art. 28(a).

196. *Id.*

197. *See* Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 356 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16 1998).

198. *See id.*

small territory, and the local leaders of the *clicas* are called *ranfleros*.¹⁹⁹ For MS-13, the *ranfleros* of the nine most powerful *clicas* form the *Comisión*, which functions as the gang's leadership and can order death sentences for gang members that are guilty of insubordination.²⁰⁰ Most of the gang's higher leadership operates out of prisons—communicating with *ranfleros* through mobile telephone.²⁰¹ Similarly, for MS-18, the *ranfleros* of the fifteen most powerful *clicas* form *the Rueda de Barrio*, or leadership of the gang.²⁰² While in MS-18 there is not a chain of command for all members in Central America, there is a chain of command within the *clicas*, with *llaveros*, who are close partners of the leaders, and *Solados* who are subordinates of the *llaveros*.²⁰³ Within the gangs, there is also hierarchy based off seniority. For example, MS-13 members with the longest experience in the gang are called *Maras permanentes* and have more power, while *Novatos* or *Simpatizantes* are rookies who have less power.²⁰⁴ There are even specific gang members called *sicarios* or *gatilleros* who are responsible for killings.²⁰⁵

Furthermore, gangs have demonstrated that the hierarchical chain of command is effective and allows them to act in unison. In 2020, investigative journalists at *El Faro* uncovered that the Bukele administration negotiated with MS-13 to give incarcerated gang members privileges in exchange for reducing the homicide rate and providing electoral support in the 2021 presidential election.²⁰⁶ While at first the truce decreased the homicide rates, between March 25 and March 27, 2022, MS-13 and MS-18 gang members killed eighty-seven civilians to signal to the Bukele administration that they wanted

199. See BELLAL, *supra* note 33, at 68–69.

200. *See id.* at 69.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.* at 68.

205. *See id.*

206. See Carlos Martínez et al., *Bukele Has Been Negotiating with MS-13 for a Reduction in Homicides and Electoral Support*, EL FARO (Sept. 6, 2020), https://elfaro.net/en/202009/el_salvador/24785/Bukele-Spent-A-Year-Negotiating-with-MS-13-for-a-Reduction-in-Homicides-and-Electoral-Support.htm [<https://perma.cc/X8Q4-S2P7>].

to change the terms of the deal.²⁰⁷ Similarly in 2015, MS-13 and MS-18 organized a national transportation strike, which paralyzed 142 bus routes, to force the government to enter into negotiations with them and threatened to kill any public transportation workers who refused to obey the gangs' orders.²⁰⁸ Gangs coordinate to exert control over local elections by negotiating with candidates to provide electoral support in exchange for leverage over future decision making.²⁰⁹ And, as this Note previously mentioned, gangs exert significant control over neighborhoods by forcing civilians to pay *renta*, controlling movement across checkpoints in their territories, and forcing people to leave their homes if they do not obey the gang's orders. The ability to negotiate truces, influence electoral politics, and systematically extort and attack the civilian population demonstrates the high level of coordination within and among gangs. Therefore, gang leaders should be held responsible for gender-based crimes committed by gang members under their chain of command because they intentionally encourage these crimes to increase their territory, punish enemies, and exert control over the civilian population.²¹⁰

As discussed above in Part IV, gender-based violence is used strategically and systematically by gangs to control women's bodies and instill fear into the broader community. The unofficial motto of M-13 is "kill, rape, control."²¹¹ Gangs use sexual violence to punish civilians who do not comply with their demands.²¹² These practices are sanctioned by gang leaders as part of a widespread attack against the civilian population. Therefore, gang leaders should be prosecuted by the ICC for gender-based crimes committed by their subordinates.

207. See Diana Roy, *Why Has Gang Violence Spiked in El Salvador?*, COUNCIL ON FOREIGN RELATIONS (May 4, 2022), <https://www.cfr.org/in-brief/why-has-gang-violence-spiked-el-salvador-bukele> [https://perma.cc/Y2YL-84ME].

208. See El paro que demuestra el poder de las maras en El Salvador [*The strike that demonstrates the power of gangs in El Salvador*], BBC NEWS MUNDO (July 29, 2015), https://www.bbc.com/mundo/noticias/2015/07/150729_america_latina_el_salvador_maras_pandillas_paro_transporte_aw [https://perma.cc/2TEF-ZUTS].

209. See APPLEBAUM & MAWBY, *supra* note 79, at 4.

210. See Elissa Bookbinder, *Crimes Committed Against Civilian Population by Transnational Criminal Organizations Should Be Considered Crimes Against Humanity and Leaders Prosecuted by ICC*, 73 WILLAMETTE J. INT'L L. & DISP. RESOL. 255, 263 (2016).

211. See APPLEBAUM & MAWBY, *supra* note 79, at 5.

212. See *id.*

In summary, the ICC has effective jurisdiction to prosecute crimes against humanity by gang members in El Salvador because the Salvadorian government is unwilling and unable to prosecute these crimes. In addition, individual gang leaders can be prosecuted for these crimes against humanity under the doctrine of command responsibility because of the hierarchical chain of command within gangs. An investigation by the ICC can significantly benefit victims by creating a pathway for perpetrators to be held criminally liable for gender-based crimes, which is currently impossible in El Salvador. An investigation would also allow victims to access remedies and services through the Trust Fund for Victims. Furthermore, an ICC investigation will bring the issue greater international attention and put additional pressure on the Salvadorian government to make the judicial and policy reforms necessary to effectively prosecute gender-based violence in the domestic legal system. Therefore, the UN Security Council should refer gender-based crimes by gang members in El Salvador to be investigated by the ICC. The next section will discuss how the UN Human Rights Council can facilitate holding gang members accountable for crimes against humanity by establishing an independent international fact-finding mission to document ongoing human rights abuses by gangs in El Salvador and the other Northern Triangle countries.

B. Establishing a UN International Fact-finding Mission

The UN Human Rights Council should establish an international fact-finding mission on gender-based violence by gang members in the Northern Triangle countries. In a fact-finding mission, the Human Rights Council appoints an independent group of experts to investigate and document serious violations of human rights and to make recommendations based on their factual and legal findings.²¹³ For the Northern Triangle countries, a UN fact-finding mission could create accountability by bringing international attention to the severity and systemic nature of

213. See generally OHCHR, *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law Guidance and Practice* (2015), https://www.ohchr.org/sites/default/files/Documents/Publications/Col_Guidance_and_Practice.pdf [<https://perma.cc/FBD6-8HGQ>].

gender-based violence by gang members across the region. A comprehensive historical record of the ongoing crimes against humanity is a critical first step to promoting accountability. Without the necessary facts and evidence, human rights activists cannot effectively identify who is responsible for crimes and advocate for change.

A UN fact-finding mission would also help grassroots civil society organizations in the Northern Triangle countries. Local organizations that serve victims of gender-based violence do not have the necessary resources to document the full extent of gender-based violence by gang members. In collaboration with civil society organizations, experts working for the international fact-finding mission could interview witnesses, review document, photo, and video evidence, and prepare a comprehensive report of gender-based violence by gang members.²¹⁴ This report can then be used by civil society organizations to support their work and prepare advocacy materials. The report will also bring international media attention to their work which can help with fundraising and raising public awareness.

Previously, UN fact-finding missions have been an effective tool to bring international attention to gender-based and sexual violence by non-State actors such as gangs. For example, the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela (the Venezuela mission) conducted a thorough investigation of sexual violence and exploitation by armed criminal groups against women, indigenous persons, and LGBTQ+ individuals in gold mining areas of the Bolívar State.²¹⁵ The Venezuela mission's 2022 report highlighted how the *El Topo sindicato*, an armed criminal group, exerted *de facto* control over large mining areas of the Bolívar State²¹⁶ and coerced women and girls who worked in the mines into sexual relations or slavery under threats of violence.²¹⁷ Prior to the Venezuela mission, these

214. *See id.* at 42.

215. *See* Human Rights Council, Rep. of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, U.N. Doc. A/HRC/51/43, ¶ 113 (Sept. 20, 2022) [hereinafter *Venezuela Fact-Finding Report*], <https://www.ohchr.org/en/hr-bodies/hrc/ffmv/report-ffmv-september2022> [<https://perma.cc/74HM-82YH>].

216. *See id.* ¶ 87.

217. *See id.* ¶ 113.

ongoing crimes against humanity by armed criminal groups were almost completely overlooked by the international community.

Similarly in the context of El Salvador, an international fact-finding mission can document and investigate sexual and gender-based violence committed by gang members that constitute crimes against humanity under international criminal law. The Human Rights Council can appoint a body of independent experts to conduct interviews with victims and gather facts about specific instances of sexual violence by gang members. Establishing an international fact-finding mission would help strengthen human rights protections for Salvadorians by providing a historical record of serious violations of international criminal law and potentially influencing changes in law and practice to advance human rights.²¹⁸ A fact-finding mission would also help ensure accountability for serious violations of human rights law, which can help deter future violations and provide a pathway for victims to seek justice and redress.²¹⁹

C. Recognizing Gender-based Violence by Gang Members as Crimes Against Humanity Would Trigger State Obligations Under the Proposed International Treaty on Crimes Against Humanity

While there is an absolute prohibition on crimes against humanity under customary international law, there is currently no specific treaty on crimes against humanity. In response to this gap in international law, the International Law Commission submitted the Draft articles on Prevention and Punishment of Crimes Against Humanity (the Draft Treaty).²²⁰ The UN General Assembly will consider the Draft Treaty in Fall 2024.²²¹ A specific treaty on crimes against humanity will promote accountability by creating an international monitoring body to ensure that States are upholding their obligations to prevent, investigate, and prosecute crimes against humanity. If adopted, the United Nations could create a treaty body to monitor the

218. See OHCHR, *supra* note 213, at 7.

219. See *id.*

220. See *UN Decision to Advance Crimes Against Humanity Treaty*, HUMAN RIGHTS WATCH (Nov. 18, 2022), <https://www.hrw.org/news/2022/11/18/un-decision-advance-crimes-against-humanity-treaty> [<https://perma.cc/JU9B-D5L4>].

221. See *id.*

implementation of the provisions by individually reviewing State parties every few years to see if they are complying with the treaty.²²²

If acts of gender-based violence by gang members are considered crimes against humanity, the adoption of the Draft Treaty will help in two ways. First, if the Northern Triangle countries adopt the proposed articles as they currently stand, the Draft Treaty will place more concrete obligations on El Salvador, Honduras, and Guatemala to address crimes against humanity by gang members and leaders. For instance, the Draft Treaty has specific provisions requiring State parties to adopt legislation to prevent crimes against humanity,²²³ hold superiors criminally responsible for crimes against humanity committed by their subordinates,²²⁴ and to protect victims from retaliation for reporting crimes against humanity.²²⁵ While the Northern Triangle countries are already obligated to prevent crimes against humanity under customary international law, having specific treaty language stipulating the requirements of upholding this obligation will encourage national governments to take more concrete actions to address crimes against humanity by gang members.²²⁶

A major weakness of implementing a specific treaty on crimes against humanity is that, even if the relevant State parties ratify the treaty, there is no enforcement mechanism to make the State parties uphold their obligations. However, adopting the treaty will create a monitoring mechanism where El Salvador will be scrutinized by the international community for the actions it takes to address gender-based crimes against humanity by gang members. If the Draft Treaty is adopted, the

222. For the core human rights law treaties, there are treaty bodies which monitor that State parties are complying with the treaty. See generally *The United Nations Human Rights Treaty System Fact Sheet No. 30/Rev.1*, U.N. HUM. RTS. OFF. HIGH COMM'R (Aug. 1, 2012), <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet30Rev1.pdf> [<https://perma.cc/6BTQ-2XVL>].

223. See Draft Articles on Prevention and Punishment of Crimes against Humanity, with Commentaries, art. 4, U.N. Doc. A/74/10 (2019) [hereinafter ILC Draft Articles].

224. See *id.* art. 6.

225. See *id.* art. 12.

226. See generally *Q&A: Towards a Crimes against Humanity Treaty*, HUMAN RIGHTS WATCH (Oct. 7, 2022), <https://www.hrw.org/news/2022/10/06/qa-towards-crimes-against-humanity-treaty> [<https://perma.cc/J29K-A6GW>].

United Nations could create an independent committee that would individually review State parties every few years to see whether they are complying with the treaty. This means that government officials would have to attend the committee review session and hear the committee's recommendations on what they should be doing to prevent crimes against humanity. The committee would also publish a report documenting how the State party has failed to comply with the treaty and what it should do to remedy the situation. While State parties could not be forced to adopt the committee's recommendations, the process promotes transparency and creates a process where government officials must answer for why they are not doing more to address gender-based violence by gang members.

Second, the Draft Treaty would also place an obligation on other State parties, such as the United States, not to send women, girls, and LGBTQ+ persons back to the Northern Triangle countries where they will likely be victims of gender-based crimes against humanity by gang members under the principle of non-refoulement. Under Article 5(1) of the Draft Treaty, "no State shall expel, return (refouler), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity."²²⁷ Focusing on the context of El Salvador, this means that the United States, if it ratifies the Draft Treaty, could not deport women, children, and LGBTQ+ persons who are escaping gender-based violence by gang members back to El Salvador. It is often extremely dangerous for asylum-seekers who are deported back to El Salvador:

Human Rights Watch identified 138 cases in which people deported by the United States to El Salvador in the past seven years had been killed, and an additional seventy cases in which people suffered severe abuse, including sexual assault or torture, after being deported from the United States to El Salvador.²²⁸

227. ILC Draft Articles, *supra* note 223, art. 5(1).

228. See HRW Every Day I Live in Fear Report, *supra* note 26, at 30.

It can be particularly dangerous for women and LGBTQ+ persons.²²⁹ LGBTQ+ deportees are likely to be targeted by gangs because many of them have no family to protect them during the reintegration process, and gangs perceive them as vulnerable.²³⁰ Therefore, under Article 5(1) of the Draft Treaty, the United States or any other State parties could not deport victims of gender-based violence by gang members back to El Salvador because there are substantial grounds to believe that they would be subjected to crimes against humanity upon their return. In summary, if acts of gender-based violence by gang members are considered crimes against humanity, State parties to the Draft Treaty will have concrete international obligations to prevent these crimes against humanity and protect potential victims, such as the obligation to not return victims fleeing gender-based violence to their home countries.

VI. CONCLUSION

In conclusion, acts of gender-based violence by gang members in El Salvador should be considered crimes against humanity under international criminal law because this would bring greater international attention to the severity and scope of gender-based gang violence. Furthermore, it would allow gang leaders to be held individually responsible for sexual and gender-based crimes committed by their subordinates. Acts of gender-based violence by gang members qualify as crimes against humanity under Article 7 of the Rome Statute because gang members commit various sexual and gender-based crimes as part of a widespread or systematic attack against the civilian population. These crimes include rape, enforced prostitution, sexual slavery, gender-based persecution against LGBTQ+ persons, femicide, and forced displacement. Gangs exert significant territorial control over municipalities in El Salvador and have a hierarchical chain of command. Gangs intentionally commit these egregious crimes against women, girls, and LGBTQ+ persons to further an organizational policy of instilling

229. See HUMAN RIGHTS WATCH, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORIANS TO DEATH AND ABUSE 46 (Feb. 5, 2020), https://www.hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf [<https://perma.cc/2FT3-SHLA>]. See generally *id.*

230. See *id.* at 23–24.

fear in the local community to force civilians to comply with the gang's authority. These crimes against humanity are so pervasive that it causes high levels of forced displacement from El Salvador as well as the other Northern Triangle countries.

Recognizing acts of gender-based violence as crimes against humanity under international criminal law will allow the international community to take more concrete steps to address the issue. For example, the ICC can investigate and prosecute gang leaders for crimes against humanity, and the UN Human Rights Council can establish an international fact-finding mission to document ongoing crimes against humanity by gang members. Finally, States will be obligated to provide victims with additional protections under the Draft Treaty such as providing remedies through the domestic judicial system or prohibiting States from returning victims back to their home countries where they will likely be revictimized. Acknowledging gender-based crimes by gangs as crimes against humanity is a critical step to fulfill the ICC's mission to "put an end to impunity for the perpetrators of the most serious crimes of concern to the international community" and to provide justice for victims.²³¹

231. Understanding the ICC, *supra* note 140 at 6; *see also* Rome Statute, *supra* note 45, pmbl.

