

## The gangs as an organized crime category in the Salvadorean Penal Code

Elsa Elizabeth Fuentes<sup>1</sup>

Under the definition of “*illicit group*”, Article 345 of the Penal Code punishes a series of behaviors carried out by “associations”, “groups”, “organizations”, and also the membership to “*maras*” and street gangs gathered in Subsection 2 of this article. All the above is possible due to historical and frequent reforms in the whole legislation of El Salvador, and concretely to the offense before the 2003 reform, known as offense of illicit association.

In accordance to Article 345 of the Penal Code, subsection 2, and related to article 1 of the Law of Prohibition of Maras, Street Gangs and Organizations of Criminal Nature, the solely belonging to gangs, synonym for “*maras*” in El Salvador, constitutes an offense typified as illicit group. Well then, most of its changes during the last years it has had the purpose to include the gangs within the concept of illicit groups and the special typification of that offense, to which the sentences are worsen only by their membership. The matter in question also collects some of the characteristics that are demanded in the Palermo Convention for the regulation of the criminal organizations, but it excludes others as well as important as its lucrative purpose.

The organized crime, as defined by the Convention, can be understood in the sense that the structure is enough to accomplish the criminal plan of the organization. In consequence, it is required that members are assigned functions even if they are not enough formal to seek growth within the organization. But, “[...]. Although there is ostensibly a consensus definition in the Palermo Convention, its drafting was not a high priority in the treaty negotiations. Thus, there are serious weaknesses in the resulting compromise definition”<sup>2</sup>.

---

<sup>1</sup> Universidad Centroamericana “José Simeón Cañas” El Salvador

<sup>2</sup> Cf. Orlova, Alexandra, and Moore, Jame. «Umbrellas or building blocks' Defining international terrorism and transnational organized

The preliminary works from the Palermo Convention show that the term “structured group” must be used in the broadest sense, to include not only the groups having a complex hierarchical structure or other kind, but the non-hierarchical groups in which their members' functions do not need a formal definition<sup>3</sup>. Therefore, another defining characteristic of the already mentioned concept outlined by the Convention is the non-required continuity in the condition of group member, but the temporary persistence of the organized structure independently of the continuity of the same members.

That the criminal groups have the purpose of getting economical benefits is one the requirements the Convention states, which would apparently prevent the application of the concept to other organizations lacking profit use. The Article 5 states the previous as “the agreement among one or more people to commit serious offenses with the purpose of keeping a direct or indirect relationship with the acquisition of an economical profit or other of material order”, in which it names “penalization of the participation in an organized criminal group”.

It is clear that the reference to “financial benefits” suggests the profit motive as a basic characteristic of organized delinquency, but the inclusion of the term “material benefits” provides doubts, yet the concept could be interpreted quite largely. The interpretation notes of the Convention state as examples, for this case, those offenses which relevant motivation was that of sexual gratification”<sup>4</sup>.

---

crime in international law». Houston Journal of International Law, n° 27, 2005. p 10

<sup>3</sup> Cf. United Nations. UN Interpretative Note for the official documents (travaux préparatoires) of the negociation of the UN Convention against Transnational Organized Crime and its Protocols. Available on line: [http://www.unodc.org/pdf/crime/final\\_instruments/383a1s.pdf](http://www.unodc.org/pdf/crime/final_instruments/383a1s.pdf) Accessed February 19, 2015.

<sup>4</sup> Cf. United Nations. UN Interpretative Note for the official documents (travaux préparatoires) of the negociation of the UN Convention against Transnational Organized Crime and its Protocols. Available on line:

To face this criminal phenomenon, the Salvadoran jurisdictional plant counts in coordination with specialized courts in charge of judging the “modalities of organized crime and complex realization offenses”, that according to the creation law of the Specialized Courts, must follow cases that imply the homicide, kidnap and extortion offenses. Even so, the Law for Organized Crime and offenses of complex realization – hereafter LCODRC- that regulates the specialized competence of the courts in concept of created organized criminality is limited because it gathers only some of the fundamental aspects needed for the identification and configuration of this type of criminal offense. It omits the profitable purpose.

The cited law mentions that organized crime is *all form of crime characterized by being derived from a structured group, formed by two or more people, that would exist during a certain period of time and behave with the purpose of committing one or more offenses.*

The Constitutional Division of the Supreme Court recognizes that the LCODRC gives a limited concept of organized crime in its statement, and consequently suggests interpretation parameters in which it states: the hierarchical structure, the possibility to substitute its members, and existence of a decision center. However, this law does not behold or create an offence of organized crime, it only makes considerations about what is to be understood. Thus, this is not a penal law, but a procedural one.

Therefore, the offense that regulates is the Article 345 under the denomination of illicit groups. The current version of the article 345 of the Penal Code related to the illicit groups states that there will be considered to be processed the following groups, associations and organizations: I. Those with at least the following characteristics: the ones conformed by three or more people, of temporary or permanent nature, and of factual or legal nature. The ones that possess certain degree of structure and having the objective to offend. II. The ones mentioned in Article 1 of the

[http://www.unodc.org/pdf/crime/final\\_instruments/383a1s.pdf](http://www.unodc.org/pdf/crime/final_instruments/383a1s.pdf) Accessed February 19, 2015.

Law of Prohibition of Maras, Street Gangs and Organizations of Criminal Nature, from now on LPMPAAONC.

The subsection 2, Article 345 of the Penal Code from El Salvador determines that the ones mentioned in the Article 1 of the LPMPAAONC are procedurally illicit. This prescribes: “They are illegal and prohibited the so-called gangs or maras such as the self-nominated Mara Salvatrucha, MS-13, Barrio Dieciocho, Mara Máquina, Mara Mao Mao and the criminal groups, associations or organizations such as the self-nominated Sombra Negra; by means of which it is prohibited their existence, legalization, funding and support. The current prohibition is applied to the different criminal gangs or maras, groups, associations or organizations, no matter which denomination they adopt or even if there is no identity assumed.”<sup>5</sup>

In this sense, it is important to mention that the *maras* are a key element of the figure of illicit groups -that by reference of the LPMPAAONC- exemplifies the constituent gangs of the concerned offense (Illicit group). There emerges the question if the legislator considers the gangs as a form of different structure to that of the association, group or organization. Therefore, if it is taken into consideration that the subsection 1 points out they will be criminally illicit, and then in subsection 2 it is referred that the ones contemplated in the LPMPAAONC, by exclusion, are not understood as being referred as the same.

In jurisprudence, this misinterpretation has already been referred: “It has been a mistake the fact that the Article 345 of the Penal Code, Section 2, uses the technique of the remission clause to a special law as it is the Law of Prohibition of Maras, Street Gangs and Organizations of Criminal Nature. The controversial point is, with such writing, there is the misunderstanding that in the first supposition the groups included are those that

<sup>5</sup> Article 1 of the Law of Prohibition of Maras, Street Gangs and Organizations of Criminal Nature. Legislative Decree 458, published in Official Journal 169, Volume 388, September 10, 2010.

are not maras or gangs; and in Section 2, there is introduced the so-called gangs or maras”<sup>6</sup>.

Meanwhile, the problem in this area might not only be the denomination of the gang as an illicit group. Considering that the gangs characteristics could be included in the groups to which the Subsection 1 of Article 345 alludes, the problem is also the vagueness of the concepts included in that Article 345, Subsection 1, and the allusion to a new or different group in Subsection 2. That dispersion of collective figures suggests, given the dissimilarities in the Penal Code, that factually and legally they have been considered different groups by the legislator, and the problem is the infringement to the rule of law due to the lack of precision, and infringement to the principle of sentences ‘proportionality.

The current version of Article 345 of the Penal Code related to the illicit groups sustains the major disvalue of the associations related to the gangs towards the groups in general terms, so their sentences become significantly more important. As we have seen, the legislator has sentenced more severely the belonging to gangs than other collective entities where there could be organized crime.

Comparative chart of the sentences in the illicit groups

<i>Sentences for associations, groups and organizations that are not considered gangs. Article 345, Subsection 1.</i>	<i>Sentences for associations, groups and organizations that are considered gangs. Article 345, Subsection 2</i>
From three to five years of prison.  The creators, organizers, bosses, leaders, financers or ringleaders of the mentioned groups will be sanctioned with six to nine years in prison.	From five to eight years of prison  If the individual were organizer, boss, leader, ringleader or financer of such groups, the sanction would be from nine to fourteen years in prison.

All that allows to confirm that the legislator applies a different punitive treatment in reference to other delinquent manifestations in

associated offenses when it is not related to gangs, but that of illicit groups, associations or organizations, because those figures have a minor disvalue from those that belong to gangs in the Salvadorian penal law, and they are considered as organized crime since the inclusion of the parameters in the Palermo Convention, but for the others delinquent manifestations of organized crime the punishment is less than the gangs.

**References**

Orlova, Alexandra and Moore, Jame. «Umbrellas or building blocks' Defining international terrorism and transnational organized crime in international law». Houston Journal of International Law, n° 27, 2005.

United Nations. *UN Interpretative Note for the official documents (travaux preparatoires) of the negotiation of the UN Convention against Transnational Organized Crime and its Protocols.* Available on line: [http://www.unodc.org/pdf/crime/final\\_instruments/383a1s.pdf](http://www.unodc.org/pdf/crime/final_instruments/383a1s.pdf) Accessed February 19, 2015.

Law of Prohibition of Maras, Street Gangs and Organizations of Criminal Nature. Legislative Decree 458, published in Official Journal 169, Volume 388, September 10, 2010.

Sentence of the Chamber of Special Procedures, San Salvador, Appendix 161, March 17, 2011.

<sup>6</sup> Sentence of the Chamber of Special Procedures, San Salvador, Appendix 161, March 17, 2011.