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The United States--El Salvador Extradition Treaty

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The United States–El Salvador Extradition Treaty: A Dated Obstacle in the Transnational War Against Mara Salvatrucha (MS-13)

ABSTRACT

This Note discusses the dramatic proliferation of the Mara Salvatrucha (MS-13) over the last two decades, primarily focusing on the efforts of the United States and El Salvador to bring the notorious MS-13 to justice. The United States' deportation policy in the mid-1990s and its impact on the presence of MS-13 in El Salvador and the United States set the backdrop for an analysis of the current weapons available to combat the gang's transnational threat. As the international implications of MS-13's actions expanded in the late 1990s, the United States and El Salvador began to charter a number of bilateral and multilateral law enforcement initiatives to address the issue. This Note examines how the antiquated structure and underlying substantive law of the United States–El Salvador Extradition Treaty threaten the progress made by these initiatives, evaluates the United States' current attempt to address this threat through the UN Convention Against Transnational Organized Crime, and suggests a means to overcome an additional barrier to extradition created by El Salvador's constitutional ban on life imprisonment.

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I. INTRODUCTION

"First is God, then your mother, then your gang. You live for God, you live for your mother, you die for your gang."[1] Brenda Paz, a former member of Mara Salvatrucha (MS-13), chillingly explained the gang's code to Federal Bureau of Investigation (FBI) agents a short time before she was brutally stabbed to death on the banks of the Shenandoah River in Virginia.[2] After discovering that Paz turned government informant, three MS-13 members—close friends of Paz—were "tapped" by the gang's leadership to carry out her murder.[3] Paz

1. *National Geographic Explorer: World's Most Dangerous Gang* (National Geographic Channel television broadcast Feb. 12, 2006) [hereinafter *National Geographic Explorer*].
2. *Id.*
3. *Id.*

was seventeen years old and pregnant with her first child at the time of her death.[4]

In 2008, the FBI reported that MS-13—labeled America's most dangerous gang[5]—was operating "in at least 42 states . . . and ha[d] about 6,000 to 10,000 members nationwide."[6] Currently, there are over 60,000 MS-13 members located in ten different nations, across two continents.[7] Over the last decade, law enforcement in the United States and El Salvador, recognizing the transnational threat posed by MS-13, joined forces to bring the gang to justice. This effort to control MS-13's expansion focuses largely on bilateral and multilateral initiatives to promote information sharing and enhance law enforcement training in the United States and Central America.[8] While these transnational initiatives continue to provide key weapons in the war against MS-13, the outdated and restrictive extradition treaty currently in effect between the United States and El Salvador threatens their success.

This Note addresses the structural flaws in the 1911 United States–El Salvador Extradition Treaty[9] (1911 Treaty) currently impeding the extradition of MS-13 members from El Salvador to the United States and highlights the provisions in El Salvador's Constitution that may create additional barriers to extradition. This Note then evaluates the United States' current attempt to address these issues through the UN Convention Against Transnational Organized Crime[10] (Organized Crime Convention) and suggests how strategic interpretation could help the United States overcome the additional obstacles to extradition created by the El Salvador Constitution.

Focusing mainly on anti-gang efforts in the United States and El Salvador, Part II provides a foundation for understanding how and why MS-13 evolved into an international threat. Part III analyzes

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4. *Id.*; *see generally* SAMUEL LOGAN, THIS IS FOR THE MARA SALVATRUCHA: INSIDE THE MS-13, AMERICA'S MOST VIOLENT GANG (2009) (detailing Brenda Paz's membership in MS-13 from the time she was beaten into the gang until her murder at the hands of fellow gang members).

5. LOGAN, *supra* note 4; *see also National Geographic Explorer*, *supra* note 1 (describing MS-13 as the "most violent gang in America").

6. *The MS-13 Threat: A National Assessment*, FED. BUREAU OF INVESTIGATION (Jan. 14, 2008), http://www.fbi.gov/page2/jan08/ms13_011408.html [hereinafter *MS-13 Threat*].

7. *See* Press Release, Fed. Bureau of Investigation, Going Global on Gangs: New Partnership Targets MS-13 (Oct. 10, 2007) [hereinafter FBI Going Global], *available at* http://www.fbi.gov/page2/oct07/ms13tag101007.htm (describing the geographic reach of MS-13).

8. *See infra* Part II.G.

9. Treaty of Extradition, U.S.–El Sal., Apr. 18, 1911, 37 Stat. 1516 [hereinafter 1911 Treaty].

10. U.N. Convention Against Transnational Organized Crime, Sept. 29, 2003, 2225 U.N.T.S. 209 [hereinafter Organized Crime Convention].

the 1911 Treaty in the context of U.S. extradition requests for MS-13 members in El Salvador. More specifically, Part III.A addresses the limitations inherent in the 1911 Treaty's list format as compared to the modern dual criminality approach. Part III.B discusses El Salvador's prohibitions on (1) extraditing Salvadoran nationals—repealed by constitutional amendment in 2000,[11] (2) the death penalty, and (3) life imprisonment[12] as potential impasses in the United States' attempt to circumvent the 1911 Treaty through the Organized Crime Convention.

Part IV evaluates the Organized Crime Convention as a mechanism for the United States to evade the restrictive language of the 1911 Treaty. In particular, Part IV.A discusses why the El Salvador Supreme Court of Justice should permit extraditions of MS-13 members requested under the Organized Crime Convention. Part IV.B suggests the use of strategic interpretation to overcome a key constitutional barrier to MS-13 extraditions—El Salvador's ban on life imprisonment.

II. HISTORY AND EXPANSION OF THE MARA SALVATRUCHA (MS-13)

The Mara Salvatrucha, often characterized as "the world's most dangerous gang," began, somewhat paradoxically, on the playground of Seoul International Park in the Pico-Union neighborhood of Los Angeles, California.[13] Throughout the 1980s, with El Salvador embroiled in a lethal civil war, hundreds of thousands of Salvadorans fled to the United States seeking refuge.[14] Of the estimated 701,000 Salvadoran immigrants, a substantial number sought sanctuary in southern California.[15] Characterized by illegal status in the United States, a majority of the Salvadoran newcomers remained in poverty, constantly fearing arrest and deportation.[16]

On the callous streets of Los Angeles, the alienated Salvadorans once again found themselves entrenched in a war. The established

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11. DEP'T OF STATE, THIRD REPORT ON INTERNATIONAL EXTRADITION (2000), *available at* http://www.state.gov/s/l/16164.htm.

12. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 27 (1983) ("Sólo podrá imponerse *la pena de muerte* en los casos previstos por las leyes militares durante el estado de guerra internacional. Se prohíbe la prisión por deudas, *las penas perpetuas*, las infamantes, las proscriptivas y toda especie de tormento." (emphasis added)).

13. *National Geographic Explorer*, *supra* note 1.

14. James LeMoyne, *Salvadorans Stream into U.S., Fleeing Poverty and Civil War*, N.Y. TIMES, Apr. 13, 1987, at A1.

15. TOM HAYDEN, STREET WARS: GANGS AND THE FUTURE OF VIOLENCE 202 (2004).

16. JAMES DIEGO VIGIL, A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY 134 (2002).

and "turf-conscious" Mexican and African American gangs preyed on the newcomers.[17] Uniting together to provide a much-needed service—protection from the homegrown Los Angeles gangs—young Salvadoran immigrants formed the notorious Mara Salvatrucha.[18] Armed with machetes, guns, and guerilla combat training—courtesy of the civil war in El Salvador—the Mara Salvatrucha rapidly became one of the most violent gangs in Los Angeles.[19]

By the 1990s, the Pico-Union neighborhood was known as Los Angeles's "gang hotspot."[20] With rival gangs, the Mara Salvatrucha (MS-13)[21] and 18th Street—a largely Mexican-American gang—controlling Pico-Union's flourishing drug trafficking market, violence rose to a new level.[22] Battles between the two gangs over the control of territory claimed the lives of gang members and innocent bystanders alike.[23] The California prison system—where many of the MS-13 members served sentences for drug offenses and violent crimes—did not deter the violence; instead it operated more like a "finishing school" for the gang's members.[24]

A. *The United States' Initial Response to the Growing MS-13 Threat*

In 1992, as MS-13 thrived on the streets of Los Angeles, El Salvador ended its twelve-year-long civil war.[25] Thereafter, local law enforcement and the U.S. Immigration and Naturalization Service (INS) intensified their efforts to apprehend and deport gang members illegally residing in the United States.[26] The Violent Gang Task Force, formed by the INS, targeted MS-13, among other gangs, for the

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17. Sam Dealey, *America's Most Vicious Gang*, READER'S DIGEST, Jan. 2006, at 100, 102–03; *National Geographic Explorer*, *supra* note 1.

18. *See* Dealey, *supra* note 17, at 102–03 (describing how MS-13 was formed after persecution by other gangs).

19. *Id.*; *see also* VIGIL, supra note 16, at 142 (stating that police believed the gang to be one of the most violent).

20. VIGIL, *supra* note 16, at 142.

21. During the 1990s, the Mara Salvatrucha joined the southern California gang alliance and renamed itself the Mara Salvatrucha 13 (MS-13). LOGAN, *supra* note 4, at 91. The gang's leadership elected to add the number "13" to their name to show respect for and an alliance with La Eme (the Mexican Mafia), a powerful and deadly gang formed in and operated out of the California prison system. *See* Jessica M. Vaughan & Jon D. Feere, *Taking Back the Streets: ICE and Local Law Enforcement Target Immigrant Gangs*, BACKGROUNDER, Oct. 2008, at 5, http://www.cis.org/articles/2008/back1208.pdf (describing the connection of the "MS-13" name to the Mexican Mafia); *see also* FED. BUREAU OF INVESTIGATION, THE MEXICAN MAFIA 9 (1974), http://foia.fbi.gov/mafia_mexican/mafia_mexican_ part02.pdf (describing the ongoing threat from the Mexican Mafia).

22. VIGIL, *supra* note 16, at 143.

23. *Id.*

24. *National Geographic Explorer*, *supra* note 1.

25. VIGIL, *supra* note 16, at 144.

26. *Id.* at 144–45.

purpose of investigating and deporting foreign-born members living in the United States illegally as well as "[t]hose who have legal permanent residency but have committed [aggravated] felonies."[27] INS Chief Special Agent Michael Flynn acknowledged, "We are focusing on [MS-13] in particular because it is one of the most substantial and violent gangs in Southern California."[28]

To promote this effort, throughout the 1990s, Congress continuously broadened the list of "aggravated felonies" that could result in the expedited removal of illegal aliens under the Immigration and Nationality Act.[29] Most notably, in 1990, Congress added "crime[s] of violence"[30] and "illicit trafficking in any controlled substance"[31] to the list. With the Violent Gang Task Force and reformed immigration laws in play, the INS deported an estimated seventy gang members to El Salvador in 1993.[32] By January 1995, reports of gang member deportations soared to 780.[33] According to the Department of Homeland Security, Salvadoran deportations for criminal activity grew at an alarming rate throughout the remainder of the decade.[34]

B. *The Exportation of Los Angeles Gang Culture to the Streets of El Salvador*

Despite the efforts of the United States to limit the growth of MS-13, El Salvador, still recovering from a gruesome civil war, acted as an incubator for MS-13's already brutal tactics.[35] The 1992 Peace Accords, which ended the civil conflict in El Salvador, demobilized more than 30,000 Salvadoran Armed Forces Soldiers, 6,400 National Police, and 8,500 other combatants.[36] The demobilization left

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27. Tracy Wilkinson, *Gangs Find Fresh Turf in Salvador*, L.A. TIMES, June 16, 1994, at A1.

28. *Id.*

29. Casey Kovacic, *Creating a Monster: MS-13 and How United States Immigration Policy Produced "The World's Most Dangerous Criminal Gang,"* 12 GONZ. J. INT'L L. 2 (2009), available at http://www.gonzagajil.org/content/view/183/26/; *see also* 8 U.S.C. § 1228 (2006) (outlining the process and guidelines for expedited removal of illegal aliens who commit aggravated felonies).

30. Immigration Act of 1990, Pub. L. No. 101–649, § 501, 104 Stat. 4978, 5048 (1990) (codified as amended at 8 U.S.C. § 1101(a)(43)(F) (2006)).

31. 8 U.S.C. § 1101(a)(43)(B).

32. Wilkinson, *supra* note 27, at A1.

33. VIGIL, *supra* note 16, at 145.

34. In 2009, the Department of Homeland Security reported that criminal charges have led to the deportation of 28,810 Salvadoran nationals since 1999. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 97, 100, 103 (2009).

35. *National Geographic Explorer*, *supra* note 1; *see* VIGIL, *supra* note 16, at 145 (recounting how more stringent deportation tactics promoted gang activity in Latin America).

36. U.S. AGENCY OF INT'L DEV. [USAID], BUREAU FOR LATIN AM. & CARIB. AFFAIRS, OFFICE OF REG'L SUSTAINABLE DEV., CENTRAL AMERICA AND MEXICO GANG

thousands of soldiers—ideal candidates for gang recruitment—unemployed.[37] As an additional byproduct of the war, Salvadoran gangs, assisted by rampant government corruption, obtained access to a large number of firearms.[38] With few employment prospects and an abundant supply of weapons, El Salvador transformed into an "enormously fertile ground for gangs."[39]

MS-13 members deported from the United States were quick to take advantage of El Salvador's transformation by remaining active in their respective gangs.[40] Many of the MS-13 deportees, having grown up in the United States, were not fluent in Spanish or connected to their local communities.[41] As a strategy for survival, members returning to El Salvador continued their lives as Los Angeles-style gangsters.[42] Continuing the gang lifestyle was easy for those deportees who lacked criminal records in El Salvador as they were released from police custody upon arrival.[43] With their freedom, these MS-13 members expanded the gang in El Salvador.[44] Impoverished Salvadoran adolescents—already desensitized to violence by the war—were quick to romanticize the gang's way of life, making them easy recruits for the returning gang members.[45]

Adopting the Los Angeles gang structure, MS-13 members in El Salvador formed a number of dispersed cliques,[46] covering different

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ASSESSMENT 45, 50 (2006), http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf.

37. *Id.* at 50.

38. *Id.* at 51.

39. Wilkinson, *supra* note 27, at A1.

40. *Id.*

41. *Id.*

42. *Id.*

43. *National Geographic Explorer*, *supra* note 1.

44. *Id.*; *see also* HERBERT COVEY, STREET GANGS THROUGHOUT THE WORLD 117 (2003) (describing how returning gang members attracted new recruits in Latin America).

45. *See* COVEY, *supra* note 44, at 117 ("The returning youth had comparatively nice clothing, money, and the romantic gang trappings that proved attractive to the less fortunate youth of El Salvador.").

46. MS-13 organizes itself by "cliques"—"geographically-defined subgroups" who often identify themselves by a surname (e.g., "Sailors Locos Salvatruchos"), tattoo, or propensity for a particular type of crime. Vaughn & Feere, *supra* note 21, at 6. "The cliques work together to defend their turf, intimidate witnesses, collect membership dues, target law enforcement, and assist each other with recruitment drives." *Id.* Individual cliques hold meetings, often "under the guise of legitimate social events such as picnics or soccer games," to discuss recruitment and gang targets. *Id.* at 9. Each clique expects its members to follow MS-13's code of conduct (support fellow gang members, do not talk to the police, etc.), punishing any member who fails to do so. *Id.* This punishment can range from a beating lasting thirteen seconds to death. *Id.* In 2008, federal law enforcement agencies reported "signs of increasing contact and synchronization among MS-13 chapters," which may signal an expansion of the MS-13 hierarchy beyond the clique level. *Id.*

neighborhoods throughout the country.[47] These cliques earned their money through drug trafficking—often acting as intermediaries for Colombian drug cartels—extortion, and other criminal endeavors.[48] For instance, in 1994, Salvadoran police reported that they routinely arrested gang members for trafficking drugs, stealing cars, mugging pedestrians, and loitering.[49] Other more gruesome reports document MS-13 members decapitating and dismembering victims.[50] Exemplifying this brutality, one Salvadoran gang member lamented to the *Los Angeles Times* that "the lack of easy access to cars here [in El Salvador made] it more difficult to do drive-by shootings."[51]

From 1994 to 1998, the government of El Salvador recorded 33,568 homicides (an average of 6,370 homicides per year), 70 percent of which were attributed to gangs.[52] During a visit to Los Angeles in 1999, former San Salvador Mayor Hector Silva pleaded for the United States to help El Salvador control its gang crisis.[53] Mayor Silva exclaimed, "All over San Salvador you see the graffiti of [L.A. gangs]."[54] For all intents and purposes, deportation from the United States merely provided MS-13 with an effective means for transnational expansion—an expansion that would allow the gang to become more organized, powerful, and violent.[55]

C. *El Salvador's "Firm-Hand" Approach to Gang Control*

In 2003, the Salvadoran government responded to the growing gang crisis by enacting Ley Anti Maras (Anti-Gang Laws).[56] These laws—referred to collectively as the Mano Dura (firm hand)—criminalized gang membership as an "unlawful association."[57] Pursuant to the Mano Dura, "those that communicate[d] or identif[ied] themselves with maras [gangs] by way of signs or tattoos" could receive up to sixty days in prison.[58] Within one year of their enactment, the Supreme Court of El Salvador declared the Mano Dura unconstitutional.[59] According to Judge Aida Luz Santos de

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47. USAID, *supra* note 36, at 45.
48. *Id.* at 50–51.
49. Wilkinson, *supra* note 27, at A1.
50. *National Geographic Explorer*, *supra* note 1.
51. *Id.*
52. Juan J. Fogelbach, Comment, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle to Reclaim Social Order*, 7 SAN DIEGO INT'L L.J. 223, 232 (2005).
53. Peter Y. Hong, *San Salvador's Mayor Discusses L.A.'s Importance*, L.A. TIMES, Nov. 21, 1999, at B1.
54. *Id.*
55. *National Geographic Explorer*, *supra* note 1.
56. Fogelboch, *supra* note 52, at 225.
57. *Id.*; USAID, *supra* note 36, at 52.
58. Fogelboch, *supra* note 52, at 238.
59. *Id.* at 239.

Escobar of the First Court of Execution of Measures and Minor Infractions in El Salvador:

> [T]he anti-*mara* laws violated constitutional norms and international treaties in several ways (1) youths were tried as adults; (2) homicide cases not committed by gang members had advantages over those committed by gang members; (3) the law violated the equity principle[;] (4) the law violated the presumption of innocence until the contrary is proved; and (5) the law was enforced retroactively.[60]

Shortly thereafter, the Salvadoran government enacted the *Super* Mano Dura, "an integral plan to deal aggressively with delinquents through law enforcement, as well as to provide for prevention and intervention initiatives."[61]

Pointing to official statistics, critics of the firm-hand approach view both the Mano Dura and Super Mano Dura laws as "more face than substance."[62] For instance, El Salvador recorded more than 16,000 murders between 2003 and 2007—after the enactment of the Mano Dura and Super Mano Dura laws.[63] Although gang recruitment in El Salvador has declined since the enactment of the Super Mano Dura, gang activities have become more violent, "moving towards homicide and trafficking in drugs and arms."[64] In April 2006, the Bureau for Latin American and Caribbean Affairs, located within the U.S. Agency for International Development (USAID), reported, "Ironically, the Mano Dura approaches seem to have actually strengthened the gangs as they band together to resist policing efforts."[65] These reports suggest that El Salvador's heavy-handed policies are ineffective deterrents of gang activity.

Despite this criticism, current Salvadoran President Mauricio Funes is pushing through new legislation criminalizing gang membership in the country.[66] This legislative push represents the President's response to the deadly June 2010 attacks on two passenger buses by Mara 18 gang members.[67] Critics of the anti-gang legislation note the striking similarities between the proposed

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60. USAID, *supra* note 36, at 52–53.

61. *Id.*

62. Wim Savenije & Chris van der Borgh, *Gang Violence in Central America: Comparing Anti-Gang Approaches and Policies*, THE BROKER, Apr. 2009, at 20, 22.

63. Raúl Gutiérrez, *El Salvador: Hard-Line Policies vs. Rule of Law*, INTER PRESS SERV. (Aug. 12, 2008), http://ipsnews.net/news.asp?idnews=43517.

64. USAID, *supra* note 36, at 53.

65. *Id.* at 53.

66. Diego Maya, *El Salvador to Crack Down on Gangs Following Bus Attacks*, INFOSURHOY (July 7, 2010), http://www.infosurhoy.com/cocoon/saii/xhtml/en_GB/features/saii/features/main/2010/07/14/feature-02.

67. In June 2010, Mara 18 members killed fourteen people and left sixteen others injured after they "doused [a passenger] bus [in El Salvador] with gasoline and set it ablaze." *Id.* Later that same day, the gang's members opened fire on a second bus, killing three passengers. *Id.* An investigation by the PNC determined that the gang's leadership planned the attack from prison cells in El Salvador. *Id.*

law and the Mano Dura laws the Supreme Court of Justice declared unconstitutional in 2004.[68] With the Salvadoran prison system already overcrowded and overrun with gang members,[69] it is unclear whether this revitalized firm-hand approach is a step in the right direction. Like the former Mano Dura laws, the new anti-gang legislation appears to ignore "the root of the [gang] epidemic," hindering its potential to impact gang recruitment in the country.[70]

D. *The Strain on El Salvador's Prison System*

The strain placed on the country's prison system by the Mano Dura and Super Mano Dura offers one explanation for the failure of the firm-hand approach in El Salvador. Both the Mano Dura and Super Mano Dura allow for the random apprehension and booking of gang members.[71] Prior to the enactment of these laws, Salvadoran prisons were already "the most overcrowded in the region," making it difficult for the country to implement successful rehabilitation and surveillance programs.[72] Between 2003 and 2004, while the Mano Dura was in effect, over 4,000 gang members were sent to prison—bringing El Salvador's total prison population to 12,117.[73]

Fearing the volatile prison environment, Salvadoran inmates often turn to MS-13 and other gangs for protection during their incarceration.[74] In 2005, the El Salvador Policía Nacional Civil (PNC) reported that MS-13 recruited 1,630 prisoners serving sentences in El Salvador's prison system.[75] Exemplifying this hostile prison atmosphere, on August 18, 2004, in La Esperanza—El Salvador's largest prison—the pressure amid the 3,200 inmates in the overloaded detention center hit critical mass.[76] Four hundred "members of [the] notorious street gang, Mara 18," armed with homemade grenades and knives[77]—"fashioned from broken wooden chapel benches and steel bed frames"—went to war with the other inmates.[78] Before prison guards could contain the outbreak, thirty-one inmates were killed, "some scalped and mutilated beyond

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68. *Id.*

69. *See infra* Part II.D.

70. *See* Maya, *supra* note 66 (describing the view held by critics of the legislation that it will be ineffective).

71. USAID, *supra* note 36, at 52.

72. *Id.*

73. *Id.*

74. *See El Salvador: The Gang Called the Mara Salvatrucha (MS-13)*, IMMIGRATION & REFUGEE BD. OF CAN. (Apr. 7, 2006), http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?l=e&id=450161 (noting that some gangs recruit in prisons).

75. *Id.*

76. Mary Jordan, *Central America's Gang Crisis: Prison Riots Reflect Widening Violence in Poor Nations*, WASH. POST, Sept. 17, 2004, at A1.

77. Also known in prisons as "shivs" or "shanks." *Id.*

78. *Id.*

recognition."[79] This unstable prison environment provides the perfect recruiting tool for gangs by enabling them to transform the incarceration of their members into another means of expansion.

After the riot in La Esperanza, the Salvadoran government separately housed incarcerated MS-13 members in two of its prisons.[80] By isolating the gang, the prison system—already utilized as a tool for gang recruitment—provided MS-13 leadership with an opportunity to organize[81]—an opportunity facilitated, somewhat ironically, by the prisons' guards.[82] Incarcerated MS-13 leaders were able to "call shots" (direct criminal activity) and communicate with gang members in Guatemala, Honduras, and the United States by paying the guards—who generally earn less than $300 per month—to smuggle in cellular phones.[83] In 2006, MS-13 members in El Salvador alluded to the potential existence of a "*national-level* leader for MS-13 who calls the shots from prison [in El Salvador]," demonstrating the extent of the threat posed from within the prisons.[84]

E. *El Salvador's Deployment of Military Forces to Control Gang Violence*

In May 2010, with violence in the country escalating, Salvadoran President Funes deployed 2,800 Armed Forces personnel to assist the PNC with monitoring gangs and other organized crime.[85] Assigned to high-crime-rate sectors throughout El Salvador, the military has the authority to "set up checkpoints, search vehicles, search people, and arrest individuals caught red-handed."[86] Despite this boost in public security, news reports indicated either no improvement or an increase in gang violence during the weeks following the military's deployment.[87] One Armed Forces officer reported, "When we move

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79. *Id.*

80. *See* Robert J. Lopez, Rich Connell & Chris Kraul, *MS-13: An International Franchise*, L.A. TIMES, Oct. 30, 2005, at A1 (noting segregation of MS-13 members from other prisoners to avoid bloodshed).

81. *Id.*

82. *Id.*

83. *Id.*

84. USAID, *supra* note 36, at 45 (emphasis added).

85. César Morales Colón, *Salvadoran Military Joins National Police to Fight Urban Gang Violence*, INFOSURHOY, (Aug. 8, 2010), http://www.infosurhoy.com/cocoon/saii/xhtml/en_GB/features/saii/features/main/2010/08/05/feature-01.

86. *Id.*

87. *See* Maya, *supra* note 66 (describing two attacks on passenger buses by Mara 18 gang members, occurring after the deployment of the military, as "one of the bloodiest days in the country's recent memory"); Ramita Naval, *Salvador Children Shoot to Kill*, WEEKEND AUSTRALIAN, June 12, 2010, at 20 ("For the first time since the end of the civil war 18 years ago, the Salvadoran Army has been granted powers to stop and search people and set up roadblocks. Yet the killings have continued.").

into a neighbourhood, most gangsters simply move out and start working elsewhere."[88]

A month after the military's deployment, President Funes sent additional Armed Forces soldiers into El Salvador's prisons.[89] The President's decision to deploy troops came three days after the Mara 18 attack on two passenger buses[90] detailed in Part II.C above. According to the PNC, incarcerated Mara 18 leaders organized the attack through the use of contraband cell phones.[91] Shortly after the attack, the *Latin American Herald* reported, "while 1855 cell phones were confiscated [in El Salvador's prisons] last year, many more have found their way in."[92] Arguably, if El Salvador's militant response succeeds in preventing jailed MS-13 leadership from accessing cellular devices, it could significantly impact MS-13's organizational structure[93]—weakening the top-tier leaders who continue to direct criminal activity in other countries.[94] President Funes's June 2010 deployment of Armed Forces to Salvadoran prisons,[95] if credited for nothing more, signals the country's recognition of the growing issues with gang leadership calling shots from behind prison bars.[96]

F. *The Creation and Implications of the North–South "Revolving Door"*

While MS-13 organized in the prisons of El Salvador, MS-13 cliques returned to the United States and spread across its major cities.[97] In 2005, the *Los Angeles Times* reported, "for a sizeable number of MS-13 members, deportation is little more than a taxpayer-financed visit with friends and family before returning north."[98] A typical cycle looks something like this: MS-13 members return, voluntarily or by force, to El Salvador for a few months or

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88. Naval, *supra* note 87, at 20.

89. *Salvador President Sends Troops to Patrol Prisons*, ABC NEWS, June 23, 2010, http://abcnews.go.com/International/wireStory?id=10998088.

90. *Id.*

91. Maya, *supra* note 66.

92. Marcela Sanchez, *Central America Seeks US Help Against Crime*, LATIN AM. HERALD TRIB. (Venez.), http://laht.com/article.asp?CategoryId=13303&ArticleId=358901 (last visited Jan. 9, 2011).

93. *Contra id.* ("There is a growing consensus among experts in the United Nations, Washington, and throughout Latin America that the use of military and other 'zero-tolerance' measures has largely been ineffective or worse, counterproductive for combating crime.").

94. For examples of imprisoned MS-13 leadership ordering murders in other countries, see *infra* Part II.F.

95. *Salvador President Sends Troops to Patrol Prisons*, *supra* note 89.

96. *See id.* ("President Mauricio Funes says jailed gang leaders often run criminal operations and order violence from within prisons . . . .").

97. Lopez, Connell & Kraul, *supra* note 80, at A1.

98. *Id.*

until they commit a crime, at which time they go back or flee to the United States.[99] The fugitives remain in the United States until deportation proceedings eventually return them to El Salvador.[100] Once they are in El Salvador, research shows gang members quickly plot a return to the United States and usually end up back in the country within a matter of weeks.[101] The FBI now recognizes that, in most cases, deportations only keep gang members off the streets for a few months.[102]

The 2009 National Gang Threat Assessment (NGTA), produced by the National Drug Intelligence Center, acknowledged MS-13 as "one of the largest Hispanic street gangs in the United States."[103] Drug and weapons trafficking, prostitution operations, alien smuggling, assaults, drive-by shootings, and murders are among the list of criminal activities the NGTA attributed to MS-13.[104] Although the MS-13 threat remains higher in the western part of the United States, the FBI reported that the recent flood of MS-13 members to the Southeast resulted in a regional increase in violent crime.[105] Exemplifying the FBI's observations, in June 2008, a federal grand jury in Charlotte, North Carolina returned a fifty-five-count indictment charging twenty-six members of MS-13 under the Racketeer Influenced and Corrupt Organizations Act (RICO) with crimes ranging from drug trafficking and illegal possession of firearms to murder and witness intimidation.[106]

The presence of "[v]iolent, well-armed, U.S.-style street gang[s]" continues to increase in El Salvador as well, with the 18th Street and Mara Salvatrucha representing the largest gangs in the country.[107] According to the Overseas Security Advisory Council, El Salvador is currently among the top five most violent countries in the world.[108] On average, ten murders a day are reported to Salvadoran authorities and, in 2007, the country's per capita murder rate was 50 per 100,000.[109] Despite the country's "firm-hand" approach to gang

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99. USAID, *supra* note 36, at 19–20.

100. *Id.* at 20.

101. *Id.*

102. Lopez, Connell & Kraul, *supra* note 80, at A1.

103. NAT'L DRUG INTEL. CTR. & NAT'L GANG INTEL. CTR., NATIONAL GANG THREAT ASSESSMENT 26 (2009).

104. *Id.*

105. *MS-13 Threat*, *supra* note 6.

106. Press Release, Dep't of Justice, Twenty-Six Members of MS-13 Indicted on Racketeering, Narcotics, Extortion and Firearms Charges (June 24, 2008) [hereinafter MS-13 Press Release], *available at* http://www.justice.gov/opa/pr/2008/June/08-ag-564.html.

107. *El Salvador 2008 Crime & Safety Report*, OVERSEAS SEC. ADVISORY COUNCIL (Mar. 17, 2008), https://www.osac.gov/Reports/report.cfm?contentID=79615.

108. *Id.*

109. *Id.*

control, in 2006, gang participation was only proven in 12 percent of the murder cases that went to trial.[110]

MS-13's transformation into a transnational organized crime syndicate is one of the more disturbing implications of the North–South "Revolving Door." Two of the twenty-six MS-13 members indicted in Charlotte, North Carolina "ordered murders in the United States from their prison cells in El Salvador."[111] In 2007, a similar situation occurred when MS-13 leader Saul Antonio Turcios Angel[112] telephoned gang members in Maryland from his prison cell in El Salvador, ordering them to murder rival gang members in the United States.[113] Two men, suspected of membership in a rival gang, were killed as a result of Angel's phone calls.[114] That same year, a federal district court in Maryland indicted twenty-two MS-13 members under RICO.[115] The *Washington Post* reported:

> During the trial of the first two defendants, government witnesses testified that MS-13 leaders in El Salvador sent two Salvadoran gang members to suburban Maryland. One of the Salvadorans told local gang members that they should kill two rival gang members a week, but local gang leaders rejected that idea because it would invite too much attention from law enforcement.[116]

With over 60,000 MS-13 members located in ten different nations across two continents,[117] the potential for transnational organization is disturbing.

G. *International Cooperation in the War Against MS-13*

Recognizing that an effective counter to the mounting MS-13 threat entails international cooperation, in 2007, the United States and El Salvador announced the Transnational Anti-Gang (TAG) initiative.[118] The TAG initiative permanently stations two FBI agents in El Salvador to work in conjunction with twenty

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110. Eric Lemus, *El Salvador: Hungry for Members, Gangs Recruit Children*, INTER PRESS SERV., Mar. 28, 2008.

111. Terry Frieden, *Suspected Gang Members Arrested in North Carolina*, CNN, June 24, 2008, http://www.cnn.com/2008/CRIME/06/24/msthirteen.arrests/index.html.

112. The El Salvador Supreme Court of Justice has yet to act on the United States' request for Saul Antonio Turcios Angel's extradition. Jorge Beltrán, *Extraditables Ligados a Homicidios y Drogas*, DIARIO DE HOY (San Salvador), June 29, 2010, http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6358&idArt=4926156.

113. Ruben Castaneda, *MS-13 Case Adds Salvadoran Inmates*, WASH. POST, June 6, 2007, at B6.

114. *Id.*

115. *Id.*

116. *Id.*

117. FBI Going Global, *supra* note 7.

118. *Id.*

investigators and ten analysts from the PNC.[119] This provides a means for the countries "to share intelligence information on gang activities across Central America and the U.S."[120] As part of the initiative, the PNC identifies, tracks, and investigates suspected gang members in El Salvador and forwards information to the FBI.[121] In return, the FBI provides information to different law enforcement agencies in Central America if a United States gang case has a connection to the Central American investigation.[122] El Salvador and the United States, through TAG, may also participate in joint investigations and assist other Central American countries as needed.[123]

The TAG initiative supplemented the Central American Fingerprint Exploitation Initiative (CAFE). CAFE, developed in 2006 by the MS-13 National Gang Task Force and the PNC, integrates criminal fingerprints gathered in Central American countries with the FBI's Criminal Justice Information Services database, making the prints readily accessible to foreign and domestic law enforcement.[124] Other transnational vehicles for cooperation in investigating and prosecuting MS-13 include the Organization of American States Mutual Legal Assistance Treaty,[125] the Organized Crime Convention[126]—discussed in greater detail in Part IV—and the Vienna Convention on Trafficking in Narcotics.[127] The U.S. Department of Justice is currently working with the Salvadoran government to improve the process of preparing extradition requests under these treaties.

III. BARRIERS TO EXTRADITION REQUESTS FOR MS-13 MEMBERS IN EL SALVADOR

Generally, a U.S. prosecutor seeking the extradition of a person located in El Salvador submits a request for extradition, based upon the commission of a crime enumerated in the 1911 Treaty, through

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. Press Release, Dep't of Justice, Fact Sheet: Department of Justice Efforts to Combat Mexican Drug Cartels (Apr. 2, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-opa-303.html.
125. Inter-American Convention on Mutual Assistance in Criminal Matters, Apr. 14, 1996, O.A.S.T.S. No. 75.
126. Organized Crime Convention, *supra* note 10.
127. U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 164.

the U.S. Department of Justice to the U.S. Department of State.[128] The State Department, acting as an intermediary, presents the prosecutor's request to the El Salvador Ministry of Foreign Affairs, which, in turn, submits the request to the El Salvador Ministry of Justice and Public Security.[129] Once the Ministry of Justice and Public Security receives the request—along with the documents establishing the basis for the request—the El Salvador Supreme Court of Justice reviews the documentation to ensure that it conforms to domestic and international law.[130] Pursuant to Article 182(3) of El Salvador's Constitution, the Salvadoran Supreme Court may then grant or deny the extradition request.[131]

Preparing extradition requests for MS-13 members under the 1911 Treaty, however, presents a host of issues unique to gang prosecutions in the United States. By listing the crimes for which a person may be extradited,[132] the 1911 Treaty limits extradition to those crimes that were criminalized at the time of the treaty's ratification.[133] The United States enacted RICO in 1970—fifty-nine years after the ratification of the 1911 Treaty—to address escalating problems with organized crime syndicates, such as the Italian Mafia.[134] Today, prosecutors in the United States utilize RICO as a means to prosecute organized street gangs like MS-13.[135] Consequently, U.S. gang prosecutions relying on RICO or any other charges not enumerated in the 1911 Treaty (i.e., conspiracy)[136] face a substantial barrier if defendants flee to El Salvador. While the United States attempts to address this hurdle by requesting extraditions under the Organized Crime Convention—discussed in greater detail below—additional barriers exist, potentially blocking successful extradition.[137]

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128. Telephone Interview with John A. Beasley, Jr., Reg'l Dep't of Justice Attaché for Cent. Am. (July 12, 2010); *see generally The Extradition Process in El Salvador*, ORG. OF AM. STATES, http://www.oas.org/juridico/MLA/en/slv/en_slv_extr_proc_salv.pdf (last visited Jan. 9, 2011).

129. Telephone Interview with John A. Beasley, Jr., *supra* note 128.

130. *Id.*; *The Extradition Process in El Salvador*, *supra* note 128.

131. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 182(3) (1983); *The Extradition Process in El Salvador*, *supra* note 128.

132. 1911 Treaty, *supra* note 9, art. II.

133. E-mail from John A. Beasley, Jr., Reg'l Dep't of Justice Attaché for Cent. Am., to author (Oct. 18, 2009, 4:39 PM CST) (on file with author).

134. Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2006); Gerald E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 667, 672 (1987).

135. KAREN L. KINNEAR, GANGS: A REFERENCE HANDBOOK 58–59 (2d ed. 2009).

136. *See generally* 1911 Treaty, *supra* note 9, art. II (failing to list conspiracy and other RICO-type charges).

137. It is important to note that the constitutional barriers discussed in this Note are not the only obstacles to extradition. For instance, the political divisions among the members of the Supreme Court of Justice, created in part by the election of justices based on nominations of the National Judiciary Council and the bar, may be

Potential obstacles to extradition also lie within El Salvador's Constitution. For instance, attempts by El Salvador and the United States to renegotiate the 1911 Treaty during the last decade ran into three separate roadblocks.[138] The first obstacle was the prohibition on extraditing Salvadoran nationals—repealed in 2000—in the El Salvador Constitution.[139] The two additional barriers blocking successful negotiations included provisions in the Constitution banning (1) life imprisonment[140] and (2) the death penalty.[141] Functionally at odds with one of the key weapons utilized under RICO and other U.S. statutes to deter gang activity—sentencing enhancements—El Salvador's restrictions on excessive punishment impede the United States' ability to request the extradition of gang members in El Salvador.[142] While the Organized Crime Convention may allow the United States to circumvent the restrictive language found in the 1911 Treaty, it does not remove the potential barriers[143] to extradition that arise under the El Salvador Constitution.

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contributing to the current backlog of extradition requests in the Court. *See* Rubén Zamora & David Holiday, *The Struggle for Lasting Reform: Vetting Processes in El Salvador*, *in* JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 80, 101 (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007) (suggesting that the politicization of the Supreme Court of Justice resulted in election-time assurances of "friendly judgments"). While it is easy to surmise about the potential impact of pervasive corruption in the Salvadoran government on the politicized Court, such speculation is beyond the scope of this Note. *See* Bureau of Democracy, Human Rights, & Labor, *2006 Report on Human Rights Practices: El Salvador*, DEP'T OF STATE (Mar. 6, 2007), http://www.state.gov/g/drl/rls/hrrpt/2006/78891.htm (listing "inefficiency and corruption in the judicial system" as one of the country's "most significant human rights problems").

138. E-mail from John A. Beasley, Jr., *supra* note 133.

139. Press Release, Dep't of Justice, First Extradition from El Salvador to the United States Brings Salvadoran National Back to Serve Prison Sentence on Texas State Sexual Assault Charges (Jan. 29, 2010) [hereinafter DOJ Press Release], *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-105.html.

140. Bureau for Int'l Narcotics and Law Enforcement Affairs, *Canada, Mexico, and Central America: International Narcotics Control Strategy Report*, DEP'T OF STATE (Mar. 2006), http://www.state.gov/p/inl/rls/nrcrpt/2006/vol1/html/62107.htm.

141. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 27 (1983) ("Sólo podrá imponerse la pena de muerte en los casos previstos por las leyes militares durante el estado de guerra internacional.").

142. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–09–708, COMBATING GANGS: BETTER COORDINATION AND PERFORMANCE MEASUREMENT WOULD HELP CLARIFY ROLES OF FEDERAL AGENCIES AND STRENGTHEN ASSESSMENT OF EFFORTS 62 (2009) ("Violations of the criminal provisions of RICO and VICAR carry significant penalties. A gang member convicted under RICO is subject to up to 20 years imprisonment, or up to life imprisonment if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment.").

143. It is important to note that not all offenses charged under RICO carry a penalty of mandatory life imprisonment. *See id.* Furthermore, strategic indicting or tactical changes to an indictment can often be used to avoid a potential impasse in RICO cases where the defendant is facing mandatory life imprisonment (assuming such a penalty is not *required* by law). E-mail from John A. Beasley, Jr., Reg'l Dep't of Justice Attaché for Cent. Am., to author (Oct. 18, 2010, 2:55 PM CST) (on file with

A. *Structural Flaws in the 1911 Treaty*

The 1911 Treaty, which individually lists extraditable crimes, is a type of extradition treaty often referred to as a "list treaty."[144] Most modern extradition treaties tend to avoid listing offenses, opting instead to apply the more flexible notion of dual criminality.[145] In broad terms, dual criminality requires that "the conduct for which extradition is sought . . . constitute an offense in both the requesting and requested state."[146] Thus, the modern approach supplies more elasticity as criminals discover new and more sophisticated ways to break the law.[147] List treaties, on the other hand, are static documents that only provide a snapshot of the criminalized activity at the time of their enactment.

The United States' legislative response to the development and dispersion of MS-13 highlights the issues raised by the antiquated 1911 Treaty in the context of gang prosecutions. To combat MS-13, prosecutors in the United States rely heavily on RICO and the Violent Crimes in Aid of Racketeering Act (VICAR)[148]—both enacted decades after the ratification of the 1911 Treaty.[149] RICO permits prosecutors to charge individuals "for a pattern of crimes [rather than for the commission of a specific crime] . . . committed through an organization, referred to in the statute as an enterprise."[150] The statute provides a means for prosecutors to indict gang leaders—who, through the use of lower level gang members, often avoid identification and prosecution—by criminalizing (1) the acquisition of income from, and (2) the operation of, an "enterprise."[151] VICAR generally supplements RICO charges, enhancing sentences for defendants who commit or threaten to commit serious crimes (i.e., murder, kidnapping, racketeering) for the purpose of receiving

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author); *see also infra* Part III.B.iii. For a defendant facing non-mandatory life imprisonment under RICO, diplomatic workarounds are also available that permit the Supreme Court of Justice to approve extradition. *Id.*

144. Charles A. Caruso, *Legal Challenges in Extradition and Suggested Solutions*, *in* DENYING SAFE HAVEN TO THE CORRUPT AND THE PROCEEDS OF CORRUPTION 57, 58 (Org. for Econ. Co-Operation and Dev., 2006).

145. ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, TREATY ENFORCEMENT AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS 206 (Rodrigo Yepes-Enriquez & Lisa Tabassi eds., 2002).

146. *Id.*; *see also* CHARLES DOYLE, EXTRADITION TO AND FROM THE UNITED STATES 15–16 (2008).

147. E-mail from John A. Beasley, Jr., *supra* note 133.

148. *See id.*

149. 18 U.S.C. §§ 1961–1968 (2006); Violent Crimes in Aid of Racketeering Act (VICAR), 18 U.S.C. § 1959; TOM DIAZ & CHRIS SWECKER, NO BOUNDARIES: TRANSNATIONAL LATINO GANGS AND AMERICAN LAW ENFORCEMENT 100 (2009).

150. STEPHEN L. MALLORY, UNDERSTANDING ORGANIZED CRIME 190 (2007); *see generally* 18 U.S.C. § 1962 (outlining activities prohibited under RICO).

151. 18 U.S.C. § 1962.

payment from or gaining entrance into a racketeering enterprise, or for the purpose of maintaining or advancing their position in a racketeering enterprise.[152]

The willingness of El Salvador to recognize crimes charged under RICO, whether through the Organized Crime Convention or the negotiation of a new extradition treaty, is an important element in the United States' ability to prosecute MS-13 leaders organizing criminal activity from prisons in El Salvador. Take, for example, the MS-13 prosecution in Charlotte, North Carolina.[153] Out of the twenty-six MS-13 members charged under RICO, eighteen members pled guilty.[154] The court found seven other members guilty at trial of racketeering, extortion, murder, and other crimes—for which one member received the death penalty.[155] The United States, however, has yet to prosecute the last member as he is currently jailed in El Salvador.[156] The inability of federal prosecutors to obtain extradition of the remaining Salvadoran national, despite the fact that the Charlotte MS-13 clique took orders from MS-13 leaders in Salvadoran prisons,[157] may reflect a debilitating side effect of the inelastic 1911 Treaty.[158]

Unfortunately, the obstacle to extradition confronted in the Charlotte MS-13 prosecution is not an isolated occurrence. In 2007, a federal grand jury in Maryland indicted three MS-13 members for directing lower level members "to commit violent crimes . . . including eight homicides in Maryland and one in Virginia."[159] The defendants, now facing RICO charges in the United States, were serving jail time in El Salvador at the time of their indictment.[160] As a result, U.S. Attorney Rod J. Rosenstein explained, the defendants "were unlikely

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152. *Id.* § 1959.

153. *See supra* text accompanying notes 106, 111.

154. Cleve R. Wootson & Gary L. Wright, *Prosecutors: Defendants Were Part of Notorious MS-13 Crime Organization*, CHARLOTTE OBSERVER, Jan. 13, 2010, http://www.charlotteobserver.com/2010/01/13/1177031/prosecutors-defendants-were-part.html.

155. *Id.*; Gary L. Wright, *MS-13 Gang Member Sentenced to Death*, CHARLOTTE OBSERVER, July 28, 2010, http://www.charlotteobserver.com/2010/07/28/1586317/ms-13-gang-member-sentenced-to.html.

156. Wootson & Wright, *supra* note 154. Note that a grand jury returned the indictment on June 23, 2008, MS-13 Press Release, *supra* note 106, prior to the Supreme Court of Justice's December 2009 landmark decision to extradite a Salvadoran national to the United States, *see infra* Part III.B.i.

157. *Id.*

158. While the 1911 Treaty does not specifically list RICO offenses, thus presenting a potential impediment to extradition, *see supra* text accompanying notes 132–34, the United States' inability to successfully seek extradition in this case ultimately could have been the result of a number of other issues unrelated to the defendant's potential sentence under RICO.

159. Ruben Castaneda, *Salvadoran Police Kill Suspect in U.S. Case*, WASH. POST, Jan. 8, 2008, at B3.

160. Castaneda, *supra* note 113, at B6.

to serve time in the United States unless they were arrested [in the United States] . . . or unless El Salvador changes its laws."[161]

B. *Provisions in the El Salvador Constitution*

i. The Extradition of Salvadoran Nationals

Over a decade ago, El Salvador passed a constitutional amendment overturning the prohibition on extraditing Salvadoran nationals.[162] On December 22, 2009, the El Salvador Supreme Court of Justice voted to extradite Jose Marvin Martinez, a Salvadoran national convicted in the United States of sexual assault and indecency with a minor.[163] The decision marked the first extradition of a Salvadoran national to the United States since the ratification of the 1911 Treaty.[164] Anticipating the potentially positive implications of this historic landmark, Assistant Attorney General Lanny A. Breuer stated, "Today's extradition brings a criminal to justice and paves the way forward in our law enforcement partnership with El Salvador. This first extradition from El Salvador to the United States marks a turning point in our continued efforts to strengthen our joint efforts to hold criminals accountable."[165]

Although Martinez's extradition indisputably warrants some optimism on behalf of U.S. prosecutors, it is important to note the less impressive *practical* implications of this otherwise positive shift in Salvadoran law and policy. Article VIII of the 1911 Treaty states, "Under the stipulations of this treaty, neither of the Contracting Parties shall be bound to deliver up its own citizens."[166] As a result, the Supreme Court of Justice retains sole discretion to extradite Salvadoran gang members jailed within El Salvador's borders.[167] Without any affirmative obligation to extradite nationals, the United States' requests could fall victim to the judicial corruption and backlog in the Supreme Court of Justice.[168] According to the State Department, the United States and El Salvador must negotiate,

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161. Castaneda, *supra* note 159, at B3. Note that U.S. Attorney Rosenstein was commenting on the state of affairs prior to the Supreme Court of Justice's December 2009 landmark decision to extradite a Salvadoran national to the United States. *See infra* Part III.B.i.

162. DOJ Press Release, *supra* note 139.

163. *Id.*

164. *Id.*

165. *Id.*

166. 1911 Treaty, *supra* note 9, art. VIII.

167. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 182(3) (1983).

168. *See* Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: El Salvador*, DEP'T OF STATE (Mar. 11, 2010), http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136112.htm (listing "a judicial backlog, and corruption" as reasons for the Salvadoran public's fleeting confidence in the country's court system).

ratify, and enforce a new treaty in order for the 2000 amendment to permanently influence the United States' ability to seek extradition of Salvadorans.[169]

ii. The Death Penalty

The sentencing enhancements—under RICO and VICAR—utilized by U.S. prosecutors to deter gang crime run counter to El Salvador's constitutional ban on the death penalty.[170] Exemplifying this conflict, in July 2010, a federal judge in North Carolina sentenced MS-13 leader Alejandro Umana to death for murdering two men "to maintain the gang's reputation and to advance his position within the criminal enterprise."[171] Umana is the first MS-13 member to receive the death penalty in a U.S. federal court.[172] In regards to Umana's sentence, Assistant U.S. Attorney Jill Rose exclaimed, "So here's the message: If you want to bring your gang to the United States and you want to commit crimes, you better be ready for some American justice."[173] U.S. prosecutors may not be able to deliver on that promise if MS-13 members charged with crimes in the United States flee to El Salvador prior to their arrest.

Presumably, El Salvador's constitutional ban on the death penalty[174] would prevent the Supreme Court of Justice from delivering up its own citizens to the United States in death penalty cases. Highlighting similarities between El Salvador's constitutional prohibition and the United States' current extradition treaty with Mexico may shed light on how the United States would approach extradition requests for death-penalty-eligible MS-13 suspects in El Salvador. Pursuant to the current United States–Mexico Extradition Treaty, Mexico retains the discretion to deny a request for extradition of any fugitive facing the death penalty in the United States.[175] Utilizing this discretion, Mexico consistently refuses to extradite death-penalty-eligible suspects without guarantees that the

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169. DEP'T OF STATE, *supra* note 11.
170. *See supra* text accompanying notes 148–58.
171. Wright, *supra* note 155.
172. *Id.*
173. *Id.*
174. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 27 (1983).
175. *See* Extradition Treaty, U.S.–Mex., art. 8, May 4, 1978, 31 U.S.T. 5059.

> When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Id. (emphasis added).

prosecutor will not seek the death penalty.[176] Take, for example, Cesar Armando Laurean, the Marine who fled to Mexico in 2008 after brutally murdering pregnant twenty-year-old Lance Corporal Maria Lauterbach, near the Camp Lejuene military base in North Carolina.[177] Captured in Mexico, the North Carolina prosecutor's office agreed to forgo seeking the death penalty in exchange for Laurean's extradition back to the United States.[178]

Similar to the current state of affairs between the United States and Mexico, El Salvador's constitutional ban on the death penalty will likely force U.S. prosecutors to remove capital punishment as an option in these cases or "wait and see" if suspects return to the United States in the hope that they will be apprehended by police.[179] Professor David McCord, an opponent of the death penalty, argues that such policies require a prosecutor to base the decision to seek capital punishment on the arbitrary factor of "whether [the defendant got] across the border before being arrested."[180] While an in-depth discussion of the death penalty debate is beyond the scope of this Note, it is important to recognize that the concessions the United States would likely make to El Salvador could draw an array of criticism from death penalty proponents and opponents alike.

iii. Life Imprisonment

El Salvador's ban on life imprisonment[181] could also force U.S. prosecutors to guarantee that the requested suspect will not face a life sentence. In the United States federal court system, where defendants have no possibility of parole,[182] this guarantee may

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176. *See U.S. Fugitives in Mexico Spared Death Penalty*, MSNBC, Jan. 17, 2008, http://www.msnbc.msn.com/id/22717899/ ("Mexico refuses to send anyone back to the United States unless the U.S. gives assurances it won't seek the death penalty a 30-year-old policy that rankles some American prosecutors and enrages victims' families.").

177. *Laurean's Capture Shocks Villagers*, ABC NEWS, April 12, 2008, http://abclocal.go.com/wtvd/story?section=news/local&id=6074380; Emily Friedman, *Former Marine Cesar Laurean Found Guilty of Pregnant Colleague Murder*, ABC NEWS, Aug. 23, 2010, http://abcnews.go.com/US/marine-cesar-laurean-found-guilty-murder/story?id=11463711.

178. *Laurean's Capture Shocks Villagers*, *supra* note 177.

179. *Strengthening the Long Arm of the Law: How Are Fugitives Avoiding Extradition and How Can We Bring Them to Justice: Hearing Before the H. Subcomm. on Criminal Justice, Drug Policy & Human Res. of the Comm. on Gov't Reform*, 108th Cong. 2 (2003) [hereinafter *Fugitive Hearing*] (statement of Hon. Mark E. Souder, Chairman, H. Subcomm. on Criminal Justice, Drug Policy & Human Res.).

180. David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to Be Unconstitutionally Arbitrary More than Three Decades After* Furman, 71 BROOK. L. REV. 797, 859 (2005).

181. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 27 (1983).

182. *See* U.S. PAROLE COMM'N, DEP'T OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM 26–34 (2003) (describing the dismantling of the federal parole system).

require the prosecutor to pursue a lesser charge.[183] The impact of El Salvador's constitutional ban on life imprisonment turns largely on the Supreme Court of Justice's interpretation of "life." Article 27 of the El Salvador Constitution requires the court either to sentence the defendant to "life" *or* to determine the meaning of "life" based on the defendant's age. For example, if a United States court sentences a fifty-year-old defendant to fifty years in prison without the possibility of parole—a de facto life sentence—has that court, under the Constitution of El Salvador, sentenced the defendant to life imprisonment?

According to Article 45 of El Salvador's Codigo Penal (Criminal Code), the maximum sentence permitted by law is seventy-five years.[184] While Articles 70 and 71 of the Criminal Code permit concurrent sentences for multiple crimes, the ultimate sentence imposed per count may not exceed seventy-five years.[185] Whether a court can impose a seventy-five-year sentence on a defendant over the age of twenty or twenty-five—a de facto life sentence—is unclear from the language of the Code.

Comparing El Salvador with Mexico, in September 2005, the Suprema Corte de Justicia de la Nacion (Supreme Court of Mexico), ruled de facto life imprisonment constitutional, despite the ban on life imprisonment in Mexico's Constitution.[186] Two months later, this landmark decision opened the door for the Mexican Supreme Court to permit the extradition of suspects facing life imprisonment in other countries.[187] In contrast, El Salvador has yet to carve out an exception to its constitutional prohibition on life imprisonment.[188] Pointing to the increase in violent crime in the country, some politicians and attorneys in El Salvador advocate for an amendment permitting the courts to sentence more dangerous criminals to life without parole.[189] Conversely, the Procuraduría para la Defensa de

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183. *But see supra* note 143 (discussing tactical fixes and diplomatic workarounds).

184. Codigo Penal [Penal Code], art. 45 (El Sal.).

185. *Id.* arts. 70–71.

186. Francisco J. Ortega, *De Facto Life Imprisonment in Mexico and the U.S.–Mexico Extradition Treaty*, 24 WIS. INT'L L.J. 1017, 1017 (2007) ("On September 6, 2005, the *Suprema Corte de Justicia de la Nación* (Mexican Supreme Court), in an eight-to-two vote, ruled de facto life imprisonment constitutional, marking an unprecedented departure from its long-standing legal tradition.").

187. *Mexico Alters Extradition Rules*, BBC NEWS, Nov. 30, 2005, http://news.bbc.co.uk/2/hi/4483746.stm.

188. *See* DEP'T OF STATE, INT'L NARCOTICS CONTROL STRATEGY: EL SALVADOR (2007), *available at* http://sansalvador.usembassy.gov/reports/2007/ncs/vol-i.html ("Negotiation of a new [extradition] treaty has stalled in light of a Salvadoran constitutional ban on life imprisonment, which may prove an obstacle to extradition in some cases.").

189. *Juristas recelosos de cadena perpetua*, DIARIO DE HOY, Oct. 30, 2006, http://www.elsalvador.com/noticias/2006/10/30/nacional/nac10.asp.

los Derechos Humanos (the Attorney for the Defense of Human Rights) in El Salvador considered the 2001 increase in the maximum penalty alone a violation of Article 27 of El Salvador's Constitution.[190]

Concerns over El Salvador's refusal to extradite defendants facing life imprisonment mirror those echoed before the Congressional Subcommittee on Criminal Justice, Drug Policy, and Human Resources in the United States in 2003.[191] The gang's members face hefty sentences in the United States because of the violent nature of the crimes they commit, including murder and rape.[192] As discussed above in Part III.B.ii, when MS-13 members charged with these violent crimes flee from the United States to a country with provisions on extradition similar to those found in El Salvador's Constitution, U.S. prosecutors must make tough decisions.[193] They must decide whether to pursue a conviction on a lesser offense—one that arguably does not match the seriousness of the crime—so the requested country will extradite—*or* take a wait-and-see approach in hopes that the suspect will return to the United States and be apprehended by police—in which case they can invoke a harsher sentence.[194] If a prosecutor takes the wait-and-see approach, potentially dangerous criminals are permitted to roam free in the country to which they fled. This reality is particularly troublesome for countries like El Salvador, where overcrowded prisons, corrupt governments, and street gangs make it difficult to control dangerous criminals and prevent violent crime.[195]

IV. A SOLUTION: THE UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND STRATEGIC INTERPRETATION

The current impasse to extradition of MS-13 members from El Salvador to the United States may be surmountable without the anticipated overhaul of El Salvador's Constitution or replacement of the 1911 Treaty. Easily stated calls for constitutional overhaul and treaty renegotiation are difficult to bring to fruition, as demonstrated

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190. Karin Wall, The PDDH in El Salvador: An Important Step Towards Reconciliation and Democracy? 46 (2003) (unpublished field study, Göteborg University, Sweden), http://gupea.ub.gu.se/bitstream/2077/2015/1/2003 26.pdf.

191. *See generally Fugitive Hearing*, *supra* note 179 (discussing the negative impact on U.S. prosecutions of the Mexican Supreme Court's 2001 decision banning extradition of suspects facing life imprisonment).

192. *See supra* Part II.

193. *See, e.g., Fugitive Hearing*, *supra* note 179, at 72 (testimony of Danny Porter, District Attorney of Gwinnett Cnty., Ga.).

194. *Id.* at 2 (statement of Hon. Mark E. Souder, Chairman, H. Subcomm. on Criminal Justice, Drug Policy, & Human Res.).

195. *See* discussion *supra* Part II.B–E.

by the abandonment of previous negotiation efforts.[196] Recognizing these difficulties and the urgent need to control violent transnational organizations like MS-13, the United States—in an effort to elude the restrictions of the 1911 Treaty—recently began requesting gang-member extraditions under the Organized Crime Convention.[197] While the language of the Organized Crime Convention appears to condone this action—discussed in detail in the next section—successful extradition may still require a strategic interpretation of El Salvador's Constitution.[198]

To combat the transnational threat posed by MS-13, El Salvador and the United States must continue to promote current international law enforcement initiatives. Attempts to pressure El Salvador to eliminate one of the core human rights' protections in its Constitution—the ban on life imprisonment[199]—could risk straining or even destroying the country's relationship with the United States. Accordingly, the United States should tread lightly along the path to transforming bilateral cooperation so that in attempting to move forward, the countries do not accidentally hit reverse. A strategic interpretation of "life," as defined in Article 27 of El Salvador's Constitution and discussed in more detail below, could provide a means to bridge this potential impasse without collapsing the current routes for bilateral collaboration.

It is important to note that any strategy reducing financial support from the United States to El Salvador could have dire consequences for both countries. In 2008, the USAID provided over $20 million in assistance to El Salvador to "create economic opportunities, promote a more transparent and efficient judiciary, support government accountability, and improve quality and access to

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196. E-mail from John A. Beasley, Jr., *supra* note 133.

197. Telephone Interview with John A. Beasley, Jr., *supra* note 128.

198. Part IV only addresses the barrier to extradition created by the ban on life imprisonment in Article 27 of the El Salvador Constitution. As discussed in Part III.B.i, El Salvador repealed its constitutional prohibition on extraditing Salvadoran nationals in 2000. DEP'T OF STATE, *supra* note 11. However, in the decade following the amendment, the Supreme Court of Justice only extradited one Salvadoran citizen. DOJ Press Release, *supra* note 139. The Supreme Court's failure to act on additional extradition requests for Salvadoran nationals suggests that any further attempt to surmount this particular obstacle may require a renegotiation of the 1911 Treaty.

The prohibition on the death penalty, also found in Article 27 of El Salvador's Constitution, appears similarly unavoidable barring a constitutional amendment. As described in Part III.B.ii above, in formulating requests for extradition, U.S. prosecutors will most likely have to relinquish any right to seek the death penalty. Because of MS-13's propensity for extreme violence and rapid expansion, the goal of this Note is to suggest the most *immediate* means by which the United States can successfully seek extradition. While I ultimately agree that the El Salvador Constitution should be amended and the 1911 Treaty renegotiated, an in-depth discussion of the likelihood of these reforms is outside of the scope of this Note.

199. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 27 (1983).

basic healthcare and education."[200] In a country with a GDP of $42.92 billion,[201] a withdrawal of over $20 million in funding could cause the government to eliminate important social programs or divert money from other areas of government spending. Either option might potentially reduce funding for programs designed to prevent and deter gang activity—a loss neither country can afford in the transnational war against MS-13.

A. *Evaluating the Potential for Success of Extradition Requests Made Pursuant to the UN Convention Against Transnational Organized Crime*

Ratified by El Salvador and the United States in 2004 and 2005, respectively, the Organized Crime Convention sets out "to promote cooperation to prevent and combat transnational organized crime more effectively."[202] In particular, the Convention applies to "the prevention, investigation, and prosecution" of serious offenses "where the offence is transnational in nature and involves an organized criminal group."[203] Given the examples described in this Note, and assuming the United States is only pursuing extradition in cases where the charged offense is particularly serious—"punishable by at least four years" in prison[204]—the Supreme Court of Justice should find MS-13 members ideal candidates for extradition under the Organized Crime Convention.

The language in Article 3(2)(c) of the Organized Crime Convention provides a means for state-party[205] prosecutors to attack MS-13 and similar organizations, based *solely* on their status as *transnational* organizations. For instance, Article 3(2)(c) defines a transnational offense as one that "is committed in one State but involves an *organized criminal group that engages in criminal activities in more than one State.*"[206] Recall the discussion from Part II regarding MS-13 leaders jailed in El Salvador directing criminal

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200. *El Salvador Country Profile*, U.S. AGENCY FOR INT'L DEV. 1 (July 2010) http://www.usaid.gov/locations/latin_america_caribbean/country/el_salvador/El_Salvador_country_profile.pdf.

201. *Id.* at 2.

202. Organized Crime Convention, supra note 10, art. 1; *Status of Ratification for the United Nations Convention Against Organized Crime*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Jan. 9, 2011) [hereinafter *Status of Ratification*].

203. Organized Crime Convention, *supra* note 10, art. 3(a).

204. *Id.* art. 2(b).

205. El Salvador and the United States ratified the Organized Crime Convention on March 18, 2004 and November 3, 2005, respectively. *Status of Ratification*, *supra* note 202.

206. Organized Crime Convention, *supra* note 10, art. 3(2)(c) (emphasis added).

activity in the United States.[207] Even if the Supreme Court of Justice were to interpret the provision narrowly—limiting its applicability to cliques who operate in both the United States *and* El Salvador—Article 3(2)(b) would likely carve out a special exception for cases involving MS-13 leaders directing criminal activities from the prisons of another country.[208] Article 3(2)(b) states, "an offense is transnational in nature if [i]t is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State."[209]

Currently, the United States is seeking MS-13 extraditions under the 1911 Treaty and Article 16(3) of the Organized Crime Convention.[210] In fulfilling the requirements under Article 5 of the Organized Crime Convention—necessitating the establishment of criminal offenses—El Salvador must enforce a regime for prosecuting criminal organizations that is fairly comparable to the RICO approach in the United States.[211] Article 16, when read in conjunction with Article 5, suggests that the Organized Crime Convention incorporates RICO-type laws into the enumerated and otherwise inflexible 1911 Treaty.[212] Article 16(3) states, "Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between

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207. *See supra* Part II.C., F.

208. *See* Organized Crime Convention, supra note 10, art. 3(2)(b); *see also supra* Part II.C.

209. Organized Crime Convention, *supra* note 10, art. 3(2)(b).

210. Email from John A. Beasley, Jr., *supra* note 143.

211. Organized Crime Convention, *supra* note 10, art. 5(1).

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> *(a)* Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
>
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
>
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
>
> a. Criminal activities of the organized criminal group;
>
> b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
>
> *(b)* Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

Id.

212. *Id.* arts. 5, 16(3).

State Parties."[213] Accordingly, the Supreme Court of Justice should permit the Organized Crime Convention to circumvent the confusion surrounding extradition of MS-13 members charged with RICO offenses under the 1911 Treaty.

B. *Overcoming the Constitutional Barriers to Extradition Via Strategic Interpretation*

While the Organized Crime Convention may provide a means to smooth out the structural kinks in the 1911 Treaty, overcoming the life imprisonment stalemate requires strategic interpretation of Article 27 of El Salvador's Constitution and Article 45 of El Salvador's Criminal Code.[214] It appears as though the seventy-five-year maximum sentence, established in Article 45 of the Criminal Code, would act as a de facto life sentence for virtually all defendants.[215] The fact that the Supreme Court of Justice has yet to invalidate the statutory maximum, however, suggests that the Court may not consider de facto life imprisonment to be a violation of El Salvador's Constitution. Thus, it appears the United States can request that El Salvador extradite a suspect charged with murder, for example, based on a promise not to pursue a sentence in excess of seventy-five years.[216] While not officially termed a "life sentence," seventy-five-years imprisonment, from a pragmatic standpoint, should still promote the goals of specific deterrence and crime prevention in both countries.

Potential complications with this practical approach to extradition may, however, lie in a split among Salvadoran courts as to whether a seventy-five-year sentence is, in fact, compliant under *all* circumstances with Article 27 of El Salvador's Constitution. In 2007, the Tribunal 4° de Setencia sentenced Jose Mario Bello to thirty-five years in prison for two counts of aggravated murder.[217] In ignoring the prosecutor's request for the court to impose the seventy-five-year maximum,[218] the Tribunal 4° de Setencia held that a sentence in excess of fifty years would violate Article 27 of El Salvador's

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213. *Id.* art. 16(3).

214. *See supra* Part III.B.iii.

215. Codigo Penal, art. 45. According to the UN Statistics Division, the average life expectancy of a man in El Salvador is 66.5 years. *Country Profile: El Salvador*, U.N. STATISTICS DIV., http://data.un.org/CountryProfile.aspx?crName=EL%20SALVADOR (last visited Jan. 9, 2011). For females in El Salvador, the average life expectancy is seventy-six years. *Id.* Thus, the chances of a seventy-five-year sentence falling short of a defendant's life span seem relatively low.

216. *See supra* note 143 (discussing tactical fixes).

217. Beatriz Castillo, *Condenan a 35 años de cárcel a Mario Belloso*, DIARIO CO LATINO (San Salvador), Aug. 16, 2007, http://www.diariocolatino.com/es/20070816/nacionales/46124/.

218. *Id.*

Constitution.[219] Conversely, in 2009, the Tribunal 6° de Setencia sentenced members of a notorious car-theft ring to upwards of one hundred-years imprisonment.[220] Accordingly, in requesting extraditions before the Supreme Court of Justice, the circuit split provides a basis on which the United States can argue that the Supreme Court of Justice should permit, at a minimum, extradition for de facto life imprisonment.

V. CONCLUSION

The progeny of disjointed national efforts to deter gang violence, MS-13 represents the danger inherent in attacking a transnational issue by shifting the burden to other nations. Deportation of Los Angeles gangs to El Salvador in the 1990s and the subsequent proliferation of MS-13 demonstrate the risk of punting the gang problem to developing countries. Harsh laws, overcrowded prisons, and rampant government corruption in El Salvador facilitated the return of a much more organized and expansive version of MS-13 to the United States.

Learning from these mistakes, the United States has charted a course for international law enforcement initiatives, such as TAG and CAFE, in an effort to form a unified global front against the Mara Salvatrucha. Failure to reach a compromise in the extradition of MS-13 members from El Salvador to the United States, however, threatens to take back the ground gained by this transnational effort. The United States and El Salvador must find a way to preserve the principles reflected in their founding documents and current treaties that will not impede their ability to maintain a unified global front against the world's most notorious street gang. As discussed above, U.S. requests for MS-13 extraditions under the Organized Crime Convention, when combined with strategic constitutional interpretation, may provide a means to address the extradition impasse without straining the countries' existent transnational efforts.

While the evaluation and suggestions outlined in Part IV of this Note provide the most immediate and least drastic means of addressing the issues encompassed in the 1911 Treaty, a complete overhaul of the treaty and Article 27 of El Salvador's Constitution would provide a more permanent solution to the current problems. Nevertheless, as a decade of fruitless negotiations demonstrates, the best solution is not always the most practicable. The one thing that

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219. *Id.*

220. Amadeo Cabrera, *Penas máximas a banda robacarros*, LA PRENSA GRAFICA (San Salvador), July 11, 2009, http://www.laprensagrafica.com/el-salvador/judicial/45828-penas-maximas-a-banda-robacarros.html.

appears certain is that MS-13 members, who live by the gang's credo—"mata, controla, viola" (kill, control, rape)—will not sit idly by and await reform.[221]

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221. John Weisman, *The Troubling Story of Brenda Paz*, WASH. TIMES, July 12, 2009, at M35 (reviewing LOGAN, *supra* note 4).

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