

Mexican Refugee Claimants: Cheating the System?

by

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Abstract

Between the years 2008 and 2009, Mexican refugee claims accounted for 25 % of the total amount of applications for asylum made in Canada. However, the rate of acceptance of this particular group went as low as 11% in 2008 and 9% in 2009. For the Canadian government, these numbers were an indicator of fraud on the part of Mexicans who just wanted to collect welfare benefits and immigrate as economic refugees. In 2009, in an attempt to decrease these numbers, the Canadian government imposed visa restrictions in order prevent Mexicans from getting into Canada without having a pre-screening process. In 2012, Canada added Mexico onto a list of countries considered safe, as a means of preventing them from appealing adverse decisions and to expedite their claims for asylum.

These measures were criticized by Canadian refugee scholars and the press on the basis that the Canadian government was ignoring the reality of thousands of Mexicans who are in need of international protection. Nevertheless, despite all the attention and controversy about Mexican refugees, there has been no in-depth analysis of this issue from a legal perspective. Because a refugee determination requires the participation of the claimant and the adjudicator, the author felt it not fair to treat Mexicans as the sole source of the problem, while failing to question and examine the role played by the Canadian refugee decision makers in contributing to the high rates at which Mexican refugee claims are denied.

In order to determine the degree of responsibility of the Canadian government in this situation, the author undertook a close examination of the Immigration and Refugee Board decisions that granted and denied refugee status to Mexicans. Their legal arguments are analyzed in order to determine if this administrative tribunal has been fairly applying the principles contained in the 1951 Refugee Convention and its interpretation by the Canadian courts.

This thesis concludes with a general overview of the past and current practices of the Immigration and Refugee Board of Canada and analyses the role that the Canadian government plays in the high rate of denial of Mexican refugee claims.

Preface

This thesis is the original, unpublished and independent work of Andrés Abogado.

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Para mi Mamá

CHAPTER 1: INTRODUCTION

I cannot tolerate a situation where they see people simply getting a plane ticket, arriving here, saying the magic word 'refugee,' getting quasi-landed status, getting a work permit and/or welfare benefits¹

1.1 The Controversy: Fraudulent Mexican Refugee Claimants

In 2009, Citizenship and Immigration Canada ("CIC") imposed travel restrictions on Mexican nationals who wanted to come to Canada. To justify this measure, CIC published a document titled "Backgrounder - The Visa Requirement for Mexico"² documenting the increasing rate of asylum claims made by Mexicans, as well as their low rate of acceptance. According to CIC:

[T]he number of Mexican refugee claimants has almost tripled from about 3,400 in 2005 to more than 9,400 in 2008 when Mexicans accounted for more than 25 percent of all refugee claims filed in Canada. In 2008, the IRB reviewed and completed 5,654 Mexican refugee claims of which 606 were accepted. This represents an overall acceptance rate of 11 percent for Mexican refugee claims... In 2009, the number of claims has increased, while the acceptance rate has decreased further still.³

Representatives of the Canadian government interpreted these numbers as a sign of fraudulent claims being made by Mexican nationals, and in turn blamed (at least in part) Canadian refugee law. In 2009, the Prime Minister of Canada, Mr. Stephen Harper, told the former president of Mexico, Mr. Felipe Calderon, "This is not the fault of the government of Mexico - let me be very clear about this. This is a problem in Canadian refugee law which encourages bogus claims."⁴ Mr. Jason Kenney, then Minister of Citizenship and Immigration, using the same words as the

¹ Nicholas Köhler, "A Crackdown On Queue-Jumpers Will the Tories make Bogus Refugee Claims An Election Issue?" *Maclean's* (28 July 2009) online: <http://www.macleans.ca> [Köhler] Statement of the Minister of Citizenship and Immigration after questioning about the Visa requirement for Mexico.

² Backgrounder - The Visa Requirement for Mexico text version: Mexico vs. All Other Countries from 1999 to 2008. Citizenship and Immigration Canada, Online: <http://www.cic.gc.ca> [Backgrounder]

³ Ibid.

⁴ Steven Chase, "Harper blames Canada for visa furor", *The Globe and Mail* (09 August 2009) online: The Globe and Mail <<http://www.theglobeandmail.com>>

Prime Minister, described Mexican asylum seekers along with Roma applicants as “bogus refugee claimants”⁵ and justified the measures given the high rate of denied applications: “[G]iven the numbers Canada had no option but to force the issue.”⁶ The visa imposition was also justified by saying that this measure was in line with American policies: “Mexico was the last Latin American country for which Canada did not require a Temporary Resident Visa. The requirement is in line with the U.S., which has had a long-standing visa policy on Mexico.”⁷ In practice, since their adoption, the visa restrictions have limited the extent to which Mexicans asylum seekers are able to make refugee claims in Canada, and have resulted in a greatly reduced number of such claims.

Experts and scholars have criticized the decision to impose visa requirements on Mexico based on stopping fraudulent Mexican asylum claimants. One of them was Peter Showler, a University of Ottawa refugee system expert and former head of the Immigration and Refugee Board (“IRB”). He challenged Minister Jason Kenney’s arguments by explaining that not all Mexican refugee claimants should be considered fraudulent and that many failed refugee claimants ought not be described as such:

Kenney is quite clear about who a bogus claimant is: anyone who is a failed refugee claimant. He cites Mexican claims as the example. Eighty-nine per cent were rejected in 2008. He has said they are all queue jumpers, economic migrants who are abusing the refugee system. But are they? With the minister's indulgence, I would define a bogus claimant as one who makes a false refugee claim knowing that he or she is not a refugee. That definition would undoubtedly cover some Mexican claimants who come to Canada with a phoney story about horrible events that never happened. It would even cover the Mexican migrant who has naively been

⁵ Köhler *supra* note 1.

⁶ Ibid.

⁷ Backgrounder *supra* note 2, politicians in the United States have manifested their strong beliefs about the lack of credibility of Mexicans in asylum claims and have often referred to them as fraudulent. See Sara Campos & Joan Friedland, “Mexican and Central American Asylum and Credible Fear Claims” (2014) American Immigration Council <www.immigrationpolicy.org>

misled by an unscrupulous travel agency to simply arrive in Canada. It would not however describe many of the failed Mexican claims.⁸

In 2013, the Canadian government took another step that served to curb the rate at which Mexicans (among other foreign nationals) were applying for refugee status in Canada. The government created the “Designated Country of Origin List” (“DCO”) based on the following rationale: “Most Canadians recognize that there are places in the world where it is less likely for a person to be persecuted compared to other areas. Yet many people from these places try to claim asylum in Canada, but are later found not to need protection. Too much time and too many resources are spent reviewing these unfounded claims.”⁹

The government explained that the aim of the DCO policy is to deter abuse of the refugee system by people (such as Mexicans) who come from countries generally considered to be safe. Refugee claimants from countries included in the DCO list have fewer procedural rights than the ones who are not. For example, DCO claimants do not have access to health coverage, nor the right to apply for a work permit upon arrival to Canada. They also have less time to present their case (hearings on these claims are expected to be held within 30 – 45 days after referral of the claim to the IRB, as opposed to the 60-day timeframe for other refugee claimants) and will not have access to the Refugee Appeal Division if their claim is dismissed.¹⁰ CIC justifies giving fewer procedural rights to asylum seekers included in the DCO by saying that “This will ensure that people in need get protection fast, while those with unfounded claims are sent home quickly

⁸ Peter Showler, “The bogus refugee myth” *The Ottawa Citizen* (13 August 2009) online: The Ottawa Citizen [www.http://ottawacitizen.com](http://ottawacitizen.com)

⁹ Citizenship and Immigration Canada “Designated Countries of Origin” online: Citizenship and Immigration Canada <http://www.cic.gc.ca> Canada was not the first refugee receiving country that came up with the idea of creating designated country or origin lists or safe country designations with the purpose of decreasing the amount of refugees that come from specific countries. See Asylum Information Database, *The Safe Country Concepts*, online: Asylum Information Database < <http://www.asylumineurope.org>>

¹⁰ Ibid.

through expedited processing.”¹¹ The DCO consists primarily of countries that belong to the European Union, as well as a handful of developed East Asian countries. The only two Latin American countries to be included are Chile and Mexico, both of which were added to the list in 2013.

In an interview with the *Globe and Mail*, Mr. Showler also criticized the inclusion of Mexico into the DCO: “This is a decision made for political and economic reasons...Most Mexican refugees say they were targeted by criminals, and can’t get state protection in the large swaths of the country effectively controlled by narco-gang...There will be people who are sent back who will be at serious risk for their lives,”¹² The tragic stories of Veronica Castro, a refugee claimant who was sent back to Mexico and murdered after a failed asylum claim¹³ and the recent incident of Ms. Vega Jimenez, a woman who feared returning to domestic trouble in Mexico and died in CBSA custody,¹⁴ serve as evidence in favor of Mr. Showler’s concerns.

1.2 Purpose and Importance of this Thesis

The goal of this thesis is to analyze the legitimacy of the theory that the high rate at which Mexican refugee claims have been denied is directly related to the rate at which Mexicans advance bogus asylum claims, which was used as the justification for the visa and DCO measures recently adopted. Indeed, no government official has been able to provide clear and

¹¹ Ibid.

¹² Campbell Clark, “Ottawa announces deal fast-track with Mexican refugees” *The Globe and Mail* (14 February 2013) online: *The Globe and Mail* <www.theglobeandmail.com> See also Egale Human Rights Trust “Open Letter: Canada needs to remove Mexico from the designated country of origin list immediately” online: Egale <<http://egale.ca>>

¹³ Mary Sheppard, “Deported Mexican Refugee Claimant Dies After Beating: The Life and Death of Veronica Castro” *Canada Broadcasting Corporation* (25 April 2012) online: CBC News <www.cbc.ca>

¹⁴ Veronica Woo, “Woman who died in CBSA custody feared returning to domestic trouble in Mexico” *The Globe and Mail* (31 January 2014) online: *The Globe and Mail* <<http://www.theglobeandmail.com>>

convincing evidence to support this claim, other than the data that demonstrated the rate of rejected of their refugee applications during 2008 and 2009. Neither the refugee scholars nor the media had concrete evidence or data with which to rebut the statements of the Canadian government representatives, despite the fact that it was commonly accepted that there are many legitimate Mexican refugee claimants in need of protection. In this case, as always, there was more than one side to the story. Unfortunately, the Canadian public and the international community received only the “official version” of the problem, which was used to justify the new immigration policies. As a result, there was a lack of attention paid to the stories told by the Mexican refugee claimants in their rejected applications and in the legal analysis thereof. This thesis seeks to fill that gap by undertaking a meaningful analysis of the IRB’s recent decisions regarding asylum claims by Mexican nationals. These cases will show if the IRB, as the body in charge of applying the 1951 Refugee Convention and its Protocol (“Refugee Convention”), is following and respecting the contents of this important international instrument and its incorporation in Canadian domestic law. If that is not the case, Canada will not only be in violation of its treaty obligations, but also of its obligations to those legitimate applicants who have risked so much to come here, believing they will receive a fair adjudication of their claim. If they have legitimate reasons to apply for protection, their hopes and needs must be respected in accordance with the law of refugee status, and government policies should not be permitted to trump that law.

1.3 Reasons of Mexicans for Fleeing Mexico in Search of International Protection

As we saw, the imposition of a visa requirement on Mexicans and the country's addition to the DCO was extremely controversial, and the media, as well as refugee experts and scholars were (and still are) extremely critical of the measures. However, there remains a real gap in the literature on this topic: none of these criticisms were sufficiently in depth to determine whether the concerns and related response of the Canadian government were reasonable. In assessing this issue, the starting point should be the assessment of why so many Mexicans sought refugee status in Canada between the years of 2006 and 2009. This is an important question to ask, because its response might indicate why this particular group of refugees was looking for international protection in Canada. Once this issue is addressed, a second inquiry must be undertaken in order to determine if there were other factors at play, other than fake refugees and the Canadian refugee law that might explain the high levels of rejection of Mexican asylum claimants.

In answering the first question and in order to achieve even a cursory understanding of this phenomenon, one must look back through the last 30 years of Mexican history, to trace when and where the country's current problems began. The Mexican drug cartels started to appear when the Colombian mafia was no longer able to meet the high demand for narcotics in the United States¹⁵. From the mid 1970's and early 1980's, Colombia saw the rise of the most

¹⁵ Paul Gootenberg explains that there were additional factors that contributed to the spreading of the cartels in Mexico: "Other forces magnified cocaine's role: Mexico's 1980s "lost decade" economic meltdown, the long death-throws of the PRI, the transformation of frontier towns like Juárez and Tijuana into sprawling metropolises of misery, and the boom of border commerce with the 1994 NAFTA treaty. See Paul Gootenberg "Cocaine's Blowback North: A Pre-History of Mexican Drug Violence" Stony Brook University Online at <http://lasa.international.pitt.edu/> at 9.

powerful drug cartel in world history: El Cartel de Medellin which had as a head the notorious kingpin Pablo Escobar:

Pablo Escobar was a Colombian drug lord and leader of the Medellín Cartel, which at one point controlled as much as 80% of the international cocaine trade. He is famous for waging war against the Colombian government in his campaign to outlaw extradition of criminals to the United States and ordering the assassination of countless individuals, including police officers, journalists, and high ranking officials and politicians. He is also well known for investing large sums of his fortune in charitable public works, including the construction of schools, sports fields and housing developments for the urban poor.¹⁶

The cartel de Medellin, along with other powerful criminal organizations from Colombia¹⁷ supplied massive quantities of cocaine and other illicit drugs to the United States, and employed Mexicans to receive and transport these drugs. As the Federal Bureau of Investigation of United States (FBI) and the Colombian government began to succeed in dismantling the cartels in Colombia, the influx of drugs diminished but the American demand for narcotics continued to exist. When the FBI and the Colombian police killed Pablo Escobar in 1993, the Cartel of Medellin became weak and the Mexicans who were previously employed by Escobar stood ready to fill the resulting vacuum. June S. Beittel explains:

An important transition in the role of Mexico in the international drug trade took place during the 1980s and early 1990s. As Colombian DTO's [drug traffic organizations] were forcibly broken up, the highly profitable traffic of cocaine into the United States was gradually taken over by Mexican traffickers. The traditional trafficking route used by the Colombians through the Caribbean was shut down by intense enforcement efforts of the U.S. government. As Colombian DTOs lost this route they increasingly subcontracted the trafficking of cocaine produced in the Andean region to the Mexican DTOs who they paid in cocaine rather than cash. These already strong organizations gradually took over the cocaine trafficking business, evolving from being mere couriers for the Colombians to being the wholesalers they are today. According to the U.S. government, more than 95% of cocaine destined for the U.S. market now flows through Mexico. As Mexico's drug

¹⁶ Jenna L. Bowley. *Robin Hood Or Villain: The Social Constructions Of Pablo Escobar* (Honours Thesis, University of Maine Honors College, University of Maine 2013) online: <<http://digitalcommons.library.umaine.edu>>

¹⁷ After The Cartel de Medellin, The Cartel de Cali from Colombia was the next most important drug supplier to the United States in the early 90's. See US, *Department of Justice, The Cali Cartel: New Drugs of Cocaine* Intelligence Division (1994) Online <https://www.ncjrs.gov>

trafficking organizations rose to dominate the U.S. drug markets in the 1980s and 1990s, the business became even more lucrative. This “raised the stakes” which encouraged the use of violence in Mexico necessary to protect and promote market share. The violent struggle between DTOs over strategic routes and warehouses where drugs are consolidated before entering the United States reflects these higher stakes.¹⁸

In 1988, when Carlos Salinas de Gortari took office as President of Mexico, the most renowned cartels and drug lords were just beginning to appear on the scene as major cross-border drug traffickers. Their operations soon expanded to cover illicit operations across the Mexico-US border, the Gulf of Mexico and the Pacific, all of which they did with near complete impunity. Paul Gootenberg explains:

By the 1990s, the spectacular risky billions in cocaine money revealed and undermined the Mexican state’s traditional political collusion with regional drug traders...The neoliberal regime of Carlos Salinas (1988-94) reflected the double-edged politics of drugs. On the one hand, Salinas, seeking to refurbish Mexico’s image for NAFTA, embraced a major national role in U.S.-led drug wars, creating inter-agency policing institutions on the model of the DEA. Mexico’s Attorney General office (PGR) became a well-funded anti-drug force. The focus also hardened on the U.S. side of the border, militarized as a “High-Intensity Drug Trafficking Region” within the 1990s South-West Border Initiative. Gone were the easy days of patrolling the Florida seas.⁹ On the other hand, most pretense of Mexican “drug control” was undercut by the involvement of Salinas appointees and family in the burgeoning trades and drug-related political assassinations. Cocaine interdiction and its evasion multiplied opportunities for graft. Total trafficker bribes rose from \$1.5-3.2 million in 1983 to some \$460 million in 1993, larger than the entire PGR budget, and thousands of federal agents jumped into the drug trade. Cocaine destabilization went public during the 1994-2000 Zedillo sexenio, when breaking custom, the new president openly condemned Salinas-era corruption. Epitomizing this exposure, in 1997, was the discovery that the military chief of Mexico’s “DEA,” Gen. Gutiérrez Rebollo, was in with the Juárez cartel, an incident sampled in the Hollywood drama “Traffick”.¹⁹

The administrations of Mr. Ernesto Zedillo Ponce de Leon (1994-2000) as well as the one of Mr. Vicente Fox (2000-2006) were also plagued of scandals of corruption, evidence of government officials being bribed and a high level of impunity. Members of the cabinet such as

¹⁸ US, *Research Service, Mexico’s Drug Congressional Trafficking Organizations Source and Scope of the violence* (2013) at 8. online www.crs.gov. [Congressional Research Service]

¹⁹ Gootenberg, *supra* note 15 at 10.

the attorney general were involved in money laundering and even the President's family succumbed to the money and power of the drug lords. Nubia Nieto explains the relationship between the government and the drug lords:

It can be observed that the development of the narcotrafficking in Mexico could not have been possible without the endorsement from the political elites...the Mexican political corruption got married with narcotrafficking, and the persistence of this marriage can be explained to a large extent by social tolerance...drug traffickers bought political elites and police in order to expand their business; in turn, politicians protected criminals in order to get money, exploiting their political positions...the merger between politicians and drug traffickers was achieved through social and religious ties such as marriage, parenthood and family links, which allowed to drug trackers to get a sort of "social laundering" that had the same function of the "money laundering". In other words, it makes legal and socially acceptable something that had origins of "dirty".²⁰

This agreements and close relationship between the Mexican government and the mafia allowed things to be smooth between the police and *narcos*. However this changed in 2006 when Mr. Calderon took office and refused to follow the corrupt practices of his predecessors. From that moment the media started to report the magnitude of the problem:

Narcoviolence had been kept moderately at bay during the extensively corrupt Salinas de Gortari administration, but the NAFTA agreement further exacerbated this violent trend allegedly compelling President Vicente Fox's administration to seek a "peace-dividend" with the Sinaloa Cartel. In the previous Zedillo administration, even members of the president's family were allegedly linked to the Amezcua brothers. It follows then that "[c]hanges in drug-traffic [and its criminal implications], in the past as well as in present times, have reflected changes in the political system." This may have certainly been the case during the years prior to the 2006 elections, when Felipe Calderon, from the National Action Party Partido de Accion Nacional (PAN) rose to power under the slogan of ending the endemic public sector corruption and curtailing narcoviolence. Arguably, the new non-negotiating position from the Calderon administration with regard to drug-traffic and drug-related violence's law enforcement [was] a key factor fueling an increase in cartel violence, not only quantitatively, but also qualitatively.²¹

²⁰ Nubia Nieto "Political Corruption and Narcotrafficking in Mexico" *Transcience* 3:2 (2012) 24 online: <http://www2.hu-berlin.de/transcience/page1.htm> [Footnotes omitted]

²¹ Fernando Celaya Pacheco "Narcoterrorism: How has Narcoterrorism Settled in Mexico?" *Studies in Conflict & Terrorism* 32:12 (2009) 1024 online: <http://www.tandfonline.com> [footnotes omitted]

When Mr. Calderon took office, he came to realize the extent of the threat that the cartels posed. The last three administrations allowed the mafia to operate in Mexico without limits for 18 years, and it infiltrated government from the lowest to the highest levels. The whole federal and state police, judges, politicians, and local governments served the cartels. The only organization that remained somewhat clean was the military. Prior to 2006, the military existed primarily as a tool to defend Mexico against foreign interests, but went largely unused due to Mexico's lack of involvement in international conflict. This role changed dramatically when Mr. Calderon came to power and decided to use the army to fight the cartels. This decision was made in light of the extreme levels of corruptions amongst state and local police across the country. Robert C. Bonner explains:

Once he assumed the presidency, Calderón realized that he could not rely on the federal police, the Agencia Federal de Investigación, to restore order or track down the cartel leaders. The A.F.I. was riddled with corruption. Over the years, the cartels had bribed not only regional comandantes but also top-level officials at the agency's Mexico City headquarters. The state police were even more unreliable. Often on the payroll of the cartels in their respective regions, they not only failed to cooperate with the federal police but also regularly protected the cartels and their leaders. With limited options, Calderón turned to the military, which, because it had not been involved in investigating or acting against the cartels, remained relatively immune from their influence. Calderón used the military as a show of force in areas wracked by cartel violence, such as Ciudad Juárez, Michoacán and Veracruz, and to surgically target, capture, and, if necessary, kill cartel leaders.²²

As we will see in future chapters, Mr. Calderon's war against the cartels and corrupt police forces resulted in thousands of people being killed, tortured and displaced, while the rule of law in the country was so weak that perpetrators were rarely caught and prosecuted, and victims of crime had few avenues for protection and redress. It was estimated that more than 130,000 people were killed in homicides related to drugs during the Calderon administration and that approximately 25,000 people went missing.²³ To have an idea of the magnitude of these

²² Robert C. Bonner "Cracking the Mexican Cartels" *The New York Times* (April 15 2012) online: The New York Times <www.nytimes.com>

²³ Campos & Friedland. *supra* note 7 at 9.

numbers, Nik Steinberg explains that “Augusto Pinochet's government in Chile disappeared more than 3,000 people and Argentina's military junta disappeared 10,000, by official count.”²⁴ Under these circumstances, it is logical to conclude that a great many Mexicans had legitimate reasons for fleeing their home country. The situation caused concern among US officials: “Former Secretary of State Hillary Clinton described Mexico as an insurgency that is looking more and more like Colombia looked 20 years ago”²⁵ and some organizations and government officials from U.S declared that Mexico was on the verge of becoming a failed state.²⁶ The crisis did not end in 2012 when Calderón finished his mandate, but has continued through the current administration of president Enrique Peña Nieto.²⁷

The foregoing (admittedly brief) narrative serves to explain, at least in part, why such a great number of Mexicans came to Canada to apply for refugee status between the years of 2006 and 2009, as well as why there continues to be a significant number of Mexican asylum seekers coming to Canada to seek protection. Later in this thesis I will assess the accuracy of the country information relied upon by the IRB in adjudicating Mexican refugee claims, and this summary of the relevant conflicts and conditions will assist in painting a clearer picture of the factors that explain why so many Mexicans flee their home country in search of international protection.

²⁴ Nik Steinberg “Vanished” *Foreign Policy* (7 January 2014) online: www.foreignpolicy.com

²⁵ Adam Entous and Nathan Hodge “U.S. Sees Heightened Threat in Mexico” *The Wall Street Journal* (10 September 2010) online: *The Wall Street Journal* <http://online.wsj.com>

²⁶ See Luis Rubio “Mexico: A Failed State?” (2009) Perspective on the Americas Center for Hemispheric Policy, University of Miami, <<https://umshare.miami.edu>>

²⁷ See Steinberg supra note 24: “While killings dropped between 8 and 13 percent in Peña Nieto's first year, the decrease fell far short of the 50 percent drop he had promised: Roughly 20,000 people were killed between December 2012 and December 2013. Perhaps more troublingly, the violence has spread. In Calderón's last six months in office, drug-related executions were registered in 217 municipalities; in Peña Nieto's first six, they occurred in 236. Kidnappings and extortions have also increased under Peña Nieto, to their highest levels in more than 15 years”.

1.4 Hypothesis

The second inquiry, namely why such a high percentage of Mexican refugee applicants have been and continue to be denied refugee status in Canada, will be the focus of the remainder of this thesis. My hypothesis is that the wrongful application of international and domestic law by the IRB is an important factor that contributed and may still be contributing to the high rate at which asylum claims brought by Mexicans are denied. I will seek to determine whether throughout this furor surrounding the high rate of refugee claims made by Mexicans in Canada, the IRB has respected its international obligations contained in the Refugee Convention as well as the domestic instruments that interpret and apply the convention. To that end, it is worth considering the definition that the Refugee Convention establishes for a refugee:

The term “refugee” shall apply to any person who owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁸

When a person applies for refugee status in Canada, she must demonstrate that she is a convention refugee or a person in need of protection, definitions of which are located at sections 96 and 97 of Canada’s *Immigration and Refugee Protection Act* (“IRPA”).²⁹ In order to do so, the claimant has to provide all possible evidence in order to demonstrate that she is a refugee, in accordance with this definition. Section 97 of the IRPA also provides complementary refugee protection:

²⁸ United Nations High Commissioner for Refugees, *The 1951 Refugee Convention* at 14, online: UNHCR The UN Refugee Agency online: <http://www.unhcr.org/3b66c2aa10.html> [Refugee Convention]

²⁹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 s 96-97 [IRPA]

Section 97 of the IRPA provides for two distinct branches of complementary refugee protection. Under paragraph 97(1)(a), claimants may succeed in their refugee claims if they establish that removal from Canada would subject them personally to a danger of torture (within the meaning of article 1 of the Convention Against Torture (CAT)). They may also succeed under paragraph 97(1)(b), if removal from Canada would subject them personally to a risk to life, or a risk of cruel and unusual treatment or punishment. For both branches of section 97, the burden of proof is on the claimant and the legal test applied by the RPD member when assessing the claim, is “balance of probabilities.”³⁰

If the claimant is able to prove and satisfies the requirements contained in both sections, Canada, as a signatory of the Refugee Convention, has the obligation to grant asylum or protection. As we will see further in this thesis, the most important protection for refugees available is the prohibition against being returned to the place where they face persecution.³¹ Because so many claims made by Mexican applicants have been rejected, it is critical to determine if Canada is fulfilling its international obligations in refugee law.

1.5 Methodology

1.5.1 Locating the Essence: IRB and Federal Court Decisions

There is no existing legal research on this topic. In order to prove my hypothesis that the IRB has contributed to the high rejection of Mexican refugee claims by not following the principles contained in international and domestic refugee law documents, I engaged in the process of locating publically available decisions from this administrative tribunal by using online legal research databases such as *Quicklaw* and *CanLii*. I have analysed cases dating from between 2002 and 2013, in order to compare them and thereby demonstrate how the criteria

³⁰ Jessica Reekie “Complementary refugee protection in Canada. The Story and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)” online: Gilbert and Tobin Centre of Public Law, The University of South Wales Australia <http://www.unsw.edu.au>

³¹ Refugee Convention *supra* note 28 at 33 (1).

applied by the IRB has been inconsistent and has changed over time. I also analyse the decisions to determine if the IRB has been following and obeying the provisions and principles contained in legally binding documents such as the Refugee Convention and the *IRPA*, as those contained in the related jurisprudence and in the IRB's own internal policies. Indeed, an important part of this thesis will be dedicated to the analysis of Federal Court cases. This is important for two reasons. First, because the Courts set out the criteria for the interpretation and the application of the principles of the refugee definition contained in the *IRPA*, as well as for section 97 and other important concepts in refugee law, such as Internal Flight Alternative (IFA). In theory, the IRB does not have a choice but to apply the principles underlined in the jurisprudence. However, I will analyse whether in practice the IRB is complying with this obligation. Indeed, if the analysis of the IRB decisions shows a disregard for the guidance given by the Courts, this will serve to prove that administrative tribunal has contributed to the high rejection of Mexican refugee claimants in violation of international and domestic refugee law. The second reason why the Federal Court jurisprudence is important is because it may show a trend as to the rate at which the Federal Courts quash or confirm IRB decisions based on its own jurisprudence. In Canadian law, the Federal Court and the Federal Court of Appeal deal with matters and disputes specified in federal statutes such as the *IRPA*. Because the IRB is an administrative tribunal charged with applying the contents of the *IRPA* and its principles as interpreted by the Canadian courts, it is necessary to ensure that the decisions of this tribunal are fair, even if the hearings are not as formal as in a Court presided by a judge:

Procedure before administrative bodies is usually simpler and less formal than in the courts. However, to ensure that such bodies exercise only the authority given to them by law and that their procedures are fair, the courts may review their decisions and proceedings. In the case of federal boards [such as the Immigration and Refugee Board], the Federal Court and

the Federal Court of Appeal do this review³²

Therefore when a refugee applicant feels that the IRB did not rendered a fair decision she can apply for judicial review to the federal court. However, “all applications for judicial review of immigration and refugee matters require leave of a judge of the Federal Court [section 72 of the *IRPA*]”³³:

Review by the Federal Court is a two-stage process. In the first stage, which is known as the “leave” stage, the Court reviews the documents related to [the] case. [it must be shown] to the Court that an error was made in the decision, or the decision was not fair or reasonable. If leave is given, this means the Court has agreed to examine the decision in depth. At this second stage, called “application for judicial review,” [the applicant and her lawyer] can attend an oral hearing before the Court and explain why [they] believe the original decision was wrong.³⁴

Also and “upon certification of a serious question of general importance, the Federal Court judge’s decision may be appealed [paragraph 74(d) of the *IRPA*]”³⁵ which means that the refugee applicant may have one more chance to reverse the decision of the IRB. However, it is difficult to obtain leave to the Federal Court of Appeal because as explained, the question has to be serious and of general importance.

³² Department of Justice, “Canada’s System of Justice” (2005) online: Department of Justice: <http://www.justice.gc.ca>

³³ Federal Court “Judicial review Immigration Law Practice” (2012) online: Federal Court: <http://cas-ncr-nter03.cas-satj.gc.ca>

³⁴ Citizenship and Immigration Canada, “Apply to the Federal Court of Canada for Judicial Review” online: Citizenship and Immigration Canada: <http://www.cic.gc.ca>

³⁵ *Supra* note 33.

1.5.2 The Structure of this Thesis

Before starting to analyze the IRB and the Federal Court cases it will be necessary to use secondary sources of information in order to introduce the reader into relevant refugee law concepts. This is critical because the analysis of the cases will not take place in vacuum but in 4 specific chapters, each focusing on one possible factor or issue within Canada's refugee adjudication system that may be potentially contributing to the high rate of denial of Mexican refugee claims and possible violations of the Refugee Convention and other domestic refugee law instruments. Chapter 2 will deal with credibility assessment of Mexican refugee claimants. I will explain the importance of credibility assessments in refugee claims in general and will analyze the tools that the Canadian decision makers use in order to determine whether or not a refugee applicant is telling the truth. Subsequently, I will analyze whether the legal principles governing assessment of credibility guidelines were correctly applied in cases that involve Mexican refugee claimants. Chapter 3 deals with the doctrine of state protection. A critical component of any refugee claim is to prove that the state in the country of origin was unable or unwilling to protect the applicant. However, determining how the state protection doctrine should be applied requires the application of jurisprudential principles in order to avoid the imposition of an excessive burden of proof on the claimant. In this section I will also analyze the principles that govern the application of a doctrine called Internal Flight Alternative, a component of the state protection doctrine that empowers decision makers to deny refugee status by commanding asylum seekers to move somewhere else within their countries of origin before looking for international protection. This is particularly important because it has been used as a

tool of rejection in many Mexican asylum claims and it also governed by a set of rules laid out in guidelines for decision makers.

The fourth chapter deals with the background information about Mexico that is provided to refugee adjudicators to assist them in their determinations. The Immigration and Refugee Board, through its research directorate, has developed a condensed document called Mexico: Country Documentation Package (“CDP”). This is a critical document to be analyzed because the success or rejection of a refugee claim depends in large part on the content of this document. I will analyze the information contained in this package in order to determine if the sources of information are authoritative, accurate, unbiased and up to date. I will also propose alternate documents and sources of information that could be used for these purposes. Finally, I will assess the jurisprudential principles developed by the federal courts that govern the application of the CDP and to determine if they are being followed at the tribunal level. The last chapter is about the application of the CDP in specific refugee cases that involve Mexican asylum seekers. In this section I will identify inconsistencies in the application of the content of the country information, and discuss the consequences that arise from the tribunal’s actions in this regard. Ultimately, I will conclude this thesis with a discussion of what my analysis demonstrates, cumulatively, with respect to the reasons why the refugee claims of Mexican asylum seekers are so frequently rejected in Canada.

1.5.3 Limits of this Research

Finding the truth about the fraudulent Mexican refugee theory advanced by the Canadian government is a task that involves the analysis of hundreds of decisions from the IRB. Nevertheless and despite that “the Immigration and Refugee Board...renders [every year] more than 40,000 decisions on refugee protection and immigration matters”³⁶ only “ a selection of [these] decisions are available on the Canadian Legal Information Institute's (CanLII) website”³⁷. Therefore, I was only able to work with the information that was available online and publicized by the IRB. Unfortunately I was not able to find any document on the Internet that explains the criterion that is being used to determine which decisions are published. The opacity of these practices impedes scholars and the media from investigating the magnitude of this and other problems, a necessary component for improving the governmental institutions of a democratic nation such as Canada. Because of these limitations, the results of this thesis will not be able to prove conclusively that the IRB has not been applied the principles of the Refugee Convention and its interpretation by Canadian courts to the detriment of all the Mexican refugee applicants who were denied refuge status in Canada. However, it might show how the IRB has been denying and expelling valid Mexican asylum seekers to face dangerous conditions and even death.

³⁶ Immigration and Refugee Board of Canada “Decisions” online: Immigration and Refugee Board: <<http://www.irb-cisr.gc.ca>>[emphasis added]

³⁷ Ibid.

CHAPTER 2: FLAWED CREDIBILITY ASSESSMENTS IN MEXICAN REFUGEE CLAIMS

2.1 Introduction

The credibility of an asylum seeker or a person in need of protection is of great significance to the determination of her claim for refugee status. Because refugee claimants rarely have much (if any) documentary support for their assertions, the credibility of their narratives (as contained both in their written submissions upon entry to Canada and in their testimony at the hearing) is often the only individual factor that the IRB has to determine whether or not the applicant is entitled to refugee status. Credibility is generally assessed through the application of a few key analytical tools: internal inconsistency, external inconsistency, plausibility and demeanour. The manner in which these tools are meant to be applied by decision makers is governed by the IRB's own guidelines on credibility assessment, which provide practical guidance, evidentiary standards and examples from the relevant jurisprudence. However, as this chapter will demonstrate, the IRB frequently fails to adhere to its own guidelines, and as a result at times draws negative inferences as to applicant's credibility in a manner that contravenes the very policies of the tribunal. As a result, potentially valid refugee claimants may be found to lack credibility, and can have their applications for refugee status dismissed as a result. The purpose of this chapter is thus to demonstrate the centrality of credibility assessment to the refugee application process, with a particular focus on how the above noted analytical tools have been at times applied to the detriment of Mexican refugee claimants.

2.2 Credibility Assessment in Refugee Claims Generally

As defined in Merriam Webster's English Dictionary, "credibility" means the "quality or power of inspiring belief."³⁸ Credibility assessment has huge importance in refugee law and is considered by the United Nations High Commissioner for Refugees ("UNHCR") "A core element of the adjudication of asylum applications. Credibility findings often lead to the determination of the material facts considered for the determination of an application, and are as such the first step in the decision-making process. Findings of facts made as a result of the credibility assessment can be determinative of the outcome of the asylum claim"³⁹. The concept of credibility assessment in refugee law "is used to refer to the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decision maker, and determining whether the statements of the applicant relating to material elements of the claim can be accepted, for the purpose of the determination of qualification for refugee and/or subsidiary protection status."⁴⁰ Michael Kagan explains that this concept "should be used to refer only to whether the applicant's own testimony will be accepted in status determination, not to the decision about whether the person is actually a refugee."⁴¹

The importance of credibility assessments is manifested when a refugee is not believed and is denied asylum labeled as a "bogus refugee". This is a practice that commonly takes place in Canada it does not reflect the reality of the situation. Unless a claimant actually admits that he

³⁸ Merriam Webster, online, *sub verbo* "credibility".

³⁹ United Nations High Commissioner for Refugees and the European Refugee Fund of the European Commission, *Beyond Proof, Credibility Assessment in EU Asylum Systems* (Brussels, May 2013) at 28, online: United Nations High Commissioner for Refugees <http://www.unhcr.org> [UNHCR assessment]

⁴⁰ Ibid at 27.

⁴¹ Michael Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination" (2003), Geo Immig Lg 633 at 370 online: <http://scholars.law.unlv.edu>

or she made up a story in order to get into the country looking for better opportunities in life, it is impossible to know if he or she was a fake refugee. Nevertheless and as we will see further in this thesis, the Canadian government has sent a message that all refugees who are denied status are bogus or fake refugee applicants. This approach has been criticised by scholars, such as Michael Kagan who mentions that reliable credibility judgments will ensure respect for the principles of the Refugee Convention:

Political rhetoric in many western countries frequently accuses asylum-seekers of being frauds who manipulate refugee protection to find a better way to live. On the other extreme some refugee advocates portray “refusing to believe the stories of individual claimants” as a technique by which “worldwide refugee protection is accepted in principle and denied in practice.” Despite advancement in broadening the interpretation of refugee definition (for instance, by recognizing gender-related persecution claims) correct application of the refugee convention still depends on reliable credibility judgements.⁴²

Because the refugee system is not the proper avenue to immigrate other than for asylum reasons, decision makers pay a lot of attention in credibility assessments. Nevertheless this process is quite different from other areas of law. In the majority of the fields finding the truth in a case is a process where the trier of fact analyses different types of evidence which are often submitted and presented by the parties, and can include the evidence of witnesses, documents and expert testimony. These different pieces of information when analyzed as a whole, provide the decision maker with a clearer picture and broader understandings of what really happened, and makes them confident to render a decision. However, in refugee law⁴³ usually is only the

⁴² Ibid at 378.

⁴³ This difference with other areas of law is explained Allan Mackey and John Barnes: “Refugee and subsidiary protection law, and related decision making on status recognition, is markedly different from almost all other areas of the domestic law of member states, familiar to lawyers and judges in their respective jurisdictions. Because so much of this now extensive and specialised field of law has only developed in the last 25 years, many lawyers and judges will have had little or no formal training in the field and thus understandably firstly seek to rely on principles of domestic administrative law” Allan Mackey and John Barnes “Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive Judicial Criteria and Standards” (Paper delivered at the International Association of Refugee Law Judges (IARLJ) in its role as a partner in the “Credo Project”, January-December 2012) Online: <http://www.iarlj.org>

applicant who is involved in the process of providing evidence beyond that contained in the information about the country of origin of the applicant. Indeed, the UNHCR has created a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees (“The Handbook”) provides that “the burden of proof rests on the applicant, who has to provide all the available evidence to be analyzed in order to prove his or her claim”.⁴⁴ However, given the nature of the events and circumstances where the applicant leaves his or her country of origin, it is very rare that the asylum seeker is carrying evidence to back up his or her application. Consequently, the adjudicator has to work only with the version of the story provided by the asylum seeker, and this personal story becomes the only element to be analyzed and capable of being believed.⁴⁵ As Jenni Milbank explains:

Refugee determinations involve the most intensely narrative mode of legal adjudication. The hearing depends largely – sometimes entirely – on the story of the applicant; this story is told in writing, orally re-told in full or in part, questioned, believed or disbelieved to varying degrees, and finally weighed against an assessment of future risk based on available documentary sources of information about the sending country to determine if the applicant faces a well founded fear of persecution.⁴⁶

Therefore, the sui generis nature of refugee law and the process of rendering a decision based on limited evidence makes the task for decision makers particularly difficult, and makes the role of credibility assessment all the more central. Audrey Macklin, a Professor of the University of

⁴⁴ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees* (UN High Commissioner for Refugees, 1992) at para. 196, online: United Nations High Commissioner for Refugees <http://www.unhcr.org> [The Handbook]

⁴⁵ There is a difference between truthful and being believed. James P. Eyster explains: “Scholars who have dedicated themselves to the topic of credibility have concluded that there is a disjunction between validity and credibility. In other words, just because something is true does not mean that it is believed, and merely because it is believed does not mean that it is true. Underlying the common sense view of credibility is the misconception that the search for credibility is the search for the truth.” James P. Eyster, “Searching For The Key In The Wrong Place: Why “Common Sense” Credibility Rules Consistently Harm Refugees” (2012) 30:1 BU Int’l LJ at 28.

⁴⁶ Jenni Millbank “The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21(1) Int’l J Refugee L at 1.

Toronto and a former member of the Refugee Protection Division (“RPD”) of the IRB also explain:

The vast majority of my time would be spent in credibility determination – did I believe the claimant’s story or, more precisely, did I believe enough of the story to render a positive decision? Ultimately, I found this to be the most challenging aspect of the job, not because the legal issues (when they arose) were so simple, or because I am so smart, but rather because credibility determination engaged me at both intellectual and emotional level in a way that bare questions of law or procedure did not...Frequently we find ourselves frustrated by the paucity of information: if only we could verify this, if only we could corroborate that, then we could know “what really happened.”⁴⁷

These evidentiary limits in refugee law are acknowledged in The Handbook, which instructs decision makers to give asylum seekers the benefit of the doubt when they are not able to present evidence that supports their statements. Nevertheless this principle is not absolute and The Handbook instructs that should only be given when the examiner is satisfied as to the applicant’s credibility in general: “The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts”⁴⁸. This explained by Sofia Casselbrant:

The benefit of the doubt is not freely granted to all applicants: the UNHCR Handbook holds that it should only be given when all available evidence has been obtained and checked, and when the decision-maker is satisfied as to the applicant’s general credibility. In this way, the notion of credibility works together with the benefit of the doubt to compensate for the evidential difficulties faced by asylum seekers.⁴⁹

⁴⁷ Audrey Macklin “Truth and Consequences: Credibility in Refugee Determination” (Paper delivered at the International Association of Refugee Law Judges, Realities of Refugee Determination on the Eve of a New Millennium 1999) at 204 online: <http://refugeestudies.org>

⁴⁸ Sofia Casselbrant, *Cross Cultural Complications: Assessing the Credibility of Asylum Applicants Testimony* (Master Thesis, Lund University Department of Law, 2013) Lund University online: <http://lup.lub.lu.se>

Furthermore, credibility issues pose a particular challenge in the realm of refugee claims as a result of the intercultural nature of the process. Decision makers, who rarely share the same cultural, ethnic and linguistic background of the claimants, filter the claimants' narratives through their own subjective world views and assessment of how a refugee claimant ought to have behaved, over the course of determining whether an asylum seeker's claims are plausible. As Siobhán Mullally states: "Assessing credibility requires adjudicators to cross many barriers - cultural, socio-economic, religious, and geographical. The adjudicator is required to position herself or himself in the place of an asylum applicant, with whom very little of life's experiences are shared."⁵⁰ It is for this very reason that Jenni Milbank suggests, "it is important to provide content to credibility assessment through complementary guidelines addressing particular issues and implementation through training that assist the process of keeping an open mind."⁵¹ The personal beliefs and subjective vision and ideas that decision makers have in how the world functions beyond their country of origin has been addressed by the creation of independent or objective guidelines for credibility. Michael Kagan explains the dichotomy of these norms:

Credibility assessments can embody a struggle between norms of objective and subjective decision-making. Subjective assessments are highly personal to the decision maker, depend on personal judgement, perceptions, and disposition, and often lacking an articulated logic. They are very difficult to review and are likely be inconsistent from one decision maker to another. Objective credibility assessments apply standard criteria and require adjudicators to conduct a more structured inquiry. Because objective assessments tend to involve more specific and concrete explanations for decisions, they are easier for appellate tribunals to review.⁵²

⁵⁰ Irish Refugee Council, *Difficult to Believe, The assessment of asylum claims in Ireland* (Dublin: Irish Refugee Council, 2012) at 2. online: Irish Refugee Council <http://www.irishrefugeecouncil.ie>

⁵¹ Millbank, *supra* note 46 at 27.

⁵² Kagan, *supra* note 41 at 374.

In order to avoid the implementation of subjective rules it has become critical for decision makers to rely just on objective guidelines in credibility analysis. These guidelines often contain principles of international and domestic law supported by jurisprudence.

2.3 The Legal Framework in Credibility Assessments

The main refugee receiving countries such as United States, United Kingdom, Australia and Canada had elaborated objective credibility guidelines that serve and guide decision makers in evaluating the credibility of refugee applicants. Because the Refugee Convention is silent about credibility assessments these guidelines mainly contain local jurisprudential principles that interpret and apply the convention. Also all of them include the principle of the benefit of the doubt contained in The Handbook. Due the lack of orientation toward European countries in 2013 the UNHCR and the European Refugee Fund of the European Commission published an extensive report called “Beyond Proof: Credibility Assessments in EU Asylum Systems”⁵³ in credibility assessments that contain the applicable principles of refugee receiving countries and clear instructions of how properly assess credibility findings.

As an aim to assist decision makers in navigating the most common credibility assessment issues that tend to arise over the course of refugee claims in 2004 the IRB published a paper titled Assessment of Credibility in Claims for Refugee Protection (“IRB Guidelines”)⁵⁴ These Guidelines represent the only comprehensive source for IRB decision makers on the subject of the principles and practice surrounding the making of credibility assessments. They reference

⁵³ UNHCR assessment *supra* note 39.

⁵⁴ Canada, IRB *Assessment of Credibility in Claims for Refugee Protection* (Ottawa: Legal Services, 2004) [IRB Guidelines]

relevant case law and policy up to 2004 and address improper evidentiary practice informed by general principles of refugee law, international law and local jurisprudence in order to assist the decision maker to make positive or adverse credibility findings that might lead to an acceptance or a rejection of a refugee application. The guidelines also contain careful explanations of situations when credibility issues are most likely to arise. Audrey Macklin explains this as “tools” that serve decision makers: “In order for the decision makers to determine the credibility of refugee applicants, the primary tools that decision makers use are consistency, plausibility and demeanour.”⁵⁵ Based on this explanation and the content of the guidelines, credibility assessments usually take place in three situations: 1) credibility concerns are found when inconsistencies appear between two versions of the events described by the applicant or when these versions go against the understanding that the decision maker has of the applicant country of origin; 2) credibility is undermined when the events described by the applicant do not seem real or are considered implausible (as commonly arises when the story of the applicant fails to match with objective information about the country of origin of the applicant) and 3) where the applicant does not seem credible because his demeanour, attitudes and physical postures not correspond to those expected by the decision maker. Each of these three categories shall be discussed in detail below, and shall be accompanied with specific examples of their application to Mexican refugee claims. As the following shall demonstrate, decision makers frequently fail to adhere to the IRB Guidelines with respect to the assessment of credibility. As a result, potentially valid Mexican refugee claimants have denied asylum in Canada.

⁵⁵ Macklin *supra* note 47 at 137.

The methodology I used in this chapter was mainly based in the location and analysis of IRB decisions by using Lexis Nexis Quicklaw and CanLii as a research tools. The most common combination of keywords that I used were:

In QuickLaw:

- “Credibility & Mexico” with 1000 IRB cases found (results)
- “Credibility & Mexicans” with 577 IRB cases found (results)

In CanLii:

- “Mexican implausibility” with 252 IRB cases found (results)
- “Lack of credibility and Mexicans” with 370 IRB cases found (results)
- “Mexican consistencies” with 480 IRB cases found (results)
- “Mexican demeanour” with 59 IRB cases found (results)

Federal court cases were also located using the same method, but just filtering the results by clicking in the federal courts box.

2.3.1 Internal Inconsistencies

The term consistency is not defined in any of the local and international instruments of refugee law, however “It is understood to comprise a lack of discrepancies, contradictions, and variations in the material facts asserted by the applicant”⁵⁶ Inconsistencies in a refugee applicant’s declarations can be internal and external. Internal consistency refers to the expectation of uniformity in written or oral statements that the decision maker has for the applicant’s version of the story, and where the tribunal expects to read or hear or read the same

⁵⁶ UNHCR assessment *supra* note 39 at 149.

version of the events every time the asylum seeker is requested to provide information (e.g., the same names and descriptions of the people involved in the persecution, the same places and locations mentioned, and any other kind of information material to the case). If such consistency is not found, the decision maker will presume that the asylum seeker is not credible. The UNHCR explains the current misconception that decision makers have with respect to internal inconsistencies:

A person who is lying is likely to be inconsistent in his or her testimony, presumably because it is considered difficult to remember and sustain a fabricated story; and/or when challenged, it is assumed that individuals who are not telling the truth try to conceal their inconsistencies by altering the facts. The converse supposition appears to be that if applicants actually experienced the events they recount, and are genuine in their statements, then they will broadly be able to recall these events and related facts accurately and consistently. However, this assumption cannot be applied as an absolute. Jurisprudence has even acknowledged that, in certain circumstances, inconsistencies and inaccuracies may be a symptom of credibility rather than dishonesty: “inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses.”⁵⁷

In Canada, the IRB Guidelines recognizes that “The existence of contradictions and inconsistencies in the evidence of a claimant or witness is a well accepted basis for finding a lack of credibility”⁵⁸ and that these contradictions could be found in either written or oral testimonies. The Guidelines also establish as a general principle that a “Finding that a testimony is not credible must be based in relevant considerations central to the claim”.⁵⁹ Following authorities from the federal court the IRB summarized in its guidelines the following general factors that decision makers have to take into account in the assessment of internal inconsistencies or discrepancies:

The discrepancies relied on by the Refugee Division must be real. The Refugee Division must not display zeal to find instances of contradiction in the [claimant’s] testimony ... it should not be over-vigilant in its microscopic examination of the evidence. The alleged

⁵⁷ Ibid.

⁵⁸ IRB Guidelines *supra* note 54 at 23.

⁵⁹ Ibid.

discrepancy or inconsistency must be rationally related to the [claimant's] credibility. Explanations, which are not obviously implausible, must be taken into account. Moreover, another line of cases establishes the proposition that the inconsistencies found by the Refugee Division must be significant and be central to the claim and must not be exaggerated.⁶⁰

Unfortunately the IRB Guidelines and the jurisprudence fail to explain what should be considered material to the claim, an omission that gives the decision maker a broad discretion in this area. The IRB Guidelines also instruct the decision maker that once an inconsistency is found, he or she may decide to confront the applicant in order to obtain an explanation and provide the applicant an opportunity to present evidence in regard of the contradictions.⁶¹ However, the decision maker is not subject to a positive obligation to do so. Additionally the IRB refers to the authorities of the federal court to provide instructions in respect of adequacy of reasons, "If the Board rejects a claim essentially because of a lack of credibility, clear reasons must be given. Those aspects of the testimony which appear not to be credible must be clearly identified and the reasons for such conclusions must be clearly articulated"⁶² and finally the IRB provides instructions with respect of how address the evidence "The Board is required to make clear findings as to what evidence is believed or disbelieved, and should go on to assess any evidence found to be credible. Ambiguous statements that do not amount to an outright rejection of the claimant's evidence, but only "cast a nebulous cloud over its reliability," are not sufficient to discount the evidence"⁶³ On this point is important to mention that the IRB guidelines contain an important principle called "presumption of truthfulness which has been described by the IRB

⁶⁰ Ibid at 26.

⁶¹ Ibid at 76 the guidelines rely in federal jurisprudence to support their instructions. This is one example: "The Federal Court has held in *Gracielome [v. Canada]* and other cases that the board should afford the claimant (and any other witnesses an opportunity to clarify evidence and to explain apparent contradictions or inconsistencies within that persons testimony. The same principle applies to inconsistencies between the claimant's oral testimony and the Personal Information Form (PIF) or port of entry notes as well as with respect to other omissions therein".

⁶² Ibid at 20.

⁶³ Ibid.

as follows “When a claimant swears that certain facts are true, this creates a presumption that they are true, unless there is valid reason to doubt their truthfulness”⁶⁴.

As the following analysis will demonstrate, it appears that some IRB decisions makers are not following the previous directions and other relevant instructions contained in the guideline. By relying and giving importance to omissions and/or discrepancies that are not central to the claim some decision makers attacking the credibility of Mexican refugee claimants. Moreover, the tribunal at times demands, against the guidelines, that applicants provide corroborative evidence to support their statements, and when they fail to do so, this omission is used to support a finding of internal inconsistency. Furthermore, some decision makers are disregarding the IRB Guidelines by requiring the applicant to accurately and precisely recall his or her narrative contained in the Personal Information Form (PIF) during the hearing. When the claimant made a mistake or mentions something not included in that narrative, internal inconsistencies are found and the applicant’s credibility is destroyed. These practices all violate the IRB Guidelines, and in so doing expose possibly legitimate asylum seekers from being found credible by the IRB.

In the case RPD MA8-06070⁶⁵ a female Mexican refugee claimant was required to provide documents to support her statements, when she got confused about dates. The facts are straightforward: she claimed refugee protection by reason of her membership in the particular social group of "female victims of domestic violence." According to the claimant she lived as a couple with the father of her youngest son for 12 years until she decided to leave him in 2004

⁶⁴ Ibid at 52.

⁶⁵ *X (Re)*, 2010 CanLII 97638 (CA IRB)

and sue him for child support. From then onwards her former common law partner followed her and harmed her physically and emotionally. He also assaulted her sexually and raped her repeatedly, until she left Mexico in 2008 and came to seek refugee status in Canada. In her narrative the claimant failed to mention the dates when she was in a relationship with her common law partner. This lack of specificity clearly disturbed the decision maker who confronted the applicant, as described in the reasons of the IRB:

The panel notes first of all that the narrative contains very few details and dates. The female claimant did not even mention in her narrative the period of time during which she allegedly lived common-law with XXXX. The panel asked her how long she had lived as a couple with XXXX XXXX XXXX, who is supposedly a XXXX, XXXX XXXXX and always accompanied by two bodyguards, and she stated, [translation] "12 years." The panel asked her to specify from what date to what date she lived common-law with XXXX. She stated that she lived with him from 1992 to 2004, that is, 12 years. The panel asked her how long into their common-law relationship she had a child with XXXX. She stated, [translation] "A year after we started living together, I had XXXX XXXX." The panel confronted her with the fact that her son XXXX was born on XXXX, 1997, or five years after she started living with XXXX. The female claimant stated that she does not recall dates and was confused. The female claimant's credibility is undermined by the lack of consistency between her narrative and her testimony. Moreover, she also lacks any document to establish that she lived with XXXX for 12 years, and her testimony is not reliable.⁶⁶

The reasoning in the IRB's credibility finding in this case violated the IRB Guidelines in a number of ways. For one, the decision maker failed to respect the principle of the benefit of the doubt, which provides that if an applicant's account appears credible, she should be given the benefit of the doubt, absent good reasons to the contrary.⁶⁷ The fact that the claimant failed to consistently contextualize her son's birth within the context of her abusive relationship was arguably not a valid reason to undermine the claimant's credibility. Her explanation seemed reasonable. Furthermore, the IRB focused on inconsistencies surrounding the timing of her relationship and her son's birth, which was arguably far from central to her claim. The applicant's relationship started in the year of 1992 and the hearing took place in 2010. She was

⁶⁶ Ibid at para 10.

⁶⁷ IRB Guidelines *supra* note 54 at 4.

required to remember an event that happened 18 years before the hearing, which itself is a stressful and confusing process for a refugee claimant.

Additionally, section 2.4.3 of the IRB Credibility Guidelines prohibits the decision maker from “requiring documentary evidence corroborating the claimant’s allegations and directs the RPD to not disbelieve a claimant merely because he or she presents no documentary evidence to confirm his or her testimony, unless there are valid reasons to question the claimant’s credibility”.⁶⁸ In this case, it was inappropriate for the decision maker to draw negative inferences from the fact that the claimant could not produce documentary evidence to support her claims with respect to the duration of her relationship. Moreover the decision maker did not clearly explain why the claimant’s testimony was not considered reliable, a clear violation of the principle of adequacy of reasons. Ultimately, the decision maker in this case clearly violated the general principles of by displaying zeal in finding instances of contradictions in the claimant’s testimony. This was evident when the claimant recounted the date when she started the relationship and the decision maker went on an keep asking her dates of event that were not central to the claim, such as what specific time her son was born during her relationship.

The IRB Guidelines also went largely unobserved in RPD file No. MA8-08387⁶⁹ where the claimant, a 26 years old citizen from Mexico alleged persecution at the hands of a prominent politician with whom he had previously been in a romantic relationship. According to the claimant, the politician’s bodyguards were following him and waiting for him outside his home. The claimant wanted the politician to stop and threatened to reveal evidence of their relationship, which would have been damaging to the politician’s reputation in the community.

⁶⁸ Ibid at 54.

⁶⁹ *X (Re)*, 2011 CanLII 100693 (CA IRB)

After this, the applicant's partner was suspiciously murdered and he moved in with a friend, but the politician was still able to find him. The claimant sought asylum in Canada, alleging that the Mexican state was unable to protect him. His story was not believed by the IRB, in part on the basis of a lack of documentary evidence:

There is no information on a politician named XXXXXXXXXXXX in the extensive evidence entered on the record. Furthermore, there is no evidence to corroborate the claimant's statements that XXXXX was XXXXXXXXXXXXXXXXXXXX in 2008. Consequently, the panel is of the opinion, based on the fact that XXXXX is not mentioned in the documentary evidence submitted and on a balance of probabilities, that XXXXX is not currently part of the political scene in Mexico. This leads the panel to question the truthfulness of the claimant's entire story.⁷⁰

The decision maker in this case not only wrongfully required the applicant to provide documentary evidence to corroborate his statements but also violated the principle of presumption of truthfulness. It was wrong to state that because the claimant did not provide documentary evidence the truthfulness of his entire story was questionable. This case also illustrates the strict approach that some decision makers of the IRB are taking when inconsistencies are found between the PIF form and the claimant's subsequent testimony. During this hearing, the panel found inconsistencies between the PIF declarations and the testimony rendered at the hearing and concluded that the claimant's testimony was not credible:

The claimant also testified that it was on XXXXX, 2008, that he had noticed strange people in a pickup truck outside his home. He added that these were XXXXX employees. When asked to explain how he knew that, the claimant added that these people were members of XXXXX security staff. Questioned further, he added that these six security officers usually accompanied them to the various locations where the claimant and XXXXX met. In light of this testimony, the claimant was asked to explain why, in paragraph 10 of his narrative, he stated that he had [translation] "started noticing strange people" where he lived. He tried to explain that he had meant to say [translation] "that it was strange that these people were in his neighbourhood." The panel is not satisfied with that explanation...the panel is of the opinion that the claimant clearly alleged in his narrative that the people outside his house were strange people or strangers, not [translation] "that it was strange that these people were in his neighbourhood." The panel is of the opinion that the claimant tried to brush aside the

⁷⁰ Ibid at para 20.

inconsistency, which the panel found to be flagrant. It is reasonable to expect the claimant to specifically and clearly disclose that he had recognized XXXXX security officers in his neighbourhood, if that was the case. The panel concludes that the inconsistency between his testimony and the information in his narrative undermines his credibility...⁷¹

The IRB Guidelines explain that errors in Personal Information Forms (PIF's) are not always indicative of lack of credibility and when these appear the IRB has to take into consideration the explanation provided by the claimant⁷². In this case, the IRB refused to accept the claimant's justification of confusion because, in the IRB's opinion, the applicant simply wanted to brush aside a flagrant inconsistency. This is contrary to an instruction in the guideline that directs decision makers to not accept explanations that are not unreasonable: "The explanation provided by the claimant must have been unreasonable or otherwise unsatisfactory to reject the claimant's testimony with respect to credibility."⁷³ Arguably, this high standard was not met in this case. The IRB Guidelines further instruct the decision maker to "Take into account explanations that are not obviously implausible and the inconsistencies found by the RPD must be significant and be central to the claim and must not be exaggerated".⁷⁴ Here it seems that the IRB rejected out of hand the reasonable explanations offered by the claimant for these purported inconsistencies. Indeed, the tribunal in this case demanded from the applicant an unreasonably high level of internal consistency when it stated "It is reasonable to expect the claimant to speak about his alleged experiences with consistency, integrity and accuracy, since, according to his testimony, these events are the reason he does not want to return to his country."⁷⁵ This requirement that the claimant would have to speak about his experiences with "consistency, integrity and accuracy" violates the principles enunciated in the IRB Guidelines

⁷¹ Ibid at para 24.

⁷² IRB Guidelines *supra* note 54 at 27.

⁷³ Ibid at 76.

⁷⁴ Ibid at 26.

⁷⁵ *Supra* note 69 at para 27.

that the claimant's credibility ought not be diminished by inconsistencies that are not central to claim, and/or that have been reasonably explained by the claimant, as was arguably the case here.

A similar level of accuracy and integrity between the PIF form and the claimant's oral testimony was also expected in RPD File No. MA8-04858⁷⁶ where the principal claimant was allegedly kidnapped and tortured by an unidentified gang wearing balaclavas and subsequently received anonymous notes and phone calls of future harm from them on several occasions, despite having moved residences. The claimant decided to contact police officers, who demanded a daily payment of \$2,500 pesos (approximately \$200 in Canadian dollars at the time). During the oral hearing the applicant mentioned that he feared the police, a fact that was not included in his PIF form:

With respect to the second statement of fact, when the officer allegedly demanded 2,500 pesos a day to provide protection, the panel asked the principal claimant whether he had asked to see higher authorities within the hierarchy of the public prosecutor's office. The principal claimant answered, [translation] "We didn't have access". Asked why there was no mention of the fact that he feared the police at question 3d of Schedule 1, Background Information, the principal claimant explained, [translation] "We were told that we did not need many details". The panel rejects this answer, because when the same question was before the panel, the fact that the claimants feared the judicial police was mentioned, while in the context of a refugee protection claim before an authority of the Canadian government, there was no mention of this fact in the Background Information. There should have been consistency between these two answers. This undermines the principal claimant's credibility on this aspect of the testimony.⁷⁷

Arguably, this alleged inconsistency (failure to mention a fear of the police in one account) is not an inconsistency of much significance. Indeed, in using this inconsistency to make a negative credibility assessment with respect to the claimant, the decision maker demonstrated a zeal for the identification of inconsistencies, which is prohibited by the IRB Guidelines.

⁷⁶ *X (Re)*, 2010 CanLII 96733 (CA IRB)

⁷⁷ *Ibid* at para 19.

It is clear that in terms of internal consistency the IRB Guidelines are not always being followed by IRB decision makers in their assessment of the credibility of Mexican asylum seekers. The strict approach to internal consistency being taken by some decision makers goes against elemental principles of refugee law, not to mention the jurisprudence contained in the official credibility guidelines which state that the Canadian refugee process is “specifically designed to be expeditious, informal, non-adversarial and investigative in nature.”⁷⁸ Rather, the adoption of this strict approach threatens to make the refugee process adversarial in nature by focusing on finding discrepancies between written and oral statements and where any inconsistency could be tailored as “relevant” in order to deny refugee status. A high expectation of internal consistency was also expected from Colombian asylum seekers in the cases: RPD File Nos. MB1-06932⁷⁹, TB0-17333⁸⁰, TB0-17333⁸¹ and TA9-09256⁸², where the decision maker determined that the applicant was not credible because his or her testimony contradicted the personal information form. The same standard of internal consistency was expected from Guatemalan applicants in the cases RPD File Nos. TB0-10708⁸³, MB0-03969⁸⁴ and MA9-06957⁸⁵ therefore I conclude that this is a generalized problem that is affecting refugee applicants from similar countries as Mexico.

⁷⁸ IRB Guidelines *supra* note 54 at 83.

⁷⁹ *X (Re)*, 2013 CanLII 92092 (CA IRB)

⁸⁰ *X (Re)*, 2012 CanLII 100522 (CA IRB)

⁸¹ *X (Re)*, 2012 CanLII 100522 (CA IRB)

⁸² *X (Re)*, 2009 CanLII 90204 (CA IRB)

⁸³ *X (Re)*, 2011 CanLII 97206 (CA IRB)

⁸⁴ *X (Re)*, 2012 CanLII 100449 (CA IRB)

⁸⁵ *X (Re)*, 2011 CanLII 97012 (CA IRB)

2.3.2 External Inconsistencies

In a refugee application, the asylum seeker is required not only to satisfy the requirement of internal consistency as between her written and oral submission, but must also convince the decision maker that her version of the events does not contradict IRB's objective understanding of the country conditions of her place of origin. In other words, the IRB will only find an applicant's story to be credible if it matches the information that the IRB has about the country from which the refugee has fled. Jenni Milbank eloquently explained the notion of external consistency:

External consistency is the extent to which the applicant's narrative is contradicted by knowledge and actions outside the narrative, such as the applicant's own behaviour or history and also what the UNHCR calls 'generally known facts', such as those drawn from country information sources: that is, the extent to which the story matches what is known of the applicant and of the world at large.⁸⁶

According to Sofia Casselbrant "Country of origin information is used within the refugee status determination process in two separate ways: first, to assess the risk on return for the applicant to her country of origin [for Internal Flight Alternative findings], and second, to assess the credibility of the applicant's account".⁸⁷ She also explains how a finding of external inconsistencies serves a double purpose for decision makers "Decision-makers commonly base findings of external inconsistency on either a lack of objective evidence with regard to events that the applicant describes in her statements, or on [CDP] providing a dissimilar or even a contradictory account of events as compared to that told by the applicant".⁸⁸ The IRB Guidelines at section 1.2 establish that "the credibility and probative value of the evidence has to be

⁸⁶ Millbank *supra* note 46 at 12.

⁸⁷ Casselbrant *supra* note 48 at 41.

⁸⁸ *Ibid.*

evaluated in the light of what is generally known about conditions and the laws in the claimant's country of origin, as well as the experience of similarly situated persons in that country.”⁸⁹

The UNHCR has warned the excessive reference to the CDP in order to corroborate the applicant's version of the claims can bring undesirable results:

Over-reliance on [CDP] can also have negative implications and UNHCR has expressed its concern with regard to accelerated procedures, when processing so-called manifestly-unfounded claims or when judicial appeal has no suspensive effect. In such cases, aberrations can occur, for example, when a certain asylum claim refers to an event that is not well-documented and this "fact," or the absence of it, is interpreted as inference of implausibility of the entire claim or casting doubt on the credibility of the applicant.⁹⁰

The following analysis will demonstrate how some IRB members are using the information contained in the CDP to speculate about the way that certain events should have happened instead of applying the information objectively. This speculation is then used to identify purported inconsistencies, which on deeper analysis are based not on the claimant's story, but on the decision maker's subjective interpretation of the CPD. These so-called inconsistencies have, as shall be demonstrated below, been used to draw negative inferences about claimants' credibility that were arguably unjustified.

The IRB case RPD File No. MA9-09296⁹¹ is an example of how a Mexican refugee applicant failed the external consistency test when his version of the events went against the speculations of the decision maker, drawn from the objective information contained in the CDP. In this case, people who identified themselves as “Los Zetas” (members of a notorious cartel)

⁸⁹ IRB Guidelines *supra* note 54 at 3.

⁹⁰ United Nations High Council for Refugees *Country of Origin Information: Towards Enhanced International Cooperation*. (Geneva, Switzerland: Department of International Protection United Nations High Commissioner for Refugees 2004) at 64 online: <http://www.refworld.org>

⁹¹ *X (Re)*, 2012 CanLII 96929 (CA IRB)

extorted the applicant on three occasions. The first time, when he refused to pay, he was seriously tortured. On subsequent occasions these individuals subjected him to threats. The decision maker acknowledged the fact that “Los Zetas” existed, because this information was contained in the CDP:

The panel believes that the Zetas are active in drug trafficking and that they are very present in Mexico, as mentioned in the documentary evidence: According to the ISN, the Los Zetas network consists of thousands of members, including both men and women, who "operate a range of illicit businesses," such as charging other groups for passage through their territory, to gun and drug smuggling, and money laundering.⁹²

Subsequently and after acknowledging the existence of the agent of persecution, the decision maker went on to describe “Los Zetas” activities and methods with the only purpose to disbelieve the applicant’s story:

The panel does not believe that the Zetas would travel around with a cargo of drugs just laid out in the trunk of their car, or that they would hang out at an intersection in the road waiting for a truck that they could stop and requisition it to transport their drugs to XXXXX. The panel also does not believe that they would risk taking a stranger to the trunk of their car, full of bags of drugs, to show him the contents before the claimant even refused or accepted the offer. In fact, the panel reviewed the documentary evidence on the Zetas and concludes that this is an organized group with access to technology and that they cannot be considered drug-trafficking amateurs⁹³.

This conclusion involves a subjective interpretation of the objective information contained in the CDP. The decision maker reviewed the documentary evidence concerning the Zetas and determined subjectively that they cannot be considered drug-trafficking amateurs, therefore it was not possible (or credible) that its members were travelling around with a cargo of drugs in the trunk of their car and approached the applicant the way the applicant claims they did. The tribunal did not use objective specific content from the CDP to contrast against the applicant’s story, what it did was to interpret the content of the package, draw general conclusions of behaviour and apply them to the case at hand. The application of this technique

⁹² Ibid at para 12.

⁹³ Ibid at para 22.

made it much easier for the IRB to conclude that the claimant's version of events was not credible. The adjudicator continued to make errors in syllogisms and logical reasoning all along his credibility analysis:

The panel then questioned the claimant about what happened subsequently, and the claimant stated that they hit him after he refused. It is surprising that the Zetas did not kill him instead of hitting him, given that the claimant had seen their cargo of drugs, but also because, according to the documentary evidence on the Zetas, they are brutal and execute their enemies. National Public Radio (NPR) of the US indicates that the DEA considers Los Zetas to be "the most dangerous drug-trafficking organization in Mexico" and that its members are "the most feared" criminals in the country (NPR 2 Oct. 2009). An article published in a daily newspaper of Quito (Ecuador), *El Comercio*, describes Los Zetas as [translation] "the most violent" organization because it executes and kidnaps its enemies (1 Feb. 2010). Cited in an article published by CNN, a DEA official stated that Los Zetas are "the No. 1 organization responsible for the majority of the homicides, the narcotic-related homicides, the beheadings, the kidnappings, the extortions that take place in Mexico" (CNN 6 Aug. 2009). The claimant replied that they thought that they had killed him because they hurt him a lot. The panel does not believe that the Zetas would have gone to the trouble of beating him up if they wanted to kill him; they would have simply gunned him down since they tend to execute their enemies, as per the aforementioned documentary evidence.⁹⁴

The IRB credibility guidelines warn decision makers "A document containing general information may not be always sufficient to refute testimony dealing with a specific, individualized event."⁹⁵ Surprisingly the decision maker used the general information of "Los Zetas" and applied as a general rule of behaviour for its members. This is an error in logical syllogism known as overzealous application of a general rule "This fallacy occurs when a generalization that does not necessarily govern is applied to an individual case. The mistake often lies in failing to recognize that there may be exceptions to the general rule".⁹⁶ In this case the decision maker concluded that because the CDP pointed out that the Zetas brutally execute their enemies, it was not credible that they had merely beaten the claimant up, rather than killing

⁹⁴ Ibid at para 22.

⁹⁵ IRB Guidelines *supra* note 54 at 55.

⁹⁶ Neal Ramee "Logic and Legal Reasoning: A Guide For Law Students" *The University of North Carolina*, online: <http://www.unc.edu>

him. After discrediting the claimant the decision maker concluded that the whole story was implausible and because he did not provide a medical document (contrary to the guidelines) the panel did not believe his allegations as a whole:

The panel does not believe that the claimant was a victim of the Zetas three times, at the same place and for the same reasons, as stated at the hearing, for the reasons outlined above: this is an organized group; they have many people who would undoubtedly be willing to transport this merchandise; and it would be surprising for them to be at the same spot after having hurt their victim so seriously, particularly if he continued to pass by the same spot repeatedly...because the claimant's story as a whole is implausible, and because the claimant has not submitted any documentary evidence, such as a medical document--the panel does not believe the claimant's main allegations, as a whole.”⁹⁷

The argument that the applicant was lying because his story goes against an objective interpretation of the *modus operandi* of “Los Zetas” was also found in the RPD Files No. VA8-03479⁹⁸, MA9-04522⁹⁹, TB1-05135¹⁰⁰, MA9-09296¹⁰¹ and the ID file No. 0003-A8-01728¹⁰².

2.3.2.1 The Doctrine of Generalized Risk

In contrast to the previous decision, in the RPD file No. VA8-02888¹⁰³, a decision maker analyzed a similar story of an asylum seeker from Guatemala¹⁰⁴ (who was also approached three times by a gang). This time the information contained in the CDP was objectively applied:

I find that the country documents overwhelmingly point to high rates of crime and violence. Documents indicate that criminal gangs target buses and force drivers to pay a daily tax to avoid the attacks. The same document explains about how gang extortion forces people out of their home or even schools. While the consistency of the claimant's experience with the

⁹⁷ *Supra* note 91 at para 26.

⁹⁸ *X (Re)*, 2010 CanLII 97494 (CA IRB)

⁹⁹ *X (Re)*, 2010 CanLII 96768 (CA IRB)

¹⁰⁰ *X (Re)*, 2012 CanLII 100184 (CA IRB)

¹⁰¹ *X (Re)*, 2012 CanLII 96929 (CA IRB)

¹⁰² Canada (Public Safety and Emergency Preparedness) c. X, 2009 CanLII 90101 (CA IRB)

¹⁰³ *X (Re)*, 2011 CanLII 97803 (CA IRB)

¹⁰⁴ Guatemala shares similar criminality problems as Mexico by having the same criminal organizations operating in both countries, including Los Zetas. See Ralph Espach et al. “Criminal Organizations and Illicit Trafficking in Guatemala’s Border Communities”, online: CNA Analysis and Solutions <http://www.cna.org>.

documentary evidence enhances his credibility, it shows that what he experienced was a generalized problem. The country documents as a whole are quite clear in indicating the vast scope of crime in Guatemala involving various criminal organizations. While different people may face a different degree of risk, I find that there are risks associated with anyone living in the country from them.¹⁰⁵

Despite the fact that the applicant was considered credible in this case, his application was denied on the basis of the theory of generalized risk. The theory of generalized risk is worthy of discussion here because it is at times used as an external inconsistency argument when the CDP shows that the risk suffered by the applicant is shared with his co-nationals. In other words, if the claimant alleges a risk that the CDP shows is not individualized to the applicant but general to the population of his country of origin, his or her application will can fail on the basis of external inconsistency. This will be demonstrated below, based on an analysis of IRB decisions concerning non-Mexican refugee claimants.

According to the IRPA victims of generalized violence cannot be considered persons in need of protection because s. 97(1) (ii) clearly states:

A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally...(ii) To a risk to their life or to a risk of cruel and unusual treatment or punishment if the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country.¹⁰⁶

One of the recent cases that confirmed the application of the doctrine of generalized risk by the IRB was *Prophète v. Canada (Citizenship and Immigration)*,¹⁰⁷ where in 2008 the federal court decided that an applicant [a businessman] from Haiti did not face a personalized risk because the danger of violence was a threat for the hole population: “The risk of all forms of criminality is

¹⁰⁵Supra note 103 at para 22.

¹⁰⁶ IRPA *supra* note 29 s 97

¹⁰⁷*Prophète v Canada (Citizenship and Immigration)*, 2008 FC 331 (available on CanLII).

general and felt by all Haitians. While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence”¹⁰⁸. However the applicant appealed *Prophete* and in 2009 the Federal Court of Appeal (FCA) explained that in the assessment and application of the doctrine of generalized risk it is critical to take into consideration the personal risk faced. The court explained, “The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant in the context of a present or prospective risk for him”.¹⁰⁹

The rationale of the FCA in *Prophete* has been unobserved unobserved by decision makers of the RPD who are just relying on the authority of the first case of *Prophete* from 2008 to dismiss evidence that shows claimants specifically targeted. Madam Justice Gleason explained this error in *Portillo v Canada (Citizenship and Immigration)*¹¹⁰

In my view, the essential starting point for the required analysis under section 97 of IRPA is to first appropriately determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk (i.e. whether he or she continues to face a “personalized risk”), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. Frequently, in many of the recent decisions interpreting section 97 of IRPA, as noted by Justice Zinn in *Guerrero* at paras 27-28, the “... decision-makers fail to actually state the risk altogether” or “use imprecise language” to describe the risk. Many of the cases where the Board’s decisions have been overturned involve determinations by this Court that the Board’s characterization of the nature of the risk faced by the claimant was unreasonable and that the Board erred in conflating a highly individual reason for heightened risk faced by a claimant with a general risk of criminality faced by all or many others in the country¹¹¹

¹⁰⁸ Ibid at para. 23.

¹⁰⁹ *Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31 at para 7 (available on CanLII).

¹¹⁰ *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 (available on CanLII).

¹¹¹ Ibid at para 40. See also *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143 (available on CanLII).

In other words, if the evidence that shows the ability of the agent of persecution to locate and harm the claimant, decision makers cannot deny refugee status by arguing general conditions of criminality in the applicant's country of origin. Unfortunately this instruction has been unobserved in Mexican refugee cases. In *De La Cruz v. Canada (Minister of Citizenship and Immigration)*¹¹² the applicants, a wealthy family from Acapulco, México was specifically being targeted by Los Zetas. They provided strong evidence of how they were followed in previous occasions and the ability of the agent of persecution to locate them in the future. The IRB rejected the claim based on the doctrine of generalized risk:

The claimant is found to be a victim of crime, but the crimes he and his family were victims of are widespread in Mexico. The claimants are therefore, part of a subset of the population that faces a generalized risk in Mexico of violence at the hands of the cartels. This subset of business owners or successful persons perceived of having wealth is more exposed to a risk that is faced generally by the population. But it is still a generalized risk faced by the claimants in Mexico.¹¹³

The court explained why, in this case, it was an error to apply the doctrine of generalized risk when the claimant was specifically and individually targeted and persecuted by the criminal gang of "Los Zetas" Moreover by using a twisted application of section 97 of the IRPA the IRB is taking away the whole meaning of the section:

This is not just a case where an applicant claims that he faces a risk of being targeted by criminal gangs, be it in a country where those gangs operate with impunity and are all pervasive. This is what the Member seems to be implying when she wrote that "[t]he fact that a claimant is personally at risk of harm does not necessarily mean that the risk is not one faced generally by other persons in the claimant's country" (Decision, para 34). In the case at bar, however, the Applicants have been personally and specifically targeted by the Zetas in circumstances where others are generally not, and this has occurred more than once. To borrow from Justice Gleason in *Portillo*, above, at para 36, "[i]f the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide protection for crime-related risks. [...] The RPD's interpretation would thus largely strip section 97 of the Act of any content or meaning."¹¹⁴

¹¹² *de La Cruz v Canada (Citizenship and Immigration)*, 2013 FC 1068 (available on CanLII).

¹¹³ *Ibid* at 37.

¹¹⁴ *Ibid* at para 42.

Similar luck was faced by an applicant from Guatemala where the IRB dismissed his claim on the basis of the doctrine of generalized risk. In *Aguilar Zacarias v. Canada* (Minister of Citizenship and Immigration)¹¹⁵ the claimant was a street vendor from Guatemala who was targeted by the MS gang and particularly by one of its member. The federal court had to reverse the decision and explained the rationale of the IRB:

The Board proceeded to analyze the documentary evidence pertaining to the Applicant's story and the country conditions in Guatemala...The Board concluded that while this subjective fear was indeed present, the Applicant faced a risk of persecution that is faced by the population in general. This generalized risk spawned from the breadth of gang activities in Guatemala. The Applicant would thus be part of a specific category of people, mainly vendors, which are targeted generally by street gangs. As such, the risk faced by the Applicant was not deemed to be within the range of possibilities provided by section 97 of the IRPA. Furthermore, there was no nexus to a refugee convention grounds. Consequently, his claim for asylum was rejected.¹¹⁶

The Federal Court explained how the risk faced by applicant was particularized by the threats and persecution on the part of one of the members of the criminal organization:

[The board] focused on the generalized threat suffered by the population of Guatemala while failing to consider the Applicant's particular situation. Because the Applicant's credibility was not in question, the Board had the duty to fully analyze and appreciate the personalized risk faced by the Applicant in order to render a complete analysis of the Applicant's claim for asylum under section 97 of the IRPA. It appears that the Applicant was not targeted in the same manner as any other vendor in the market: reprisal was sought because he had collaborated with authorities, refused to comply with the gang's requests...¹¹⁷

The case was sent back for redetermination by a newly constituted panel, but this time surprisingly the board dismissed the claim by founding that the claimant was not credible (contrary to the first decision maker who found him credible). In 2012 the applicant had to

¹¹⁵ *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2011 FC 62 (available on CanLII).

¹¹⁶ Ibid at paras 8 and 10 .

¹¹⁷ Ibid at para 34 See also *Martinez Pineda v Canada (Citizenship and Immigration)*, 2007 FC 365 (available on CanLII).

appeal again and in the case of *Aguilar Zacarias v. Canada*¹¹⁸ and the Federal Court quashed the IRB decision for a second time:

A case where an erroneous credibility finding requires intervention...The RPD's findings in this case are based on impermissible conjecture and conclusions that contradict the evidence before the Board and thus cannot stand. The Board made findings that went to the core of the applicant's claim that are no more than "unfounded speculation" and that lack an evidentiary basis. Since the Board's conclusion that the applicant was not at risk was based on his lack of credibility, it is unreasonable and must be set aside.¹¹⁹

As the above has demonstrated, Mexican refugee applicants and asylum seekers who are fleeing from countries in similar conditions as Mexico are vulnerable to findings of incredibility due external inconsistencies where decision makers engage in speculation based on information contained in the CDP or where their stories reveal that their claim is based on a generalized rather than an individualized risk. Despite that the federal courts are providing clear instructions of how to properly assess the doctrine of generalized risk, the IRB continues to apply twisted interpretations of the IRPA and the old doctrine set out in the first case of *Prophete* to deny refugee status to Mexican applicant's who allegedly were victims of "Los Zetas", without taking into account personal circumstances of the claimant. This was confirmed after reviewing the cases TA9-04577¹²⁰ VA9-02305¹²¹ TA9-05443¹²² VA8-05002¹²³.

¹¹⁸ *Aguilar Zacarias v. Canada (Citizenship and Immigration)*, 2012 FC 1155 (CanLII) [Aguilar Zacarias 2012]

¹¹⁹ *Ibid* at paras 3 and 26.

¹²⁰ *X (Re)*, 2010 CanLII 97357 (CA IRB)

¹²¹ *X (Re)*, 2011 CanLII 97819 (CA IRB)

¹²² *X (Re)*, 2012 CanLII 94164 (CA IRB)

¹²³ *X (Re)*, 2010 CanLII 100689 (CA IRB)

2.3.3 Implausibilities

Decision makers commonly mention the term “implausibility” when they find external inconsistencies between the applicant’s story and the CPD information concerning the applicant’s country of origin. In other words, IRB decision makers sometimes find an applicant’s version of events to be implausible on the basis of information contained in the CDP as Jenni Millbank explains, “There is a great deal of overlap between the notions of plausibility and external consistency, due to the fact that the latter is often based on comparisons between general information about her country of origin and her story itself.”¹²⁴ Michael Kagan points out that the “plausibility criterion overlaps with examining whether an account is consistent with generally known facts about the country of origin and that a finding of implausibility based on concrete evidence about how a country of origin functions is really finding that the account is not consistent with generally known facts”¹²⁵.

The UNHCR has warned that when a decision maker finds that something is implausible he or she has to remain as objective as possible because subjective perceptions of what should have happened could have an adverse impact on credibility findings. That is why it becomes critical to follow the instructions contained in objective credibility guidelines such as those produced by the IRB, and not to engage in excessive interpretation of the content of the country information. “If indicators are based on unfounded subjective assumptions about how human beings should act and behave in particular circumstances, or on how people should perceive and respond to situations of risk, and if they equate to the decision-maker’s limited knowledge with

¹²⁴ Millbank *supra* note 46 at 12.

¹²⁵ Kagan *supra* note 41 at 390.

the truth, then they are likely to be flawed and to risk producing flawed credibility finding.¹²⁶

The UNHCR also warns not to resort to common sense to determine that something is implausible:

[R]esorting to ‘common sense’ is not an effective means of judging the plausibility of events, particularly in societies and countries that differ from one’s own. Considerable caution is required when assessing the behaviour, norms, and customs of people from different cultures, and the practices and procedures of their political, justice, and social systems”¹²⁷

Unfortunately and contrary to the recommendations of the UNHCR the IRB Guidelines allow decision makers to use implausibilities and common sense in credibility findings: “The RPD is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole.”¹²⁸

One of the most common problems that arise in determining implausibilities is when decision makers speculate how the applicant or the agent of persecutor should have behaved in particular circumstances. This is explained by Casselbrant: “Even though a variety of different information may play a role in establishing a future risk of persecution, the most critical plausibility assessments tend to concern either the applicant’s actions in the face of persecution or the behaviour of the persecutor.”¹²⁹ This is echoed by Millbank, who says “Plausibility assessment may also be based upon what is speculated upon or imagined to be likely, rather than upon actual evidence of what has occurred or evidence of general conditions that inform the

¹²⁶ UNHCR assessments *supra* note 39 at 178.

¹²⁷ Ibid.

¹²⁸ IRB Guildeines *supra* note 54 at 33.

¹²⁹ Casselbrant *supra* note 48 at 49.

likelihood of an occurrence.”¹³⁰ Following this rationale the IRB guidelines instruct that: “Adverse findings of credibility must be based on reasonably drawn inferences and not conjecture or mere speculation. Where the RPD finds a lack of credibility based on inferences concerning the plausibility of the evidence, there must be a basis in the evidence to support the inferences”¹³¹ However this rules are being unobserved because as in the case of external inconsistencies findings, a similar problem is haunting Mexican refugee applicants when decision makers, by subjectively interpreting information contained in the CDP, are creating general rules of conduct that according to them contradict the personal story of the asylum seekers and therefore are implausible.

The story told by the applicant in the case MA9-09296¹³² was considered implausible as a whole after the decision maker interpreted the content of the CDP and determined that the modus operandi of Los Zetas did not correspond with his narration of the events. In this case the decision maker argued:

The panel considers it implausible that the Zetas would be looking for a stranger to transport drugs, as this would be a surprising risk for such a group to take: Los Zetas have adopted a business-style structure, which includes holding regular meetings (CNN 6 Aug. 2009)... According to an article published by CNN in August 2009, the US government has stated that Los Zetas is "the most technologically advanced, sophisticated and dangerous cartel operating in Mexico."¹³³

In concluding that because “Los Zetas” business-style structure makes it is impossible to believe that they would be looking for a stranger to transport drugs, the IRB engaged in unwarranted speculation, which was in turn used to draw adverse inferences as to the applicant’s credibility.

¹³⁰ Millbank *supra* note 46 at 12.

¹³¹ IRB Guidelines *supra* note 54 at 33 [footnotes omitted]

¹³² *Supra* note 91.

¹³³ Ibid at para 83 [emphasis added]

The documented activities of criminal organizations made by the press do not constitute general rules of behaviour of the members of such organizations, especially when, according to the decision maker, the organization is comprised by “thousands of members including men and women”¹³⁴

Similar speculation was used to the detriment of the Guatemalan asylum seeker in the case of *Aguilar Zacarias v. Canada*¹³⁵, also discussed above. There the Federal Court of reversed a decision based on impermissible conjectures from a member of the IRB. This case is plagued by errors of syllogism and subjective theories of the decision maker about how things should happen in the applicant’s country of origin. One such implausibility argument used by the decision maker was that, because the CDP showed that the gang MS started its criminal activities in the year of 1990, they should had extorted the applicant “soon after” he started his business instead of two and a half years later. The judge explained how the board reasoned:

The claimant began selling chicken as a market street vendor in [2004]. He testified that he had never seen Chubby [the agent of persecution] before June 2006 when the extortion began. This is implausible given his own testimony that the Mara are everywhere in his country, and have been, according to the objective evidence, since the 1990’s. I find, on balance of probabilities, that the local Mara would have not begun extorting the claimant soon after he set up shop in 2004. Given their ubiquitous and rapacious [sic] I find no plausible reason for them not to have begun extorting him earlier. I therefore find his statement implausible. His credibility is eroded¹³⁶.

The federal judge explained the erroneousness of this logic because the fact that the agent of persecution started its criminal activities in certain year is totally unrelated when the date that the applicant started suffering persecution by the gang members:

¹³⁴ Ibid at para 12.

¹³⁵ *Aguilar Zacarias* 2012 *supra* note 118.

¹³⁶ Ibid at para 13.

[T]his conclusion is unreasonable. The fact that the MS is ubiquitous throughout Guatemala does not imply that they must be targeting every single vendor within the country at the same time nor that they immediately target every vendor as soon as he or she sets up a stall. It is not implausible that the applicant was not targeted until the date he claims the extortion started and there is nothing in the evidence from which the Board could reasonably have concluded otherwise. Accordingly, this implausibility finding is not reasonable.¹³⁷

Because the implausibility findings were unsupported by any document in the CDP the decision maker had to pervert its content by giving a subjective view of how things should have happened. Nowhere in the CDP says that the MS target every single vendor at the same time and right after they start their business. This was a subjective interpretation of the country information that lacks any logic. Unfounded speculations that amounted to implausibilities were also found in the cases RPD File Nos. MA9-08468¹³⁸ MA9-02092¹³⁹ and TA8-23773¹⁴⁰ where the decision maker founded the statements of the Mexican applicant implausible due the subjective understanding of the CDP.

2.3.4 Demeanour

The last tool used by decision makers to assess the credibility of refugee applicants and persons in need of protection is to analyze the applicant's physical behavior during the hearing. The UNHCR has defined the concept of demeanour evidence as "The outward behaviour and manner of a person, including their manner of acting, expression or reply (for example, hesitant, reticent, evasive, confident, spontaneous, or direct), tone of voice, modulation or pace of speech,

¹³⁷ Ibid at para 14.

¹³⁸ *X (Re)*, 2012 CanLII 100029 (CA IRB)

¹³⁹ *X (Re)*, 2011 CanLII 100454 (CA IRB)

¹⁴⁰ *X (Re)*, 2010 CanLII 96835 (CA IRB)

facial expression, eye contact, emotion, physical posture, and other non-verbal communication”.

¹⁴¹ However Casselbrant explains that many have questioned the value of this tool:

Research in psychology has demonstrated that the ability to distinguish between truthful and untruthful statements of assessed individuals is of low reliability, even amongst professionals that often conduct such evaluations. There is also a gender aspect to such assessments: studies have shown that triers of fact identify typically male communication traits as traits of credibility. The problem of distinguishing between liars and truth-tellers is further complicated in a cross-cultural setting, where differing body language, gazes and manners of expression are often misinterpreted.¹⁴²

This is confirmed by the UNHCR when it says, “cultural differences and norms governing the behaviour of men and women may also influence an applicant’s demeanour. Previous UNHCR research has found that ‘correct’ and ‘incorrect’ demeanours have a bearing on decision-makers’ credibility findings in gender-related cases.”¹⁴³ This is why it is important to follow objective rules when the demeanour of the applicant is analyzed as a credibility factor. In Canada, the rules of demeanour are also regulated the IRB Guidelines:

In assessing the credibility of the evidence, the RPD can evaluate the general demeanour of a witness as he or she is testifying. This involves assessing the manner in which the witness replies to questions, his or her facial expressions, tone of voice, physical movements, general integrity and intelligence and powers of recollection, However, relying on demeanour to find a claimant not credible must be approached with a great deal of caution.¹⁴⁴

Jenni Millbank explains that the IRB guidelines “Distinguish between subjective ‘impressions’ based upon physical appearance on the one hand (which it states ought not be relied upon), and what are characterized as ‘objective’ elements of demeanour such as ‘frankness and spontaneity’ in providing an oral narrative”¹⁴⁵.

¹⁴¹ UNHCR assessments *supra* note 39 at 185.

¹⁴² Casselbrant *supra* note 48 at 55.

¹⁴³ UNHCR assessments *supra* note 39 at 186.

¹⁴⁴ IRB Guidelines *supra* note 54 at 38-39.

¹⁴⁵ Millbank *supra* note 46 at 7.

Few cases touching on the demeanour of Mexican refugee applicants were found by this author. In the IRB file No. MA4-04505¹⁴⁶ the panel determined that the when one of the applicant's children failed to respond a question of the immigration officer, this was not the demeanour of a person who feared for her life, though the IRB denied the family's asylum claim for different reasons. The rest of the cases analyzed show how demeanour was used in a positive way to determine that the applicant actually had a subjective fear, nevertheless the claims were rejected on the theory of generalized risk or lack of credibility.¹⁴⁷

2.4 Conclusion

As this chapter has shown, credibility assessment is of the utmost importance to refugee applications. Like all asylum seekers, Mexican refugee applicants must convince the IRB that their claims are credible, in order to succeed in their quests for asylum. However, that task is rendered significantly more difficult as a result of the IRB's inconsistent application of its own guidelines with respect to credibility assessment. As the cases analyzed above have shown, there are numerous documented incidents of the IRB failing to give applicants the benefit of the doubt, using the CPD information to speculate unreasonably and generally being overzealous in its identification of inconsistencies in asylum seekers stories. As I will explain in my next chapter, even if a Mexican refugee applicant survives credibility findings, the doctrines of Internal Flight Alternative and State Protection may be applied and result in the dismissal of her application. These factors combined may serve to explain, at least in part, why Mexican asylum seekers are denied refugee status in such great numbers.

¹⁴⁶ *X (Re)*, 2008 CanLII 87597 (CA IRB)

¹⁴⁷ *X (Re)*, 2007 CanLII 70662 (CA IRB), *X (Re)*, 2011 CanLII 100717 (CA IRB)

CHAPTER 3: THE DOCTRINE OF STATE PROTECTION AND ITS INCORRECT APPLICATION TO MEXICAN REFUGEE CLAIMS

3.1 Introduction

As was discussed in the previous chapter, credibility determinations in refugee law pose a significant challenge for decision makers and require them to use different tools to assess whether the applicant is being honest in his or her narration of the events that constitute grounds for refugee status. As this chapter shall demonstrate, the assessment of whether a state has provided an adequate level of protection to the asylum claimant is equally difficult and it demands from the decision maker to evaluate all the evidence presented by the applicant, the information contained in the CDP and the application of doctrinal principles contained in the jurisprudence, however as we will see, the case law is unclear as Penelope Mathew, James Hathaway and Michelle Foster have explained: “The task of assessing whether a state has provided an appropriate level of protection is proving to be a difficult one for decision makers giving rise to controversies in the case law concerning the relevant test for state protection.”¹⁴⁸ Indeed, it will be proven that the IRB has been deliberately relying exclusively on lines of jurisprudence that tend to take a strict and demanding approach to three key aspects of the state protection doctrine: 1) the duty to exhaust all avenues of protection; 2) the adequacy vs. effectiveness of protection; and 3) internal flight alternative. When viewed as a whole, the IRB’s tendencies (as well as those, to a lesser extent, of the Federal Court) in each of these three areas are serving to limit the availability of refugee status on the basis of the state protection doctrine,

¹⁴⁸ Penelope Mathew, James C. Hathaway and Michelle Foster “The Role of State Protection in Refugee Analysis” (Paper delivered at the Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002) At. 444.

to the particular detriment of asylum seekers from high refugee producing countries, such as Mexico.

3.2 Surrogate protection: Inability and Unwillingness to Protect

Establishing a lack of state protection is essential to the success of claims for refugee status, which will only be granted if the asylum seeker can demonstrate on a balance of probabilities that the state is unable or unwilling to protect the claimant from persecution in her country of origin. Therefore state protection becomes part of the persecution analysis “The Convention overarching goal is to provide a new national home to persons driven from their own country by the risk of being persecuted”¹⁴⁹ This overarching goal is just limited to persons who are unable to avail themselves of protection in their countries of nationality or habitual residence.

Martin Jones and Sasha Bagley explain:

It is the duty of all states to offer protection to its nationals. Refugee protection only becomes available when a state fails in the performance of its duty, including at the extreme participating in the persecution of its own nationals... the protection on an individual only becomes the obligation of the international community qua refugee convention refugee if his state of nationality is unable to offer protection or the refugee claimant is unwilling to avail himself of state protection.¹⁵⁰

Therefore refugee protection is commonly referred to as a “surrogate” or “substitute” protection, in that it will only be granted if the claimant is, in the words of Article 1(a)(2) of the Refugee Convention “unable, or owing to such fear is unwilling to avail himself of the protection of that

¹⁴⁹ James Hathaway and Michelle Foster, *The Law of Refugee Status* 2d ed (Cambridge, United Kingdom: Cambridge University Press, 2014) at 288 [Hathaway]

¹⁵⁰ Martin Jones and Sasha Bagley. *Refugee Law* (Toronto: Irwin Law 2007) at 134.

country.”¹⁵¹ The Handbook provides a useful explanation of how the first term “unable” ought to be interpreted, in the context of state protection:

Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.¹⁵²

The Federal Court of Appeal in turn provided its own definition of inability to protect. The 1991 decision of *Zalzali v. Canada*¹⁵³ the claimant was determined to have been unable to seek the assistance of the state because there was effectively no government to which to turn. The Court explained:

The natural meaning of the words “is unable” assumes an objective inability on the part of the claimant, and the fact that “is unable” in contrast to “is unwilling” not qualified by reason of “that fear” seems to me to confirm that the inability in question is governed by objective criteria which can be verified independently of the acts which prompted that fear and their perpetrators... [T]here is no doubt that “unable” applies in the case at bar, as the evidence established that the appellant was unable to seek the protection of his government or even to approach it for the simple and brutal reason that there was no government to resort to¹⁵⁴

Refugee claimants are able to objectively establish an inability to seek state protections in situations similar to those in *Zalzali*, when the state apparatus had ceased to operate and it is thus obvious that the state is not able to provide protection to its citizens¹⁵⁵. Therefore unless there has been a complete breakdown, the state will be presumed to be able to protect its own citizens.

¹⁵¹ Refugee Convention *supra* note 28 at 14.

¹⁵² The Handbook *supra* note 44 at para 98.

¹⁵³ *Zalzali v. Canada*, [1991] FJC 341 (QL) at 11 (FCA) [*Zalzali*]

¹⁵⁴ *Ibid.*

¹⁵⁵ Jones and Baglay *supra* note 150 at 137 explain that there has been a few recognitions of completely failed states by the Canadian government “The jurisprudence provides very few examples of a complete breakdown: Lebanon during its civil war in the 1980s [*Zalzali*] and parts of Somalia are the most cited examples As a general rule, the Board and the courts are very reluctant to make a finding of breakdown if the machinery, even during the devastating (and ongoing) civil wars of Colombia, Ethiopia, and Afghanistan.

However Matthews, Hathaway and Foster explain how the unable notion of *Zalzali* is not followed anymore and it has been substituted by the unwillingness term:

While it appears to be accepted in theory that [unwilling and unable] are analytically distinct notions, courts have often elided the two inquiries in practice into a single determination of willingness, contrary to the approach outlined in *Zalzali v. Canada*. To some extent this reflects an apparent misconception that to find that a state is unable to protect is tantamount to a finding of unwillingness (a finding only sometimes appropriate)¹⁵⁶

Indeed as we will see, the term unable has been substituted by unwilling and because the courts had not followed a single criteria for the terms, the application is confusing.

The interpretation of the term “unwilling” is somewhat more complicated, as it has evolved over time. Originally, unwillingness was interpreted exclusively from the perspective of the claimant, and was thus focussed on the justification of the claimant’s unwillingness to access state protection. This original definition was provided in the UNHCR Handbook:

The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase “owing to such fear.” Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country “owing to well-founded fear of persecution.” Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.¹⁵⁷

However, increasingly since the early 1990s, unwillingness has been interpreted to encompass both the willingness of the claimant to access state protection, and the willingness of the state to provide it. As Hathaway explains, “the most straightforward manifestation of a failure of state protection is where a state is unwilling to protect.”¹⁵⁸

¹⁵⁶ Matthew *supra* note 148 at 453.

¹⁵⁷ The Handbook *supra* note 44 at para. 100.

¹⁵⁸ Hathaway *supra* note 149 at 297.

This broader interpretation of unwillingness was endorsed by the Supreme Court of Canada in its landmark decision in *Canada (Attorney General) v. Ward*¹⁵⁹, where the court held: “A refugee may establish a well founded fear of persecution when the official authorities are not persecuting him if they refuse or are unable to offer him adequate protection from his persecutors...most states will be willing to attempt to protect when an objective assessment established that they are not able to do this effectively.”¹⁶⁰ Nevertheless in practice it does not really matter how the words unwilling and protection are actually used, the important think to keep in mind is if the state is able to provide in practice mechanisms to change the applicant’s perception and fear as Jones and Baglay argue, “Both unable and unwilling get conflated into a single question: can the actions of the state mitigate the risk to the claimant enough to remove her well-founded fear?”.¹⁶¹

3.3 Burden of Proof: Rebutting the Presumption of State Protection

The unwilling/unable distinction is often used to determine what kind of evidence the claimant has to put forward in order to rebut the presumption of state protection:

The utility of the distinction is that it highlights the type of evidence that a claimant may be able to produce to indicate the absence of state protection. “Inability” cases are characterized by evidence of the state’s failure to provide adequate resources to the executive agencies that might protect an individual. In contrast, the “unwilling” cases largely rely upon the proximity of the state to the agents of persecution.¹⁶²

¹⁵⁹ *Canada (Attorney General) v. Ward* [1993] S.C.J. No. 74 (QL) (SCC) [Ward]

¹⁶⁰ Ibid at para 136.

¹⁶¹ Jones *supra* note 150 at 136.

¹⁶² Ibid.

The burden of proving that the state is unable or unwilling to protect the asylum seeker, or that he or she is unwilling to seek help for a justifiable reason, lies with the claimant who needs to provide sufficient evidence to convince the decision maker (on a balance of probabilities)¹⁶³ that the state in her country of origin was (and is) unable or unwilling to protect her. In order to demonstrate that the state in her home country is unable or unwilling to protect her, a refugee claimant must rebut the presumption of state protection. In *Ward*, the Supreme Court of Canada explained the challenges that a refugee applicant faces when attempting to displace the presumption:

The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.¹⁶⁴

Furthermore, in the more than twenty years since *Ward* was decided, the Federal Courts have made it even more difficult to displace the presumption, largely as a result of the development of separate and conflicting lines of authority in its jurisprudence. Specifically, such conflict has arisen in the case law dealing with the duty to approach other state authorities and the existence of adequate protection in the country of origin. I argue below, it has tended to be the more demanding authorities (those that are quicker to require more of asylum seekers or to find the protection available in the country of origin to be sufficient), that have most informed the

¹⁶³ See *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 (QL) [Flores Carrillo]

¹⁶⁴ *Ward supra* note 159 at para 50.

guidelines established by the IRB with respect to the application of the state protection doctrine, despite repeated decisions to the contrary from the federal courts. The IRB has continued to rely on jurisprudence that takes a very strict approach to the doctrine of state protection, and as a result has rejected potentially valid refugee claims, including from Mexican applicants.

3.4 Agents of Protection: Two Lines of Authority

Conflicting lines of authority have developed in the Federal Court decisions surrounding whether a refugee claimant has exhausted all avenues for protection available in his country of origin. In *Ward*, La Forest J. explained the refugee claimant's limited obligation to seek protection from state authorities in his country of origin:

Only in situations in which state protection "might reasonably have been forthcoming," will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.¹⁶⁵

The question of whether and how the claimant ought to have approached state authorities will depend on the place from which his alleged persecution emanates. For example, if the police themselves are the source of the claimant's persecution, he will not be expected to have gone to the police to seek assistance. However, as shall be shown below, his obligations with respect to seeking state assistance are unclearly defined by Canadian courts when the source of his persecution lies outside the state.

¹⁶⁵ *Ward supra note 159* at 124.

3.4.1 Democracy Means Exhaustiveness

Indeed, the Federal Court has struggled with the issue of whether the claimant should approach other authorities besides the police to look for state protection when the perpetrators are not state officials. In some cases, depending on the level of democracy at work in the country of origin, failure to seek help from organizations other than the police will be used by decision makers to conclude that the claimant has failed to displace the presumption of protection. The case of *Satiacum v. Canada*¹⁶⁶ provides a good example. In this case, a Native American chief, involved in various legal conflicts with the US government over native rights issues, fled to Canada and the board granted refugee status after being charged with various violations of American federal laws. However the minister appealed and the federal court overturned the decision on the basis that the American court system would provide a fair trial to the claimant: “In a case of a democratic state, in a refugee hearing Canadian tribunals have to assume that the judicial process is democratic and fair”¹⁶⁷.

Similarly, in the case of *Canada (Citizenship and Immigration) v. Kadenko*¹⁶⁸, the Federal Court of Appeal commented that an applicant from Israel had the obligation to seek further protection after he encountered police refusal, on the basis that Israel is a democratic society:

Once it is assumed that the state has political and judicial institutions capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. The answer might have been different if the question had related, for example, to the refusal by the police as an institution or to a more or less general refusal by the police force to provide the protection conferred by the country’s political and judicial institutions. Applied in when the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see

¹⁶⁶ *Satiacum v. Canada* (Min Of Employment & Immigration) [1989] F.C.J. No. 505 (QL)

¹⁶⁷ Ibid at para 11.

¹⁶⁸ *Canada (Citizenship and Immigration) v Kadenko*, 1996 CanLII 3981 (FC) [Kadenko]

some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.¹⁶⁹

This obligation to seek additional state protection from sources other than the police was initially imposed only on claimants from countries considered by Canada to possess a high level of democracy. Following *Satiacum*, the Federal Court in *Hinzman v. Canada*¹⁷⁰ sent a clear message to applicants from United States who seek to apply for refugee in Canada:

Kadenko and *Satiacum* together teach that in the case of a developed democracy, the claimant is faced with the burden of proving that he exhausted all the possible protections available to him and will be exempted from his obligation to seek state protection only in the event of exceptional circumstances...Reading all these authorities together, a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status. In view of the fact that the United States is a democracy that has adopted a comprehensive scheme to ensure those who object to military service are dealt with fairly, I conclude that the appellants have adduced insufficient support to satisfy this high threshold. Therefore, I find that it was objectively unreasonable for the appellants to have failed to take significant steps to attempt to obtain protection in the United States before claiming refugee status in Canada. Since the United States was a democratic country with a system of checks and balances among the branches of government, Hinzman and Hughey bore a heavy burden in attempting to rebut the presumption the United States was capable of protecting them from persecution.¹⁷¹

Unfortunately, this case has been utilized by decision makers to set up an exhaustiveness criteria for applicants who come from countries which, according to international reports, do not have a high level of democracy and whose nationals are recurrent applicants for asylum and protection in Canada.

¹⁶⁹ Ibid at para 3 [emphasis added]

¹⁷⁰ *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 (available on CanLII) [Hinzman]

¹⁷¹ Ibid at 57 [emphasis added]

One such example is the Roma community from Hungary. In 2000, in the case of *Szucs v. Canada (Minister of Citizenship and Immigration)*¹⁷², the Federal Court declared that the Roma applicant was required to approach non-governmental organizations and other government funded agencies before seeking international protection. Because he failed to do so the presumption of state protection was not rebutted:

Thus, in the case at bar, the Board had to determine if state protection was reasonably forthcoming for the Applicant in Hungary. In determining the availability of state protection, the Board was also entitled to examine all reasonable steps the Applicant had taken in the circumstances to seek protection of his state of origin. The Board concluded that police protection would be available to the claimant should he require it in the future but also that additional protection was available from other organizations. The Board found that for more serious and persistent forms of discrimination like eviction from housing, persistent unemployment due to discrimination or other serious harm, there was a network of government and government sponsored organizations throughout Hungary which assist without charge those so threatened. The evidence established that the Applicant had never tried to seek help from either the Ombudsman, NGO's or through minority self-government. I find that the Board, in requiring the Applicant to exhaust these avenues of protection in addition to police protection, was asking the Applicant to take reasonable steps in order to ensure his protection.¹⁷³

In the case of Mexican claimants, the expectation that they have to go to the police more than once or to look for protection in other agencies besides the police was also present in various cases, even when the agent of persecution was the state itself. In the 2008 decision of *Quinatzin v. Canada (Minister of Citizenship and Immigration)*¹⁷⁴, the Federal Judge confirmed the decision of the IRB to require the Mexican applicant who was being persecuted for reasons of homosexuality to go and approach different police members that the ones who were allegedly persecuting him:

¹⁷² *Szucs v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16293 (FC) [Szucs]

¹⁷³ Ibid at paras 27 to 29. Also see *Virag v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 698 (CanLII) where the Court made use of a line of authorities that demanded exhaustiveness of state protection from Roma people.

¹⁷⁴ *Quinatzin v Canada (Citizenship and Immigration)*, 2008 FC 937 (available on CanLII), [Quinatzin]

In my opinion it was reasonable for the Board to find that there were reasonable other avenues of state protection available to the applicant. In cases where the alleged agents of persecution were the police, it is critical that the board considers the reasonableness of asking the applicant to approach the same police force to ask for protection. I believe that the board committed no error in finding that the applicant should have made an effort to seek state protection before seeking international protection even if the agents of persecution were the police themselves.¹⁷⁵

The same approach was taken the same year in the case of *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*¹⁷⁶ decided by the Federal Court of Appeal. In this case a victim of domestic violence was required to show evidence that she approached human rights organizations in order to be able to rebut the presumption of state protection:

[t]he more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her." It found that Mexico is a fledgling democracy governed by the rule of law the respondent had failed to make determined efforts to seek protection. She reported to police only once during more than four years of alleged abuse... the respondent did not make additional effort to seek protection from the authorities when the local police officers allegedly did not provide the protection she was seeking. She could have sought redress through National or State Human Rights Commissions, the Secretariat of Public Administration, the Program Against Impunity, the General Comptroller's Assistance Directorate and the complaints procedure at the office of the Federal Attorney General.¹⁷⁷

In 2010 the Federal Court in *Cadena Ramirez v. Canada (Minister of Citizenship and Immigration)*¹⁷⁸ when the Federal Court affirmed the IRB's finding that the applicant should have approached the police forces on repeated occasions: "The applicant made only one effort to approach local police in Tuxtla which generally would not be enough to rebut the presumption of state protection. Applicants are obliged to make "determined efforts" to access state protection and "additional efforts" may be required to rebut the presumption."¹⁷⁹

¹⁷⁵ Ibid at para 28.

¹⁷⁶ *Flores Carrillo supra note 163.*

¹⁷⁷ Ibid at para 34.

¹⁷⁸ *Cadena Ramirez v Canada (Citoyenneté Et Immigration)*, 2010 FC 1276 (available on CanLII).

¹⁷⁹ Ibid at para 13.

3.4.2 Is Mexico a Democracy?

An entirely different line of authority has been developed over the years by the Federal Courts which take the view that the only agency that is meant to provide protection for refugee applicants in their home countries is the police and that any other entity such as human rights, non-profit and civil organizations are not adequate to offer protection. As a result, these cases, contrary to those discussed above, do not find the presumption of protection to be unrebutted if the claimant failed to seek assistance from organizations other than the police. In *Molnar v. Canada (Minister of Citizenship and Immigration)*¹⁸⁰, the applicant, a Hungarian citizen, was demanded by the IRB to look for further protection even when the state agents were the perpetrators. Justice Tremblay-Lamer rejected this approach and explained:

In *Kadenko v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal imposed a heavy burden on the applicant to demonstrate that all courses of action have been exhausted before claiming the protection of another state, holding that the refusal of certain police officers to provide protection does not in itself indicate that the state is incapable of doing so. However, the police herein not only refused to protect the applicants, but were also the perpetrators of the acts of violence. So it was clearly unreasonable to have expected the applicant to seek additional protection from the police when it was the police who were responsible for the acts of violence. The Board also erred in imposing on the applicants the burden of seeking redress from agencies other than the police. This Court has indicated that if the police refuse or are unwilling to act, there is no obligation on an individual to seek counselling, legal advice, or assistance from human rights agencies. Furthermore, it is important to draw a distinction between acts of discrimination and acts of a criminal nature. Where protection from crime is at issue, as it was herein, it is questionable whether redress could have been obtained by seeking assistance from human rights organizations. The only authority that could have provided assistance was the police.¹⁸¹

¹⁸⁰ *Molnar v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 FCR 339, 2002 FCT 1081 (CanLII) [Molnar]

¹⁸¹ *Ibid.* at 19 [Emphasis added] See also *Malik v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 453 (CanLII).

Molnar, which was decided by the Federal Court in 2003, was one of the first decisions in which the Federal Court began to distance themselves from the notion that claimants would be required to seek assistance from sources other than the police before seeking refugee protection in Canada. This principle has equally been applied in a series of cases dealing with Mexican asylum seekers.

In 2005 the Federal Court in *Chavez v. Canada (Minister of Citizenship and Immigration)*¹⁸² applied the principles of *Molnar* and explained the approach that the courts should take when applying *Kadenko* and *Ward*, by not demanding that applicants exhaust all the available resources that might be able to provide protection and that when the police, as the only body to provide this tasks fails to do so, the burden of proof on the applicant is undercut:

In my view, however, *Ward*, supra and *Kadenko*, supra, cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted...Rather, where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof.¹⁸³

This finding is particularly important in the case of Mexican refugee applicants, who are often alleging persecution at the hands of state agents. Indeed, as a result of high levels of corruption within their organizations, it is often police actions that form the bases of Mexican asylum seekers' claims.

¹⁸² *Chaves v Canada (Minister of Citizenship and Immigration)*, 2005 FC 193 (available on CanLII).

¹⁸³ *Ibid* at para 15.

In 2008 in *Zepeda v. Canada (Minister of Citizenship and Immigration)*¹⁸⁴, the Federal Court explained the conflicting lines of authority that exist in regard to the state protection in Mexico. The Federal Court confirmed that, in the case of Mexico the only authority that should be taken into account to provide state protection is the police and that any other agency, NGO or human rights organization need not be turned to as well:

The Board proposed a number of alternate institutions in response to the applicants' claim that they were dissatisfied with police efforts and concerned with police corruption. These alternate institutions do not constitute avenues of protection *per se*; unless there is contrary evidence, the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate."¹⁸⁵

Furthermore, the Court in *Zepeda* addressed the question of Mexico's status as a democratic country, and the impact that this should have on the assessment of whether it was willing or able to offer protection from persecution to its nationals:

In the recent decision of *Hinzman v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal noted that the presumption that a state is able to protect its citizens applies equally to cases where an individual claims to fear persecution by non-state entities and to those where the state is alleged to be a persecutor. Therefore, the existence of state persecuting agents does not serve to automatically rebut the presumption that a state is capable of protecting its citizens. While the burden placed on claimants from developed democratic states is a high one, this burden does not require that they put themselves in danger in order to exhaust all possible avenues of protection. Indeed, the requirement of having to place oneself in danger in order to exhaust all protection avenues would constitute an "exceptional circumstance" which would exempt a claimant from his obligation to seek state protection. While Mexico is a democracy and generally willing to protect its citizens, its governance and corruption problems are well documented. Therefore, decision makers must engage in a full assessment of the evidence placed before them that suggests that while Mexico is willing to protect its citizens, it may be unable to do so.¹⁸⁶

Since rendering their decisions in *Chavez* and *Zepeda*, the Federal Court has continued to apply its principles in other decisions relating to Mexican refugee claimants and their obligations

¹⁸⁴ *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 FCR 237.

¹⁸⁵ *Ibid* at para 33.

¹⁸⁶ *Ibid.* at para 20.

to seek assistance from actors other than the police. In 2009, in *Lopez Villicana v. Canada (Citizenship and Immigration)*,¹⁸⁷ the court reversed a decision of the RPD by applying the previously discussed principles from *Chavez* and not demanding evidence from the applicant of previous attempts to look for protection, especially if the police were the ones persecuting the applicant. Arguably, this correctly follows the Supreme Court of Canada's holding in *Ward*, by not demanding evidence that is not reasonable forthcoming because the state is the agent of persecution. The court explained how in Mexico, the institutions put in place by the government are often the ones that perpetrate abuses and human rights violations:

In the present case, the Applicants did not approach the authorities. Their explanation was that the Principal Applicant had been harassed in the past by the police in Mexico City and the police were, in any event, friendly with the agents of persecution. They feared that approaching the police would expose them to risk. In addition, that says that even if they had approached the police, the evidence before the Board was that the police would not have assisted them. In the present case, the Applicants placed before the Board reputable evidence not only that the Mexican authorities cannot protect ordinary Mexicans who lack wealth and influence, but that it is those very authorities (the police, the judiciary and the government) who pose the greatest danger to the normal citizen. This evidence suggests that all police forces in Mexico are riddled with corruption and are operating outside the law, that the National Human Rights Commission acknowledges that the very institutions who are supposedly there to protect ordinary Mexicans are the ones most likely to violate their human rights, and that the wealthy and the well-connected operate outside the law with impunity in a context where the police and government are infested by drug traffickers and other organized criminals.¹⁸⁸

The federal court also questioned if the principles of high expectation of exhaustiveness due democracy applied in *Hinzman* should be used in assessing claimants from Mexico and confirmed the position rendered in *Zepeda*: “In the case of a fully developed democracy, these excuses for not approaching the authorities would not have availed the Applicants, but Mexico has problems that require a fuller assessment and a contextual approach to state protection. The

¹⁸⁷ *Lopez Villicana v Canada (Citizenship and Immigration)*, 2009 FC 1205 (available on CanLII) [Lopez]. See also *Hernandez Rodriguez v Canada (Citizenship and Immigration)*, 2011 FC 587 (available on CanLII).

¹⁸⁸ *Ibid.* at para 68.

state of Mexico certainly wants to protect its citizens, but is it able to protect them?”¹⁸⁹

Subsequent cases had pointed out the weak democratic structure of Mexico and how claimants should not be required to approach the police due its high levels of corruption.¹⁹⁰

3.4.3 The Preferred Line of Authority for the IRB

The board has continued to rely on the older (and since overruled) line of authority of *Kadenko* and *Hinzman* by putting Mexico in a high level of democracy such as United States and demanding its refugee claimants to exhaust all possible avenues for protection prior to coming to Canada. One such example is RPD file No. MA8-08387¹⁹¹ from 2011 discussed in detail in the previous chapter. There the IRB concluded that the claimant lacked credibility and that adequate state protection was available to him in Mexico. Completely contrary to recent Federal Court decisions discussed above (including *Lopez* and *Zepeda*), the IRB found Mexico to be a fully functioning democracy capable of offering protection to its nationals:

The claimant is a national of Mexico, a country that, according to the documentation, functions normally and is not in a situation of complete breakdown. Therefore, the claimant's country is presumed to be capable of protecting him, and this requires him to seek this protection before claiming refugee protection elsewhere, in this case, here in Canada. The documentary evidence shows that Mexico is making an effort to protect its citizens, by putting structures in place and adopting measures to enable citizens to file complaints. They can file a complaint by telephone, in person or online via the Internet. In this case, there is nothing in the written or oral evidence demonstrating that the claimant made a serious and sufficient effort to obtain state protection or that he exhausted all courses of action open to him.¹⁹²

Arguably, the IRB was wrongly applying the “complete breakdown” standard associated with

¹⁸⁹ Ibid at para 69.

¹⁹⁰ See also *Rodriguez Capitaine v Canada (Citizenship and Immigration)*, 2008 FC 98 (available on CanLII) [Capitaine] and *Medina v. Canada (Citizenship and Immigration)* [2008 FC 728 \(CanLII\)](#) for a further discussion of the inability of the Mexican state to protect its citizens from persecution.

¹⁹¹ *Supra* note 69.

¹⁹² Ibid at para 37.

Zalzali, which would almost never be achievable for a refugee applicant. Indeed, in its 2007 decision in *Garcia v. Canada (Minister of Immigration)*¹⁹³, the Federal Court overruled an IRB decision that had denied refugee status to a Brazilian claimant on the basis of her failure to establish that Brazil was in complete breakdown: “it appears from the statement that the applicant was required to prove that the government of Brazil is in a condition of collapse in order to rebut the presumption of state protection which, as above described, is an error in law.”¹⁹⁴ The *Zalzali* standard had been applied against Mexican refugee applicants in more than 30 cases found including TA8-13335¹⁹⁵ TA8-17119¹⁹⁶ VA9-02578¹⁹⁷ TA8-08697¹⁹⁸ TA8-23342¹⁹⁹ where the IRB used the same sentence in all of them to dismiss the claim and deny refugee status *There is nothing in the documentary evidence before the Board to suggest that Mexico is in a state of complete breakdown.*

Furthermore, the more recent line of Federal Court authorities such as Molnar, Zepeda and Lopez are being ignored in the IRB’s own interpretation guidelines, which are pointing decision makers to outdated and since overruled cases, which tend to require that claimants go to great ends to seek protection at home before making a refugee application. These guidelines, which were last updated in 2011, are found at Chapter 6 of the *Interpretation of the Refugee Definition in the Caselaw*²⁰⁰ (“Interpretation Guidelines”) and provide extensive guidance to the IRB with respect to the application of the doctrine of state protection. For example, at section

¹⁹³ *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, [2007] 4 FCR 385.

¹⁹⁴ *Ibid* at para 28.

¹⁹⁵ *X (Re)*, 2009 CanLII 88511 (CA IRB)

¹⁹⁶ *X (Re)*, 2009 CanLII 88512 (CA IRB)

¹⁹⁷ *X (Re)*, 2011 CanLII 97889 (CA IRB)

¹⁹⁸ *X (Re)*, 2009 CanLII 89861 (CA IRB)

¹⁹⁹ *X (Re)*, 2009 CanLII 89699 (CA IRB)

²⁰⁰ Memorandum from Sylvia Cox-Duquette, Senior General Counsel, Legal Services (September 16, 2011) “Interpretation of the Refugee Convention Definition in the Case Law” online: CICH<http://www.irb-cisr.gc.ca> [Interpretation Guidelines]

6.1.12 (Source of Protection), the Interpretation Guidelines state:

The Trial Division held in a number of decisions that the availability of protection from non-state sources might, nevertheless, be relevant to establishing an objective basis for the claim. Other more recent caselaw on the subject of claimants' obligations to approach state-funded non-governmental agencies for assistance, seems to suggest that these agencies are part and parcel of the protection network, and that at the very least their existence and the claimants' willingness to approach them for assistance in obtaining protection is a relevant consideration in the assessment of the claim.²⁰¹

The problem with the above guidance is, of course, that it in no way accords with the recent decisions of the Federal Court on the subject, which pre-date the creation of the Interpretation Guidelines. Indeed, in support of the above proposition, the Interpretation Guidelines cite three decisions of the Federal Court, all of which date from the mid-1990 and have been overruled²⁰². Consequently, the fact that the IRB has continued to rely on outdated jurisprudence may be less its own fault, due the conflicting jurisprudence in this matter. Regardless of the reason, the clear result is that the tendency to favour the more demanding line of authority prejudices refugee claimants, including many Mexicans, in their attempts to seek asylum.

3.5 Adequate vs. Effective Protection: Two Other Lines of Authority

A similar situation of contradictory cases has arisen with respect to the Federal Court's jurisprudence on the issue of whether a refugee claimant has displaced the presumption of state protection when a certain measure of protection from persecution (such as laws and institutions designed to protect citizens) is available in her country of origin. As shall be demonstrated below, despite clear authority from the Federal Court, IRB decision makers have continued to

²⁰¹ Ibid section 6.1.12.

²⁰² For example *Kadenko* was distinguished in *Molnar, Chavez and Diaz de Leon v Canada (Citizenship and Immigration)*, 2007 FC 1307 (available on CanLII). Also the authority of *Szucs* has been distinguished by several cases. See *Racz v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1293 (available on CanLII) for a summary of all the authorities that go in favour of not exhaustiveness for Roma applicants.

rely on outdated caselaw that suggest that refugee status ought not be granted if the government in the country of origin has made attempts at protection, even if in practice the protection offered is ineffective. In other words, the protection offered in the home country must merely be adequate, and need not in fact be effective. The IRB has maintained this position by relying on both one line of Federal Court authority that supports its position, and by relying on its own Interpretation Guidelines, which also advocate this more restrictive approach.

3.5.1 Adequacy of Protection

One of the first cases and the authority that created the doctrine of adequacy of protection was the Federal Court of Appeal's decision in *Canada (Minister of Employment & Immigration) v. Villafranca*,²⁰³ where a Filipino policeman claimed refugee status on the basis of his fears of persecution at the hands of a guerrilla terrorist group that has been terrorizing the whole population. The Federal Court dismissed the appeal on the bases of adequacy of protection:

No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation... Where, however, the state is so weak, and its control over all or part of its territory so tenuous as to make it a government in name only, as this Court found in the case of *Zalzali v. Canada (Minister of Employment and Immigration)* a refugee may justly claim to be unable to avail himself of its protection. Situations of civil war, invasion or the total collapse of internal order will normally be required to support a claim of inability. On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection.²⁰⁴

²⁰³ *Canada (Min of Employment & Immigration) v. Villafranca* [1992] F.C.J. No. 1189 (QL) (FCA) [Villafranca]

²⁰⁴ *Ibid* at para 46 [emphasis added]

This case has been used in combination with *Zalzali* by the IRB to demand proof from the applicant that her state is in complete anarchy in order to rebut the presumption of state protection and as long as there are laws and state institutions in place refugee protection will not be granted. This approach completely fails in taking into consideration other elements of importance that were developed in the jurisprudence after *Villafranca*. Two years after this decision, Justice Tremblay-Lamer ruled in *Bobrik v Canada (Minister of Citizenship and Immigration)*²⁰⁵ that “Even when the state is willing to protect its citizens, a claimant will meet the criteria for refugee status if the protection being offered is ineffective. A state must actually provide protection and not merely indicate a willingness to help.”²⁰⁶ However, this instruction was unobserved In *Smirnov v. Canada (Secretary of State)*²⁰⁷, where another judge of the Federal Court decided not to follow her rationale:

With great respect, I conclude that Madam Justice Tremblay-Lamer sets too high a standard for state protection, a standard that would, in many circumstances, be difficult to attain even in this country. It is a reality of modern-day life that protection offered is sometimes ineffective. Many incidents of harassment and/or discrimination can be affected in a manner that renders effective investigation and protection very difficult. Even the most effective, well-resourced and highly motivated police forces will have difficulty providing effective protection. This Court should not impose on other states a standard of "effective" protection that police forces in our own country, regrettably, sometimes only aspire to.²⁰⁸

In the years that followed the *Smirnov* decision, various cases continued to espouse the adequate protection doctrine of *Villafranca*. In *Zhuravlev v Canada (Minister of Citizenship and Immigration)*²⁰⁹ the Federal Court found: “When the agent of persecution is not the state, the lack of state protection has to be assessed in a manner of state capacity to provide protection rather than from the perspective of whether the local apparatus provided protection in a given

²⁰⁵ *Bobrik v Canada (Minister of Citizenship and Immigration)* [1994] F.C.J. No. 1364 (QL) (FC) [Bobrik]

²⁰⁶ *Ibid* at para 17.

²⁰⁷ *Smirnov v Canada (Secretary of State)*, [1995] 1 FCR 780 (available on CanLII) (FC).

²⁰⁸ *Ibid* at para 11.

²⁰⁹ *Zhuravlev v Canada (Minister of Citizenship and Immigration)* [2000] 4 FCR 3 (available on CanLII) (FC).

circumstance.”²¹⁰ This same standard of adequacy has been applied to cases where asylum was sought on the basis of domestic violence. In *Cho v. Canada*²¹¹, the Federal Court applied the principles of Villafranca against a victim of domestic violence from Korea because there were laws and government institutions in that country:

The court in [Villafranca] mentioned: It is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become convention refugees simply because their governments have been unable to suppress the evil. Precisely the same must be said about the evil of family violence...The Board found that Cho had state protection available to assist her. It acknowledged that there were imperfections in the training of police in the implementation of laws, but that the government had adequate mechanisms to protect victims of domestic abuse...I am satisfied that the analysis of the CRDD.²¹²

Similarly in *Resulaj v. Canada (Minister of Citizenship and Immigration)*²¹³ the court used the doctrine of adequacy of protection to dismiss a judicial review from an Albanian woman who was victim of domestic violence:

State protection cannot be held to a standard of perfection but it must be adequate...the evidence demonstrates that there are systems in place to provide assistance to victims. While progress has been made, there remain deficiencies... The evidence reveals that difficulties in implementation are largely restricted by police corruption. However, the state is taking various measures to combat this problem included increasing training, investigations, convictions and dismissal for misconduct²¹⁴

In the case of Mexican refugee claims the Federal Court dismissed judicial reviews of Mexicans who were rejected by the IRB on the basis that although the protection provided by Mexico is inefficient, measures to improve its situation were taking place and the government

²¹⁰ Ibid at para 31.

²¹¹ *Cho v Canada (Minister Of Citizenship And Immigration)* [2000] F.C.J. No. 1371

²¹² Ibid at para 16.

²¹³ *Reference Re sulaj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 269 (available on CanLII).

²¹⁴ Ibid at para 20.

had created institutions to solve its problems. Unfortunately, these measures failed to result in improvements and the situation in reality became worse. Indeed, many IRB cases decided during the administrations of the president Vicente Fox (2000-2006) focused on the good intentions of the Mexican government, rather than on the existence (or lack thereof) in practical improvements in the effectiveness of the protections available to Mexican nationals²¹⁵. The Federal Courts confirmed this approach. In *Alfaro v. Canada (Minister of Citizenship and Immigration)*²¹⁶ the court confirmed the approach taken by the IRB that the presumption of state protection was not rebutted because intentions of the President Vicente Fox to improve security conditions in Mexico and because Mexico was not in a state of complete breakdown as in *Zalzali*:

The excerpt from this report cited by the applicants in support of this argument concerns corruption in the judicial system. However, it must be noted that the same document mentions the determination of President Vicente Fox to carry out the reforms undertaken at the beginning of his administration. It is therefore not possible to conclude that the state apparatus has totally broken down as far as the protection of its nationals is concerned.²¹⁷

There were other federal court cases from 2007 that confirmed this approach despite the fact that the administration of Vicente Fox finished in 2006²¹⁸.

Starting in 2008, Mexico saw one of its most violent years since the end of the Mexican revolution in 1920 due the war on drugs started by the former President Felipe Calderon²¹⁹. Despite the overwhelming information regarding the conflict, the IRB and Canadian courts

²¹⁵ See *X (Re)*, 2005 CanLII 77856 (CA IRB) and *X (Re)*, 2005 CanLII 77802 (CA IRB).

²¹⁶ *Alfaro C. Canada (Ministre De La Citoyenneté Et De L'immigration)* [2006] F.C.J. No. 569 (QL) (FC) [Alfaro]

²¹⁷ Ibid at para 17.

²¹⁸ See *Lazcano v Canada (Citizenship and Immigration)*, 2007 FC 1242 (available on CanLII).

²¹⁹ See Nathaniel Parish Flannery "Calderón's War" (April 16th 2013) online: University of Columbia Journal of International Affairs <http://jia.sipa.columbia.edu>

decided to use the doctrine of adequacy protection to deny refugee status. In *Mendez v. Canada (Citizenship and Immigration)*²²⁰ the court said:

The test is not effectiveness but adequacy. In the present instance, the RPD was not persuaded that the state protection available to the applicants in Mexico was inadequate. Given that Mexico is a democracy with functioning political and judicial systems, the burden on the applicants to rebut the presumption of state protection was necessarily a heavy one. The finding that the applicants had failed to meet their burden to rebut the presumption was within the spectrum of reasonable decisions open to the Panel and I see no reason to interfere with that conclusion.²²¹

The chances that Mexican refugee applicants were sent back to Mexico during the years of the war on drugs between 2006 and 2012 are very high. By using this doctrine decision makers not only failed to fulfill its international obligations of refugee law but they also twisted the cases of *Zalzali* and *Villafranca* in order to make the presumption of state protection impossible to rebut.

3.5.2 Effective Protection: The Standard for Mexicans

The Federal Court simultaneously developed another line of authority, which runs parallel to the adequacy of protection doctrine, known as the doctrine of effective protection. In this doctrine Federal Judges decided to follow the rationale of Justice Tremblay-Lamer set out in *Bobrik*. These decisions take the position that it is not enough to have laws and mechanism in place if they are not efficient and fail in real terms to provide protection to the applicant. Victims of domestic violence were the first group who was protected by this line of authority. In *Elcock v. Canada (Minister of Citizenship and Immigration)*²²² the applicant was a citizen of Grenada who suffered persecution on the hands of her former spouse. She presented documentary evidence regarding the reluctance of the Grenadian police to intervene in situations of domestic violence. The RPD found that Elcock had not provided clear and

²²⁰ *Mendez v Canada (Citizenship and Immigration)*, 2008 FC 584 (available on CanLII).

²²¹ *Ibid* at para 58.

²²² *Elcock (Milkson) v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8680 (FC).

convincing proof of Grenada's inability to protect her, but its decision was overturned on appeal to the Federal Court:

The CRDD committed a reviewable error in failing to effectively analyze, not merely whether a legislative and procedural framework for protection existed, but also whether the state, through the police, was willing to effectively implement any such framework. Ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.²²³

Similar decisions have been rendered by the Federal Court with respect to applicants from high refugee producing countries such as Hungarian Romas. In *Mohacsi v. Canada (Minister Of Citizenship And Immigration)*²²⁴ the Court, followed the authority of *Elcock* and held:

It is also wrong in law for the Board to adopt a "systemic" approach which may have the net effect of denying individual refugee claims on the sole ground that the documentary evidence generally shows the Hungarian government is making some efforts to protect Romas from persecution or discrimination by police authorities, housing authorities and other groups that have historically persecuted them. The existence of anti-discrimination provisions in itself is not proof that state protection is available in practice...Hungary is now considered a democratic nation which normally would be considered as being able to provide state protection to all its citizens. Unfortunately, there are still doubts concerning the effectiveness of the means taken by the government to reach this goal. Therefore, a "reality check" with the claimants' own experiences appears necessary in all cases where Roman citizens are involved.²²⁵

This and other cases have pointed out how in practice Hungary is unable to protect its citizens and that serious efforts to improve the conditions of this group will not suffice if they are not effectively implemented. In the recent decision of 2012 *Hercegi v. Canada (Minister Of Citizenship And Immigration)*²²⁶ the court noted:

The reasons do not address the issue of state protection properly. They do not show whether, and if so, what, the Member considered as to provisions made by Hungary to provide

²²³ Ibid. at 27. See also *King v Canada (Minister Of Citizenship And Immigration)* [2005] F.C.J. No. 979 *James v Canada (Minister Of Citizenship And Immigration)* [1998] F.C.J. No. 747 and *Woods v Canada (Minister Of Citizenship And Immigration)* [2008] F.C.J. No. 570.

²²⁴ *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 FCR 771, 2003 FCT 429 (CanLII) [Mohacsi]

²²⁵ Ibid. at para 56.

²²⁶ *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 (available on CanLII).

adequate state protection *now* to its citizens. It is not enough to say that steps are being taken that some day may result in adequate state protection. It is what state protection is *actually provided* at the *present time* that is relevant. In the present case, the evidence is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens.²²⁷

Similar decisions demanding effective (rather than merely adequate) protection have been rendered with respect of Mexican refugee applicants. In 2006 the Federal Court in *Vigueras Avila v. Canada (Minister of Citizenship and Immigration)*²²⁸ followed *Mohacsi* and concluded

The board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard the legislation and procedures, which the applicant may use to obtain state protection, may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice... in the case of Mexico, one must look not only at the protection existing at the federal level, but also at the state level.²²⁹

Contrary to the views presented in *Alfaro*²³⁰ the federal court in *Hernandez v Canada (Citizenship and Immigration)*²³¹, following the rationale set out in *Bobrik* explained why the efforts made during the administration of the ex-president Vicente Fox should not have been taken as a fact of state protection “President Vicente Fox has repeatedly promised to address these problems and has taken important steps toward doing so—establishing a special prosecutor's office to investigate past abuses and proposing justice reforms designed to prevent future ones. Unfortunately, neither initiative has lived up to its potential.”²³²

Similar points of view were made with respect to cases made during the administration of the former president Felipe Calderon (2008-2012). In *Rodriguez Capitaine v. Canada (Minister of*

²²⁷ Ibid at para 5. See also *Jaroslav v Canada (Citizenship and Immigration)*, 2011 FC 634 (available on CanLII) and *Beharry v Canada (Citizenship and Immigration)*, 2011 FC 111 (available on CanLII).

²²⁸ *Vigueras Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 (available on CanLII). [Avila]

²²⁹ Ibid. at para 27.

²³⁰ Alfaro *supra* note 216.

²³¹ *Hernandez v Canada (Citizenship and Immigration)*, 2007 FC 1211 (available on CanLII).

²³² Ibid. at para 16.

Citizenship and Immigration)²³³ the court explained why Mexico should not be put in the same level of democracy as United States or Israel:

In developed democracies such as the U.S. and Israel, it is clear from *Hinzman* that to rebut the presumption of state protection, this evidence must include proof that an applicant has exhausted all recourses available to her or him. It is also clear that, except in exceptional circumstances, it would be unreasonable in such countries not to seek state protection before seeking it in Canada. The Court does not understand *Hinzman* to say that this conclusion applies to all countries wherever they stand on the "democracy spectrum" and to relieve the decision-maker of his or her obligation to assess the evidence offered to establish that, in Mexico for example, the state is unable (although willing) to protect its citizens.²³⁴

In 2010 the court released its decision in *Lopez v. Canada (Minster of Citizenship and Immigration)*²³⁵ where the court explained why Mexico should not be considered a fully developed democracy and that the test is effective protection and not adequacy of protection. The court references previous lines of authority to support its findings:

Another error of law is with respect to what is the nature of state protection that is to be considered. Here the Member found that Mexico "is making serious and genuine efforts" to address the problem. That is not the test. What must be considered is the actual effectiveness of the protection...Decisions of this Court point to the fact that Mexico is an emerging, not a full fledged, democracy and that regard must be given to what is actually happening and not what the state is proposing or endeavouring to put in place. As to the reasonableness of the findings, the evidence is overwhelming in the present case that Mexico has failed to provide adequate protection. The evidence shows ineptitude, ineffectiveness and corruption in the state agencies that the Member suggested could offer protection.²³⁶

In *Toriz Gilvaja v Canada (Citizenship and Immigration)*²³⁷ the Federal Court explained that protection for Mexicans has to be effective and that "having laws on books does not equate with actual, experienced state protection for its citizens"²³⁸ and it noted that "while Mexico has undertaken to create legislation to combat police corruption, impunity, and the victims of violence

²³³ Capitaine *supra* note 190.

²³⁴ Ibid at paras 21-22.

²³⁵ *Lopez v Canada (Citizenship and Immigration)*, 2010 FC 1176 (available on CanLII)

²³⁶ Ibid at 8 [Emphasis added]

²³⁷ *Toriz Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598 (available on CanLII). [Toriz]

²³⁸ Ibid at para 39.

generally, the implementation of those initiatives has been lacking.”²³⁹ Until the IRB recognizes these authorities, the rates of acceptance of Mexican refugee applicants will increase.

3.5.3 The Preferred Line of Authority Used by the IRB

As the above has demonstrated, two clear lines of authority exist within the Federal Court’s jurisprudence as to whether or not the protections available to refugee claimants, and specifically Mexican ones, in their country of origin must merely be seen to exist, or must have an actual ability to protect them from harm. However, just as the IRB has tended to prefer one line of authority relating to the whether a claimant must have exhausted all possible avenues of protection in her home country, so too has it preferred a line of authority with respect to the adequacy / effectiveness of protection. Specifically, the IRB has shown a clear preference for those authorities that merely required the existence of attempts at protection, such as the Federal Court of Appeal’s decision in *Villafranca*. This tendency has been formalized within the Interpretation Guidelines. At section 6.1.11 (Adequacy of Protection – Standard), the guidelines clearly demonstrate a preference for the reasoning in *Villafranca*, and fail to note both the limits of its application, and the growing tendency of the Federal Court to insist upon a standard of effective protection. Indeed, focusing primarily on older decisions, the Interpretation Guidelines assert that “while some cases suggest effectiveness is the correct standard, the preponderance of cases follow *Villafranca* and adopt the adequacy standard.”²⁴⁰ Arguably, this fails woefully to acknowledge the growing number of authorities that require more than the mere presence of purported protection, such as *Hercegi*, *Lopez*, *Mohacsi*,

²³⁹ Ibid at para 40.

²⁴⁰ Interpretation Guidelines *supra* note 200.

Viguera Avila and *Gilvaja*, among many others that have been decided over the course of the last decade.

Furthermore, the Interpretation Guidelines fail to address an important and distinguishing fact from *Villafranca*: the refugee claimant in that case had not been personally targeted by the group at the hands of which he feared persecution. This is, arguably, a very important fact to have overlooked. Its omission from the guidelines falsely gives IRB decision makers the impression that the applicable standard of protection ought to be adequacy, regardless of whether the refugee claimant has been personally targeted. Such a position fails to reflect more recent jurisprudence, in which the Federal Court has clearly held that the adequacy of protection standard ought not be applied when a claimant has been specifically and personally targeted by a terrorist organization. In *Mendivil v. Canada (Secretary of State)*²⁴¹ just two years after *Villafranca* the Federal Court of Appeal explained a rationale that it took to reverse a decision from the IRB that relied on *Villafranca* to dismiss an application made by a Peruvian citizen who was fleeing Peru at the beginning of the 90's, a period of high social unrest:

The Board members do not appear to have considered the possibility that persons specifically targeted, who may qualify as members of a particular social group, might still have good grounds for fearing persecution when a state is capable of protecting ordinary citizens but incapable of protecting members of that particular social group. In addition, I cannot be sure that the Board members appreciated the facts in their entirety, since they did not refer to [t]he Shining Path guerrilla group was reported as being responsible for the shooting and killing of a public education director in the capital of Lima, a deputy mayor in the city of Villa El Salvador, a shanty town ten miles south of Lima, a rural self-defense group outside of Lima, and numerous civilians in the capital and elsewhere. This evidence was relevant since the hearing of this claim came to an end on October 20, 1992. I remain in doubt as to whether the evidence as a whole was considered.²⁴²

²⁴¹ *Mendivil v Canada (Secretary of State)* [1994] F.J.C. 2021 (QL) (FCA)

²⁴² *Ibid* at paras 10-11.

This rationale was applied in the 1996 Federal Court decision of *Badran v. Canada (Minister of Citizenship and Immigration)*²⁴³, where it was held that effective protection would be required in such circumstances:

In most cases the inability to protect against random terrorist attacks will not constitute an inability of the state to protect. But Ward, supra, and Mendivil, supra, have set out a limited exception where past personal incidents may qualify an individual as a member of a particular social group which the state is unable to protect. In the present case there is a specifically and directly targeted applicant who is a member of a small targeted group. This distinguishes the case from most cases which involve random incidents of terrorism.²⁴⁴

This important distinction goes unrecognized in the IRB guidelines, and thus could hinder fair and effective decision-making at the board level. This was the situation that a Mexican refugee applicant faced when the IRB disregarded evidence that showed how he was specifically targeted for being a police officer. In the case of *Ortiz Torres v Canada (Citizenship and Immigration)*²⁴⁵ the federal court overturned this: “The Board, once it decided that Mr. Ortiz Torres was not a police officer in Mexico, engaged in a very generic analysis of state protection available to the Applicants in Mexico. It renders the decision unreasonable, as the personal circumstances of Mr. Ortiz Torres, namely his identity as a police officer and the danger that he faced as such, was not fully considered.”²⁴⁶

Similarly, the Interpretation Guidelines fail to draw any kind of limitation on the application of *Villafranca*, which arguably should not apply outside of cases with similar factual backgrounds: namely, where refugee claims are made on the basis of terrorist activities. Recent IRB decisions indicate that *Villafranca* is being applied much more broadly, and being used to justify decisions that

²⁴³ *Badran v Canada (Minister of Citizenship and Immigration)* [1996] FCJ No 437 (QL)

²⁴⁴ Ibid at 16. See also *Sunarti v Canada (Citizenship and Immigration)*, 2011 FC 191 (available on CanLII).

²⁴⁵ *Ortiz Torres v Canada (Citizenship and Immigration)*, 2011 FC 67 (available on CanLII) See also *Ramirez Meza v Canada (Citizenship and Immigration)*, 2011 FC 274 (available on CanLII).

²⁴⁶ Ibid at para 33.

other purported attempts at state protection from persecution emanating from other sources were sufficient. One such example comes from MA8-04858²⁴⁷ where the Mexican claimant had been targeted and extorted by unidentified gang members. The IRB applied the reasoning in *Villafranca* to find that the claimant's failure to seek assistance from the federal courts (after an official at the state prosecutor's office had demanded a hefty weekly bribe in order to secure protection) was unreasonable: "A refugee protection claimant cannot rebut the presumption of state protection in a country with a functioning democracy simply by stating that there is a subjective reluctance to solicit state protection. The level of protection that the state must provide is not that of perfect protection, but of adequate protection."²⁴⁸

The reasoning from *Villafranca* has equally (and arguably inappropriately) also be applied in the RPD files MA9-09296²⁴⁹, TA5-01412²⁵⁰ TA8-12950²⁵¹ and TA9-13723²⁵². Ultimately, *Villafranca* (particularly when applied outside of its factual confines) has been used by the IRB to limit the availability of refugee status, without giving sufficient consideration to the content and context of the asylum seeker's claim. As long as it continues to play such a central role in the IRB Interpretation Guidelines, it will likely continue to have such an effect, despite the increasing extent to which is not followed in Federal Court decisions.

²⁴⁷ *Supra* note 76.

²⁴⁸ *Ibid* at para 24.

²⁴⁹ *X (Re)*, 2012 CanLII 96929 (CA IRB)

²⁵⁰ *X (Re)*, 2009 CanLII 88659 (CA IRB)

²⁵¹ *X (Re)*, 2009 CanLII 88427 (CA IRB)

²⁵² *X (Re)*, 2010 CanLII 97643 (CA IRB)

3.6 Internal Flight Alternative

An IFA becomes part of the state protection analysis and its determination is a finding of fact, usually based on the information contained in the CDP, where the decision makers conclude that the claimant should have relocated herself within her country of origin and had no need to come to Canada to look for protection. The IFA assessment is often made against applicants who have otherwise passed the credibility and initial state protection tests. If the decision maker finds the claimant credible and her state (in her specific home location) unable to protect her, the applicant will not be found a refugee or a person in need of protection if an IFA is available. The IFA test was developed by the federal courts of Canada in the mid-1990s and has been incorporated into the interpretation guidelines to be used by IRB members. However, as shall be demonstrated below, in an analysis of federal court cases and IRB decisions, decision makers of the administrative tribunal are making findings of IFA without explaining or backing up their conclusions with evidence. Indeed, decision makers frequently support their IFA conclusions with general statements found in the CPD for the relevant country of origin (*e.g.*, “the CDP shows that place X is safe.”) Furthermore, the IRB has also been imposing an additional evidentiary burden on refugee applicants that is not demanded by the jurisprudence: proof that the claimant “tested” other regions of her country of origin, and only came to Canada when such testing demonstrated that the claimant would also endure persecution in this secondary location. The imposition of this requirement by IRB decision makers has been struck down by the federal courts, but unfortunately seems to still be applied. The result is that potentially valid refugee claimants are continuing to have their claims denied on unfair bases.

3.6.1 Nature and Origins of the IFA

The IFA doctrine serves a limiting function within the greater umbrella of the doctrine of state protection. Hathaway and Foster eloquently explain the notion of IFA:

Even when there is evidence of a risk of being persecuted-in that the home state is unable or unwilling to protect against the risk of serious harm in the applicant's place of origin- the existence of state protection in some other part of the some state may still obviate the need for international protection. Simply put, a person cannot be said to be "unable or, owing to such fear...unwilling to avail himself of the protection of the [home] country, if she has access to the protection of that state, albeit in some other part of the home country."²⁵³

Thus, a refugee claimant who has successfully established that the state (as it exists in her home region) is unable or unwilling to offer her protection from persecution, may still be denied refugee status if the decision maker finds that protection would be available within another region of her home country. The board could, on that basis, conclude that the claimant had the duty to migrate to this other region of her home country, rather than seeking protection from the international community as a refugee.

The issue of IFA is almost omnipresent in the majority of the IRB's recent decisions.²⁵⁴ It has become part of the analysis of refugee determinations in Canada despite the fact that the

²⁵³ Hathaway *supra* note 149 at 332.

²⁵⁴ See Maria O'Sullivan, *Territorial Protection: Cessation of refugee status and Internal Flight Alternative compared. The Ashgate Research Companion to Migration Law, Theory and Policy* Edited by Satvinder S. Juss, King's College London, UK "It is now widely accepted that refugee status will not be recognized if there is a viable "internal flight" or "Internal relocation" alternative- that is, a place within the country of origin to which the applicant for refugee status may relocate as an alternative to the international protection available through refugee status. This development may be explained by the increase in persecution by non-state actors since the adoption of the refugee convention, along with changing attitudes to refugee status. It is so well accepted in state practice, that despite question as to whether this development is a legitimate part of refugee law, it may not be too late to resile from it".

drafters of the Refugee Convention never mentioned it as a requirement. As Reinhart Marx explains:

The 1951 refugee convention says nothing about “internal flight alternative.” At the beginning of the eighties it emerged from state practice but very unsystematically and without a clearly conceptualized understanding. The notion was developed in a somewhat ad hoc manner through international and national jurisprudence, academic analyses and governmental and intergovernmental policy statements. This it comes as no surprise that the way it is applied in the states is rather confusing.²⁵⁵

In Canada, the doctrine of IFA developed much as described above by Marx, until the mid 1990’s, when two Federal Court decisions developed a two-prong test to be applied in the determination of whether an asylum seeker ought to have opted for an IFA, rather than seeking refugee protection.

3.6.2 The Test: Safety and Reasonableness:

The current test taken in Canada by the Interpretation Guidelines to determine the existence of an IFA is based on two principles that were developed in the jurisprudence: safety and reasonableness. With respect to the safety principle, “the board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists.”²⁵⁶ This part of the test draws its authority from the 1994 Federal Court decision in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*.²⁵⁷ Here the appellant, a Tamil citizen of Sri Lanka was found by the board to face a serious risk to his life in the part of the country where he lived, but was required to make

²⁵⁵ Marx, Reinhart. “The Criteria of Applying the “Internal Flight Alternative” Test in National Refugee Status Determination Procedures” (2002) *International Journal of Refugee Law* Vol. 14 No. 2/3. At. 179.

²⁵⁶ Interpretation Guidelines *supra* note 200 at Chapter 8 “Internal Flight Alternative”.

²⁵⁷ *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 589 (available on CanLII) (FC).

reasonable efforts to relocate within the country before fleeing: “The CRDD found that the appellant could have obtained state protection in Colombo, despite the fact that he had been twice arrested, detained and beaten by the police in Colombo”. The federal court allowed the appeal: “The CRDD had erred when it found that there was no serious possibility that the appellant would face persecution in Colombo on the basis of race. In fact, he had been arbitrarily arrested and beaten at the hands of Sri Lankan government during his time in Colombo simply because he was a Tamil”. This case stands for the proposition that the IRB is not allowed for the board to demand that claimants actually attempt relocation within their country of origin prior to fleeing, as well as for the proposition that if the evidence shows that the claimant has been hurt in other parts of the country, an IFA should not be applied. However, as I will demonstrate below, the IRB is disregarding the authority of *Thirunavukkarasu* by demanding evidence from Mexican refugee claims demonstrates that they have attempted to seek protection in a second part of Mexico prior to seeking refugee status in Canada.

The second requirement, reasonableness, demands decision makers to take into account the personal circumstances of the claimant before applying the IFA doctrine: “Conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refugee there.” This principle stems from the case of *Rasaratnam v. Canada (Minister of Employment and Immigration)*,²⁵⁸ where in 1992 the Federal Court dismissed the appeal of a Tamil, who was denied refugee status on the grounds that Colombo, Sri Lanka, was a reasonable location for an internal flight alternative: “There was ample evidence upon which the board could conclude that Colombo provided an IFA for Tamil refugees from Jaffna generally and that in the circumstances

²⁵⁸ *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (QL) (FC)

of the appellants case it would not be unreasonable for him to seek refugee there.”²⁵⁹ This reasonableness part of the test demands an assessment of the applicant’s personal circumstances prior to the imposition of an obligation to relocate: “The reasonableness of an IFA depends on the claimant’s background, the ability of the claimant to settle in new location, the presence of family in the putative IFA location, and many other considerations.”²⁶⁰ As I shall demonstrate below, this requirement is often unobserved in Mexican refugee claims, in that the personal circumstances of the claimants are not taken into account and decision makers are not considering evidence of Mexicans who had been specifically targeted.

3.6.3 The Incorrect Application of the IFA Test in Mexican Refugee Claims

3.6.3.1 Asking to Relocate Prior to Arrival

The IRB has a proven record of breaking the IFA test and demanding Mexican refugee claimants to have migrated internally in an attempt to seek protection prior to seeking refugee status, contrary to the relevant Federal Court jurisprudence cited above. Such was the case in *Estrada Lugo v. Canada (Citizenship and Immigration)*²⁶¹ where a mother and daughter applied for judicial review of a decision of the RPD that found them to be neither refugees nor persons in need of protection. The mother was divorced from her husband. She claimed she was threatened and harassed by Mexican government officials because of her former husband's involvement with the fiancée of a high-ranking military officer. The Board held that the applicants had an internal flight alternative in Mexico, and denied them refugee status in reliance (in part) on the

²⁵⁹ Ibid at para 13.

²⁶⁰ Jones *supra* note 150 at 111.

²⁶¹ *Estrada Lugo v Canada (Citizenship and Immigration)*, 2010 FC 170 (available on CanLII).

fact that they had not attempted to exercise this IFA, contrary to the principles in *Thirunavukkarasu*.

The Federal Court explained: “No cases were brought to my attention to support the Board’s contention that refugee claimants have an obligation to have already sought protection in the proposed IFA location. Thus, I find that the Board’s comments were in error.”²⁶²

Subsequently, the court went on to explain the application of the IFA test:

The test for the existence of an IFA set out in *Thirunavukkarasu* above, is a two pronged test, but it is a test in which the refugee claimant need only defeat one of the prongs. Both prongs can be successfully defeated without a refugee having lived in or even travelled to the proposed IFA. A refugee claimant may defeat prong one by establishing that there is a serious possibility of being persecuted or subjected, on a balance of probabilities, to persecution or to a danger of torture or to a risk to life or of cruel and unusual treatment or punishment in the proposed IFA. Alternatively, a claimant can defeat prong two by establishing that conditions in the IFA are such that it would be unreasonable in all the circumstances for the claimant to seek refuge there. The Board must not only state the correct test but it must also apply the correct test. Adding an additional requirement in the application of the test will cause the Board to run afoul of the reasonableness standard. Adding the requirement that the applicants must have tried living in another, safer region of the country demonstrates a misunderstanding of the legal test for an IFA. As noted above, this was an error.²⁶³

By failing to follow the principles in *Thirunavukkarasu*, which was decided in 1994 and is both cited and explained in the IRB’s own interpretation guidelines (specifically at Chapter 8: Internal Flight Alternative), the tribunal is demonstrated in this case a disregard for the requirements of the IFA doctrine. Furthermore, it has taken this same impugned approach to IFA in other cases involving Mexican refugee applicants. For example, in its decision at TA8-05973²⁶⁴, the board commented: “I find the claimants clearly had an obligation to relocate, in this case to Guadalajara, and if in the chance they were to have problems with XXXXX XXXXX there, to

²⁶² Ibid at para 34.

²⁶³ Ibid at paras 35 and 36. [emphasis added]

²⁶⁴ *X (Re)*, 2009 CanLII 89030 (CA IRB)

approach the state before seeking Canada's protection."²⁶⁵ Similar conclusions were made in the IRB files Nos. TA7-1485²⁶⁶, TA6-160118²⁶⁷ and, TA7-12028²⁶⁸.

3.6.3.2 Ignoring Evidence of Mexicans Specifically Targeted

Another error that has been made by the IRB is supporting IFA findings with very weak and very brief arguments, while simultaneously disregarding evidence that demonstrates the extent to which IFA would be inappropriate for many persons who have been specifically targeted for persecution in their home countries. Indeed, persons specifically targeted by powerful persecutors will often be unable to escape persecution through internal migration, because the victim could be located in other parts of the country. Powerful state agents, such as the police or drug cartels with connections in government or politics have such resources available to them that a person specifically targeted by them must necessarily seek protection outside of Mexico.

This was the situation in *Barajas v. Canada (Minister of Citizenship and Immigration)*.²⁶⁹ The applicant was a Mexican truck driver who was asked by the commander of the Judicial Police of Guadalajara to transport illicit drugs in his truck. The applicant refused, and the commander retaliated by threatening his family. The claimant then sought assistance from the police, who refused to help him when they learned that his complaint was against a high-ranking official. The next day, the applicant was assaulted by three policemen and was told that he

²⁶⁵ Ibid at para 17.

²⁶⁶ *X (Re)*, 2009 CanLII 88418 (CA IRB)

²⁶⁷ *X (Re)*, 2008 CanLII 88035 (CA IRB)

²⁶⁸ *X (Re)*, 2008 CanLII 87952 (CA IRB)

²⁶⁹ *Barajas v Canada (Citizenship and Immigration)*, 2010 FC 21 (available on CanLII).

should not have gone to the police. The board found an IFA on Mexico City the basis that “Mexico City is an international destination for tourists, thus creating an atmosphere where criminality is combated to ensure tourism flourishes”²⁷⁰ and specifically because “[h]e is no longer driving a truck for the same company [he] would not be viewed as someone to pursue in the future.”²⁷¹ This conclusion was backed up with the fact that, despite criminality and corruption in Mexico City, there are state authorities in the Federal District from whom the Applicant could seek protection if he was pursued.

The Federal Court disagreed with the IRB with respect to the issue of IFA in two respects. First, because the IRB failed to assess the evidence that showed that the claimant was specifically targeted:

These conclusions, in my view, are based upon a misconception of the threat which the Applicant faced. The Applicant had been beaten by the police and told that he should not have attempted to report police corruption. The police had also placed a gun to his head and told him that he had better cooperate. Everything the Board says about IFA and protection in the Federal District is premised upon the Board’s own inadequate assessment of the immediate threat which the Applicant faced and the source of that threat. The Applicant was threatened by the police and, in addition to not making his truck available to transport illicit drugs for corrupt police officers, he has twice attempted to report police corruption and he has been beaten by the police and told he should not have done that. What is more, the Applicant provided unquestioned evidence that he was still being pursued. Since the Applicant has been in Canada, the police have visited his mother in an attempt to find him, and his mother has also received threatening phone calls. This suggests a strong continuing interest in the Applicant by corrupt police, which the Officer failed to address.

Secondly, the Court explained why it is an error to find that other metropolitan areas will be safe for a claimant who is specifically targeted without providing any explanation of such a finding:

In addition, the Board seems to have made the same mistake outlined in *Martinez, supra* and *Emma Georgina Astoraga Favela et al. v. The Minister of Citizenship and Immigration*,

²⁷⁰ Ibid at 43.

²⁷¹ Ibid at 70.

IMM-174-09, order rendered by Deputy Judge Frederick Gibson on August 28, 2009. In *Favela*, Justice Gibson, citing Justice Dawson in *Martinez, supra*, found a reviewable error where the Board identified Mexico City, Monterey and Tijuana as viable IFAs “notwithstanding the Applicant’s experiences in Guadalajara, without citing any evidence that might have established that the situation existing in the three metropolitan areas identified was qualitatively different from that prevailing in Guadalajara.” In the present case, the Applicant has faced police threats in Guadalajara and Zapopan, two large cities. There is no evidence to show why the situation in Mexico City would be any different, or why the Applicant would be any safer in Mexico City. See *Martinez, supra* at paragraph 12.

Similar problem faced the applicant until the Federal Court had to intervene in the case of *Cruz Martinez v. Canada (Citizenship and Immigration)*,²⁷². In this decision it is explained how the decision maker applied IFA by supporting her conclusion in this regard solely with an adequacy of protection argument which as we saw, is not longer used :

I agree with counsel that there are many identified problems in the enforcement of the laws that have implemented to combat corruption in the security forces. However, I do not agree that these efforts of the government have not had an impact in urban areas of Mexico such as Mexico City. On a balance of probabilities, I am satisfied that should the claimant suffer further harm or threat of harm from officers of the Federal Police, that the legal recourses available to him in Mexico City will provide him with adequate protection.²⁷³

On judicial review the decision was quashed on the basis that the IRB conflated IFA with adequacy of protection and disregarded important evidence before it that clearly showed the ineffectiveness of the Mexican authorities:

The RPD failed to cite any evidence that established that the situation existing in Mexico City was qualitatively different from that prevailing elsewhere in Mexico...The following evidence was before the RPD: corruption is widespread in the police and criminal justice systems; although a number of efforts have been initiated to combat corruption, monitoring organizations have reported that acts of public and private corruption still occur on a regular basis; secret drug trafficking networks exist in the police and the armed forces; the extensive use of the voter’s registration card makes it easy for the police to find a person by accessing the database; kidnapping for extortion is prevalent across the country, especially in major urban areas such as Mexico City; and police involvement in kidnappings was reported in numerous media articles. The finding of an internal flight alternative in Mexico was made

²⁷² *Cruz Martinez v Canada (Citizenship and Immigration)*, 2008 FC 399 (available on CanLII).

²⁷³ *Ibid* at 9.

without any evidentiary basis to establish why things were different in Mexico City. The finding of an internal flight alternative was also made without apparent regard to the above evidence, which contradicted the finding of the RPD. For these reasons, the decision of the RPD cannot be justified. It is therefore unreasonable.²⁷⁴

The analysis of the above cases has shown that the IFA doctrine has often become an extra burden imposed on asylum seekers from Mexico. The test of reasonableness is often being wrongfully applied in order to deny refugee status. Instead of decision makers focusing on prospective places of relocation, they often look at the past and demand evidence of previous attempts at relocation. Furthermore, the IRB need only name one of the other Mexican municipalities (and find it to be an IFA), in order to trigger a shift in burden on to the applicant to demonstrate, on a balance of probabilities, why the location chosen is not reasonable for him. If the claimant is able to provide evidence of why the location chosen is not reasonable, either because the CDP somehow shows that the proposed location shares the same criminality problems that the applicant's place of origin or because the agent of persecution will locate her, the decision maker may still disregard the evidence under the doctrine of adequacy of protection. Ultimately, the result is that IFA has become yet another way in which the IRB makes it exceptionally difficult for Mexican asylum seekers to prove that they qualify for refugee status.

3.7 Conclusion

As the above has shown, through its selective application of the jurisprudence developed around the doctrine of state protection, the IRB has regularly managed to limit the availability of refugee status for many groups of asylum seekers, including Mexicans. It has done so primarily by focusing its analyses on the most restrictive and demanding lines of Federal Court authority, and in

²⁷⁴ Ibid at 10. [emphasis added]

some instances applying those cases outside of their factual confines. The consequence of this restrictive approach on the part of the IRB is that only when a claimant has gone to extreme ends to seek all available help at home (including seeking refuge in another region), and there is almost no available protection whatsoever in her country of origin, will she be found eligible for refugee status on the basis of lack of state protection. Arguably, this situation treads dangerously close to that against which the Supreme Court of Canada warned in *Ward*: “it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.”²⁷⁵ However, for certain refugee claimants, including many Mexicans, this seems to be the level of sacrifice that is being demanded by the IRB. One possible solution to this problem is to hope that a refugee case where the state protection doctrine is challenged reaches the Supreme Court of Canada, which could potentially result in the development of a single test to determine the application of the state protection analysis and to provide guidance about in which circumstances a claimant will be deemed to have rebutted the presumption of state protection.

²⁷⁵ *Ward supra note 159.*

CHAPTER 4: INNACCURACY OF MEXICAN COUNTRY INFORMATION USED BY THE IRB IN MEXICAN REFUGEE APPLICATIONS

4.1 Introduction

There are reasons to believe that the content of the CDP with respect to Mexico does more to distort the adjudication of Mexican refugee claims than it does to provide an objective basis against which the claims of Mexican asylum seekers can be measured. In this chapter, I will explore the content and impact of the CDP in the determination of Mexican refugee claims in a number of ways. I will analyse its contents to assess whether it in fact demonstrates, as many IRB decision makers have found, that Mexico is in fact capable of offering protection to its citizens, in order to determine whether it is reasonable for the doctrine of adequacy of protection to be applied to Mexican asylum seekers. I contrast external sources of information against the content of the current CDP and will identify potentially more authoritative and useful documents that ought to be included within the package. Additionally, I will identify those CDP documents that fail to meet the IRB's own standards for inclusion, and thus ought to be removed. Ultimately, this chapter will demonstrate that despite the Ministry of Immigration's view that Mexico is currently able to protect its vulnerable citizens from persecution, the Mexican government remains largely ineffectual in this regard. This is revealed by information contained in the CDP itself, but also by many authoritative documents that have been excluded from the package.

4.2 Importance of Country Information

The role that country information plays in refugee determinations is extremely significant. The Handbook explicitly states the importance of the CDP:

As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin--while not a primary objective--is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there²⁷⁶

Decision makers frequently use the CDP in the assessment of the credibility of a refugee claimant, measuring her story against the information contained in the package and often making negative credibility findings when the applicant's story is not supported by the CDP. Natasha Tesangarides explains,

Country of origin information (COI) is an important part of the refugee status determination process. It assists decision makers to assess the credibility of accounts and the risk upon return against background evidence that details the conditions in the country of origin. If legal representatives, advisors or decision-makers are unable properly to access, understand and utilise country information, they cannot provide quality advice and representation to asylum seekers or make proper decisions.²⁷⁷

The other area where country information is frequently used is in the analysis of state protection, where decision makers will base their decisions as to the applicant's need for

²⁷⁶ The Handbook *supra* note 44 at 42.

²⁷⁷ Natasha Tenangarides, "The Refugee Roulette. The Role of Country information in Refugee Status Determination" (January 2010) online: Refworld <http://www.refworld.org> at 07.

protection in large part upon the content of the CDP. If the information contained in the CDP demonstrates that the applicant's state of origin is ineffective in providing protection to its citizens, the well-founded fear of the asylum seeker will be justified. As Elizabeth Williams explains:

It is generally accepted that Country of Origin Information (COI) is central to refugee status determination (RSD) in order to inform decision makers about conditions in the countries of origin of asylum applicants and to assist them in establishing an objective criteria as to whether an asylum claim is well founded. The importance of COI has been endorsed by statements, reports and policy documents of the UNHCR, the international body of Immigration Judges (IARLJ), the European Union and the Home Office Asylum Policy Unit.²⁷⁸

It is thus very important that the CDP contain information that will give decision makers the clearest picture of the reality of the applicants' countries of origin. To that end, as Anthony Good explains: "Country information has to come from various sources, such as country reports from governments, multinational agencies and NGOs; printed and electronic media; and evidence from 'country experts' such as anthropologists."²⁷⁹

4.3 The Use of Country Information in the Major Refugee Receiving Countries

The top seven refugee receiving countries in the world, including Canada, use information from the applicant's country of origin in their refugee assessments.²⁸⁰ With the

²⁷⁸ Immigration Advisory Service (IAS), *The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives*, May 2009, online: <http://www.refworld.org>

²⁷⁹ Anthony Good. *Anthropologists as providers of country or origin information (COI) in the British Asylum Courts*. (The University of Edinburgh, United Kingdom 2012)

²⁸⁰ See *UNHCR Statistics Asylum Levels & Trends in Industrialized Countries*. 2012. Online: The UN Refugee Agency General Office Australia, New Zealand, Papua Nueva Guinea and the Pacific: <http://unhcr.org.au>. "Canada was the seventh largest recipient of new asylum-seekers in 2012, with 20,500 claims, a decrease by 19 per cent compared to 2011 and the lowest level since 2005"

exception of Sweden,²⁸¹ they all have their own independent government-funded research departments that collect information from the nations that produce the most refugees. In the case of the United States, the government has created the “U.S. State Department’s Country Reports”²⁸² which provide decision makers and applicants the necessary information of country conditions to present their case. In France, the government built “Les cartables documentaires électroniques de la CNDA,” which contains statistics and current country conditions, relating to those states that produce the most asylum seekers in France.²⁸³ The government of Germany uses the information generated by the “Federal Office’s Asylum and Migration Information Centre and its database (*Bundesamt für Migration und Flüchtlinge*),” which contains “Extensive information about all countries of origin, information and status reports from the Federal Foreign Office, information from the refugee agency UNHCR and from Amnesty International. Reports from academic institutions, press articles and specialist literature are also included in the database.”²⁸⁴ The United Kingdom (UK) relies on its operational guidance notes, which “provide a brief summary of the general, political and human rights situation in the country and describe common types of claim providing clear guidance on whether the main types of claim are likely to justify the grant of asylum, humanitarian protection or discretionary leave.”²⁸⁵ In Switzerland, the Country of Origin Analysis of the Swiss Refugee council generates country reports that can be used by the refugee applicants “in order to foster an objective and fair trail for asylum seekers

²⁸¹ The asylum seekers in Sweden have the responsibility to gather evidence of the conditions of her country of origin from external sources. Migrationsverket *Show us who you are* online: <http://www.migrationsverket.se>

²⁸² The single largest recipient of asylum requests was the United States with 83,400 claims, 7,400 more than in 2011. Most of these were individuals from China (24 per cent), Mexico (17 per cent) and El Salvador (seven per cent). United Nations High Commissioner for Refugees, *Asylum trends 2012, Levels and Trends in Industrialised Countries* (United Nations High Commissioner for Refugee, 2011 Geneva Switzerland) online: www.unhcr.org

²⁸³ See Robert Gibb & Anthony Good “Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures” (2013) 25 *Int’l J Refugee L*

²⁸⁴ Federal Office for Migration and Refugees, *Asylum procedure. How to make an application?* Online: <http://www.bamf.de>

²⁸⁵ UK Border Agency. *Country Specific Asylum Policy OGNs* online: <http://www.bia.homeoffice.gov.uk>

in Switzerland.”²⁸⁶ Other interesting country information sources are provided by the government of Austria where the Austrian Centre develops the country information for Country of Origin and Asylum Research and Documentation (ACCORD), which contains information on more than 42 countries. The Austrian Red Cross also provides information regarding the country conditions of refugee applicants.²⁸⁷

4.4 Information about Mexico Used by the IRB

Other than United States, Canada is the only country among the major refugee receiving nations that produces specific country information about Mexico. The creation of CDPs draws its authority from section 33 (2) of the RPD Rules and Policy (“RPD Rules”)²⁸⁸ which states: “The Division may disclose country documentation by providing to the parties a list of those documents or providing information as to where a list of those documents can be found on the Board’s website.”²⁸⁹ Additionally, in 2007 the IRB published its “Policy on Country-of-Origin Information Packages in Refugee Protection Claims,”²⁹⁰ (“RPD Policy”) which states the principles to be followed in the building of CDPs:

²⁸⁶ Refworld, *Swiss Refugee Council, Country reports* online: <http://www.refworld.org>

²⁸⁷ See Refworld, *Austrian Center for Country of Origin and Asylum Research and Documentation*, online <http://www.refworld.org> “The Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) is an independent country of origin information centre affiliated with the Austrian Red Cross and co-funded by the European Refugee Fund, UNHCR, the Austrian Ministry of the Interior and the Austrian refugee organizations. ACCORD’s activities include researching individual information requests, publishing country reports and managing the country of origin information website www.ecoi.net. Between 1999 and 2002, and again in 2005 and 2007, ACCORD organized workshops in the European Country of Origin Information Seminar Series.” See also “[ecoi.net](http://www.ecoi.net), the country of origin information system of the Austrian Red Cross, gathers, structures and processes publicly available country of origin information with a focus on the needs of asylum lawyers, refugee counsels and persons deciding on claims for asylum and other forms of international protection”. European Country of Origin Information Network, about online: <https://www.ecoi.net>

²⁸⁸ Refugee Protection Division Rules SOR/2012-256

²⁸⁹ Ibid at s. 33 (2).

²⁹⁰ Immigration and Refugee Board of Canada “Policy on Country-of-Origin Information Packages in Refugee Protection Claims” (March 12, 2007), online: <http://www.irb-cisr.gc.ca>

The development of [CDP] packages is a process that involves the careful selection, production and use of documents about a specific country. The development of these [CDP] packages is based on the following principles: Expertise and experience, drawing on the experience of decision-makers and IRB officers in hearing rooms, country-of-origin expertise, and quality assurance analysis; Collaboration, engaging all regional offices, through members and IRB officers, in order to ensure that [CDP] needs are identified and addressed; Effectiveness and efficiency, employing a flexible process for coordinated and timely delivery of [CDP] packages; and Innovation, seeking to continuously improve the process of production, distribution and use of [CDP] packages.

This policy also imposes an obligation on the IRB to produce CPD packages that are “relevant, comprehensive, and yet concise; avoid repetition and overlap; and are easy-to-use when preparing a claim, identifying the determinative issues of a claim, and rendering reasons for a decision.”²⁹¹ The IRB has changed the name of the “Country of Origin Information” to “CDP” on its website. According to CIC, the selection of the documents contained in the CDP is based on a series of steps presented as questions that help to clarify the standard that is meant to apply to the creation of the packages:

The most comprehensive picture possible is given of conditions in the countries of origin of refugee claimants within time and resource constraints. Information is compared, contrasted and corroborated, whenever possible, to provide decision makers with a spectrum of views and opinions drawn from current, reliable sources. Researchers assess available information based on the following criteria: How up-to-date is the information? Who is the author? What are/is the qualifications/expertise of the author? What is the reputation of the publication/publisher? Does the author/publisher display any bias? What is the source of the information on which the document is based? Is the information consistent with other reliable evidence? Are there other publications by same author? Where does the author's knowledge of the subject matter come from? What is the "tone" of the document? (Is it impartial?) To what extent is the document based on opinion? To what extent is the document based on observable facts? For what purpose was the document prepared? Are there any spelling errors in the official document?²⁹²

²⁹¹ Ibid at s. 5.1.

²⁹² Immigration and Refugee Board of Canada, “National Documentation Packages”, Online: <http://www.irb-cisr.gc.ca>

Practically, the CDPs consist of a list of links from the CIC's website to online documents and external databases divided into specific categories. CIC does not guarantee the accuracy of the contents and the functionality of the links: "CIC is not responsible to ensure the functionality of these links, the content accessed by these links and the availability of external content in both English and French."²⁹³ Also it notes that CDP "are not, and do not purport to be, exhaustive with regard to conditions in the countries surveyed or conclusive as to the merit of any particular claim to refugee status or protection."²⁹⁴

The first available CDP about Mexico dates from March 15, 2006 and contains 68 documents, of which 37 were responses to information requests.²⁹⁵ In the following seven years, 27 documents were added and the number of information requests increased by 17%. The latest CDP about Mexico is from August 19, 2014 and contains 94 separate links to either websites or PDF papers available online. The most relevant categories (*i.e.*, those containing the greatest number of links) are: 1) Criminality and corruption (21 documents) 2) Gender, Domestic Violence and Children (18 documents). 3) Judiciary, Legal and Penal Systems (11 documents); and 4) Sexual Minorities (8 documents). The least exhaustive categories are: 1) Religion (no documents); 2) Political activities and organizations (one document) and 3) Labour employment and unions (one document). In the following sections I will analyse the contents of the most significant categories within the Mexican CDP, in order to assess whether the CDP demonstrates that Mexico is able to offer effective protection to its citizens. I will also identify sources of information that are biased, inaccurate and misleading, and in such instances will suggest (where

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Immigration and Refugee Board of Canada, Responses to Information Requests online: <http://www.irb-cisr.gc.ca> "Responses to Information Requests (RIR) respond to focused Requests for Information that are submitted to the Research Directorate in the course of the refugee protection determination process. The database contains a seven-year archive of English and French RIRs. Earlier RIRs may be found on the UNHCR's [Refworld](#) website".

possible) alternative sources for better information on the country conditions in present-day Mexico.

4.4.1 Information on Gender, Domestic Violence and Children

4.4.1.1 Are Mere Legislative Efforts Enough?

The first section of the Mexican CDP that I will analyse is that which deals with violence against women in Mexico. Document 5.2, titled “*Femicide in Ciudad Juárez: Ever Present and Worsening*”²⁹⁶ underscores the major obstacles faced by anti-femicide organizations in Ciudad Juárez, Mexico (considered from 2009 to 2011 the world’s most deadly city²⁹⁷) and provides policy guidance to the Juárez authorities for the development of mechanisms to increase the protection offered to women in the city. The author of this document is Sophia Koutsoyannis, who presented this paper at a workshop on “Peacebuilding in Latin America,” convened by Peacebuild in Ottawa on May 31, 2011. Because this document is 4 years old, it would only be useful for decision makers seeking information on the conditions of domestic violence and female murders in Ciudad Juárez prior to 2011. Therefore, it would be useful if more thorough and current sources were added to this category of the CDP. A database with links to useful and recent information on Juárez killings is found at the Columbia University Journalism School website.²⁹⁸ A detailed document dealing with the conditions of violence against women in

²⁹⁶ Sophia Koutsoyannis “Femicide in Ciudad Juárez: Ever-Present and Worsening” Background paper, (2007) online: Peace Build Canada < <http://peacebuild.ca>>

²⁹⁷ See Paul Rexton Kan. “Mexico’s Narco Refugees. The Looming Challenge for U.S. National Security” U.S. Army War College. October 2011. “[A]s many as 200, 000 people may have fled Ciudad Juárez for other parts of Mexico or the United States. Of that number, according to the Ciudad Juárez Citizen Security and Co-Existence Observatory, about 124,000 people may have sought safe haven in el Paso”.

²⁹⁸ Ivette Cabrera, Minerva Canto, and Rose Palmisano “Women of Juárez: Resource List” online: Dart Center of Journalism and Trauma. A project of Columbia Journalism School < <http://dartcenter.org/>>

Juarez, “The Juarez and Chihuahua War on Drugs and CEDAW Recommendations,” was published in 2012 by non-profit and civil associations.²⁹⁹ The United States Department of State also published a 2014 report about Juarez.³⁰⁰ These documents would arguably assist the IRB in making better-informed decisions when dealing with refugee applications from women alleging persecution in Ciudad Juarez.

Document 5.4 is titled “*Case Study: Violence Against Women in Mexican Law, A Parliamentary Response to Violence Against Women*,”³⁰¹ authored by Ludivina Menchaca, a former Mexican senator accused by the press of corruption and nepotism.³⁰² This paper is clearly focused on demonstrating the achievements of Ms. Menchaca’s political caucus, and is thus arguably not very objective. Furthermore, the content of the document is not very useful because its information is out-dated. The whole report is based on statistics of violence against women generated by the federal Department of Statistics in Mexico more than 10 years ago. The rest of the paper consists of a translation of the contents of *Women’s Access to a Life Free of Violence Act* (WALFV), enacted in February 2007. Because this report was made in 2008, it is unable to address the question of whether these legislative measures had any practical effect on the level of violence experienced by Mexican women. Notably, Sophia Koutsoyannis in the previous paper argued that “four years after passing the WALFV act the levels of gender violence remain the

²⁹⁹ Justice for Our Daughters & Center for Women’s Human Rights *The Juarez and Chihuahua War on Drugs and CEDAW Recommendations Shadow Report 2012* online: United Nations Human Rights <http://www2.ohchr.org>

³⁰⁰ United States Department of State, Bureau of Diplomatic Security *Mexico 2014 Crime and Safety Report: Ciudad Juarez*, online: Overseas Security Advisory Council <https://www.osac.gov>

³⁰¹ Ludivina Menchaca “Case Study: Violence against Women in Mexican Law” (paper delivered at the Conference of Chairpersons and Members of Parliamentary Bodies Dealing with Gender Equality, Geneva 2-4 December 2008) online: Inter Parliamentary Union <http://www.ipu.org>

³⁰² See Poder Urbano “Ludivina Menchaca: Corruption and Inefficiency” *Poder Urbano* (29 July 2014) online: Poder Urbano www.poderurbano.com.mx see also Francisco Canul “PROFEPA Corruption is denounced” (10 July 2014) *Queqi Newspaper* online: Queqi www.queqi.com.mx

same while the number of feminicides continuing to increase, render the law inoperable.”³⁰³ Indeed, evidence suggests that the legislative response of the federal congress has not been effective to solve the problem in Juarez. Daniel Cave, a finalist for the Pulitzer Prize in international reporting and the winning of the Overseas Press Club award for best international coverage explained the situation in 2012:

[Until June 23 2012] 60 women and girls have been killed...at least 100 have been reported missing over the past two years. And though the death toll for women so far this year is on track to fall below the high of 304 in 2010, state officials say there have already been more women killed in 2012 than in any year of the earlier so-called femicide era... Mexican authorities have made promises to prioritize cases like these for years, and in the wake of international pressure, prosecutors now argue that more of the killings are being solved. But arrests and convictions are exceedingly rare. For the victims found in the mass grave in the Juárez Valley, even the most basic details were still a mystery months later: forensic teams said they were not even sure how many women were buried there.

As the foregoing demonstrates, the legislative responses have been inadequate to solve the situation and it is clear that women from Juarez will in many cases still be in need of international protection due to the inability and incapacity of the Mexican state to protect them. Nevertheless, this information is not contained within the Mexican CDP.

Document 5.13, “Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Mexico”³⁰⁴ is a United Nations response to a report made by the Mexican government to demonstrate the degree of its fulfillment of its obligations as a signatory state of the *Elimination of All Forms of Discrimination Against Women* treaty. If this document is not carefully read it might be misleading because a large part of it acknowledges the legislative measures implemented by the Mexican state. However, towards the end, the UN Committee

³⁰³ Koutsoyannis *supra* note 296 at.1 [footnotes omitted]

³⁰⁴ United Nations, Committee On The Elimination Of All Forms Of Discrimination Against Women “Concluding Observations of the Committee On The Elimination Of All Forms Of Discrimination Against Women” online: United Nations: <<http://www2.ohchr.org>>

noted that the enforcement of laws is not taking place and recommended that the Mexican state take steps to achieve this goal: “Despite the legislative reforms, high levels of insecurity and violence in Mexico keep negatively impacting women and girls in the enjoyment of their human rights” ...all the legislative advances have not been very effective to prevent or punish violence against women.”³⁰⁵ Consequently, while information surrounding the legislative steps taken to address violence against women in Mexico is rightly available in the CDP, information on its practical effects must also be included, so that decision makers are presented with the full pictures of the conditions for women in Mexico. There are many examples of useful sources that would help the IRB to obtain a more complete sense of the reality on the ground in Mexico. For example, the Civil Society Alliance Organization of Mexico concluded that: “Credit should be given for the significant advances that have been made in recent years in laws relating to equality and in cases of violence. However, much remains to be done especially in terms of harmonizing legislation, because the situation continues to be precarious.”³⁰⁶ The Mexican Commission of Defense and Promotion of Human Rights also stated “The lack of statistical data and reliable systems of information impede an adequate assessment on the severity of the problem, as the institutions do not generate sufficient data and statistical information. Also the absence of reliable records of victims impedes to know the real magnitude of the situation.”³⁰⁷

³⁰⁵ Ibid.

³⁰⁶ United Nations, Committee On The Elimination Of All Forms Of Discrimination Against Women “Mexico’s Alternate Report: Civil Society Organizations. Academia Mexicana de Derechos Humanos, Federacion Mexicana de Universitarias AC and Catedra UNESCO de Derechos Humanos”. Online: United Nations <<http://www2.ohchr.org>> at 1.

³⁰⁷ United Nations, Committee On The Elimination Of All Forms Of Discrimination Against Women “Femicide and Impunity in Mexico: A context of structural and generalized violence” Report presented before the Committee in the Elimination of all forms of Discrimination against Women, online: United Nations <<http://www2.ohchr.org>> at 3.

4.4.1.2 Current Situation: The Changes Never Materialized

In 2013, the government of Mexico provided recent statistics regarding violence against women within the country not included in the CDP. This data was summarized in a special report made by the most important and authoritative newspaper in Mexico, “*El Universal*” which explained that the frequency and severity of violence against women in the country has increased significantly over the course of the last decade.³⁰⁸ The reporter provided the following statistics contained in a government report:

Data collected from January to September of 2013 shows that 19, 827 cases of domestic violence against women were reported just in Mexico City (including 300 cases of human trafficking) where 70 % of the female population is victim of domestic violence. In 2013, sixty-three women were killed in the State of Guanajuato as a consequence of gender- related violence and in the State of Mexico fifty-six were reported murdered. According to the 2013 statistics provided by the National Institute of Woman, [(which belongs to the Federal Government)] six women die in Mexico every day as product of gender violence.³⁰⁹

This situation has reached a crisis point, as the current President of Mexico, Enrique Peña Nieto, recognized officially in November of 2013.³¹⁰ Other organizations have shown the scale of the problem, including The Women’s Nobel Initiative, which, in association with important committees of Mexico, published in 2012 an extensive report on the precarious conditions of protection against domestic violence in Mexico,³¹¹ explaining how ineffective the attempts made at protecting women from domestic violence have been:

In Mexico, women reported that the government “simulates” compliance with international

³⁰⁸ Lilia Alcantara, “Violence against women is now lethal” *El Universal* (25 November 2013) online: *El Universal* <<http://www.eluniversal.com.mx>>

³⁰⁹ National Institute of Women, *First Report 2012-2013*, online: National Institute of Women <<http://cedoc.inmujeres.gob.mx>>

³¹⁰ Francisco Resendiz “Enough of Violence Against Women: Peña” *El Universal* (26 November 2013) online: *El Universal* <<http://www.eluniversal.com.mx>>

³¹¹ Women’s Nobel Initiative “From Survivors to Defenders: Woman Confronting Domestic Violence in Mexico, Honduras and Guatemala” online: Woman’s Nobel Initiative <<http://nobelwomensinitiative.org>>

treaties and norms on preventing and addressing violence against women rather than make real changes. For example in Ciudad Juarez, where the Inter-American Court of Human Rights found the Mexican government guilty of failing to protect women and prosecute femicide cases, the Mexican government created specialized agencies, made speeches and reformed laws—without solving the murders or stemming crimes against women.

This report, as well as the others discussed in the foregoing paragraphs, is not contained within the Mexican CDP. Indeed, the documents in the CDP focus almost exclusively on the attempts that are being made to combat the issue, while failing to address the extent to which these efforts have resulted in little to no practical changes. The Mexican government itself has acknowledged the fact that the mechanisms set in place are not working. By failing to include documents that recognize and analyse the ineffectiveness of this legislation, the CDP paints an inaccurate picture of Mexico, as a result of which legitimate Mexican refugee claimants may be unfairly denied much needed protection.

4.4.1.3 Children: Mexican Youths in Need of Protection

Until September 3 2013, the Mexican CDP did not address domestic violence against children, despite the fact that over the past decade there has been a significant increase in the sexual abuse, violent acts, torture, murders and disappearing of children in Mexico. In 2014, the Research Directorate added document 5.5 “Children on the run: Unaccompanied children leaving Central America and Mexico and the need for international protection”³¹² published by the UNHCR. This is a very useful document for decision makers because it provides data that explains the issues that children are currently facing in Mexico and why are they fleeing to United States in search of protection. As the report explains:

³¹² Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection, UNHCR (2013) online: <http://www.unhcrwashington.org>

A third category of harm giving rise to potential international protection needs arose only among the children from Mexico: recruitment into and exploitation by the criminal industry of human smuggling – that is, facilitating others in crossing into the United States unlawfully. Thirty-eight percent of the children from Mexico fell into this category. Eleven percent of the children reported having suffered or being in fear of both violence in society and abuse in the home. UNHCR found that these types of serious harm raised by the children are clear indicators of the need to conduct a full review of international protection needs consistent with the obligations to ensure that unaccompanied and separated children are not returned to situations of harm or danger.³¹³

However, other useful data is available online and should be included in the CDP. In 2010, UNICEF published an extensive report on the rights of the children and adolescents in Mexico.³¹⁴ Casa Alianza,³¹⁵ provide facts and figures about the current conditions of children in Mexico:

In Mexico City alone, approximately 1,900,000 children and teenagers who are the victims of abuse, violence and abandonment are forced to live on the streets. An average of 8 kids are killed on a daily basis. The precarious living standards of many children in Mexico force them to try and travel on their own to find new opportunities, most often in the United States. One in 5 teenagers in Mexico does not have the personal or familial income to purchase enough to eat. More than 3 million teenagers, between the ages of 12 and 17, are not enrolled in formal education.³¹⁶

Additionally, the disappearing of children occurs in places such as Juarez at alarming rates. Alberto Buitre, the winner of the National Media Price UN-DH Mexico, reported in the Huffington Post that 1800 girls disappeared in Juarez between 2008 and mid 2013: in 2008, 326 disappearances; 2009, 259 disappearances; 2010, 387 disappearances; 2011, 330 disappearances;

³¹³ Ibid at 6.

³¹⁴ The Rights of Children and Adolescents in Mexico: A Present Day Agenda, UNICEF (2010) online: <http://www.unicef.org>

³¹⁵ See Covenant House, Casa Alianza: Overview, online: Covenant House www.covenanthouse.org “For over 25 years, Casa Alianza Mexico has provided care and protection for boys and girls who have experienced extraordinary trauma, including abuse, neglect, violence, abandonment, addiction to harmful substances, sexual exploitation and human trafficking”.

³¹⁶ Ibid.

2012, 390 disappearances y until August 2013 126 disappearances.³¹⁷ Based on these numbers it is difficult to deny the fact that some children from Mexico are in need of international protection, and that Canada, as a signatory country has the obligation to provide such protection. However, the CDP fails to provide the IRB decision makers with a full account of the dangers facing children and young people in Mexico, and thus risks underestimating their need for international protection³¹⁸.

4.4.2 Information Regarding Sexual Minorities

4.4.2.1 Legislation Fails to Protect Sexual Minorities

As was demonstrated in the previous chapter, a significant proportion of the Mexicans who seek asylum in Canada do so on the grounds of persecution and lack of state protection based on sexual orientation. The related section of the CDP contains eight documents, of which half deal with the right to equal marriage. Document 6.3 is a 2010 report made by various organizations including the International Gay and Lesbian Human Rights Commission, the International Human Rights Clinic of Harvard Law School and Civil Associations, titled “Mexico: Shadow Report, The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons”(LGBT).³¹⁹ According to this document, Mexico implemented positive steps to protect and recognize rights of the LGBT community, including the creation of the

³¹⁷ Alberto Buitre, “More Than 1800 Disappeared Girls From Ciudad Juarez” *The Huffington Post* (02 August 2013) online: The Huffington Post <http://voces.huffingtonpost.com>

³¹⁸ See AJ Vicens “43 Mexican College Students Disappeared Weeks Ago. What Happened to Them?” *Mother Jones* (October 16 2014) online: Mother Jones <www.motherjones.com

³¹⁹ International Gay and Lesbian Human Rights Commission, Mexico: Shadow Report, The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons (March 2010) online: International Gay and Lesbian Human Rights Commission <http://iglhrc.org>

National Council to Prevent Discrimination (CONAPRED), the 2003 enactment of federal legislation that prohibits discrimination on the basis of sexual orientation in workplaces and the enactment of local legislation in Mexico City allowing same-sex marriage. The report explains how other parts of Mexico are left behind Mexico City in terms of the recognition of same sex rights:

Mexico has provided increasing protection for LGBT individuals. Troublingly, however, most of the country lags far behind Mexico City in recognition of LGBT rights. The protections given to LGBT individuals in Mexico City—including the ability to change the name and gender on identity documents—should be expanded to reach LGBT persons throughout Mexico. Individuals are vulnerable to hate crimes on grounds of their sexual orientation and gender identity, including hate-motivated killings. The existing hate crimes legislation should be given effect in Mexico City, and similar legislation should be passed on a national level.³²⁰

It is presumably on the basis of information such as this that IRB decision makers have held Mexico City to be safe haven or internal flight alternative for asylum seekers persecuted elsewhere in the country on the basis of their sexual orientation. However, other documents contained in the CDP demonstrate the extent to which Mexico City ought not be seen as such. One of them is document 6.2: “Treatment of sexual minorities, including legislation protecting sexual minorities, other state protection, recourse and services available; treatment of sexual minorities in the Federal District; information on the Zona Rosa”³²¹ which shows that the protection offered to members of the LGBT community in Mexico city is not that effective as some decision makers think:

According to the Letra S report on homophobic hate crimes, between 1995 and 2008, the majority of such crimes took place in the Federal District (Letra S Dec. 2009, 5). The report

³²⁰ Ibid at 15.

³²¹ Immigration and Refugee Board of Canada, Responses to Information Requests “Mexico: Treatment of sexual minorities, including legislation protecting sexual minorities, other state protection, recourse and services available; treatment of sexual minorities in the Federal District; information on the Zona Rosa Research Directorate, Immigration and Refugee Board of Canada, Ottawa” online: Immigration and Refugee Board <http://irb-cisr.gc.ca>

notes that in those years, 143 homophobic homicides occurred in the Federal District, of which 109 were committed against men, 29 against transvestites, transsexuals and transgendered persons, and 5 against women (ibid.). As recently as 23 July 2011, a 25-year-old gay rights activist and member of the Sexual Diversity Coordinating Committee (Coordinadora para la Diversidad Sexual) for the Democratic Revolution Party (Partido de la Revolución Democrática, PRD) was killed in his home (Mexico 24 July 2011) in Mexico City with "brutal wounds" (EFE 25 July 2011).³²²

In a 2013 backgrounder paper (not included in the CDP) called "LGBT Persecution in Mexico and Canada's Refugee Program,"³²³ the Canada Human Rights Trust (Egale), explained the situation that LGBT asylum claimants from Mexico City face:

The Federal District (Mexico City) has significantly more progressive legislation than many other areas of the country. To date, it has already passed equal marriage and adoption legislation, which has withstood constitutional challenge. This is sometimes used as evidence that Mexican LGBT people need not seek asylum in another country, because they can seek safe refuge in the Federal District. However, this is not the experience of many LGBT people in Mexico City. Many who identify as LGBT and live within the Federal District report homophobia, transphobia, and violence, sometimes at the hands of police. 11% of LGBT people living in Mexico City report that they have been victims of threats, extortion, or detention by police due to their sexual orientation. The prevalence of societal and police homophobia and transphobia mean that LGBT people may face persecution within the Federal District.³²⁴

As the above demonstrates, the mere fact that Mexico City permits same sex marriage is not necessarily indicative that LGBT refugee claimants could find protection in this city. Indeed, the federal government of Mexico itself has documented that seven out of tenth people from the LGBT community agree that in Mexico City their rights are not respected.³²⁵ Consequently, more nuanced information concerning the persecution of LGBT individuals in Mexico City must

³²² Ibid.

³²³ Egale Human Rights Trust "LGBT Persecution and Canada's Refugee Program: Backgrounder", online: Egale Canada <http://egale.ca/>

³²⁴ Ibid at 3.

³²⁵ See National Council to Prevent Discrimination (CONAPRED): Fighting Homophobia: Current challenges (Mexico 2012) online: <http://www.conapred.org.mx> [CONAPRED] "In 2012 CONAPRED, which is part of the Government of Mexico, published its latest report where states that in Mexico City same sex marriages do not have access to social security and the administrative procedures for adoption have not been implemented in municipal bylaws. It also documents that seven out of tenth people from the LGBT community agree that in Mexico City their rights are not respected.

be included in the CDP in order for the IRB to make accurate determinations as to whether it presents a viable option for IFA.

4.4.2.2 Right to Marry Does not Mean Effective Protection

As noted above, the CDP regarding conditions for LGBT Mexicans is largely focused on documents dealing with the right to marriage. Document 6.8: “The Mexican Supreme Court Sexual Revolution”³²⁶ published in the Texas Law Review in 2011 is an article that analyses the Supreme Court of Mexico’s controversial cases, including the 2009 case where the attorney general challenged the constitutionality of the provisions that allowed same sex marriage in Mexico City on the basis that changing the historical definition of marriage goes against protection of the family included in the Mexican Constitution.³²⁷ The Supreme Court of Mexico found in favour of the Mexico City legislature and upheld the reforms as constitutional. As was explained in the Texas Law Review article: “In a historic and unprecedented decision, with an overwhelming majority (nine of eleven justices), the court upheld the reform: same-sex marriage and adoption are both constitutional”³²⁸. The practical effect of this decision was to bind all the rest of the states in Mexico to include in their legislations provisions to allow marriage rights to same sex partners.

The foregoing should nevertheless not be taken as evidence that the rights of LGBT individuals are respected in Mexico. Indeed, there is evidence to suggest that same sex marriages

³²⁶ Alejandro Madrazo & Estefania Vela “The Mexican’s Supreme Court Sexual Revolution?” (2011) 89 Tex L Rev online: < <http://www.texaslrev.com> >

³²⁷ This case is arguably similar to the Canadian *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79.

³²⁸ Madrazo *supra* note 326 at 1880.

remain frequently unrecognized outside of Mexico City. The 2014 Human Rights Watch World Report³²⁹ (not included in the CDP) explains: “In August 2010, the Supreme Court recognized the right of same-sex couples in Mexico City to adopt children and to marry, and ruled that all 31 Mexican states must recognize same-sex marriages that take place in Mexico City. Yet the ruling does not require that states recognize the right themselves, and many still deny same-sex couples the right to marry.”³³⁰

Another CDP document (6.7) dealing with marriage rights, titled “Mexico’s gay rights movement gaining around: Despite a shift in public opinion, gay couples remain unable to marry throughout most of the country.”³³¹ was added to the CPD in 2014. This brief article from Al Jazeera arguably fails to provide a thorough and objective account of the situation facing many LGBT Mexicans. Indeed, an application of the IRB’s own criteria with respect to the inclusion of documentation in the CDP demonstrates that the article is not worthy of inclusion. Firstly, it was written by Duncan Tucker, who is described on the Al Jazeera website as follows: “Duncan Tucker is a British freelance journalist based in Guadalajara, Mexico. He focuses mostly on Mexican current affairs, politics and culture. Much of his work can be found on his blog, The Tequila Files.”³³² Arguably, this hardly shows Mr. Duncan to be any sort of authority of the circumstances of LGBT Mexicans. Furthermore, the article appears to be based largely on personal opinion and speculation:

Intolerance of sexual diversity remains common across much of Mexico and Latin America, a strongly Catholic region where macho attitudes prevail. Yet the region has seen rapid change in recent years. Democratization, an increased respect for human rights, the onset of

³²⁹ Human Rights Watch, “World Report 2014” online: Human Rights Watch <http://www.hrw.org>

³³⁰ Ibid at 270.

³³¹ Duncan Tucker “Mexico’s Gay Rights Movements Gaining Around” *Al Jazeera* (28 January 2014) online: <http://www.aljazeera.com>

³³² Ibid.

globalization and the growth of social media have all facilitated the expansion of lesbian, gay, bisexual, transgender and queer (LGBTQ) rights across the region.³³³

This information is unsupported by other data and analysis. Furthermore, the author relies on a single poll, with a very small sample size, to support his assertion that the majority of Mexicans believe that LGBT individuals should receive equal treatment in society. Furthermore, the arguments of this author are contradicted by other more authoritative sources of information demonstrating how the right to marry has not necessarily resulted in a greater level of respect or protection for LGBT people in Mexico City.³³⁴ As a result of the foregoing, there is no justification for the inclusion of this document in the CDP and it ought to be removed and replaced with documents that provide a more nuanced account of the conditions faced by LGBT Mexicans.

4.4.3 Information about Criminality and Corruption

The current president of Mexico, Enrique Peña Nieto, started his mandate in December 2012. Therefore, most of the documents contained in the CDP deal with inherited conflicts that began before his administration began, primarily from 2006 to 2012. However, a small amount of more recent information has been added. In the following section, I will separately analyse the country information dealing with criminality and corruption both prior to and during the Peña Nieto administration, to determine if the CDP documents a change in these factors in more recent years.

³³³ Ibid.

³³⁴ CONAPRED *supra* note 325.

4.4.3.1 Felipe Calderon Administration: 2006-2012

As was discussed in the introduction to this thesis, the “Mexican Drug War,” which officially started in 2003, displaced families and entire communities from cities located in the states where the cartels operate. Documents included in the CDP demonstrate the magnitude of the problems that have faced Mexico as a result of this war, as well as the ineffectiveness of the Mexican state in protecting its nationals from the related violence.

Document 7.7, “Mexico’s Drug Trafficking Organizations: Source and of the Violence,”³³⁵ published by the Congressional Research Service of United States, describes the impact that the proliferation of Mexican drug cartels had in promoting corruption and how their illegal activities were never prosecuted:

In Mexico, the police and court system, historically weak and undercut by corruption, appear not equipped, organized, or managed to combat the drug organizations. Most arrests are never prosecuted.” For example, the large numbers of arrests during the Calderon administration infrequently led to successful prosecutions. The rate of impunity (non prosecution) for murder in Mexico is 81% and higher for other types of crime.³³⁶

This situation is even worst in the southern states, where the rule of law is almost non-existent. This has resulted in a growth of vigilantism, as armed citizens take justice and security into their own hands. Document 7.5 titled: “Justice at the Barrel of a Gun: Vigilante Militias in Mexico. Latin America Briefing No. 29”³³⁷ created by International Crisis Group, an independent, non-profit organization, provides useful and well-documented information for the decision maker to understand the spreading of independent armed groups who are fighting back the crime and

³³⁵ Congressional Research Service *supra* note 18.

³³⁶ Ibid at 45 [footnotes omitted]

³³⁷ International Crisis Group, “Justice at the Barrel of a Gun: Vigilante Militias in Mexico. Latin America Briefing No. 29” (May 2013) online: Crisis Group: <http://www.crisisgroup.org>

narcotrafficking in Mexico. The briefing focuses on the militia presence in the states of Guerrero and Michoacan, where the Crisis Group interviewed and documented the activities of the members of the militias.

Police persecution and torture is also well documented in document 7.17, an executive summary from Human Rights Watch called “Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's 'War on Drugs'”³³⁸. Members and staff of Human Rights Watch interviewed more than 200 people, including government agents, citizens and members of non-governmental organizations from November 2009 to December 2011. It concludes that both the police and the military in Mexico were persecuting and prosecuting innocent people, blaming them for crimes that they did not commit. Malicious prosecution, police and military torture and forced confessions were performed against innocent citizens with the purpose of presenting them to the public and the press and generating statistics to show that measures to combat criminality were taking place, when in reality the police was unable to go after the real offenders. As this report explains:

Most victims were detained arbitrarily under the pretext of being caught in the act of committing a crime and then held unlawfully unacknowledged for hours or days before being handed to the prosecutors. During this period of “enforced disappearance”- in which victims were often held incommunicado on military bases, police stations or other illegal detention facilities-detainees were tortured to obtain information about organized crime and to confess to belonging to criminal groups. Their confessions often served a posteriori to justify security forces’ illegal arrests and the main in criminal evidence in criminal charges against them filed by prosecutors.³³⁹

This information arguably provides a clear justification for why many Mexican asylum seekers alleged having been too afraid or unwilling to seek help from authorities.

³³⁸ Human Rights Watch *Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's 'War on Drugs'* (2011) online: Human Rights Watch < <http://www.hrw.org> >

³³⁹ Ibid at 6.

Furthermore, the homicide rate in Mexico was shockingly high during this time period. The amount of drug related between during Calderon administration reached levels compared to countries in war or in civil revolutions.³⁴⁰ June S. Bittel explains this in Document 7.7 of the CDP:

With the end of President Calderón's term in late 2012, several observers maintained that between 47,000 to 65,000 organized crime-related killings had occurred during his tenure depending on the source cited, roughly 10,000 such murders a year. Some analysts, such as those at the Trans-Border Institute (TBI) at the University of San Diego have also begun to report total intentional homicides. Drawing on data from Mexican government agencies, the TBI has reported that between 120,000 to 125,000 people were killed (all homicides) during the Calderón administration.³⁴¹

In 2013, the department of statistics of Mexico published a report explaining that the murder rate of Mexico dropped from by 2% between 2011 and 2012. Nevertheless, as was noted by the Mexican Institute of Competitiveness, Mexico's 2012 homicide rate was equal to the murder rate for all of Europe combined in that same year.³⁴²

³⁴⁰ See Molly Molloy "Mexico's national crime statistics show no significant decline in homicides and disappearances" (24 October 2013) online: James A. Baker III Institute for Public Policy at Rice University <<http://blog.chron.com>> "Despite a death toll from homicide comparable to those in Iraq, Afghanistan, Libya and Syria — where civil wars, invasions and insurgencies rage — Mexico is touted as a thriving democracy with a fast-growing economy, a middle-class majority and close, friendly relations with the United States. These visions of Mexico are repeated in the U.S. and world press, while at the same time, Mexico is the scene of violent conflict that has killed more than 135,000 and caused the disappearances of at least 25,000 people in the past six years"

³⁴¹ Congressional Research Service *supra* note 18 at 1.

³⁴² Animal Politico "Homicides Rates In Mexico Are Still Extraordinary High: IMCO" *Animal Politico* (31 July 2013) online: < <http://www.animalpolitico.com>>

4.4.3.2 Peña Nieto Administration 2012-2014

Interestingly, the perception of lack of state protection has worsened since Enrique Peña Nieto took office in 2012.³⁴³ The existence of armed groups of citizens is an example of state inefficiency. A recent document included in the CDP (7.3) called “Mexico's Security Dilemma: Michoacán's Militias. The Rise of Vigilantism in Mexico and Its Implications Going Forward”³⁴⁴ describes how militias have taken over the security of entire towns and cities in Mexico due the absence of rule of law and the ineffectiveness of police. According to the authors:

The rise of hyper-violent, predatory criminal groups through the past decade changed the security equation in Mexico. These criminals usurped territory from security forces, changed the balance of political power and disrupted the marketplace. The militias that have emerged in both Michoacán and Guerrero have sought to deal with this outside threat rather than merely manage internal community matters³⁴⁵

The paper explains that the incapacity of the Mexican state (during both the previous and current administrations) to protect its own citizens has led directly to the establishment of these self-defence groups. Despite attempts in 2013 to legislatively legitimize these groups, their existence continues to demonstrate the extent to which, at least in some regions, Mexico is still facing a near complete breakdown of the state:

³⁴³ See Silvia Longmire “In Mexico Security is in the Eye of the Beholder” (21 October 2013) online: James A Baker III Institute For Public Policy at Rice University <<http://blog.chron.com>> “The Pew Research Center has conducted various surveys in Mexico related to perceptions of security roughly every year. In 2012, the survey found that 75 percent of respondents felt cartel-related violence was a very big problem. Almost 70 percent believed both corrupt political leaders and illegal drugs were a major concern. The numbers for the previous year were mostly similar, although percentage of people who felt overall crime was a major problem dropped seven percentage points from 2011 to 2012. Mexico’s National Institute of Statistics and Geography (INEGI) carries out their own annual security survey, and the results are similar to those of the Pew Center. The most recent report, published in September 2013, indicated just over 72 percent of respondents felt insecure, up from 67 percent the year before. Those believing various levels of police agencies were corrupt ranged from 65 to 78 percent.

³⁴⁴ Dudley Althaus and Steven Dudley “Mexico’s Security Dilemma: Michoacán’s Militias The Rise of Vigilantism in Mexico and Its Implications Going Forward” online: Wilson Center Mexico Institute: <http://www.wilsoncenter.org>

The State had abandoned many Mexican citizens. This is most apparent at the local level where police and local government officials are either co-opted or too afraid to challenge the authority of powerful criminal groups like the Knights Templar. The Mexican government is in the process of trying to change this equation, but progress is slow and, for some, relief has not come fast enough. The purging and restocking of local police has been uneven at best. Judicial reform has sputtered along. And efforts to hold municipal authorities accountable are out of touch with the reality on the ground that these authorities have little recourse when faced with well-armed criminal groups.³⁴⁶

Furthermore, there is evidence to indicate that conditions have continued to worsen under the current administration. Some sources of information contained in the CDP explain how, despite the promises made by the current President to fight criminality and improve security, problems such as the high incidence of kidnapping have not been rectified. One such example is document 7.4, which contains statistics from July 2009 to August of 2013 as to the numbers of kidnappings for ransom, and discusses the strategies to address the problem, as well as the complicity of police officers:

In correspondence with the Research Directorate, the President of the Citizen Council for Public Security and Criminal Justice (Consejo Ciudadano para la Seguridad Pública y la Justicia Penal, CCSPJP), a research institution that focuses on the issue of kidnapping in Mexico by conducting research, proposing policies, and providing legal assistance to victims, said that kidnapping is the biggest public security problem faced by Mexico (CCSPJP 29 Aug. 2013). Some sources indicate that Mexico has the highest rate of kidnapping in the world (ibid.; *Le Parisien* 15 Oct. 2012).³⁴⁷

The same document explains how the government, under the current administration of Peña Nieto has proven its incapacity to provide effective protection to victims of kidnapping:

The President of the CCSPJP indicated that there is no state protection for kidnapping in Mexico (29 Aug. 2013). The Associate Researcher indicated that state protection for kidnapping is "weak" and that state efforts to implement programs and provide protection for

³⁴⁶ Ibid at 19.

³⁴⁷ Immigration and Refugee Board of Canada, Responses to Information Requests "Mexico: Kidnappings for ransom, including the types of kidnapping, protection available to victims, the effectiveness of anti-kidnapping measures, and complicity of police officers (July 2009-August 2013) Research Directorate, Immigration and Refugee Board of Canada, Ottawa" online: Immigration and Refugee Board <http://irb-cisr.gc.ca> [emphasis added] [Response to Information Request]

kidnapping have not had any result (Associate Researcher 23 Aug. 2013). He added that victims of kidnappings are offered [translation] "little" or no psychological assistance, and explained that since kidnappings are not usually reported, the government is unaware of the existence of these victims.³⁴⁸

Another significant problem that Mexico is currently facing is human trafficking. Document 7.16 "Mexico (Tier 2). Trafficking in Persons Report 2014"³⁴⁹ drafted by the US Department of State, explains: "official complicity, a lack of intelligence-based investigations, and some officials' limited understanding of human trafficking continued to undermine anti-trafficking efforts."³⁵⁰ As the report goes on to explain:

Anti-trafficking law enforcement efforts remained uneven. The trafficking law obligated states to have a dedicated human trafficking prosecutor, but many states lacked funding to employ one. In many parts of the country, law enforcement efforts focused on raiding bars and nightclubs and searching for administrative irregularities, as opposed to intelligence-based anti-trafficking operations. Officials and NGOs reported that some investigations and prosecutions were delayed while authorities determined which prosecutors had jurisdiction or coordinated with officials in other parts of the country, to the detriment of both the criminal case and the victims. Some public officials did not adequately distinguish between alien smuggling, prostitution, and human trafficking offenses, and many officials were not familiar with trafficking laws.³⁵¹

Obviously, the foregoing demonstrates that there are significant ongoing problems in Mexico with respect to the identification and prevention of a very serious source of persecution for Mexican nationals: human trafficking. On September of 2013 representatives of the Mexican government recognized in the National Assembly of Justice and Human Trafficking that the Mexican state had failed to protect victims of human trafficking: "despite the fact that 399

³⁴⁸ Ibid.

³⁴⁹ US Department of State Mexico Office to Monitor and Combat Trafficking in Persons 2014 Trafficking in Persons Report Tier 2 (2013) online: US Department of State <http://www.state.gov>

³⁵⁰ Ibid.

³⁵¹ Ibid.

persons where saved and released from human trafficking between 2009 and 2011 we have not been able to stop human exploitation and trafficking.”³⁵²

There are also reasons to believe that the homicide rate has remained relatively consistent under the administration of Enrique Peña Nieto. Indeed, the Mexican media has reported a total of 23,640 murders related to organized crime³⁵³ and more than 26,121 disappearances³⁵⁴ since December of 2012, when his mandate started. The police in Mexico keeps finding *narco fosas*,³⁵⁵ holes in the ground with unburied bodies of people who were believed missing. Despite the fact that the total number of homicides appears to have declined by approximately 15% in 2013 according to statistics generated by the federal department of statistics in Mexico, Document 7.8 of the CDP, a study from the University of San Diego (USD) titled: “Drug and Violence in Mexico: Data and Analysis Trough 2013”³⁵⁶ explains that the reality is that these numbers are not reliable and they were potentially manipulated by the Mexican government: “The USD study reported 15 percent drop in homicides in 2013...these findings should be viewed with caution, due to questions raised by analysts over “possible withholding or manipulation of data. [There are reported] significant increases in extortion and kidnapping cases”.³⁵⁷ Furthermore, there has been an increase in the incidence of other types of crime under the current administration:

³⁵² Enrique Mendez “Recognize Unnestopable Traficking Person Mafias in Mexico and USA” *La Jornada* (September 24 2013) online: *La Jornada* <http://www.jornada.unam.mx>

³⁵³ Sandra Dibble “Mexico Homicides Down, But Other Drug-Related Crimes Persist” *The San Diego Union-Tribune* (15 April 2014) online: *The San Diego Tribune* <http://www.utsandiego.com>

³⁵⁴ CBS News, “Mexico: Drug War has led to 26,121 disappearances” *Canada Broadcasting Corporation* online: *CBC News* <http://www.cbsnews.com/news/mexico-drug-war-has-led-to-26121-disappearances/>

³⁵⁵ See Steinberg supra note 24 “Peña Nieto has dragged his feet on creating a database of unidentified bodies. More than 16,000 such bodies have been found in recent years, many in mass grave. See also Havana Pura “31 bodies unburied in narco fosas in La Barca, Jalisco” *Borderland Beat* online: <http://www.borderlandbeat.com>

³⁵⁶ Kimberly Heinle, Octavio Rodríguez Ferreira, and David A. Shirk *Drug Violence in Mexico Data and Analysis Through 2013: Special Report* (2013) *Justice Mexico* online: <http://justiceinmexico.files.wordpress.com>

³⁵⁷ *Ibid* at 2.

Despite a decline in homicides, other crimes in Mexico rose for a second straight year in 2013, affecting more than a third of households as muggings, extortion and kidnappings all increased, according to a government survey. The National Statistics Institute, or Inegi, said there were 33.1 million crimes committed last year against 22.5 million victims, or close to 42,000 crimes per 100,000 in the general population. The number of crimes was up 19% from 27.8 million in 2012.³⁵⁸

Nevertheless, the research directorate of the IRB fills the CDP with documents focussed on the efforts that the Mexican state is making, overlooking significant information with respect to the real dangers that continues to exist.

One such example is document 7.15, “Mexico: Crime Rate Traffic Light,”³⁵⁹ which appears to have been authored by a Mexican private consulting company called “RRS y Asociados.” No information about the reputation or the background of this company could be found on Internet besides its website. The entire document is a power point PDF, which consists of a series of maps of Mexico showing its states coloured in red for the most dangerous parts, yellow for the not that dangerous zones and green as safe havens. There is no discernible methodology employed or explained, and it appears to have been produced in reliance on crime rates from 2008.³⁶⁰ Overall, the document is unprofessional, and its previous versions contained in the CDP are littered with grammatical errors. According to this document, Canada has a higher rate of kidnaps than Mexico with 8.67 % per 100, 000 citizens in comparison to Mexico which only has 1.4. This information clearly goes against the data collected by more reputable sources included in the CDP, which explain that Mexico is the number 1 country in the world for

³⁵⁸ Anthony Harrup “Despite drop in homicides, Mexico's crimes said to increase less than 10% of crimes were reported to police last year, survey says” *The Wall Street Journal* (30 September 2014) online: The Wall Street Journal <<http://online.wsj.com>>

³⁵⁹ Prominix “Semaforo Delito” online: Prominix: <http://www.prominix.com>

³⁶⁰ For example the CDP from September 30 2013 contains the same document (7.15) Some names of Countries are misspelled in the document such as Sueden to refer to Sweden and the abbreviations for the Mexican states are not uniform, for example QROO or Q. ROO. Which shows the lack of professionalism of this document.

kidnappings.³⁶¹ Obviously, this document does not meet the IRB's own standards for inclusion in the CDP. It is critical for the research directorate to try to use and follow its own policies in regard of the standards used to gather and include information into the CDP. Indeed, considering the life and death nature of the decisions made by the IRB, it is completely inappropriate that such materials would be included in the CDP.

4.4.4 Information about the Justice System in Mexico

Document 9.7, "Mexico and its Legal System"³⁶², is contained within the CPD to assist decision makers in understanding the workings of the Mexican justice system. However, the document was published on February 27, 2008, and as a result of reforms that substantially altered the Mexican Constitution in March of 2008, is woefully out-of-date. This information should thus be removed from CPD; it can be misleading and contains inaccurate information about the current Mexican legal system. Unfortunately, locating more current sources on the Mexican legal system is not a simple task. As a Civil Law jurisdiction, legislative changes occur on a monthly basis, making it very difficult to locate updated legal information in English. On its website, the University of Georgetown provides a brief guide to Mexican law, with books and secondary sources in English, but unfortunately most of this information is also out-of-date³⁶³. Francisco Avalos, a Mexican legal scholar, has published a book called "A Comprehensive Research Guide of the Mexican Legal System," of which an electronic edition is available in the

³⁶¹ Response to Information Request *supra* note 346.

³⁶² Jorge A. Vargas "Mexico and its Legal System" (27 February 2008) online: Law and Technology Resources for Legal Professionals <<http://www.llrx.com>>

³⁶³ Georgetown Library, "Mexican Legal Reserach. A brief guide to researching Mexican Law Background Materials and General Sources." Online: University of Georgetown <http://www.law.georgetown.edu>

New York University School of Law website since November 2009³⁶⁴ (with previous updates in August 2011, and September 2012) However it is important for decision makers to understand that the Mexican legal system is complicated, and cannot be properly explained to decision makers in reliance on Internet materials alone. Furthermore, it is ultimately the enforcement of Mexican laws, rather than the legal system as it exists on the books, that are of most relevance to the assessment of Mexican asylum claims.

Indeed, as has been discussed throughout this thesis, the lack of state protection and access to justice by Mexicans is one of the main causes of refugee applications. In 2008, Mexico underwent a series of legal reforms aimed at increasing access to justice. The new system moves from the inefficient inquisitorial judicial practice to an accusatorial procedure, with features of common law criminal justice systems. This is a brief description of how the old (and current) system operates, at least in criminal law:

Unlike the U.S., Mexico's legal system has no jury trials. In the majority of cases, there are also no oral arguments, meaning lawyers don't stand in front of a judge to plead their client's case. Judges usually never meet the accused. Everything is done via paperwork. Judges are subject to a Napoleonic code of justice, meaning laws are strictly codified, leaving them little room for judgment. Most Mexicans have no idea what happens in a courtroom. Only specific parts of a trial are open to family members and others. The rest, including evidence for or against the accused, is sealed to the public until the case is closed.³⁶⁵

However, despite the fact that the reforms were introduced in the Mexican Congress in 2008, it will take until 2016 to implement the changes across all states. Document 9.1, titled

³⁶⁴ Francisco A. Avalos and Elisa Donnadieu "An Electronic Guide to Mexican Law, online: Hauser Global Law School Program, New York University School of Law < <http://www.nyulawglobal.org>>

³⁶⁵ David Luhnnow "Presumption of Guilt" *The Wall Street Journal* (17 October 2009) online: The Wall Street Journal <http://online.wsj.com>

“Supporting Criminal Justice System Reform in Mexico: The U.S. Role,”³⁶⁶ was written by Clare Ribando Seale, a specialist in Latin American Affairs at the Congressional Research Service. This document is meant to give an overview of the reforms and provides information regarding the Merida Initiative,³⁶⁷ and on how the United States is financially supporting the Mexican government in the implementation of the judicial reforms. This document is useful for the decision maker to understand the purpose of the judicial reform in Mexico:

Significant obstacles to state-level reform remain, both in terms of the level of support that the federal government has provided to back state-level efforts and in how the reform is being implemented in the states. In general, a lack of progress and leadership at the federal level has left states without clear guidance on how the reforms should be implemented.³⁶⁸

John Kerry, the American Secretary of State, explains that the judicial reform has not been implemented yet at the federal level and “the absence of reform at the federal level means that federal crimes, such as those related to organized crime, are still being prosecuted in the inquisitorial system, with all of its inherent weaknesses.”³⁶⁹

Indeed, the judicial reforms have yet to show a significant impact in decreasing the crime statistics and providing access to justice to victims. The rates of murder, kidnap and torture have increased dramatically since the reforms were approved in 2008 and still only 2 percent of the reported crimes lead to convictions,³⁷⁰ which means that the role of the judiciary to prevent and punish crime in Mexico is still very limited. Most of the abuses take place in the investigatory stage, where the police and the prosecution still have a lot of discretionary power and control

³⁶⁶ US, *Congressional Research Service, Supporting Criminal Justice System Reform in Mexico: The U.S. Role* (2013) online www.crs.gov. [Criminal reform]

³⁶⁷ See US, *Department of State “Merida Initiative”* online: U.S Department of State <http://www.state.gov>

³⁶⁸ Criminal Reform *supra* note 365 at 10.

³⁶⁹ US *Committee on Foreign Relations: Judicial and Police Reforms in Mexico: Essential Building Blocks for a Lawful Society* 112th Congress (Washington, DC, 2012) at 9 online: <http://www.foreign.senate.gov>

³⁷⁰ Abbie Zislin “Mexico’s Police Force: The Plata o Plomo Predicament (October 9 2014) online: International Association Affairs of the University of Pennsylvania <http://www.theconsul.org>

over the accused. Fabrication of evidence is still a big problem in Mexico. The problems that affect the independence of the judiciary and the capacity of its members are still common. The special rapporteur on the independence of judges and lawyers stated:

During her visit, the Special Rapporteur saw first-hand that Mexico is in crisis owing to the exponential increase in violent incidents, most of which are linked to organized crime. This situation has a direct impact on the work of judges, public prosecutors, public defenders and lawyers. In many cases, judges, court officials and legal professionals are unable to act freely or fully independently because they are faced with threats, intimidation, harassment and other forms of undue pressure. In addition, criminals and particularly organized crime are stepping up their efforts to infiltrate and interfere with judicial institutions through the use of corruption and threats³⁷¹

Consequently, while it is important that the CPD contain up-to-date information with respect to the judicial reforms that are underway in Mexico, care must also be taken to ensure that the IRB is informed of the extent to which the problems noted above are still ongoing. As the above has shown, very significant problems with respect to crime, corruption and the near abandonment of the rule of law have continued to exist under the current administration. Crime rates remain extremely high, and there are reasons to question the accuracy of many of the documents contained in the CPD that state otherwise.

4.5 Conclusion

Ultimately, this chapter has demonstrated that Mexico has for many years, and continues to be, an extremely dangerous place for many of its nationals. To a certain extent, this is reflected in the CPD. However, the documents selected for inclusion in the package are often biased towards reporting the efforts that have been made at improvement, while overlooking the failure

³⁷¹ United Nations General Assembly, *Report on the special rapporteur on the independence of judges and lawyers Mission to Mexico* GE.11-12933 Human Rights Council 17th Sess, Supp No 1 UN Doc A/HRC/17/30/Add.3 (2011) 12 online: <http://www2.ohchr.org>

of these reforms to result in practical improvements in the lives of Mexican nationals. In some cases, the CPD contains extremely unprofessional and unsubstantiated reports, while failing to include much more authoritative documents on the same subject. As has been shown herein, these excluded documents often provide evidence that the Mexican state is unable to provide adequate protections to many of its citizens. This is particularly the case when the citizens belong to particularly vulnerable groups of Mexican society, including female victims of domestic violence, children and LGBT persons. This information runs clearly contrary to the narrative espoused by the Ministry of Immigration (as well as by many IRB decision makers) that Mexico is a democratic country with the ability to offer meaningful protection to its nationals. Indeed, despite the bias within the CPD towards materials that tend to show alleged improvements in the Mexican country conditions, even the CPD itself demonstrates the extent to which this is simply not the case.

CHAPTER 5: THE INCORRECT USE OF THE CDP AND ITS IMPACT ON MEXICAN ASYLUM CLAIMS

5.1 Introduction:

The information that the CIC provides to IRB decision makers in the form of the CDP plays a central role in the adjudication of Mexican refugee claims. However, as was discussed in the previous chapter, there are real concerns with respect to the accuracy, currency and objectivity of the Mexican CDP information. While on the whole the CDP reveals ongoing insecurity and inability to protect on the part of the Mexican government, it also contains frequently misleading pieces of more positive information, which are prone to being cherry picked by the IRB and used as a basis for the denial of Mexican asylum claims. Indeed, as shall be discussed in this chapter, reliance on isolated parts of the CDP has frequently resulted in the denial of refugee claims made by Mexican nationals, in the face of other evidence that clearly contradicts the Board's findings of fact. Indeed, as shall be demonstrated herein, rather than merely assisting the decision maker to understand the applicant's background and country of origin, the CDP has frequently being used by decision makers as a tool to strengthen their arguments that deny asylum claims on bases such as adverse credibility findings, adequate state protection and IFA.

The focus of this chapter will be on IRB decisions that demonstrate a selective use of parts of the CDP that supported adverse asylum determinations, to the detriment of Mexican refugee applicants. I will compare and contrast IRB decisions that involve Mexican refugee claimants to determine whether, and to what extent, selective reliance on the CDP is contributing

to the denial of refugee claims. The majority of the decisions analysed in this chapter were located in the old IRB database called Reflex now available on CanLii. Twenty cases dating from 1995 to 2013 were located and subsequently classified on the basis of the asserted grounds for protection, for the purposes of this review. I subsequently analyse the Federal Court's response to this practice, with a particular focus on those decisions that provide guidance on how the CDP should be used by decision makers, in order to assess the extent to which these selective practices are being sanctioned or condemned on judicial review.

5.2 Cherry Picking from the CDP: The UK Experience

Overly selective use of CDP information has been frequently documented in the UK, one of the world's major refugee receiving countries. In a study undertaken by the Independent Chief Inspector of the UK Border Service Agency from October 2010 to May 2011, it was found that:

The main problem is that Country of Origin Information is used to buttress Case Owners' decisions rather than considering the application, placing it in the context of the COI. Very often the selections from reports that are cited in refusal letters totally ignore the fact that the report overall may say something else. The cases are refused on the basis of policy considerations rather than on purely matching or considering the specific facts of the case in the context of a set of country conditions. This means that COI is drummed up to support speculative queries [and] doubts on credibility.³⁷²

In 2014 the House of Commons acknowledged this study which found that in 13 % of the cases analyzed, UK decision makers had been selective in picking out information from the CDP that

³⁷² UK, Border Services Agency *The use of country of origin information in deciding asylum applications: A thematic inspection* John Vine CBE QPM Independent Chief Inspector of the UK Border Agency (London, Independent Chief Inspector of the UK Border Agency, 2011) at 20, online: <http://icinspector.independent.gov.uk>

would help to support the case for refusing asylum.³⁷³ The Parliament issued the following recommendation:

Caseworkers should always make a fair judgement of the merits of the case. The same point was made by Asylum Aid, Women for Refugee Women, the Refugee Council and the Law Society as an issue. Asylum Aid cited one case in which the case worker quoted independent country of origin information which stated that women in Iraq could gain effective help from a local police station, but omitted the preceding sentence which stated that “women have been sexually assaulted by the police when reporting to a police station.”³⁷⁴

Similar concerns were addressed in a 2009 study made by the Immigration Advisory Service of UK, which recommended: “All users in the Refugee Status Determination process refrain from using any of the COI contained in OGNs as they are selected by the policy unit of a governmental body to guide their own case owners responsible for Refugee Status Determination in an adversarial system.”³⁷⁵ No such study has been produced in the Canadian context, and so it remains impossible to determine with precision the extent to which this practice is operating within the Canadian refugee adjudication process. However, as the foregoing analysis will demonstrate, it appears safe to conclude that this practice is very much alive at the IRB, at least in the case of Mexican refugee claims.

5.3 Selecting parts of the CDP to Deny Refugee Claimants who belong to Particular Social Groups

The previous chapter shows that the Mexican CDP contains significant amounts of information demonstrating the precarious conditions of Mexicans who belong to certain minority groups, who are frequently either persecuted or left unprotected by state authorities. Such is the situation of many applicants who identify themselves as members of the LGBT community or

³⁷³ UK, HC Asylum 7th Report in Sessional Papers vol 1 (2013-2014) 6.

³⁷⁴ Ibid at para 38.

³⁷⁵ Immigration Advisory Service, “The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives” (May 2009) online: Refworld <http://www.refworld.org>

are female victims of domestic violence. In *Chan v. Canada*,³⁷⁶ Justice La Forest explained that claimants who demonstrate persecution under such categories could be considered to fulfill the definition of a convention refugee or a person in need of protection:

The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers*, *Cheung* and *Matter of Acosta*, *supra*, provide a good working rule to achieve this result. They identify three possible categories: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence. The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.³⁷⁷

5.3.1 Female Victims of Domestic Violence

Since 2003, the IRB has recognized the gravity of the domestic violence to which Mexican women can be subjected and, in reliance on the contents of the CDP, have granted refugee status to some such claimants. One example is the RPD file No. MA2-06206³⁷⁸, where the decision maker acknowledged the situation of domestic violence in Mexico:

[D]ocumentary evidence also reveals a very high incidence of domestic and sexual violence in Mexico...the documentary evidence indicates that, in practice, civil and penal authorities do not generally take legal action in cases of domestic violence unless physical violence is involved, that very often rape and violence against women are not taken seriously, and that judges and prosecutors are frequently indifferent and hostile towards women who report rape.³⁷⁹

³⁷⁶ *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 (available on CanLII).

³⁷⁷ *Ibid.* at para 82.

³⁷⁸ *X (Re)*, 2003 CanLII 55231 (CA IRB)

³⁷⁹ *Ibid* at para 14.

Troublingly in the same year in the file VA1 04271³⁸⁰, the decision maker found, in reliance on the CDP, that there is no evidence to indicate that Mexico would be unable or unwilling to offer protection to abused women:

The country documentation indicates Mexico has a functioning police and judicial system. There are problems of corruption with the police, however the country documentation does not suggest that police protection is generally not available. The police did not abuse or threaten the claimant when she went to them. They merely said nothing happened. Based on the country documentation and claimant's evidence, I find there is not clear and convincing evidence that the state was unable or unwilling to protect her.³⁸¹

Similarly, in the 2007 IRB file TA6-15001³⁸², the Board denied a claim on the basis of a safe flight alternative to Mexico City. This time the decision maker concluded that Mexico City is the perfect place for the claimant to find justice and protection. The writer of this decision used documentary evidence that showed highlighted the legal framework in the Federal District regarding domestic violence, but overlooked those parts of the CDP that indicated how ineffective these protections can be:

I find the claimant can reasonably relocate to Mexico City.... My earlier analysis satisfies me that, as a minimum in Mexico City, part of the D.F. where federal laws apply, the state has in place a legal structure to provide women with legal recourse to domestic violence. Further, the state has taken positive steps to ensure women are aware of these various resources and those responsible are providing the assistance mandated by law. There will always be times when even at the federal level these efforts will provide an imperfect result. That fact on its own does not result in inadequate protection by the state, only an imperfect result which Canadian lawmakers envisioned when they accepted that state protection need not be perfect.³⁸³

The approach taken in the above IRB decision should be contrasted with the 2008 Federal Court decision of *Gallo Farias v Canada (Citizenship and Immigration)*,³⁸⁴ where the Court explained that the amount of claims from Mexicans that have been made its way to the Federal Court

³⁸⁰ *X (Re)*, 2003 CanLII 55297 (CA IRB)

³⁸¹ *Ibid.* at para 12.

³⁸² *X (Re)*, 2007 CanLII 60074 (CA IRB).

³⁸³ *Ibid.*

³⁸⁴ *Gallo Farias v Canada (Citizenship and Immigration)*, 2008 FC 1035 (available on CanLII).

between the years of 2006 and 2007 proves the fact that Mexican women were in need of protection in Canada:

In cases before this Court, it is clear that crime and domestic abuse in Mexico are widespread. The Court has seen more refugee claims from Mexico than any other country in the past few years. Many of these cases involve domestic abuse. In its Departmental Performance Report of the Immigration and Refugee Board of Canada to the Treasury Board of Canada Secretariat for the 2006-2007 fiscal year, available at <<http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/irb/irb01-eng.asp>>, the Immigration and Refugee Board of Canada provides the following statistics: Mexico was the top source country in 2006-2007 with 5,490 claims referred; China was second, far behind Mexico, with 1,700 claims; and Colombia was third with 1,450 claims. Mexico accounted for 23% of all claims referred in 2006-2007, 43% above the number of claims referred in 2005-2006; this source country is the principal reason for the overall increase in referrals.³⁸⁵

As the previous chapter demonstrated, the situation of domestic violence against women in Mexico has continued to worsen, a fact that has been almost entirely overlooked by IRB decision makers. Moreover, the amount of applications made by Mexicans has been interpreted by the Federal Government as a sign of bogus refugees, rather than, as noted by the Federal Court, an indication of the magnitude of the problem. Perhaps as a result of the low rate at which IRB decisions are reviewed by the Federal Court, this trend shows no signs of reversing.

5.3.2 LGBT

LGBT Mexicans seek refugee status in Canada for a variety of reasons, including violence and extortion at the hands of the police, discrimination and homophobia in the streets and workplace and the inability of the state to protect them. These problems are well documented within the Mexican CDP. However, a review of the IRBs decisions with respect to Mexican LGBT asylum seekers reveals the extent to which small pieces of more positive information are being relied

³⁸⁵ Ibid at 32.

upon as a means for denying these claims. For example, in the 2006 case MA6-01580, the IRB granted refugee status to the applicant, despite having learned that an IFA was not a safe alternative for the claimant:

Even in Mexico City, homophobia is still common, and although protective measures exist, they are, according to document MEX101377.EF, ineffective. As stated above, in view of the continual discrimination experienced by the claimant, his repeated loss of employment due to his effeminate appearance and the statistics cited in chapter 6.11, which show that many similarly situated persons have been beaten or even killed simply because of their sexual orientation, not only in Mexico City but throughout the country, the panel finds that the risk of persecution in other Mexican cities remains very serious.³⁸⁶

A similar argument was used in the 2007 case VA6-00539, where the IRB granted refugee status to the applicant on the basis that Mexico is a dangerous country for homosexuals as general, as demonstrated in the CDP:

[W]hen assessing potential risks of persecution, or of death, or of cruel and unusual treatment or punishment, legal and judicial reform are of little consequence unless they are accompanied by evidence of actual enforcement of the new laws, and concrete change in the conditions in which the victims live. Unfortunately, there is little evidence of such, yet, in Mexico. In this regard, the panel has considered the report of the Research Directorate of the IRB of June 5, 2006, which paints a very difficult picture of the conditions of risk in which gay and lesbian people currently live. [T]he country has had a long history of 'attacks and murders' of homosexuals and transsexuals and members of these communities continue to face discriminate although the law 'prohibits several types of discrimination including sexual preference, 'homophobic beliefs and practices were common. The Citizen's Commission Against Hate Crimes (CCCCOH) stated that 15 homophobic or transphobic murders occur each month in Mexico. Other sources estimated that between 100 and 180 homophobic killings take place each year in Mexico placing Mexico second on the continent for homophobic murders. According to the CCCCCOH, the majority of victims are men between 20 and 40 years old. Most murders of homosexuals occurred in the Federal District, followed by the states of Mexico, Veracruz and Michoacan.³⁸⁷

Only two months later, contrary arguments were used in the decision TA6-07148, and as a result refugee status was denied. This time the decision maker used the same CDP to prove that

³⁸⁶ *X (Re)*, 2007 CanLII 47771 (CA IRB)

³⁸⁷ *X (Re)*, 2007 CanLII 49710 (CA IRB)

Mexico City was actually a safe place for homosexuals to live and therefore, there were no grounds to look for protection in Canada:

[T]he situation for gays and lesbians may vary from state to state or even large cities to small town and rural areas. However, in the D.F., there is in place a legal system that provides redress to the rule of law for citizens who have suffered persecution or serious harm as a result of their sexuality. Further, the various reports indicate that the situation has shown steady improvement as noted by the recent changes in the anti-discriminatory laws. The recent surveys where more than 40% of those questioned indicated the situation was improving for gays in Mexico indicates that these legal remedies are in fact making a change in the situation faced by homosexuals and lesbians in large urban areas under federal control, i.e. Mexico City. As a result, I am satisfied that, as a minimum, in Mexico City, the state is making serious efforts to provide adequate protection for its gay and lesbian citizens.³⁸⁸

The same problem of selecting parts of documentary evidence to reach different outcomes kept happening in recent decisions. For instance, on June 23 2011 the IRB published on Reflex the decision MA8-04150, granting a refugee status to a member of the LGBT community on the grounds that the documentary evidence proves that the City of Mexico is not a safe place to live for members of the LGBT community:

The claimant's allegations are corroborated by the overwhelming evidence concerning the treatment of homosexuals in Mexico, updated in the latest documentation package on Mexico. The document, published by the Board's research centre in Ottawa, states that homosexuals are the targets of assault and murder even in Mexico City, which is generally more open to people on the margins. Discrimination against homosexuals in the workplace is widespread... The document states that there are, on average, 15 homophobic or transphobic (transvestites) murders per day in Mexico, the majority in Mexico City. While Mexico is a violent country with a population of 100 million and hundreds of murders every day, the above-mentioned figure does indicate a homophobic society. The document reports that homosexuals working in Mexico City, in situations similar to that of the claimant, have been beaten and killed, and have received no protection from the authorities.... This information supports the claimant's allegations.³⁸⁹

³⁸⁸ *X (Re)*, 2007 CanLII 61464 (CA IRB)

³⁸⁹ *X (Re)*, 2011 CanLII 67655 (CA IRB)

Nevertheless, four months after, the IRB decision in VA9-05795 decided that a claimant was not a convention refugee by concluding, contrary to the previous decision that the CPD shows that Mexico City provides a safe haven for members of the LGBT community:

Mexico City, D.F. have made gains in improvements to the legal framework and services for combating violence and discrimination against homosexuals. While there remains much to be addressed, improvements were seen in the treatment of homosexuals as early as 2003. A survey in 2005 corroborated this finding when 41 percent of the homosexuals interviewed believed that general prospects for had improved. In respect of the claimant's fear that he would face difficulty finding employment because he is a HIV-positive gay man, I refer to my previous analysis of state protection in Mexico. In 2003, the legislation was enacted prohibiting discrimination on employment and occupation due to sexual orientation. The state created the National Council to Prevent Discrimination (CONAPRED) to take a proactive role in creating anti-discrimination programs and to receive and resolve complaints made in the public and private sectors. I find that the claimant would have access to state protection in the event he experienced discrimination in employment as a HIV-positive gay male.³⁹⁰

As the foregoing has demonstrated, there is significant discrepancy in the manner in which the IRB interprets and employs the information contained in the CDP with respect to the conditions faced by LGBT Mexicans in their country of origin. Indeed, it appears that the identity of the IRB decision maker presiding over an LGBT Mexicans asylum claim may have more bearing on the outcome of the hearing than does the actual content of the CDP.

5.4 Selecting Parts of the CDP to Deny Claims based on Violence and Criminality

The majority of the refugee applications made by Mexicans in Canada are related to situations where the asylum claimants were victims of crime and narcotrafficking-related violence, from which the claimants allege the Mexican government was unwilling or unable to protect them. In the early 2000s, claims of this nature met with a relatively high degree of success. Once such example comes from the 2002 decision in RPD file VA1-03535 where the

³⁹⁰ *X (Re)*, 2011 CanLII 93473 (CA IRB) at para 35.

applicant, a male in late in his forties along his family, applied for refugee status on the basis of fear of being kidnapped, tortured or killed by a Mexican drug cartel and corrupt police officers due to his being identified as an undercover detective. The applicant was granted refugee protection in Canada in reliance on the information contained in the CDP:

We read that the kidnapping situation in Mexico is second only to Colombia. It is not difficult to accept the possibility that the young, minor claimant could be kidnapped as a way to ferret out the principal claimant so that he can be made to suffer for being an informant. Given the veiled threat made to Mr. XXXXXX about the daughter XXXXXX, this fear is justified.”³⁹¹

Similarly, in late 2003, the RPD in the file MA3-03119 granted refugee status to a Mexican asylum claimant who witnessed a murder of a prostitute by drug traffickers and police officers in México, who then threatened to kill him and his family. The applicant did not make any effort to look for police protection because the police were involved in the event. Nevertheless, refugee status was justified by using the content of the CDP:

Impunity remained a problem among the security forces, although the Government continued to sanction public officials, police officers, and members of the military. Widespread police corruption and alleged police involvement in narcotics-related crime continued, and police abuse and inefficiency hampered investigations. The Government continued to take important steps to improve the human rights situation; however its efforts continued to meet with limited success in many areas.³⁹²

This trend of granting refugee status to Mexican victims of criminality continued through the mid to late 2000s. IRB decision MA6-05154 shows how the decision maker relied on extensive documentation about the kidnapping situation in Mexico from 2003 to 2005 and granted refugee status to a Mexican claimant who was kidnapped and at risk of being kidnapped again:

The facts reported are plausible and compatible with the documentation in the National

³⁹¹ *X (Re)*, 2002 CanLII 52731 (CA IRB)

³⁹² *X (Re)*, 2003 CanLII 55247 (CA IRB)

Documentation Package on Mexico dated June 29, 2007...According to the PGR, although there were 2,318 kidnappings reported nationwide from 2000 to March 2004, Express kidnapping involves short-term abductions, from a few hours to a few days, to obtain cash quickly, usually from Automatic Teller Machines (ATMs) or by holding an individual until a modest ransom is paid for their release. While there has been success in dismantling major kidnapping rings, the result has apparently been a proliferation of smaller gangs that are “more ruthless” when the victim’s family is unable to pay the ransom demand.³⁹³

Further cases continued the trend. One such example is the file VA6 01614, which demonstrated a willingness of the Board to grant refugee status on the basis of CDP information:

Mexico is one of those countries which is both dark and light and it is in the shadows where the risk lies. The country material is replete with references to the problems which human rights activists face. The failure of state protection, not on an absolutely uniform basis, but on a repeated basis, as well as the failure of IFA in many cases, although not all, but in many cases, including this one.³⁹⁴

However, as shall be discussed below, in recent years there has been a notable reversal of the trend towards granting refugee status to claimants who fall into this category (among others.)

5.5 The Adverse Impact of the IRB’s “Persuasive Decision”

Since 2008, Mexican refugee claims have arguably been, on the whole, met with an increased amount of skepticism and scrutiny on the part of IRB decision makers. The source of this trend appears to be the 2007 decision TA6-07453³⁹⁵ declared as persuasive on May 2008 by a ministerial decision. This decision is still included in the IRB website as a guidelines for decision makers³⁹⁶ and according to the IRB:

³⁹³ *X (Re)*, 2007 CanLII 64580 (CA IRB)

³⁹⁴ *X (Re)*, 2007 CanLII 62964 (CA IRB)

³⁹⁵ *X (Re)*, 2007 CanLII 80277 (CA IRB)

³⁹⁶ Immigration and Refugee Board of Canada “Persuasive decisions” online: Immigration and Refugee Board of Canada <<http://www.irb-cisr.gc.ca>>

Persuasive decisions are decisions that have been identified by the Deputy Chairperson as being of persuasive value in developing the jurisprudence of the Division. Although Members are not expected to follow them, they are decisions that Members of the IRB are encouraged to rely upon in the interests of consistency and collegiality.³⁹⁷

In other words, by virtue of its status as a “persuasive decision”, TA6-07453 serves as a non-binding but extremely influential guide as to how IRB decision makers ought to approach the adjudication of Mexican refugee claims. This particular decision has arguably done a great deal to decrease the rate at which Mexican refugee claims can succeed.³⁹⁸ This results from the fact that this particular persuasive decision emphasizes the principles of *Zalzali*, *Villafranca* and *Kadenko* which, as discussed in detail in Chapter 2, establish an extremely low bar with respect to whether a country will be deemed sufficiently able to offer protection to its nationals. Indeed, collectively these cases stand for the proposition that not only must the state in the country of origin be in a near-complete state of breakdown before international protection will be warranted, asylum seekers must also exhaust all potential avenues (both state and non-state based) for protection at home before seeking protection abroad. In this decision, the RPD states that while it is not disagreeing that there are serious problems in México with respect to drug trafficking, corruption and criminality, it nonetheless wishes to acknowledge the fact that the Mexican government is making considerable efforts to ameliorate the situation, and that these efforts are worthy of consideration. In other words, the doctrines of exhaustiveness and adequacy of protection were adopted by this persuasive decision as the official standard by which to analyze Mexican refugee claims.

³⁹⁷ Immigration and Refugee Board of Canada “Policy on Persuasive decisions” online: Immigration and Refugee Board of Canada <<http://www.irb-cisr.gc.ca>>

³⁹⁸ For example in 2006 the acceptance for refugee claims was as high as 28 % and after the release of the persuasive decision the acceptance rate dropped to 8 %. Human Rights Research and Education Center “Refugee Statistics 1989-2011 online: University of Ottawa <<http://www.cdp-hrc.uottawa.ca>>

One example of the impact of the persuasive decision on the adjudication of Mexican refugee claims comes from the IRB's more recent responses to asylums claims made by Mexican journalists. Before 2008 journalists successfully appealed decisions from the IRB that went contrary to the content of the CDP to the Federal Court. Decisions of the IRB that rejected claims of journalist by selecting parts of the CDP in order to support the "efforts of the authorities" were reversed. In December 2007, 5 months prior to the persuasive decision, the following was held in *Diaz de Leon v Canada (Citizenship and Immigration)*³⁹⁹:

The Board was impressed by the Attorney General's and the Federal Investigation Agency's significant efforts to combat criminality and drug trafficking, while protecting Mexican citizens. It also mentioned the victimization of journalists and reporters. A simple reading of this documentation reveals that a 2000 annual report on Mexico states "despite the good news, Mexico is still a relatively dangerous place to work as a journalist. The investigation of drug trafficking leads to death threats – three of the five journalists murdered in 1997 and 1998 had been investigating the subject..." The same document refers to threats, attacks and arrests and kidnapping of journalists. The Reuters document for 2006 is entitled "Mexico hit by fresh wave of drug killings". It is a fact that president Vincento Fox promised renewed efforts to combat crimes yet in a letter from Canada dated October 7th 2005, the association complained of violation of human rights in Mexico, and the murders of journalists. The Board should have examined the totality of the evidence, particularly the documentary evidence to realize that notwithstanding President's Fox's promises and efforts, investigative journalists in Mexico still face threats and risk of death. This evidence together with the Applicant's recital of facts and events especially support her objective and subjective fears for her life in Mexico⁴⁰⁰

Indeed prior to the rendering of the persuasive decision, members of the IRB were granting refugee status to journalists based on the information contained in the CDP. One such example comes from the decision TA7-04670 dated on March of 2008, 2 months before the persuasive decision was rendered:

The documentary evidence states "with nine journalists murdered and three missing, the country has the worst record in the Americas in 2006 and was second only to Iraq for the number killed, despite establishment in February of a special Federal Court to punish attacks

³⁹⁹ *Diaz de Leon v Canada (Citizenship and Immigration)*, 2007 FC 1307 (available on CanLII).

⁴⁰⁰ Ibid paras 17-20.

on the media.” The report goes on to state that despite establishing this Court, “but these good intentions did not prevent one of the worst annual press freedom tolls of the past decade in the Americas... I find that there is a serious possibility that the PC, on account of his vocation as an XXXXX XXXXX, would be persecuted, should he return to Mexico.”⁴⁰¹

However it seems that the case MA7-01065 followed the principles of the persuasive decision because despite the fact that it was rendered 5 months after the previous one and the CDP was the same the IRB concluded that there was *nothing* in the documentary evidence that showed journalists were in danger in Mexico

Can it be concluded that a XXXXX cannot obtain state protection in Mexico? There is nothing in the documentary evidence from which it could be concluded that XXXXX in Mexico are at risk of death simply because they are journalists and that they cannot obtain state protection. The panel is of the opinion that, while Mexico has problems with corruption, it certainly cannot be described as a country where there has been a complete breakdown of the state apparatus. There are places where complaints can be made, as indicated in a document submitted as Exhibit A1. That document is an overview in which the author describes various federal law enforcement agencies, such as the federal judicial police, and refers to the police services of the various states and federal districts of Mexico. If an individual is not satisfied with the responses or protection offered by the police, there are remedies and oversight, as may be seen in that documentation. Thus, even though corruption is a problem in Mexico, it can be concluded that the authorities have made serious efforts to eliminate it. The panel concludes that the claimant did not make a complaint to a police service, to the office of the attorney general of the republic or to his state’s human rights commission, or consult the commission in his state that that works for human rights. To reiterate: even though the situation is not perfect in Mexico, the panel cannot conclude that there is clear and convincing evidence that the Mexican state could not protect the claimant if he were to return to his country, and accordingly, the panel concludes that the claimant has not presented clear and convincing evidence that the state was unable and unwilling to protect him, and also concludes that state protection is available in this case.”⁴⁰²

Arguably, the IRB can only justify the application of the principles from the persuasive decision if it selectively interprets the content of the CDP in order to support its analysis, as it did in the above decision. While the CPD does, as the IRB noted in the previous decision, reveal extensive efforts on the part of the Mexican government to improve the security and protection offered to

⁴⁰¹ *X (Re)*, 2008 CanLII 49548 (CA IRB)

⁴⁰² *X (Re)*, 2008 CanLII 87720 (CA IRB) paras 30-33 [emphasis added]

its nationals, however an objective reading of the CPD clearly demonstrates the extent to which the plurality of these efforts have been ineffectual. In that sense, the cases of *Villafranca*, *Kadenko*, *Zalzali* and *Hinzman*, emphasized in the persuasive decisions and others like it, are operating as a tool to decrease the availability of refugee status, despite the existence of evidence (both included in the CPD and otherwise) that conditions warranting international protection persist within Mexico (and other refugee producing countries.) In relying on the principles from these cases, the IRB overlooks not only the available CPD information, but also often the guidance of the Federal Court, which will be analysed below.

5.6 Federal Court's Prohibition Selecting Parts of the CDP to Deny Refugee Status

The practice of failing to address CPD information that contradicts its findings has been a long –standing problem within the IRB. However, in 1998 the Federal Court in the leading decision of *Cepeda-Gutierrez v. Canada*,⁴⁰³ overturned an IRB decision that failed to grant refugee status to a Mexican on IFA basis because the board failed to assess and mention relevant evidence put forward by the claimant, including a psychological assessment:

[A]gencies [are not] required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it...However the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"...In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact⁴⁰⁴

⁴⁰³ *Cepeda-gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC). This is a leading decision that has been cited by the Federal Courts on approximately 1,000 occasions.

⁴⁰⁴ *Ibid* at paras 15. Contra Szucs *supra* note 172.

According to the principles of *Cepeda*, the IRB has to consider and address the relevant and important evidence that contradicts its findings. A failure to do so may result in intervention by the Federal Court. As the Court made clear in the 2003 the case of *Mohacsi v. Canada*,⁴⁰⁵ “This court has held that all of the documentary evidence must be assessed and must be assessed together and not in parts in isolation from each other.”⁴⁰⁶

These principles were followed in subsequent Federal Court cases involving Mexican refugee applicants. One such example is the 2006 decision *Vigueras Avila v. Canada*,⁴⁰⁷ where the court, in reliance on established authorities, found:

The Board’s role was to make findings of fact and arrive at a reasonable finding based on the evidence, even if conflicting. In this case, it is clear that the Board completely disregarded relevant evidence. The Board cannot, without giving reasonable grounds, ignore or dismiss the content of a document dealing expressly with state protection in a given region (*Renteria et al.*, *supra*). For example, the document *Mexico: State Protection (December 2003 - March 2005)*, *supra*, though it was filed at the hearing, was not mentioned in the decision. This document, which originates with the Board’s Research Directorate, presents an overall and quite detailed view of the protective machinery available in Mexico and its dubious effectiveness. Taken in isolation, certain passages from the document appear to show that there is some desire by the present government to improve the situation, while other passages suggest that protective measures are ineffective, at least in certain cases. The same applies to a host of other relevant documents which were part of the National Documentation Package on Mexico that were not considered by the Board. It is clear that in the instant case the Board undertook a superficial, if not highly selective, analysis of the documentary evidence.⁴⁰⁸

However, in the 2007 case of *Shen v. Canada*⁴⁰⁹, it was held that the principles from *Cepeda* ought to be restricted to the specific evidence related to the claimant (such as the psychological

⁴⁰⁵ *Mohacsi supra note 224*.

⁴⁰⁶ *Ibid* at para 17.

⁴⁰⁷ *Avila supra note* at 228.

⁴⁰⁸ *Ibid* at paras 30-31.

⁴⁰⁹ *Shen v Canada (Citizenship and Immigration)*, 2007 FC 1001 (available on CanLII).

report in *Cepeda*) and should not apply to general documentary evidence such as the CPD: “In my view, *Cepeda-Gutierrez* is distinguishable from this application, since the evidence in that case was particular to the applicant, whereas the evidence which the applicant claims was ignored here is general documentary evidence.”⁴¹⁰ This rationale, followed just in few decisions from the Federal Court,⁴¹¹ arguably gave the IRB latitude to continue with its practice of cherry picking the CPD information that best supports its findings, to the exclusion of other relevant evidence.

Nonetheless, the Federal Court soon returned to a more expansive interpretation of the principles from *Cepeda*, and in 2008 reversed a number of IRB decisions where the decision maker had selectively relied on the CPD to justify denying the asylum claims of individuals from high refugee producing countries. For example, in *Sinnasamy v. Canada (Citizenship and Immigration)*⁴¹² the court quashed a decision in which the IRB had deliberately been selective in its interpretation and application of the CPD information:

The officer relies on the United Nations High Commissioner for Refugees (UNHCR) Position on the International Protection Needs of Asylum-Seekers from Sri Lanka, dated December 2006, to support her conclusion that the applicant does not fall within the profile of Tamils in Colombo who are specifically targeted. But this same document states that “[a]ll asylum claims of Tamils from the North or East should be favourably considered”; “[w]here individual acts of harassment do not in and of themselves constitute persecution, taken together they may cumulatively amount to a serious violation of human rights and therefore be persecutory”; “[...] there is no realistic internal flight alternative given the reach of the LTTE and the inability of the authorities to provide assured protection”; “[i]t may be noted that Tamils originating from the North and East [who are able to reach Colombo], in particular from LTTE-controlled areas, are perceived by the authorities as potential LTTE members or supporters, and are more likely to be subject to arrests, detention, abduction or even killings”; and “[n]o Tamils from the North or East should be returned forcibly until there is significant improvement

⁴¹⁰ Ibid at para 6.

⁴¹¹ Quinatzin *supra* note 174 and *O.E.N.R. v. Canada (Minister of Citizenship and Immigration)* [2011] F.C.J. No. 1831 (QL) (FC)

⁴¹² *Sinnasamy v. Canada (Citizenship and Immigration)*, 2008 FC 67 (CanLII)

in the security situation in Sri Lanka”. It is difficult to understand why the officer did not address these findings. The least that can be said is that she conducted a very selective reading of this document. No explanation was given as to why the officer disregarded this document in concluding that the applicant has an IFA in Colombo. After all, this is a most credible source, and the leading refugee agency in the world. As so often repeated by this Court, the officer’s burden of explanation increases with the relevance of the evidence to the disputed facts: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 1998 CanLII 8667 (FC), 157 F.T.R. 35 at para. 17.⁴¹³

Similarly, Colombian applicants applied to the Federal Court for judicial review of a decision based on information cherry picked from the CDP. In this case, *Gonzalo Vallenilla v. Canada (Citizenship and Immigration)*, decided in 2010, the court relied on other authorities similar to *Cepeda* to reverse the Board’s decisions.⁴¹⁴

Indeed, in a recent case where, as here, the contradictory evidence overlooked by the decision-maker was contained in the same document on which it relied in support of its finding, Justice James Russell concluded that “[a] review of the evidence before the Board reveals an extremely partial selectiveness in order to support conclusions that the evidence in total may well contradict.” (*Prekaj v. Canada (Citizenship and Immigration)*, 2009 FC 1047 (CanLII), 85 Imm. L.R. (3d) 124, at par. 26; see also *Sinnasamy v. Canada (Citizenship and Immigration)*, 2008 FC 67 (CanLII), 68 Imm. L.R. (3d) 246 at par. 33).⁴¹⁵

Applicants from other countries such as St. Vincent and the Granadines were facing the same problems. In *Alexander v. Canada (Citizenship and Immigration)*⁴¹⁶ the court noted:

I find absolutely astonishing that the IRB publishes information on country conditions but fails to mention that the Consul General has admitted that the state cannot guarantee the effectiveness of a restraining order. That would be relevant information in any assessment as would an analysis of the types of threats Ms. Trimmingham received as opposed to those received by Ms. Alexander... In the light of the above, no further analysis need be made of the finding that Ms. Alexander did not try hard enough to seek state protection. As Mr. Justice Urie noted in the Federal Court of Appeal in *Ward*, above, the inability of a state to protect may be because it turns a “blind eye” to the situation. Good intentions, if they are good intentions, are simply not enough. Why were there reports five years ago that the

⁴¹³ Ibid at paras 32-33.

⁴¹⁴ *Gonzalo Vallenilla v. Canada (Citizenship and Immigration)*, 2010 FC 433 (CanLII)

⁴¹⁵ Ibid at para 15.

⁴¹⁶ *Alexander v Canada (Citizenship and Immigration)*, 2009 FC 1305 (available on CanLII).

Government was renovating a women's shelter, while the latest reports indicate that there is no shelter at all.⁴¹⁷

Nevertheless, in clear disregard of these authorities, the IRB continued to rely on selected parts of the CPD in isolation in order to deny refugee status to Mexican (and other) refugee applicants. This was the situation in the 2009 case of *Sanchez v. Canada (Minister of Citizenship and Immigration)*⁴¹⁸, where the Court admonished the IRB for relying on the presumption of state protection in the face of concrete evidence of the dangerous conditions prevalent in Mexico. The Court concluded that, at the very least, the IRB was obliged to engage with clear evidence that contradicts its findings:

There was cogent evidence before the Board that the police in Mexico are corrupt and have extensive involvement with kidnapping gangs, that human rights commissions are ineffective, and that government initiatives to deal with the problem have largely failed. All of this is highly relevant to the issue of why the principal applicant did not go to the police. In other words, it was the usual “mixed bag”, but in this case the evidence that refuted the Board’s conclusions on this point was so cogent and so important to the applicants’ case, that the Board’s failure to deal with it and to simply rely upon the usual presumptions of state protection looks more like defending a general position on Mexico than addressing the specifics of the evidence before the Board in this case. If there is cogent evidence before the Board that government efforts are failing and that many normal citizens will not go near a police station, then I think great care is needed before the Court can accept the frequently used “mixed bag” rationale for not mentioning clear evidence that contradicts the Board’s conclusions. I agree with the respondent that, as a general principle, a Board is not obliged to mention every piece of evidence. However, the Board should not paper over compelling evidence that directly contradicts its own conclusions with phrases such as “the panel does not disagree”, or “based on the totality of the evidence”. The Board should engage with that evidence and say why it can be discounted or why other evidence is to be preferred. Reading the decision as a whole, it is my view that the Board does not engage with clear evidence that contradicts its own conclusions in the way that the jurisprudence of this Court says it should engage with that evidence. This becomes particularly problematic in a case where, as I have found, the Board also made a reviewable error by discounting the principal applicant’s own testimony because she was not a disinterested party. This is a reviewable error and the matter needs to be reconsidered.⁴¹⁹

⁴¹⁷ Ibid at paras 13-14.

⁴¹⁸ *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1336, [2009] 3 FCR 591.

⁴¹⁹ Ibid at paras 81-88 [emphasis added]

Additionally, the Federal Court was critical of the IRB for having failed to adequately take into account the evidence provided by the applicant and for having preferred certain evidence without a reasonable basis for so doing:

In the present case, the Board did not just fail to weigh the principal applicant's evidence against other evidence. The Board adopted as a principle of its decision that other evidence was to be preferred over the "written evidence and oral testimony given by the applicant" because the other evidence came from sources having no interest in the case and because those sources were more reputable. There is no explanation as to why the applicants' "written evidence" did not come from reputable sources, or sources that were any less reputable. There is also no explanation as to why the principal applicant's evidence, without a negative credibility finding, should be discounted as less reputable merely because she had an interest in the outcome of the case. As Justice Snider pointed out in *Coitinho*, this is "tantamount to stating that documentary evidence should always be preferred to that of refugee claimant's because the latter is interested in the outcome of the hearing. If permitted, such reasoning would always defeat a claimant's evidence."⁴²⁰

Unfortunately, the guidance offered by the Federal Court in *Sanchez* doesn't seem to have had much of an effect on the IRB, which continued with its cherry picking practices with respect to the use of the CDP. Further cases decided in 2009 dealt the same problematic practices addressed in *Sanchez*, and the Federal Court repeatedly overturned the IRB's decisions on the basis that decision makers cannot rely exclusively on those parts of the CDP that boost their findings and ignore the totality of evidence. In its June 2009 decision in *Toriz Gilvaja v. Canada*⁴²¹, the Federal Court yet again explained that the Board should assess the totality of the evidence, and not rely exclusively on the information that would favour a denial of refugee status:

There is evidence on the record that contradicts the Board's decision that state protection would be available to the applicant. The Board's role was to make findings of fact and arrive at a reasonable decision based on the evidence, even if conflicting. Certain passages from the documentary evidence appear to show that there is some desire by the present government of Mexico to improve the situation, while other passages suggest that protective measures are ineffective. In this circumstance, the Board had a duty to explain

⁴²⁰ Ibid at para 58.

⁴²¹ *Toriz supra* note 237.

why it preferred the evidence of the efforts the state is taking over the evidence that corruption and impunity continue to be a widespread and pervasive reality in Mexico. Upon reading the documentary evidence and the Board's decision, it is clear that the Board took a selective analysis of the documentary evidence.⁴²²

Similarly, in *Lopez Villicana v. Canada*⁴²³, released in November 2009, the court explained, in reliance on documentary evidence and academic authorities contained in the CDP, that the efforts of the government of Mexico should not equated with effective state protection. In so doing, the Court overturned the Board's decision, as a result of yet another example of selective reliance on and interpretation of the CDP:

The Board was notably silent on this evidence that contradicted its own conclusions. The Board did not have to accept this contrary evidence. But it had an obligation to review it and say why it could be discounted in favour of other reports that support its own conclusions. See *Babai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1341 (CanLII) [2004] F.C.J. No. 1614, paragraphs 35-37, and *Cepeda-Gutierrez*, paragraph 47. The Board's failure to do this renders the Decision unreasonable.⁴²⁴

The important of the IRB engaging with the CDP information, as well as other available evidence, in a full and fair fashion was yet again emphasized by the Federal Court, in the 2014 decision of *Ponniah v. Canada*.⁴²⁵ In this case the Court explained that the principles from *Cepeda* impose an obligation on decision makers of the IRB to analyze and apply relevant evidence that tends to contradict its findings, and in so doing expressly rejected the argument that *Cepeda* applies exclusively to evidence that is specific to the applicant (as opposed to gathered from the CDP):

The Board only referred to one excerpt at page 33 of a Danish Immigration Service report titled "Human Rights and Security Issues concerning Tamils in Sri Lanka," in discounting the Applicant's place of birth in Eastern Sri Lanka as a significant risk factor. However, the

⁴²² Ibid at para 38.

⁴²³ Lopez *supra* note 187.

⁴²⁴ Ibid at paras 78-79.

⁴²⁵ *Ponniah v. Canada (Citizenship and Immigration)*, 2014 FC 190 (CanLII)

Applicant cited many excerpts from a United Nations High Commission on Refugees report titled “Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka” (at pages 56 and 61) and a United Kingdom Border Agency report titled “Sri Lanka: Country of Origin Information,” (at pages 93, 120-122, 126-127 and 158). The Respondent argues that the precedent in *Cepeda-Gutierrez* applies to evidence specific to an applicant, and not general country condition evidence. I find that nothing in *Cepeda-Gutierrez* supports such a narrow reading so as to constrain its precedent to evidence regarding the Applicant’s personal situation. This is supported by the jurisprudence (*Packinathan*, above, at para 9; *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 (CanLII); *Gonzalo Vallenilla v Canada (Minister of Citizenship and Immigration)*, 2010 FC 433 (CanLII)). It is unreasonable to ignore the clear evidence which shows that Eastern and Northern Tamil males face the same substantial risks of persecution. This contradicts the Board’s finding on this important issue and no single concluding statement by the Board which asserts that it considered all the evidence is sufficient to support a finding otherwise (*Cepeda-Gutierrez*, above, at para 17; *Packinathan*, above, at para 10).⁴²⁶

Recently, the IRB in *Gonzales v. Canada*⁴²⁷ (*Citizenship and Immigration*) unsuccessfully advanced a similar argument to that which was rejected in *Ponniah* from 2014:

The Respondent suggests that *Cepeda-Gutierrez*, above, should be read narrowly so that it does not apply where the documents in question use general country documents and are not specific to the applicant. Justice Manson recently disposed of this argument in *Ponniah*...The Board spends a lot of time reciting in a perfunctory way the legal principles that govern the state protection issue, but it avoids dealing with the specifics of the evidence on the key issue. Phrases such as “the preponderance of the evidence” cannot be used to evade the Board’s duty to examine and cite evidence that actually supports its conclusions and deal with evidence that directly contradicts those conclusions.⁴²⁸

As the foregoing has demonstrated, the Federal Court has been clear: the selective reliance on those pieces of evidence or information (whether from the CPD or otherwise) that support the Board’s findings is not an accepted component of refugee adjudication in Canada. Nevertheless, the IRB has been extremely reluctant to integrate this guidance into its practices, as demonstrated by the extensive array of Federal Court decisions that have had to overturn IRB decisions on this

⁴²⁶ Ibid at para 16.

⁴²⁷ *Gonzalez v Canada (Citizenship and Immigration)*, 2014 FC 750 (available on CanLII).

⁴²⁸ Ibid at paras 56 and 59.

basis. Whether the Board's practice in this regard will finally start to change will remain to be seen.

5.7 Conclusion

As this chapter has demonstrated, above and beyond those concerns that exist with respect to the accuracy, currency and objectivity of the CDP, there are significant problems with the manner in which the IRB is interpreting and applying the Mexican CDP. With great frequency, the IRB has cherry picked that information from the CDP that supported its findings, such as evidence of attempts on the part of the Mexican government to improve security and protection, and completely failed to consider the CDP information that contradicts its conclusions, such as the evidence demonstrating the ineffectual nature of government reforms. This practice has affected a great number of Mexican asylum seekers, including LGBT individuals and victims of domestic violence, who have sought protection on the basis of the inability or unwillingness of the Mexican state to protect them from persecution. As this chapter has also shown, the tendency of the Board to engage in this selective analysis of the CDP has increased since the rendering of a persuasive decision emphasizing a strict interpretation of the circumstances in which international protection will be warranted. Despite the fact that the Federal Court has on many occasions criticized these practices, they seemingly persist within the IRB, much to the detriment of refugee applicants from Mexico.

CHAPTER 6: GENERAL CONCLUSIONS

In response to the significant attention paid by the government, press and scholars to Mexican refugee applicants in Canada, this thesis has set out to explore the possible causes and explanations for the low acceptance rate of Mexican asylum claims in the Canadian refugee system, with the aim of challenging the Canadian government's explanation that a great number of Mexicans advance false refugee claims. Its focus has been on the identification and analysis of factors internal to the Canadian refugee system that may be contributing to the high rate of denial of Mexican asylum claims. I have identified four key aspects of IRB decision making that may themselves be contributing to the denial of Mexican would-be refugees: credibility assessment, the application of the doctrine of state protection, inaccuracies in the Mexican CDP, and the selective use of parts of the CDP in the IRB's decisions. Each of these aspects of the refugee determination process are potentially contributing to the high rates of denial of Mexican refugee claims.

As was discussed in detail in Chapter 2, the regular disregard of the "Assessment of Credibility Guidelines for Refugee Protection" provided by the IRB to its decision makers has arguably contributed to the unwarranted denial of Mexican refugee claims. Indeed, the IRB has frequently engaged in subjective assessments and applied tests with no jurisprudential support in order to justify adverse credibility findings of potentially valid Mexican refugee claims. Furthermore, as was discussed in Chapter 3, the failure of the courts to establish one clear test to rebut the presumption of state protection had led the IRB to use ad-hoc jurisprudence to deny refugee status. An analysis of the Board's decisions shows how very difficult it is for Mexican

refugee applicants to succeed in their claims when the IRB considers Mexico to be a democratic country capable of protecting its citizens, particularly when the IRB disregards jurisprudence that holds Mexico to be ineffective at protecting its citizens.

As was demonstrated in Chapter 4, the fact that the IRB decision makers are being provided with weak and misleading information about Mexico could be considered as a contributing cause of the high rate at which Mexican asylum claims are denied. The Research Directorate of the IRB has not succeeded in clearly and accurately explaining the past (and current) country conditions in Mexico. Indeed, the IRB did not follow its own guidelines with respect to how to build a country of origin information package. Instead, a series of links to websites and online documents were categorized and presented without any structured analysis and cohesive explanation, misleading the reader in many ways. Furthermore, analysis of the CDP shows that some of its sources are neither reputable nor objective, including freelance journalists and independent private consulting companies. As a result, the understanding of the country conditions in Mexico is blurred, incoherent and promotes the use of isolated documents of the CDP without considering the entire information in context.

Additionally, in Chapter 5 it was argued that the IRB has a tendency to select and rely on specific components of the Mexican CDP to make a case against asylum seekers. The analysis of various cases from the IRB showed that, in an adversarial fashion, decision makers were building cases against applicants by improperly selecting parts of the CDP and using it to construct arguments in favour of the denial of refugee status. In this process the IRB, by being judge and advocate on its own cause, often failed to address evidence that contradict their

arguments, such as the testimony of the applicant and the parts of the package that showed contrary views. Unfortunately, redress was only the small percentage of Mexican asylum seekers who were able to seek judicial review from the Federal Courts, which have condemned the Board's practice of cherry picking CDP information that supports its findings and ignoring that which does not.

In light of these findings, there are strong reasons to revisit the idea that Mexican refugee applicants were (or still are) fraudulent asylum claimants who try to abuse the system. It is impossible to know how many of the applicants were being truthful in their stories. However, what has been possible to demonstrate is the objective failure of the IRB to correctly apply elementary principles of refugee law contained in Canadian jurisprudence. This error constituted a contributing factor to the low acceptance rates of Mexicans. Unfortunately, it is difficult to determine with precision the extent to which truthful claims have been rejected, in part because the IRB only publishes a selected number of its decisions. Nevertheless, as the findings of this thesis indicate, there are real reasons to believe that truthful and valid Mexican refugee claimants were denied (and continue to be denied) protection in Canada, as a result of the unfair practices of the IRB.

The explanation given by the Canadian government to its citizens and to the international community that the source of the problem was the applicants and a system easy to abuse was inaccurate. The declaration of the former Minister of Citizenship and Immigration that as a result of the high number of rejections he had no other option than to impose the visa on Mexicans was unfortunate and carried undesirable consequences such as negative effects on tourism and

diplomatic relations.⁴²⁹ The Minister clearly had other alternatives instead of preventing and discouraging prospective refugee claimants from coming to Canada by other than establishing extremely costly Visa Application Centers in Mexico. These resources could have been put to work in training decision makers of the IRB in the correct application of Canadian and international refugee law. Properly training decision makers may have had the ability to detect and reject bogus claimants through an application of the principles in the Refugee Convention and relevant jurisprudence, without a need to create subjective tests and issue decisions contrary to the law. This could have resulted in a smaller amount of reversed decisions by the federal courts, which in turn would have resulted in a more effective use of the IRB's resources. However, as Peter Showler noted, the Canadian government has opted to attempt to save resources by establishing a visa requirement for Mexicans, and adding Mexico to the Designated Country of Origin list.⁴³⁰

The addition of Mexico into the DCO list was a mere formalization of the misconception that Mexico is a safe country capable of protecting its citizens. My analysis of IRB cases shows how decision makers have been denying refugee status to Mexicans since the 1990's under the doctrine of adequacy of protection, which focusses on Mexican efforts to combat criminality and corruption, rather than insisting on real results. Unfortunately, the fact that the situation never improved demonstrates the fallacy of this test. The argument of adequacy of protection is so

⁴²⁹ Laura Dawson, "Canada's trade with Mexico: Where we've been, where we are going and why it matters" Canadian Council of Chief Executives (February 2014) online: Canadian Council of Chief Executives <http://www.ceocouncil.ca> "Canada has paid a high Price for Visa in terms of reputation and lost revenue from tourists, students and investors. In 2008, Mexican tourists spent \$365 million in Canada. In 2012, that number fell below \$200 million. Canadian airlines have had to eliminate or reduced planned routes and it is virtually impossible for a Mexican to arrange travel to Canada on short notice, whether for business purposes or to take advantage of Canada's competitive airfares to Asia." at 17. See also Liette Gilbert "Canada's Visa Requirement For Mexicans and Its Political Rationalities" *Revista UNAM* (2012) online: revistascisan <http://www.revistascisan.unam.mx>

⁴³⁰ Clark *supra* note 12.

frequently repeated in IRB decisions that it appears in almost all publically available decisions where refugee status is denied to a Mexican applicant. In order to comply with its international obligations as a signatory country of the Refugee Convention, it is critical for Canada to understand that what counts is the actual protection offered to foreign nationals in their home countries, rather than governments' good intentions. As Mr. Justice O'Keefe explained: "Having laws on the books does not equate with actual, experienced state protection for citizens."⁴³¹ While several federal court judges have adopted this approach, in practice the IRB continues to apply the "good intentions" test. The inclusion of Mexico in the DCO does not just confirms an old and persistent point of view of the IRB but also sends the wrong message to new decision makers, potentially predisposing them to evaluate Mexican refugee claims in the same way they would approach claims from much safer countries, such as Australia or Japan. It also sends the wrong message to the international community when they refuse to recognize refugees from dangerous states. The ministerial decision of officially considering Mexico a safe and non-refugee producing country also goes against the content of the IRB's CDP, as well as numerous national and international reports from reputed authors and sources of information.

The fact that in 2014 more than 30% of reviewed applications made by Mexicans were accepted shows how Mexico does not belong on the DCO list.⁴³² Despite that designation, Mexico will continue to be a significant refugee producing country until such time as its government manages to find a way to provide effective protections for the human rights of its nationals. Furthermore, as long as the IRB continues to disregard the principles of the Refugee Convention in its adjudication of asylum claims, Canada will continue to fail to fulfill its

⁴³¹ Toriz *supra* note 237 at para 39.

⁴³² Janet Dench, "Statistics for the Refugee Protection Division for the first half of 2014" Canadian Council for Refugees. (forwarded e mail from Janet Dench on Professor Catherine Dauvergne on August 26, 2014)

obligations as a signatory of such convention.⁴³³ Despite the very real dangers that many Mexicans face in their home country, being recognized as a refugee in Canada is rendered virtually impossible as a result of a range of aspects of the Canadian immigration system. The visa requirement and the inclusion of Mexico on the DCO list are not just the only burdens that a Mexican refugee applicant needs to overcome. If a Mexican refugee manages to come to Canada, the IRB will be waiting for her with a whole set of argumentative tools to deny her refugee status: lack of credibility, internal flight alternative, high level of democracy in her country and the use of isolated parts of the CDP that prove that she is lying and Mexico is safe.

It remains worth noting that, despite the efforts made by this thesis, further research is required in order for the extent of the issues analysed in this work to be entirely documented and understood. If researchers had access to all IRB decisions in cases involving Mexican refugee applicants, with appropriate time and funding it would be possible to conclusively determine whether the primary source of the denial of Mexican refugee claimants was the illegitimacy of their applications, or the IRB's disregard for the principles of refugee law. If such research demonstrated, as this thesis has begun to do, that the IRB has been denying refugee status to Mexicans in violation of national and international refugee law, perhaps law makers could be petitioned to lift the visa requirement and DCO designation, which were based on the potentially erroneous "bogus claimant" theory.

⁴³³ Catherine Dauvergne, *Humanitarianism, Identity, and Nation. Migration Laws in Canada and Australia*. (2005: UBC Press) at. 86. As Catherine Dauvergne has argued, that the refugee convention is in similar tone and form to many of the human rights instruments that are now considered to constrain national sovereignty at some level. The treatment that Mexican refugee claimants regularly receive from the IRB is arguably a violation of Canada's international obligations and an example of the Ministry of Immigration's internal policies trumping the contents of international human rights legislation.

Another interesting area of research would be to investigate if the IRB employed similar techniques against other claimants from high refugee producing countries. In Chapter 3, I analyzed several Federal Court cases that overturned the wrongful application of the law against Roma, a group that also faced the same accusations as Mexicans. Similarly, the Czech Republic (a prime source of Roma refugee claimants in Canada) was also made the subject of a new visa requirement and was added to the DCO. Other cases from the Federal Court discussed in Chapter 5 also dealt with the unfair adjudication of refugee claims made by citizens of Sri Lanka, which is one of the main refugee producing countries in Canada. If further research proves that the IRB is using equally unlawful techniques in its determination of refugee claims from these countries, it will provide strong evidence for an argument that the tribunal is deliberately curtailing the rate of acceptance of refugee claims from countries that produce high numbers of asylum seekers in Canada, many of whom should legitimately qualify as refugees.

At this point it is useful to make an analogy, which, in my estimation, demonstrates the extent to which the operation of the Canadian refugee claims process is imposing insurmountable barriers for asylum seekers, such that even extremely persecuted individuals may not be able to succeed in their refugee claims. For the purposes of this analogy we will go back 150 years, when President Abraham Lincoln issued the Emancipation Proclamation of 1863, freeing the majority of slaves in the United States. After the Civil War ended, the enforcement of the Proclamation was difficult and many freed African Americans continued to suffer the harshness of slavery and persecution.⁴³⁴ One of the states where white people refused to free slaves was

⁴³⁴ See Douglas A. Blackmon *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*. (New York: Anchor Books: 2008)

Tennessee.⁴³⁵ Let's imagine the predicament of a woman freed by the Proclamation, but kept in slavery and forced to work in inhuman conditions. She managed to escape and asked for help from the state authorities, but the police failed to protect her, beat her and returned her to her master. Now let's assume that she managed to escape and come to Canada, where she applied for refugee status. If the current policies with respect to refugee determination were applied to her case, she would almost certainly have been denied asylum.

First of all, the IRB would demand complete precision in her declarations, in spite of the traumatic nature of her experiences. The expectation of accurate memory is very important for IRB decision makers. If she mentions something new during her hearing that she failed to mention in her written form, she may be considered a liar. Also, if she equivocates with dates, descriptions and names of people, she is incredible too. If she manages to be believed, the IRB demand from her clear and convincing evidence that the state of Tennessee and the American government are unable to protect her. As a democratic state, the US is presumed capable of protecting its citizens, and therefore she would be requested to prove that she approached the police without success. It would not matter if the police failed to protect her and actually persecuted her, she had the obligation to go to other police members and even approach civil and human rights organizations because a failure to do so would be fatal to her claim.

Now if she provides evidence to show that the US is unable to protect her, the decision maker will apply the doctrine of adequacy of protection in a manner similar to the following: "The information contained in the CDP shows how the government of United States is making

⁴³⁵ See Antoinette G. van Zelm "Hope Within a Wilderness of Suffering: The Transition from Slavery to Freedom During the Civil War and Reconstruction in Tennessee" online Library of Congress < <http://library.mtsu.edu>>

considerable efforts to abolish slavery. Just a few years ago, President Abraham Lincoln proclaimed the abolition of all forms of slavery in the US, including Tennessee. Therefore the panel concludes that Ms. xxxxx has adequate protection in United States and she is not a refugee or a person in need of protection.” It would likely not matter if the text and principles outlined in the Proclamation were only words without enforcement, because for the IRB the test is adequacy and not effectiveness. Furthermore, the IRB could apply the test of Internal Protection to demand from her evidence that she tested previous locations before coming to Canada. However, even if she did so it may not matter because the IRB will find another “safe” location in her home country to which she could purportedly relocate. On those bases, the IRB would deny her claim for asylum. If she managed to find the funds to pay a lawyer, she may be able to seek judicial review from the Federal Court. However, even if leave were granted for her review, the inclusion of the United States on the DCO means that she could be deported prior to the release of the Court’s decision in her case.

The atrocities committed against the African American community in the United States, even after President Lincoln made Emancipation Proclamation, have been well documented. It would be hard to deny that some of them had actual grounds to be refugees, particularly in light of the incapacity and/or unwillingness of America to protect them. Unfortunately, the situation faced by Mexicans currently seeking asylum in Canada is unfortunately not that far removed from the hypothetical situation described above.⁴³⁶ Indeed, many Mexican refugee claimants are being sent back to Mexico to face dangerous conditions and even death. The current approach

⁴³⁶ See Loan Grillo “The Mexican Drug Cartels’ Other Business: Sex Trafficking” *Time Magazine* (31 July 2013) online: Time Magazine <http://world.time.com>. Narco-gangs, including the Zetas, have diversified their portfolio to include buying and selling women as slaves. See also: Paris Martinez, “How’s Mexico’s Zetas slave Engineers” *Insight Crime* (October 2012) online: Insight Crime <http://www.insightcrime.org>

taken by the IRB shows how decision makers will find a way to justify a negative finding of refugee status, regardless of the evidence of persecution that is put forward. The IRB decisions analysed in this thesis have frequently demonstrated the extent to which the IRB has twisted country information, jurisprudential principles and its own policies in order to dismiss the claims of Mexican refugee claimants. This is far different from what the writers of the Refugee Convention in *Travaux Préparatoires* had in mind. It is also far away from the expectations that the international community had for Canada when it ratified this international instrument. Once seen as a country that welcomed refugee applicants and treated them fairly, Canada is no longer living up to this reputation. Indeed, refugee applicants who come to Canada in search of protection may be shocked by the asylum system that greets them. What they will find is an adversarial system, one similar to that employed in civil and criminal trials, but with the only difference that the opposite counsel will be the decision maker itself.

Indeed, the way that the IRB is handling and approaching claims from certain countries such as Mexico seems mechanical. The IRB's decisions seem almost robotic and at times it seems that the only differences among them are the name of the decision maker and the facts of the claim⁴³⁷. Arguably, the IRB now rejects Mexican refugee claims almost automatically, without evaluating each case on its own. This is particularly problematic in light of the severity of the problems that are currently affecting Mexicans in their home country. Unfortunately, instead of receiving protection, most of those who make it to Canada and seek refugee status are sent back and labelled as "bogus." As has been demonstrated herein, the reasons that so many Mexicans are denied refugee status in Canada are far more complex than that. Indeed, it is arguable that a

⁴³⁷ Kirk Martin "Plagiarism alleged in some Canadian refugee board decisions" *The Globe and Mail* (12 October 2012) online: The Globe and Mail: www.theglobeandmail.com

large number of the failed Mexican asylum seekers are rejected not because they are illegitimate refugee claimants, but because the refugee system makes it almost impossible for them to prove that they are not. This is a direct contradiction of internationally agreed rules about standard of proof in refugee determination. Until such time as the IRB's own decision making process is reformed to remove these unfair practices, Canada will continue to deport potentially legitimate refugee claimants back to extremely dangerous circumstances in Mexico, in blatant breach of international law.

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