

February 18, 2013 Commission de
l'immigration
et du statut de réfugié
Section de la protection des réfugiés



Immigration and
Refugee Board
Refugee Protection Division

N° dossier SPR / RPD File No.: MB1-03649
MB1-03650

Huis clos

Private Proceeding

Demandeur(e)s d'asile

Claimant(s)

**XXXX XXXX XXXX
XXXX XXXX XXXX**

Date(s) de l'audience

Date(s) of Hearing

November 14, 2012

Lieu de l'audience

Place of Hearing

Ottawa, Ontario

Date de la décision

Date of decision

February 18, 2013

Tribunal

Panel

Sylvie Roy

Conseil du demandeur d'asile

Claimant's Counsel

Heather Neufeld

Agent du tribunal

Tribunal Officer

Myriam De Bailleul
[Deposit of documents]

Représentant désigné

Designated representative

S/O

Conseil du ministre

Minister's Counsel

S/O

[1] The principal claimant, XXXX XXXX XXXX XXXX XXXX XXXX (hereafter called XXXX) and her husband, XXXX XXXX XXXX XXXX, (hereafter called XXXX), citizens of El Salvador, are making refugee claims pursuant to Section 96 and 97(1) of the *Immigration and Refugee Protection Act* (the *Act*).

[2] XXXX was identified as a «vulnerable person» under the terms of the Chairperson's *Guideline 8*¹ and in keeping with section 4.2 of the Guidelines; procedural accommodations were applied as per the Coordinator's decision of July 10, 2012.

SUMMARY OF ALLEGATIONS

XXXX

[3] The story alleging the basis of the family's fear is outlined in detail in XXXX Personal Information Forms (PIF)².

[4] XXXX met her husband in 2003 and they began living together in XXXX, a municipality in the San Salvador department of El Salvador, on XXXX XXXX XXXX 2005, at the time their son was born. She was a stay-at-home mom and XXXX worked as an XXXX.

[5] XXXX left his country in XXXX 2008, as a result of being threatened by the Mara 18 gang members. After XXXX left, XXXX and her son returned to live with her mom in XXXX XXXX, a rural community of the municipality of XXXX, a municipality in the Cuscatlán department of El Salvador.

[6] In XXXX 2010, XXXX went shopping, alone, to XXXX, a city in the municipality in the XXXX department of El Salvador. She had to walk a short distance to XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX and took two buses to reach the city. However, on her return trip home, XXXX was required to take a different route which took her walking on an isolated road

¹ *Guideline 8 - Concerning Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada.* The intention of this Guideline is to provide procedural accommodation(s) for individuals who are identified as vulnerable persons by the Immigration and Refugee Board of Canada (IRB). (December 2006 / Amended in December 2012).

² Exhibit C-1-1, C-1-2, C-1-3 and C-1-4: Personal Information Forms (PIF) and amendments.

between XXXX XXXX and XXXX XXXX XXXX The trip from this area to her mother's home is approximately three hours by foot.

[7] About half way through the trip, she suddenly encountered «three gang members wearing balaclavas » and baggy clothes coming out of a sugar cane field. They robbed her. One gang member took off his shirt disclosing the numbers 18 tattooed on his chest to put the shirt around XXXX head and cover her mouth. Another put a pistol to her head and hauled her into the field. All three men raped and beat her. After the rape, they threatened to cut her into pieces.

[8] The claimant passed out before she woke up to drag herself to the road. Subsequently, a stranger on a horse passed by and took XXXX to her mother's house. The next day she would have attempted suicide.

[9] Three days later, the claimant agreed to go with her mother to a private clinic in XXXX XXXX which was several hours' distance by car.

[10] XXXX mother would also have convinced XXXX to report the rape to the police, which they would have, following visit at the clinic.

[11] XXXX states that she reported the rape to a police station; however, the policeman responded that since XXXX could not identify her rapist, he did not believe she was raped and appeared uninterested. XXXX alleges that he also mentioned he did not believe her because and he was unable to verify bruises on her body. According to XXXX, he wrote something, but he did not show her what he wrote.

[12] About three or four weeks later, XXXX mother would have answered the telephone when a male voice demanded «to talk to the bitch ». XXXX mother would have responded that there was no bitch at that house and hung up.

[13] Initially, XXXX stated that the caller telephoned the next day again; however, she amended her PIF's narrative to reflect the fact, that she received the second call a week after the first call. XXXX further stated the caller told her he was aware she had gone to the police and threatened to do the same thing they had done to her, to her son.

[14] A week later, the claimant and her son moved to XXXX, two and a half hours by bus from XXXX, to live with her sister.

[15] XXXX mother made arrangements for XXXX to leave El Salvador by contacting a smuggler who had previously organized her younger sister's journey to the United States.

[16] XXXX left her son with family members and left XXXX, El Salvador, on XXXX XXXX, 2010. She traveled with the smugglers to Guatemala and Mexico before arriving in Arizona, USA, on XXXX XXXX, 2010, and finally joined XXXX in San Francisco, on XXXX XXXX, 2010.

[17] The couple worked and resided illegally in the U.S.A. until they travelled to Fort Erie, on XXXX XXXX, 2011, at which time they claimed refugee status.

XXXX

[18] At the outset of the hearing, counsel for the claimants submitted that XXXX was basing his claim on XXXX claim as a family member and not on the circumstances he described in his PIF's narrative³, which he completed and signed on XXXX XXXX, 2011. He testified that his fear is based on his wife's risk of being persecuted by gang members, should she return to El Salvador, and his inability to protect her.

[19] XXXX also testified that he fears persecution at the hands of the immigration officials in El Salvador and also at the hands of all gang members in his country as a result of the multitude of tattoos etched on his body. He submits that he acquired the tattoos while living in the United States, after he left El Salvador, in XXXX 2008. He also submitted that none of the tattoos are gang-related.

Preamble

[20] XXXX siblings, XXXX XXXX XXXX XXXX, claimed refugee status in Canada, in August 2010, XXXX XXXX XXXX XXXX claimed in September 2010, XXXX XXXX XXXX XXXX claimed in December 2012 and XXXX XXXX XXXX XXXX claimed in June 2011.

DECISION

³ Exhibit C-1-3

[21] The panel finds that the claimants are neither “Convention refugees” nor “persons in need of protection” pursuant to Sections 96 and 97(1) of the *IRPA*. The claimants do not have a well-founded fear of persecution for a Convention reason, and their removal to El Salvador would not subject them personally to a risk to life, or a risk of cruel and unusual treatment or punishment, or a danger of torture, not persons in need of protection because they face a personal risk of harm that is faced generally by all people in El Salvador.

Identity

[22] The panel is satisfied that claimants are citizens of El Salvador, based on copies of their genuine passports which form part of Exhibit A-2⁴.

Credibility

[23] In assessing these claims, the panel found that some of XXXX story lacked credibility. The following are some of the issues the panel does not believe.

[24] The panel believes, on a balance of probabilities, that XXXX was raped. This fact is corroborated by the medical report from the Clinica Medica Hospital XXXX XXXX⁵, a document that does not give rise for the panel to doubt its veracity.

[25] However, the panel does not believe that the men who allegedly raped her telephoned at her mother’s home subsequent to the rape to victimize her further for the following reasons.

[26] The claimant alleges that three days after she was raped, she and her mother reported the rape to a police station in XXXX XXXX, a municipality in the San Salvador department of El Salvador, a community located about two and a half hours from her mother’s home in a small village called XXXX XXXX. She further alleged that the rapists, who she alleged were Mara 18 gang members, would have called her mother’s home about three or four weeks later to speak to her.

[27] The documentary evidence⁶ states the following:

⁴ Exhibit A-2: Immigration documents.

⁵ Exhibit C-16: Medical letter, completed on January 23, 2012.

⁶ Exhibit A-1: 7.4 United Staes. 3 January 2011. Congressional Research Service. Clare Ribando Seekle, [Gangs in Central America](#).

« Latin America has among the highest homicide rates in the world, and in recent years homicide rates in several Central American countries have significantly exceeded the regional average (see **Table 1**). According to figures cited in a 2009 U.N. Development Program (UNDP) report, Latin America’s average homicide rate in 2005 stood at roughly 25 homicides per 100,000 people, almost three times the world average of 9 homicides per 100,000 people.⁵ That same year, average homicide rates per 100,000 people in El Salvador, Guatemala, and Honduras reached approximately 62, 44, and 37, respectively. Whereas homicide rates in Colombia, historically the most violent country in Latin America, have fallen in the past few years, homicide rates have remained at elevated levels in El Salvador, Guatemala, and, to a lesser extent, Belize. Homicide rates have increased significantly in Honduras. By 2008, the estimated murder rate per 100,000 people stood at roughly 32 in Belize, 52 in El Salvador, 48 in Guatemala, and 58 in Honduras. In Costa Rica, Nicaragua, and Panama, the corresponding figures were 11, 13, and 11, respectively. Homicide rates in the region have generally continued to trend upwards since 2008.

....

The major gangs operating in Central America with ties to the United States are the “18th Street” gang (also known as M-18), and their main rival, the Mara Salvatrucha (MS-13).

...

Estimates of Central American gang membership by country also vary considerably, but UNODC has cited country membership totals of some 10,500 in El Salvador... Many contend that gang-deportees have “exported” a Los Angeles gang culture to Central America and that they have recruited new members from among the local populations.

...

While MS-13 and M-18 began as loosely structured street gangs, there is evidence that both gangs, but particularly the MS-13, have expanded geographically and become more organized and sophisticated.

...

Some analysts maintain that the relationship between DTOs and gangs appears to be most developed in El Salvador...»

[28] Other documentary evidence⁷ add the following:

« 10. With a homicide rate of over 65 per 100,000 inhabitants¹ – the highest rate in Central America – and alarming levels of other expressions of violence, including injuries, robberies, extortions, and domestic and gender-based violence, El Salvador is considered to be among the most violent countries in the world today. The proliferation of small and light weapons and the actions of violent gangs (maras) contribute to such levels of violence. Homicide rates for women have also increased alarmingly in recent years and are currently the highest in the region.

...

⁷ Exhibit A-1, Tab. 5.3, United Nations. 14 February 2011. Human Rights Council. *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo. Addendum: Follow-up Mission to El Salvador.* (A/HRC/17/26/Add.2)

13. Despite notable achievements at the institutional and legislative levels in the post conflict era, significant challenges persist in the area of violence against women and girls. Impunity for crimes, socio-economic disparities and the machista culture continue to foster a generalized state of violence, subjecting women to a continuum of multiple violent acts, including murder, rape, domestic violence, sexual harassment and commercial sexual exploitation.

... Extremely violent murders of women and girls, highlighted as a major concern in the previous mandate holder's report, have increased alarmingly over recent years, reaching a situation that many of the Special Rapporteur's interlocutors described as reflecting a culture of hatred towards women and an indicator of the failure of the criminal justice system. All governmental bodies in charge of the analysis and investigation of such cases, as well as non-governmental organizations doing research on the subject, were unanimous about the disturbing proportions that this phenomenon has reached and the urgency of stepping up efforts to address it.

26. Particularly appalling is the level of brutality inflicted on the victims' bodies, sometimes involving mutilation, torture and decapitation, and often accompanied by Kidnapping and sexual violence. Over half of registered murders followed a similar pattern, in which victims aged between 10 and 29 years disappeared and were later found murdered, in parks or wasteland. The majority of these murders took place in **San Salvador**, La Libertad, Santa Ana and San Miguel. »

[29] According to the documentary evidence on Mara 18 and other gangs, the claimant's story is at odds with their well-known *modus operandi*. Mara 18 is comprised of young and willing men that are ruthless and willing to kill easily without thought. The claimant's story does not reflect how they operate.

[30] XXXX testified that her mother's village is located in a rural area with a population of approximately 1,000 people. Her parents owned a farm in the village for a very long time and sold their crops in the area. Her mother is well-known in the village.

[31] Given the documentary evidence, the panel finds on a balance of probabilities, that if these gang members had indeed discovered that XXXX had reported the rape to the police as alleged, they would have dealt her a ruthless blow as soon as they would have learned about it. It is not credible that they would have called her house about a month later, not only once, but twice to warn her and in effect, give her the opportunity to flee. Given the documentary evidence and on a balance of probabilities, the panel finds that the Mara 18 would have gone directly to her mother's house to finish her off. The claimant is not credible.

[32] Given that the panel does not believe that the individuals who raped her telephoned to warn her in advance of what they would do to her, it also does not believe that the claimant, accompanied by her mother, reported the rape to the police for the following reasons.

[33] Throughout her testimony, XXXX demonstrated outbursts of distress and submitted that her memory of the events that led to her refugee claim was diminished. Her testimony was laborious, particularly at the second sitting, despite having had counsel begin the questioning in accordance with the Chairperson's *Guideline 8* (Procedures with respect to vulnerable persons appearing before the IRB) and despite having her counselor to provide moral support for her. In summary, her testimony was onerous. Taking into consideration the psychological reports in this file, the panel attempted to confine her questions.

[34] Counsel provided voluminous documentary evidence to support these claims, including several affidavits from family members and support persons, including documents from XXXX XXXX, (hereafter called XXXX) who translated the claimants' documents from Spanish to English.

[35] XXXX completed her initial PIF on July 27, 2011, with the assistance of XXXX as her interpreter and with the assistance of her counsel. XXXX provided not only assistance as the claimants' interpreter for several documents throughout the process, but she also provided an Affidavit, disclosed at Exhibit C-17⁸, in which she describes her familiar relationship with the claimants as well as her recent visit to El Salvador and telephone conversations she has had with XXXX mother and sister. In addition, she provided a 2nd Affidavit, Exhibit C-18⁹, in which she purports to be an expert regarding violence against women in El Salvador. A copy of her credentials is included with her affidavit.

[36] At paragraph 26 of her PIF's narrative, XXXX states the following:

«The policeman seemed very uninterested in what happened to me. He wrote something down but didn't show it to me. He didn't ask me to sign anything. I don't know if he even took down an official complaint».

⁸ Exhibit C-17: Affidavit of XXXXXX XXXX XXXXX.

⁹ Exhibit C-18: CV Expert and Affidavit of XXXXXX XXXX XXX.

[37] XXXX also forwarded detailed amendments to her PIF's narrative which she signed with the assistance of an interpreter, on September 13, 2012. There is no further reference about the police reporting in the amendments.

[38] As well, XXXX mother prepared a letter to support her daughter's claim which is entered as Exhibit 16¹⁰. The letter is signed December 26, 2011. The mother states that she accompanied her daughter to the XXXX Police station and states the following with respect to the reporting:

«... The officer told us that if we could not recognize these men, the police would not be able to do anything in that regard. The officer did not write down a single word and he did not ask us to sign any document at all. I believe the policeman did not file a report because many times police officers are accomplices of gang members».

[39] Although the panel did not confront XXXX with this inconsistency, it considered it noteworthy to mention.

[40] The interpreter, XXXX, in her Affidavit in Exhibit C-17, states that she spoke with XXXX mother by telephone to get an update of the circumstances before the hearing. She states that it was difficult to organize these calls as XXXX mother and sister fear speaking on the telephone because of the gang members. In addition, XXXX mother is very sick with heart and pulmonary problems and it was difficult to find a time when she was well enough to be interviewed; finally, the phone service is poor and calls must often be repeated many times to get a clear connection.

[41] At paragraph 14 of her Affidavit, XXXX states that XXXX (XXXX sister) indicated that their mother had recently returned to the police station. She further states: «... she did go to the police station in XXXX a week prior to our telephone conversation to request a copy of the police complaint». The police said there was nothing in their records. The mother would have added that she doesn't understand why the police said they had nothing since she went to the police with XXXX to make the complaint.

[42] The panel finds the statements made (by XXXX sister and mother) are inconsistent with the mother's own earlier statements that «The officer did not write down a single word and he did not ask us to sign any document at all». Given the mother's circumstances about her illness and the difficulty

¹⁰ Exhibit 16 (?)

in reaching her by telephone, the panel understands why it may not have been possible for her to testify by telephone at the hearing. However, the fact remains that the mother provided two significantly different accounts of the alleged visit to the police station. This impugns XXXX credibility.

[43] The panel considered the psychological state of XXXX however, given the allegation that there was one single visit to the police station, it is reasonable to expect that the statements of XXXX and of her mother would be internally coherent about that one visit.

[44] As well, the alleged return visit by XXXX mother to the police station gives rise to the panel to further question the truthfulness of reporting the rape for the following reason. XXXX mother clearly stated in her first letter that « The officer did not write down a single word and he did not ask us to sign any document at all. I believe the policeman did not file a report ». Therefore, in that light, why would she go back to the police station to ask for a report? Based on the evidence analyzed above, the panel finds, on a balance of probabilities, that the mother's evidence is untrustworthy and not credible. When evaluating credibility the tribunal is entitled to rely on common sense.¹¹

[45] Given the above analysis and the inconsistent statements about what actually occurred at the police station led the panel to reject the allegation that XXXX and her mother reported the rape to the police.

[46] The panel finds based on the above analysis and on a balance of probabilities, XXXX incorporated reporting the rape to the police in her story to embellish her claim and to avoid explaining why she would not have reported the crime to the police.

Generalized versus Personalized Risk

XXXX

[47] XXXX testified that she was raped by three gang members that she described as being part of the Maras 18 gang because one rapist had the numbers 18 tattooed on his stomach.

¹¹ *Shahanati, Hasan v. M.E.I.* (F.C.A. # A-388-92) Pratte, Hugessen, McDonald, March 24, 1994.

[48] Aside from the alleged ensuing two telephone threats, which the panel did not believe, there was no evidence that XXXX had had any direct interaction with the Mara 18 or any other member of any other gang before the rape in XXXX 2010.

[49] Her evidence was that it was while walking alone, with no one in sight, on an isolated road lined by sugarcane fields between the towns of XXXX and XXXX XXXX, when three men suddenly leaped from the field to rape her. She could not identify the men.

[50] It was her first direct encounter with any gang member, other than generally noticing «MS» gang members in her village and Mara 18 gang members in XXXX XXXX XXXX as reflected in testimony.

[51] Given the evidence the panel finds, based on a balance of probabilities, that what XXXX faced and continues to face is a generalized risk, a risk faced by all other women in El Salvador. The following analysis supports that finding.

Report of Morena Soledad Herrera Argueta¹² (Undated)

[52] Ms. Herrera states that she is a Women's Human Rights Defender and feminist activist in El Salvador since the 1990s. She outlines at page 19/125 in her report the following:

«I think that XXXX story, regarding the assault she suffered in XXXX 2010, coincides with the patterns of operation that the gangs use in the streets and rural roads of XXXX.

The first aspect to point out is that I am familiar with the geographic area mentioned by XXXX. Through my work with women's organizations and with municipalities, I am familiar with many places, especially those located within the department of Cuscatlán, and bordering municipalities. In addition, I have been living for 6 years in the municipality of XXXX where gangs' control of territory is more and more evident.

Given that I work in violence prevention with community organizations, emphasizing citizen security, I know that there are communities in the XXXX area where the gangs have gained greater and greater control over the territory without the police being able to regain control. This is a growing reality in this region and there are places where the police don't dare enter because they are controlled by the gangs.

¹² Exhibit C-9: Expert report of Morena Soledad Herrera Argueta.

I know women community leaders, who live in fear, and who try not to have any interaction with the gangs. They tell me that they prefer not to enter these gang-controlled areas in order to not be singled out and threatened. Were they to be threatened, they would have to abandon their homes and communities.

My knowledge about the area, both on a general level of the municipality of XXXX and the communities of XXXX XXXX, XXXX XXXX and XXXX XXXX, permit me to affirm that the testimony of XXXX is unfortunately not the only case that has occurred in this area, and that unfortunately other women have provided similar testimonies, although in the majority of cases women resist reporting the crime due to the fear of the threats made by the ones who attacked them. Also, because they do not have faith in what the police will do, or because the police does not guarantee that the assailants will not be notified of the reported crime.

In the community of XXXX XXXX, like many other rural communities of the municipality of XXXX, there is no police post there. This community has 2 entries, one XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX and the other by land, by crossing a dirt road. Due to this, on several occasions, families that have reported crimes, despite having called the police for threats and assaults, say that the police presence is not assured, or they only arrive several hours after he acts have been committed. This also adds to the perception of insecurity and defenselessness of the population, especially for women who are victims of sexual assaults. Police presence is sporadic and infrequent, and only by means of patrols throughout the area.

The area where XXXX described when she was attacked (between the community of XXXX XXXX and XXXX XXXX) is in fact an area where there are no homes and where people that travel by foot have to walk long distances, that even when they are assaulted they cannot be heard when crying out for help.

This is why, in the last 2 years, it has been a place where assaults happen frequently, even to vehicles. The Group of Women of XXXX was assaulted at this location in 2011. Fortunately only 4 people were travelling and they were only robbed of valuables, but none of the women were travelling in the vehicle were victims of sexual assault, only the drive was hit but even these were minor.

...»

[53] A more recent, RIR¹³ provides the following:

« Sources indicate that El Salvador is one of the most violent countries in Central America (AFP 27 Oct. 2011; *The New York Times* 25 Mar. 2012). The Council on Hemispheric Affairs (COHA), "an NGO specialized in monitoring Latin American and Canadian relations," indicates that El Salvador faces "a genuine threat to citizen security from both gangs and international organized crime" (16 Feb. 2012). Reuters reports

¹³ Exhibit A-1: Tab 7.6 RIR SLV104089E. Dated 25 June 2012.

that, according to the National Civil Police (Policía Nacional Civil, PNC), violence increased 9.2 percent during 2011 when compared to 2010 (1 Jan. 2012). The Mara Salvatrucha (MS-13) and Mara18, (M-18) the two "most powerful gangs" in El Salvador (*The Guardian* 2 May 2012) are responsible for half of the homicides committed in that country (Reuters 1 Jan. 2012). Sources indicate that drug trafficking organizations are also contributing to the rise of violence in the country (UN 28 Feb. 2012, para. 380; US 13 Jan. 2012, 1). According to the US Congressional Research Service (CRS), criminal organizations other than gangs or those dealing with drug trafficking also operate in Central America (ibid. 11). The CRS indicates that, despite the absence of publicly available information, organizations involved in criminal activities such as arms trafficking, human trafficking and money laundering "possess the capital, manpower, and networks required to run sophisticated enterprises and to penetrate state institutions at high levels" (ibid.).

According to the *2011 Global Study on Homicide* by the United Nations Office on Drugs and Crime (UNODC), Honduras and El Salvador have the highest homicide rates in the world with 82.1 and 66 per 100,000 people, respectively (UN 2011, 93; AP 6 Oct. 2011). Sources report that approximately 4,300 people were killed in 2011 (Reuters 1 Jan. 2012; AFP 3 May 2012) out of an estimated population of 6,090,646 (US 8 June 2012). In 2010, 4,085 were killed (UN 2011, 93). In comparison, 554 homicides occurred in Canada in 2010 (Canada 26 Oct. 2011a), representing a rate of 1.62 per 100,000 people (ibid. 26 Oct. 2011b). A 2011 report produced by the UN International Narcotics Control Board indicates that the presence of Mexican drug cartels in Central America has represented an increase in violent crimes such as kidnapping, bribery, and torture (UN 28 Feb. 2012, para. 380). Amnesty International (AI) indicates in its *Annual Report 2011* for El Salvador that the number of women killed rose from 253 in 2008 to 477 between January and October 2011 (AI 2011). The AI report also indicates that "[m]any" of them were raped and mutilated (ibid.).

2. Gang Activity

The CRS indicates that according to the UNODC, membership in gangs in El Salvador was estimated at 10,500 people in 2007 (US 13 Jan. 2012, 10). However, Freedom House indicates that 20,000 people were gang members as of 2009, including 9,000 in prison (Freedom House 2011). AFP reports that membership of both MS 13 and M-18 is estimated at 32,000 persons; including 10,000 in prison (AFP 3 May 2012).

Sources indicate that gangs in El Salvador are actively involved in extortion and drug trafficking (ibid.; AP 23 Mar. 2012). Sources also indicate that gangs target bus drivers for extortion (*Los Angeles Times* 22 June 2010; *Toronto Star* 10 Mar. 2012). The *Toronto Star* reports that bus drivers are "typically obliged to make protection payments to gang members amounting to [US] \$1,000 a month or more" (ibid.). The Human Rights Institute of the José Simeón Cañas Central American University (Instituto de Derechos Humanos de la Universidad Centroamericana "José Simeón Cañas," IDHUCA), indicates in its 2010 report that [translation] "at least seventeen people died incinerated" when a criminal group sprayed a bus with gasoline and set it on fire (2010,

5). *Los Angeles Times* also reports this and another incident where attackers "strafed passengers with automatic rifle fire" killing two people (22 June 2010). In both cases "several" children were killed (ibid.). The Research Directorate could not obtain additional information on these incidents among the sources consulted within the time constraints of this Response.

According to AI, prisons in El Salvador also experience "high levels" of gang violence (2011). The US Department of State's *2010 Country Reports on Human Rights Practices* indicates that gang activity inside prisons continues to be a "serious problem," and that gangs continue to exercise influence on the judicial system from prisons (US 8 Apr. 2011, Sec. 1c). The CRS reports that the Salvadoran police found evidence suggesting that some MS-13 leaders imprisoned in El Salvador were ordering "retaliatory assassinations" of individuals in Northern Virginia (US 13 Jan. 2012, 10). It also reports that the Federal Bureau of Investigation (FBI) has "documented increasing numbers in cases of extortion schemes carried out by gangs in El Salvador against Salvadorans in the United States" (ibid.).

Sources report that by March 2012, homicides in El Salvador had decreased (CISPES 20 Apr. 2012; *The New York Times* 25 Mar. 2012). The Committee in Solidarity with the People of El Salvador (CISPES) indicates that the homicide rate dropped by 40 percent in March 2012 (20 Apr. 2012), while other sources report that homicides dropped to 5 per day from a "typical" rate of 14 per day (*The New York Times* 25 Mar. 2012; AFP 3 May 2012). Sources also report that the aforementioned drop in homicides is due to negotiations carried out between the Salvadoran Catholic Church and gangs with the support of the Salvadoran government to bring about a truce in violence (CISPES 20 Apr. 2012; AFP 3 May 2012). AFP further reports that gangs have announced the cessation of "forceful recruitment of young people and declared schools to be 'zones of peace'" (ibid.).

However, sources report scepticism with regard to the truce (*The Guardian* 2 May 2012; *The New York Times* 25 Mar. 2012). *The New York Times* reports that 30 imprisoned gang leaders were transferred from "maximum-security" prisons to prisons with "perks" (25 Mar. 2012; see also *The Guardian* 2 May 2012). CISPES reports that, despite the drop in homicide rates, extortion levels to residents and business owners remain the same (20 Apr. 2012).

3. State Response

According to COHA, Salvadoran president Funes replaced between November 2011 and January 2012 "key public security and intelligence officials with retired high ranking military personnel" (16 Feb. 2012). Sources also indicate that president Funes deployed the armed forces to counteract gang violence in the country (AI 2011; AFP 3 May 2012). Freedom House reports that the government extended the deployment during 2010, granting additional powers to the military to "conduct patrols and searches among civilians" (2011). The CRS indicates that despite the 8,000 troops involved in

border security and joint patrols with the police, crime rates have not been reduced "significantly" (US 13 Jan. 2012).

Sources report on President Funes' plan to create a program that would draft 5,000 adolescents at risk of joining gangs (*Los Angeles Times* 12 June 2011; AFP 1 June 2011). The plan, according to *Los Angeles Times*, would provide "noncombat" and "practical training in such skills as mechanics and carpentry" (12 June 2011). The purpose of the program is to offer rehabilitation alternatives, promote [translation] "a change of conduct" and facilitate their incorporation into the productive sectors of the economy (AFP 1 June 2011). Sources also report that President Funes asked the business sector to create employment alternatives to curtail violence (ibid. 2 May 2012; NOTIMEX 2 May 2012). One program consists of providing training for nine months to young people between the ages of 14 and 17 in natural disaster management (AFP 2 May 2012). Another program plans to train between 500 and 1,000 teens in trades that would aid them in obtaining employment (ibid.). Additional information on these programs could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

The Mexican News Agency (Agencia de Noticias del Estado Mexicano, NOTIMEX) reports that the Central American Bank for Economic Integration (Banco Centroamericano de Integración Económica, BCIE) and the Italian Anti-mafia Attorney would provide training to [translation] "at least" 50 prosecutors in Central America to fight criminality (9 Feb. 2012). Additional information on this initiative could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

The CRS indicates that the US provides, through the Central America Regional Security Initiative (CARSI), assistance such as equipment, technical assistance and training to Central American nations "to improve narcotics interdiction and disrupt criminal networks that operate in the region" (US 13 Jan. 2012, 24).

4. Effectiveness of State Institutions

According to the US Department of State, "inadequate training, insufficient government funding, lack of a uniform code of evidence, and isolated instances of corruption and outright criminality interfered with the PNC's effectiveness" (US 8 Apr. 2011, Sec. 1d). Sources also indicate that the judiciary is inefficient, corrupt and prone to political interference, and that impunity remained high (ibid., Sec. 1e; IDHUCA 2010, 15). The US Department of State indicates that police officers, victims and witnesses are intimidated and assassinated; judges are subject to outside influence; and that the criminal conviction rate is less than 5 percent (8 Apr. 2011, Sec. 1e). IDHUCA indicates in its 2010 report that, during judicial proceedings, oral testimony takes precedence over scientific evidence, with the latter hardly ever used (2010, 13).

5. Witness Protection Program

According to the Executive Technical Unit (Unidad Técnica Ejecutiva, UTE), the [translation] "institution responsible for providing technical, administrative and financial assistance to the Coordinating Commission of the Justice Sector" (El Salvador 18 Apr. 2012), the Victim and Witness Protection Area (Área de Protección de Víctimas y Testigos) is the agency responsible for [translation] "providing protection measures, and assistance to victims, witnesses and other persons involved in judicial processes or crime investigations" (ibid. 25 May 2012). The Area consists of six Technical Evaluation Teams (Equipos Técnicos Evaluadores) in different regions of the country (ibid.). According to the Regulation for the Special Law for Victim and Witness Protection (Reglamento de la Ley Especial para la Protección de Víctimas y Testigos), these teams are responsible for providing social, psychological and juridical assistance; evaluating and supervising protective measures to witnesses and victims; and carrying out studies to improve the program, among others (ibid. 2007, Art. 8). The Regulation states that requests for protection that meet all the requirements must be evaluated as soon as possible; if a positive decision is made on the application, protection measures are decided in the following five days (ibid., Art. 17). The law also calls for protection measures in [translation] "urgent" cases which may take up to eight hours to inform the protection officer (ibid., Art. 23). According to the US Department of State, the program offered protection to 3,151 persons in 2010, including 149 who were protected under "extraordinary measures" (8 Apr. 2011, Sec. 1e).

La Prensa Gráfica, a San Salvador-based newspaper, reports that according to the Office of the Attorney General (Fiscalía General de la República, FGR), [translation] "at least" 10 witnesses have been obliged to provide testimony without voice distortion or balaclavas by some judges (*La Prensa Gráfica* 12 Dec. 2011). The article quotes a judge as saying that [translation] "judges have the discretion to suppress any of the [protection] measures ordered by the Executive Technical Unit of the Justice Sector (UTE)" (ibid.). The same article cites the Director of the UTE as saying that judges "must follow the resolutions sent by a technical team of the protection program"; otherwise, judges would be violating the Penal Code with regard to the prohibition to release data or images of witnesses enrolled in the protection program (ibid.). According to the UTE, six other cases have been reported for violation of protection measures (ibid.).

Another *La Prensa Gráfica* report indicates that six hours after a witness had testified without a voice distorter, two of his family members were attacked resulting in one of them being killed (ibid. 30 Nov. 2011). According to the article, the judge did not authorize the use of a voice distorter because [translation] "of difficulty taking and evaluating [witness'] testimony" (ibid.). *La Página*, a San Salvador-based newspaper, reports that, according to two prosecutors and an ex-prosecutor that were interviewed by the newspaper, [translation] "'at least 100 witnesses were murdered in 2010 across the country'" (9 Feb. 2011). According to the ex-prosecutor interviewed, protection measures last until the judicial process comes to an end; and those witnesses that receive protection in shelters, have to cohabit with "witnesses from all gangs [as well

as] civilians" (ibid.). The newspaper also interviewed an attorney who indicated that the state does not provide assistance with relocation alternatives, finding employment, or changing identity (ibid.). According to the Director of the Anti-homicide Specialized Unit (Unidad Especializada Anti homicidios), the program does not have sufficient resources; the unit had a budget of US\$1.7 million in 2010, down from US\$2.7 million in 2008 (Comunica 7 Apr. 2010). The US Department of State indicates that "street gang intimidation and violence against witnesses contributed to a climate of impunity from criminal prosecution" (8 Apr. 2011, Sec. 1e).»

[54] The panel finds, on a balance of probabilities, based on the above-noted documentary evidence, which the panel finds compelling and to the point, and based on its review of all of the evidence, that in XXXX 2010, XXXX was a victim of crime of a generalized nature at the hands of the MS-18.

[55] I further find that XXXX rape was solely carried out for criminal motives, and for no other reason; it was, on a balance of probabilities, a random rape. The gang members did not specifically target her; she happened to be on an isolate road where gang members were located and they took advantage of her helpless circumstances. If any other woman had been in XXXX unfortunate circumstances, alone on that isolate road, the panel finds that the women would have found themselves in the same indiscriminate situation as were the women described in Ms. Herrera's submission.

[56] There was no persuasive evidence before the panel that the claimant was targeted for any reason other than she was a typical victim of rape.

[57] In accordance with the voluminous documentary evidence, the risk faced by XXXX as a result of being raped is faced generally by all women in El Salvador. The crime of rape would be faced in every part of the country and is faced generally by all individuals in El Salvador.¹⁴ The evidence in this case demonstrates that the fear of rape has been recognized as a generalized risk. A generalized

¹⁴ Exhibit R/A-1, Item 7.2, *Response to Information Request* Number SLV103445.FE., 3 June 2010, The presence and activities of Mara Salvatrucha (MS or MS-13) and of Mara 18 (M18) in El Salvador, recruitment, measures taken by the government to fight the maras, and protection offered to victims of the Maras (2008-2010).

risk does not have to affect everyone in the same way. The Federal Court has upheld the Board in finding generalized risk for various victims of Maras.¹⁵

Affidavits of Siblings

[58] The panel afforded little weight to the Affidavits of XXXX two sisters and one brother for the following reasons.

[59] None of the siblings were in El Salvador at the time that XXXX was raped. What they describe in each affidavit is their individual alleged circumstances that led each one of them to leave their country to eventually claim refugee status in Canada.

[60] At paragraph 67 of his affidavit, Thomas Boerman submits that (because XXXX and XXXX have both been raped by gang members and the brother was pressured to join the 18th street gang and the Mara Salvatrucha and finally, that XXXX witnessed an homicide and cooperated with police in its aftermath, and another sister who is still living in El Salvador is receiving death threats from gang members) « While theoretically anyone in a gang-affected area is at some level of risk, it is clearly acknowledged that those who have been targeted by gangs or fallen into disfavor with them are at *exponentially* » higher risk of physical harm or death. The panel disagrees for the following reasons.

[61] The panel has already concluded that XXXX rape was a random rape, that she was not specifically targeted.

[62] With respect to the circumstances of alleged persecution of the other members of this family, the panel is not in a position to make a decision on any of their claims, as each panel's decision would be based on each individual case. Having stated this, however, it is clear that each set of circumstances as related in each of the three affidavits, is distinct from each other. Example: XXXX was raped by MS 18, while XXXX was allegedly raped by Mara Salvatrucha gang members (different gangs who fight each other) in order to extort from her information about her boyfriend's whereabouts. – Clearly, different circumstances.

¹⁵ *Mejia, RenéAlberto v. M.C.I.* (F.C., no. IMM-3448-05), Blais, January 9, 2006; 2006 FC 12; *Velasquez, Ventura Sarai Batres v. M.C.I.* (F.C., no. IMM-2299-08), de Montigny, February 2.

[63] Although the panel is not in a position to predict on how a persecution will be carried out¹⁶, when evaluating credibility the panel is entitled to rely on common sense and logic.¹⁷ Given the documentary evidence, it is reasonable to conclude that if this family had been personally targeted by any gang in El Salvador, whether MS-18 or MS13, or any other gang, the mother would have been persecuted as well.

¹⁶ *Chaudary, Imran Akram v. M.C.I.* (F.C.T.D., no. IMM-2048-94), Reed, May 4, 1995.

¹⁷ *Shahamati, Hasan v. M.E.I.* (F.C.A., no. A-388-92), Pratte, Hugessen, McDonald, March 24, 1994.

XXXX

[64] Although XXXX testified that he firstly fears for XXXX security, he also fears that he will be persecuted not only by the Salvadorian authorities but by gang member in El Salvador who target men with tattoos.

[65] It was submitted that XXXX tattoos are not gang-related, but « highly likely they will be perceived as such in El Salvador, which translates to risk to him should he be returned to his country of origin. The basis for this conclusion, as described previously, is that tattoos are so strongly associated with gang culture that any tattoo - even non-gang tattoos - often put individuals and those associated with them in great danger »[1][1] and consequently he and XXXX would further be at risk in their country.

[66] What is distressing in this case is that XXXX, a 43-year-old married man and father to small children, admitted in testimony that he was told, prior to obtaining the tattoos, while living illegally in the United States, that his life would be at risk in El Salvador as the results of tattoos on his body.

[67] At paragraph 69 of his Affidavit, Mr. Boerman states: « Because tattoos are so strongly associated with gangs and the fact that so many people, particularly young males, are killed because of their tattoos, many feel the pressure to have non-gang tattoos removed, as merely keeping them covered offers no assurance of safety. Unfortunately, tattoo removal is not necessarily readily available and when it is it is an expensive, lengthy and painful process, and thus is not a feasible option for all individuals ».

[68] At the outset, the panel considers that people bearing tattoos on their bodies do not constitute a particular social group as defined in *Ward*¹⁸[2]. The Supreme Court of Canada in this decision

¹⁸ *Canada (Procureur général) c. Ward*, [1990] 2 C.F. 667; 67 D.L.R. (4th) 1; 10 Imm. L.R. (2d) 189 (C.A.); *Canada (Procureur général) c. Ward*, [1993] 2 R.C.S. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85; *infirmant* [1990], 2 C.F. 667, 67 D.L.R. (4th) 1, 10 Imm. L.R. (2d) 189 (C.A.).

stressed the element of immutability in defining “membership in a particular social group”. As readily acknowledged by XXXX and his counsel, tattoos are removable by laser therapy.

[69] Although XXXX submitted that he does not currently have the funds to have his tattoos removed, this, in itself, is not a reason that the panel can take into consideration to find XXXX and XXXX refugees under the Geneva Convention. XXXX presented no objective evidence in terms of cost to have the tattoos removed or whether he made any attempts to have them removed. Nor was there any objective evidence such as bank statements, pay stubs or other evidence presented to support the allegations about his lack of resources or his inability to take on additional work to pay for their removal or find other means to have the tattoos removed.

Affidavit of Thomas Boerman, Ph.D., dated September 2012

[70] For all the above reasons, the panel finds that Thomas J. Boerman’s Affidavit has limited probative value beyond confirming what is already very clear in the objective documentary evidence, and that is that El Salvador is still struggling with corruption and incompetence and that it faces huge challenges. It fails to give credit to El Salvadorian authorities in noting the steps they took, and continue to take, to fight criminal gangs, which taints its probative value and therefore the panel affords minimal weight to it.

[71] In passing, the panel wishes to add that although it appreciates the work that has been put into the affidavits of individuals such as Mr. Boerman and Ms. Herrera, the onus to assess credibility in these proceedings lie with the panel, and no other.

[72] The objective documentary evidence is clear that El Salvador, a democracy, while still beset by governmental corruption, is engaging in serious reforms to eliminate corruption and improve police competence.

Compelling Reasons

[73] Counsel submitted that the claim should be considered under “compelling reasons.” For the detailed reasons given within this decision, the panel respectfully disagrees.

[74] While the panel accepts that the claimant was raped and suffers psychologically as a result, it does not find that the abuse rises to the level of “appalling persecution”. As such, it does not find that there are compelling reasons for not returning the claimants to their home country.

[75] The panel finds, consequently, that on a balance of probabilities, the risk the claimants faced is generalized and is one which is faced generally by the population of El Salvador. Based on the particular facts of this case, even if the claimants faced a particularized risk of harm in accordance with Section 97 of the *IRPA*, the risk faced by the claimants is generalized, which falls under the paragraph 97(1)(b) exception.

Stay in the United States

[76] XXXX lived in the United States beginning in XXXX 2008, while XXXX joined him in XXXX 2010, before they both travelled to Canada in XXXX 2011.

[77] XXXX was asked why they stayed in the United States for such an extended period, she testified, in summary, that the members of the community where they were living advised them not to approach the authorities because they would immediately be imprisoned and returned to El Salvador.

[78] The delay in leaving the United States when the claimants alleged they faced more than a mere possibility of persecution, as well as a risk to life or a risk of cruel and unusual treatment or punishment in Mexico, is inconsistent with a subjective fear of persecution, or a belief that one faces a risk to life or a risk of cruel and unusual treatment or punishment.

[79] In conclusion, the panel wishes to convey that it finds it difficult to reject these claims, as it was evident from XXXX closing remarks, and from the different psychological reports entered as exhibits that XXXX has had to overcome difficult issues. Auspiciously, their extended stay in Canada has allowed her and XXXX to acquire professional services that encouraged them to make tremendous progress in dealing with these issues since their arrival.

[80] However, these are not reasons that the panel can take into consideration to find them refugees under the Geneva Convention.

CONCLUSION

[81] Accordingly, having considered all of the evidence and based on the above analysis, the panel finds the claimants **XXXX XXXX XXXX XXXX XXXX XXXX** and **XXXX XXXX XXXX XXXX** not to be “Convention refugees”, as they have not established that there is a serious possibility that they would be persecuted for a Convention ground, or that they would be in danger of torture, or that they would be at risk for their life or to be subjected to cruel and unusual treatment or punishment, should they return to El Salvador.

[82] The panel rejects these claims.

Sylvie Roy

Sylvie Roy

February 18, 2013

Date

/c/