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**Assessing the Efficacy of the Application of the new  
Mexican Law for Refugees and Subsidiary Protection  
2011**

**Through the Mexican Commission for Refugee Aid  
(COMAR) in Relation to Asylum Seekers**

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## Declaration Form

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work, has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed: Jazmin Sol Terroso

Date: 22 May 2012

## **Acknowledgements**

To all the people who believe that change is possible

## Abstract

In Mexico the governmental authority in charge of refugees and asylum seekers is the Mexican Commission for Refugee Aid (hereafter COMAR). In 1980, Mexico was the host country for numerous populations that were fleeing dictatorships in Central America. Therefore, the Mexican federal government established COMAR as the agency in charge of analyzing asylum claims and responding to refugee needs. Since then, COMAR has been the governmental agency in charge of carrying out refugee status determinations (hereafter RSD) and providing assistance to refugees in Mexico in accordance to national and international standards.

Hence, in January 2011 the Mexican government enacted a new refugee law and COMAR became the institution in charge of its applicability. According to the organisation Voices on International law, Policy and Practice “Mexico created this law in order to bring its practices into line with international standards, nonetheless, despite the law is expansive and inclusive in its definitions and principles, falls short on process and protection for disfavored groups.”<sup>1</sup>

Therefore, the scope of my research will be the new asylum law at the light of the protection of the rights of asylum seekers. Firstly, I will analyze if the new national asylum law has fully incorporated the 1951 Refugee Convention. Secondly, I will conduct a qualitative research through interviews with COMAR officials. Secondly, I will conduct interview with asylum seekers in order to analyze how the law is put into practice.

**Key words:** refugee, law, asylum seeker, refugee status determination, vulnerable groups and refugee’s rights.

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<sup>1</sup>Information available at: <http://intlawgrrls.blogspot.com/2011/02/from-principles-to-process-mexicos-new.html> [accessed 21.11.11]

## **List of Abbreviations and Acronyms**

<b>BID</b>	Best Interest of the Child Determination
<b>COMAR</b>	Comision Mexicana de Ayuda a Refugiados (Mexican Commission for Aid to Refugees)
<b>CRC</b>	Convention on the Rights of the Child
<b>ICCPR</b>	Civil and Political Rights Covenant
<b>NGO</b>	Non- governmental Organisation
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>RSD</b>	Refugee Status Determination
<b>UNCHR</b>	United Nations High Commissioner for Refugees
<b>UNICEF</b>	United Nations Children's Fund
<b>UN</b>	United Nations

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## CHAPTER 1. INTRODUCTION

### 1.1 Conceptual framework

At the present time refugee law faces a severe crisis. In the literature, refugee law is increasingly seen as creating an alternative pathway for migration and therefore raises concerns about border control and migration policies. In this respect, migration policies have become a central issue in the political agenda. In fact, some right wing political movements have proposed restrictive approaches to migration policy in order to gain votes and power (Nathwani: 2003).

Concerning this, Goodwin-Gill states that a tension between refugee law and migration policies emerged in 20<sup>th</sup> century. According to Goodwin-Gill, migration policies and practices during the 1980s and 1990s became more restrictive. Moreover, migration policies were largely dominated by strict visa requirements, restrictive admissibility criteria, safe third country removals, carrier sanctions and the emphasis on removal of failed asylum seekers (Goodwin-Gill: 1996).

Furthermore, the migration debate is complex and ideologically charged (Nathwani: 2003), and to some extent is ‘obsessive, punitive, neurotic and in its own terms, inexplicable’ (Skran: 1992). Consequently, refugee law is embroiled in complex ideological debate.

The main arguments in the debate about refugee law oscillate between a realism that tries to justify restrictive migration policies and an idealism that considers that the international protection of refugees should go beyond migration policies. However, Harvey argues that even the most comprehensive models of refugee law will be partial when the protection measures they outline are implemented, as refugee law is a dynamic and complex issue that cannot disregard migration policies (Harvey: 1999).

In this context, Nathwani states that “in legal terms, the areas of migration law and refugee law differ in their legal structure: whereas migration law is ruled by the



principle of sovereignty, where every state is free to design and implement its own immigration policy, refugee law is characterized by various international obligations based on international law. While, under international law, a state is free to decide that it wishes no migration, this level of discretion is not permitted under refugee law” (Nathwani: 2003).

Other academics, such as Black, support Nathwani’s thesis, highlighting that special public policy measures are justified in order to differentiate a refugee from a economic migrant (Black: 2001).

Nathwani’s thesis points out that the main problem relating to refugee law is that it is perceived as an obstacle to the efficiency of migration controls. Consequently, this perception leads critics to demand that refugee law is practiced restrictively (Nathwani: 2003). Contrary to Nathwani’s thesis, Weis (1982) claims that although refugee law is linked to migration policies, it is not considered an obstacle to migration controls.

According to Weis, the political will to strengthen refugee law is clear, since several states have ratified international legal instruments for the protection of refugees and some states have recognized this responsibility within their national legal system (Weis: 1999). It is in this context that the present research takes place. It is undeniable that refugee law is directly related to migration policy, thus, a progressive practice of refugee law is at stake.

In this regard, it is important for this study to analyze and assess the efficacy of the application of the law for refugees and subsidiary protection enacted in Mexico in 2011 under the auspices of the Mexican Commission for Refugee Aid (COMAR). This analysis and assessment will be carried out within the context outlined in the following section.

## **1.2 Asylum in Mexico**

Asylum in Mexico is a tradition that started with a massive flow of Spaniards fleeing the Spanish Civil War. At the end of 1930’s, the Mexican president Lazaro Cardenas

welcomed a considerable migration of Spanish republican activists that were fleeing a dictatorship in Spain (COMAR: 2009).

In the 1960's another important wave of refugees arrived to Mexico, fleeing political and social conflicts in South America. At that time, this region was facing military movements, coups d'états and violent clashes as a consequence of communist or anticommunist regimes. Moreover, people from universities, trade unions, and political and cultural groups from Argentina, Brazil, Uruguay, Chile and Bolivia also fled their countries.

Over a decade later, in 1973, Chile was undergoing severe repression as a result of the military coup against the government of Salvador Allende. Mexico therefore became the main destination for a considerable migration flow of people that feared persecution in their home countries. In this respect, Mexico granted refugee status to great number of Spanish speaking asylum seekers that were quickly integrated into Mexican society and the economy (COMAR:2009).

Nonetheless, the need for assistance for asylum seekers increased when instability in various countries in Central America arose, such as Nicaragua with the Sandinista revolution and violent insurgencies in El Salvador and Guatemala. As a consequence, the Mexican government decided that the creation of a specialized body for asylum seekers and refugees was needed.

### **1.3 Mexican Commission for Refugee Aid (COMAR)**

The Mexican government decided to create an organisation in charge of creating and implementing policies to provide attention to asylum seekers and refugees and to create adequate conditions for them to integrate effectively into the country. This organisation was called Mexican Commission for Refugee Aid (hereafter COMAR).

The decree establishing COMAR was promulgated on July 22 1980, establishing as a first priority the signing of agreements with international organizations. COMAR was to study the needs and problems of the refugee community and provide it with aid,

protection and assistance, seeking solutions of either a temporary or permanent nature regarding employment and economic self-sufficiency.

Since then, COMAR has been the governmental agency in charge of carrying out Refugee Status Determinations (hereafter RSD) and providing assistance to asylum seekers and refugees in Mexico in accordance with national and international standards. Moreover, in 2000 Mexico signed and ratified the 1951 United Nations Convention Relating to the Status of Refugees<sup>2</sup> and its 1967 Protocol, in order to demonstrate its commitment to complying with the international standards on refugees' issues. Since then, COMAR has adhered to this international legal framework when carrying out RSDs for people seeking asylum in the country.

#### **1.4 Mexican Asylum and Subsidiary Protection law 2011**

In January 2011, the Mexican government enacted a new Mexican Asylum and Subsidiary Protection Law, in order to bring the legislation in line with the international standards and obligations that Mexico acquired when it signed international human rights conventions and treaties.

Through the new law, Mexico has put an end to the lack of a specific legal framework dealing with refugee issues. Moreover, from now on Mexico has sole responsibility for considering RSDs in accordance with the new legislation, a duty that it previously shared with the United Nations High Commissioner for Refugees.

Nonetheless, there is a concern among the international community regarding the efficacy of the implementation of the law. This concern has arisen since an effective implementation of the new law could have an impact on the migration flow to the United States of America<sup>3</sup>. Furthermore, these concerns have been highlighted by the organisation *Voices on International law, Policy and Practice*, which monitors human rights issues in the Americas: "Mexico created this law in order to bring its practices into line with international standards, nonetheless, despite the law is expansive and

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<sup>2</sup>Information available at: <http://www.unhcr.org/3b73b0d63.html> [accessed 15.11.11]

<sup>3</sup>Information available at: <http://www.ilw.com/articles/2011,0202-dzubow.shtm> [accessed 23.04.2012]

inclusive in its definitions and principles, falls short on process and protection for disfavored groups”.<sup>4</sup>

## CHAPTER 2. METHODOLOGY DESIGN

### 2.1 Research Description

In the last few decades there has been “an intensification of human rights violations in countries of origin and a severe decline in the level of protection and assistance provided to refugees and asylum seekers in countries of asylum”.<sup>5</sup>

Nonetheless, in more recent years there have been many advances in international human rights law. However, the problem now is not about establishing principles but about practice. In this respect, it is true that an established law may set a norm for practice, although small deviations in the applicability of the law may have a considerable negative impact in its efficiency, widening the gap between practice and the law. Therefore, it is important to monitor the progress of the practical implementation of human rights instruments adopted by governments, in order to avoid complacency and inaction once a treaty has been ratified (Gentile: 2003).

Consequently, the scope of this research will be the practices of COMAR in light of the new Mexican asylum law and the subsidiary protection law of 2011 when dealing with asylum seekers.

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<sup>4</sup>Information available at: <http://intlawgrrls.blogspot.com/2011/02/from-principles-to-process-mexicos-new.html> [accessed 21.11.11]

<sup>5</sup>Gentile, L. (2003) “New Asylum Regimes or a World without Asylum? The myth of International Protection”, in in Joly, D. *Global changes in asylum regimes*, Palgrave/Macmillan, Basingstoke, Hampshire; New York, P.51 Available at: <http://site.ebrary.com/lib/roehampton/Doc?id=10057384&ppg=51> [Accessed 25.04.2012]

The main focus of the research will be to answer the following questions:

- a. How does the Mexican law comply with the rights of asylum seekers according to the international standards?
- b. How do COMAR officials' practices respond to asylum seekers' legal entitlements?

To this purpose, this study will analyze the new national asylum law in the light of the UN Convention of 1951 relating to the Status of Refugees, in order to establish progress and gaps in protection. Secondly, qualitative data research and analysis will be conducted through interviews with COMAR officials to obtain an insight into COMAR practices when applying the law.

Moreover, research and analysis will be conducted through interviews with asylum seekers to obtain an insight into the perspectives and experiences of the beneficiaries of the law.

Overall, the aim of this research is to analyze the efficacy of the new asylum law and to establish how and whether or not COMAR practices meet asylum seekers' needs and respond adequately to their legal entitlements. The main objective is to identify best practice, gaps in protection and the efficiency of the law when it is implemented practically with regard to asylum seekers.

## **2.2 Methodology Description**

In order to answer my research questions, I will firstly analyze the new Mexican asylum law and Subsidiary Protection 2011 together with the UN Convention of 1951 relating to Refugee Status, its 1967 Protocol and the Cartagena Declaration of 1984; both international instruments related to refugee issues which have been signed and ratified by Mexico.

At this stage, the aim of the research is to find out whether the national asylum law complies with the international standards or if it falls short in the provision of legal protection to asylum seekers.

Consequently, at the end of the first two chapters the researcher intends to highlight the progress (positive aspects) and the gaps in protection (challenges) found within the new legislation in terms of provisions for asylum seekers. In order to establish the comparison between the international and the national standards, the study will use content analysis as its methodology.

Secondly, the author will conduct interviews with senior COMAR officials and protection officials, as the people responsible for applying the law (Interview A). In addition, the research will undertake interviews with asylum seekers in Mexico, as the beneficiaries of the national law (Interview B).

The main objective at this stage of the research will be to identify how the local authorities respond to the asylum seekers' needs and legal entitlements and how their practices comply with the obligations stipulated in the law.

Interview A - This questionnaire will be conducted to COMAR officials. This interview focuses on questions about the Mexican Asylum law and how the officials apply it on the field.

Interview B – This questionnaire will be conducted on a “representative sample” of current asylum seekers in Mexico. This interview focuses on questions about their experiences (in terms of treatment and information about their procedures) since their arrival in the country. The main purpose is to identify their main needs and their perception on whether their basic needs have been fulfilled.

Consequently, the findings of this research could lead to further research in order to elaborate recommendations for how COMAR could improve the applicability of the asylum law in order to have a greater positive impact among the asylum seekers community in Mexico.

The sample size will consider the total number of asylum seekers in the last two months, a number which ranged between 5 and 10, although it is important to notice that the number of asylum claims varies considerably from one month to another.

As the findings will consist of words and observations, a systematic approach is required to understand and order the collected qualitative data (Taylor Powell and Renner: 2003).

Hence, the researcher will use content analysis to analyze and interpret it. Content analysis methodology “has been defined as a systematic, replicable technique for compressing many words of text into fewer content categories based on explicit rules of coding [...] [Moreover] it offers a technique for making inferences by objectively and systematically identifying specified characteristics of messages [...] It can be a useful technique for allowing us to discover and describe the focus of individual, group, institutional or social attentions.”<sup>6</sup>

Thus, the collected qualitative data will be analyzed in order to identify consistencies and differences among all the answers. Afterwards, the researcher will explore connections and relationships between the answers in order to categorize the information. Finally, these categories will be given certain value or measure and the researcher will identify patterns and connections between the categories.

### **2.3 Limitations and ethical issues arising from methodology**

This study is based on the analysis of the national law with the international law, both publicly available data, therefore, there are no issues of ethical concern. Nevertheless, the study will also analyze data collected from interviews, thus, confidentiality and informed consent from the interviewees was taken into account.

Moreover, the foremost limitation identified by the author of this research relies on the interpretative nature of content analysis method. Hence, it is important to mention that efforts will be made in order to systematically process the data as objectively as possible.

However, it should be highlighted that this study does not represent absolute truths and the conclusions are based on the assessments of the researcher.

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<sup>6</sup> Stemler, S. (2001) *An overview of content analysis. Practical Assessment, Research & Evaluation*. Available at: <http://PAREonline.net/getvn.asp?v=7&n=17> [accessed 26.04.2012]

### **CHAPTER 3. THE MEXICAN LAW FOR REFUGEES AND SUBSIDIARY PROTECTION AND THE INTERNATIONAL LEGAL STANDARDS RELATING REFUGEES AND ASYLUM SEEKERS: THE POSITIVE ASPECTS**

The new Mexican law for Refugees and Subsidiary Protection (hereafter ‘Mexican asylum law’<sup>7</sup>) fills a gap in the Mexican legislation, and gives legal grounds to the fulfilment of the implementation of international commitments made by Mexico. In April 2000, Mexico ratified the UN Geneva Convention of 1951 and its 1967 Protocol relating to the Status of Refugees, and also signed up to the Cartagena Declaration in 1984.

Furthermore, the new Mexican refugee law not only represents a harmonization with the international instruments, and therefore provides legal certainty to asylum seekers and refugees in Mexico, but also makes clear the distinction between economic migrants and refugees. This is an important step forward within the region, since there is a need to separate migration issues from refugee issues in terms of legal protection and treatment. Therefore, the new legislation recognises that each of these phenomena demand a different legal approach.

Thus, the Mexican refugee law includes principles of international refugee law protected by the 1951 Convention and other international conventions that Mexico has ratified. These include: the principle of non-refoulement, non-discrimination, no sanction for illegal entry, family unit, the best interests of the child, non-consular notification and confidentiality. In addition, the Mexican refugee law also includes articles that regulate subsidiary protection, enhancing country responsibilities in relation to human rights covenants and declarations such as: the Universal Declaration of Human Rights, the American Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR).

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<sup>7</sup> Also, the Mexican asylum law will be referred through this paper as the Mexican refugee law, national legislation or national law.



It is important to mention that the new Mexican refugee law represents the first national legal framework to provide protection to those who seek asylum in the country. This framework has seen an end to the former practice, which saw the Mexican authorities take their decisions relating to refugees and asylum seekers based on administrative documents, such as circulars, issued by the migration authority.

This chapter aims to highlight the positive aspects of this national refugee law in the context of the international legal standards in place to protect asylum seekers and refugees. The main positive aspects of the new legislation are outlined below:

### **3.1 Definition of the term “refugee”**

In order to find out whether the Mexican refugee law contains a broader definition of the term or if its definitions falls short in terms of protection, it is necessary to mention the definitions of the term refugee contained in the main legal instruments: the UN Geneva Convention of 1951 and its Protocol of 1967 relating to the States of Refugees, and the Cartagena Declaration of 1984.

It is important to mention that on many occasions when the UN Geneva Convention does not mention certain terms within the international treaty, it will be necessary to review the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (hereafter the UNHCR Handbook). These clarify and explain both the broader sense of the Convention and its practical applications. Similarly, when the Mexican Refugee Law makes no mention of certain matters, it will be also necessary to review the handbook of regulations for the Mexican refugee law.

#### *A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

Since its creation the United Nations, the ultimate international organisation, has been interested in the protection of refugees around the world. This might be related to the fact that world history has shown that whenever a country or a region goes through violent economical, political or social upheaval, the population affected by these changes has a tendency to migrate.

Thus, the international community decided to highlight the difference between a migrant and a refugee:

“g]rounded in Article 14 of the Universal Declaration of human rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centerpiece of international refugee protection today.(1) The Convention entered into force on 22 April 1954, and it has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention.(2) The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage. It has since been supplemented by refugee and subsidiary protection regimes in several regions, as well as via the progressive development of international human rights law.”<sup>8</sup>

Thus, for the purposes of this dissertation, it is important to mention which are the international legal standards protecting the rights of asylum seekers and refugees (international instruments that Mexico has signed and ratified<sup>9</sup>) in order to draw a comparison between the international and national standards of protection. In order to draw the main differences between the international and national instruments, I will focus on the concept of the term “refugee”.

According to the UN Convention of 1951, the term “refugee” shall apply to any person who:

“Article 1: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and **owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is**

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<sup>8</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at:

<http://www.unhcr.org/refworld/docid/3be01b964.html> [accessed 21 February 2012]

<sup>9</sup> International Treaties adherence – Mexico Information available at:

[http://www.adh-geneva.ch/RULAC/international\\_treaties.php?id\\_state=145](http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=145) [accessed 20 March 2012]

**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.”<sup>10</sup>**

### *B) The Cartagena Declaration of 1984*

Also, it is important to mention the Cartagena Declaration on Refugees because it is a regional instrument related to refugees inter alia, and Mexico has incorporated some of the provisions mentioned in this international instrument into its new asylum law.

The Cartagena Declaration on Refugees is a non-binding agreement which was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984. The Cartagena Declaration on Refugees bases its principles on the “commitments with regards to refugees” defined in the Contadora Act on Peace and Cooperation (which are based on the 1951 UN Refugee Convention and the 1967 Protocol). It was formulated in September 1984 and includes a range of detailed commitments to peace, democratization, regional security and economic co-operation. It also provided for regional committees to evaluate and verify compliance with these commitments.

Moreover, “[t]he Cartagena Declaration [...] remains the most encompassing definition of a refugee to have emerged from Latin America” (Gibney/Hansen 2005: 71). Although not formally binding, the Cartagena Declaration has become the basis of refugee policy in the region and has been incorporated in to the national legislation of a number of States.”<sup>11</sup>

According to the Cartagena Declaration of 1984, the concept of “refugee” applies as follows:

“Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees **persons who have**

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<sup>10</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [21.02.2012]

<sup>11</sup> Refugee Legal Aid Network Information available at: <http://www.frlan.org/content/organisation-american-states-refugee-definition> [accessed 20.03.2012]

**fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”<sup>12</sup>**

Thus, we can note that the Declaration enlarges the refugee definition to include “[...] persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”<sup>13</sup> While the Cartagena Declaration is not a treaty, its provisions are respected across Central America and have been incorporated in some national laws.

### *C) The Mexican refugee law*

The previous chapters of this dissertation have discussed the moment at the beginning of 2011 when the Mexican President, Felipe Calderon, signed and enacted Mexico's new Law on Refugees and Supplementary Protection. Through the creation of the new law, Mexico gave the message to the international community that it is willing to bring its national legal practices in line with international standards. Previously, Mexico acceded to the UN Convention Relating to the Status of Refugees in 2000, and ratified the Protocol the same year. Moreover, Mexico is the fifteenth country in applying the principles considered in the Cartagena Declaration of 1984 to its national law.<sup>14</sup> The new Mexican asylum law is expansive and inclusive in its definition of the term “refugee”:

“Article 13: The refugee status will be recognized to all foreigners in the national territory, under the following reasons:

I. That because owing a well- founded fear of being persecuted for reasons of race, religion, nationality, **gender**, membership of a particular social group or political opinion, is out-side 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.

II. That fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts,

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<sup>12</sup> Cartagena Declaration 1984 Information available at: <http://www.unhcr.org/basics/BASICS/45dc19084.pdf> [accessed 20.03.2012]

<sup>13</sup> Ibidem

<sup>14</sup> Information available at: <http://www.intlawgrrls.com/2011/02/from-principles-to-process-mexicos-new.html>

massive violation of human rights or other circumstances which have seriously disturbed public order, and

III. That because of circumstances which have emerged in their country of origin or as a result of carried activities while in the national territory, their **have well-founded fear of being persecuted for reasons of race, religion, nationality, gender, membership of a particular social group or political opinion, or that their lives, safety or freedom could be threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.**<sup>15</sup>

From the information mentioned above it is possible to highlight that the Mexican law has a complete and comprehensive definition of the term “refugee”, as it not only includes both the definition considered in the UN Geneva Convention and its Protocol, but also the extended definition of “refugee” considered in the Cartagena Declaration of 1984.

Furthermore, the Mexican legislation related to refugees considers persecution based on gender as grounds on which to claim asylum. This is an important step forward in asylum legislation as persecution on the grounds of gender could refer to sexual violence, domestic violence, genital mutilation, and punishments for the transgression of values and moral customs in the country of origin, as long as the country of origin is unable to grant or negligent in the granting of effective protection.

### **Positive aspect # 1: A broader definition**

The Mexican refugee law considers a broader definition of the term “refugee”, as it incorporates the UN Geneva Convention definition and the definition contained in the Cartagena Declaration. Furthermore, for the first time in all regional legal instruments relating to refugees, the Mexican Refugee Law mentions gender as a cause for claiming asylum. In doing so, Mexico became the first country in the region to expand the protection of refugees to people who face persecution because of their gender.

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<sup>15</sup> Mexican Asylum and Subsidiary Protection Law 2011 available at: [http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404\\_LeySobreRefugiados.pdf](http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404_LeySobreRefugiados.pdf) [accessed 21.02.2012]

### 3.2 Group refugee status determination

At the present time, the majority of refugees in the world reach their refugee status through a Refugee Status Determination procedure (hereafter RSD) on a ‘prima facie’ basis<sup>16</sup>. The Latin term *prima facie* refers to “a cause of action or defense that is sufficiently established by a party's evidence to justify a verdict in his or her favor”<sup>17</sup>. The group or prima facie RSD has been used in a variety of contexts and it is defined as the RSD applied to a mass influx of asylum seekers into a host country.

Although a group RSD (or prima facie RSD) has been implemented before, it is still a topic susceptible to controversy among the international community, since some states do prefer to perform an individualised RSD.

#### *A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

In this instance reference will be made to the UNHCR Handbook, because, while the UN Convention does not mention the definition of group recognition of the Refugee Status, however, the handbook does make mention of it:

“44. While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called “group determination” of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.”<sup>18</sup>

#### *B) The Cartagena Declaration of 1984*

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<sup>16</sup> “Estimates of the number of prima facie refugees vary. Jacobsen notes that, ‘[i]n 2003, some 64% of the world's 9.7 million refugees were granted refugee status on a group or prima facie basis, and less than [sic] a quarter (24%) were granted refugee status following individual determination’ (2005: 5). Cuellar estimates that 92% of refugees worldwide in 1999 were granted refugee status on a prima facie basis (2006: 22) [...]” Information available at: [http://www.rsc.ox.ac.uk/publications/working-papers-folder\\_contents/RSCworkingpaper55.pdf](http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper55.pdf) [accessed on 22.03.2012]

<sup>17</sup> Legal Information Institute, prima facie definition. Information available at: [http://www.law.cornell.edu/wex/prima\\_facie](http://www.law.cornell.edu/wex/prima_facie) [accessed on 22.03.2012]

<sup>18</sup> UNHCR Handbook available at: <http://www.unhcr.org/3d58e13b4.html> [accessed 21.02.2012]

In this matter, the Cartagena Declaration does not contain any reference to group recognition.

### *C) The Mexican Refugee Law*

In this regard, the Mexican Refugee Law considers:

“Article 26: In the event of a massive entry a group of people into the national territory that may be in the provisions of the article 13 of this Act, and if this situation produces a substantial increase in the amount of asylum applications, the Secretary may establish guidelines to be followed to address the asylum seekers as a group, if there are no elements to consider that their procedure must be individual. Once the massive entry is attended, the Secretariat must undertake as soon as possible an individual refugee status determination.”<sup>19</sup>

#### **Positive Aspect # 2: Inclusion of the group refugee status determination**

The Mexican Refugee Law is not restrained to the individual recognition of Refugee Status. In certain circumstances, recognition of the condition of refugee can be granted through the so-called ‘prima-facie determination’. This determination refers to the massive influx of people into a national territory as a result of a sudden change in the situation of a given country. Therefore, the law considers the issuance of special guidelines for the purpose of responding to the emergency to ensure the protection of these persons, without restricting or limiting the rights granted in cases of individual recognition of Refugee Status.

### **3.3 Refugees ‘sur place’**

International protection mechanisms for refugees have considered the emergence of several circumstances that may force a person not to return to his home country. Therefore, a foreigner who was not yet a refugee when he left his country might become a refugee at a later date, in the event of certain circumstances during his absence that could endanger his rights and freedoms. This person is called a refugee ‘sur place’.

#### *A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

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<sup>19</sup> Mexican Asylum and Subsidiary Protection Law 2011 available at: [http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404\\_LeySobreRefugiados.pdf](http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404_LeySobreRefugiados.pdf)

Similar to the previous explanation given above, in this instance reference will also be made to the UNHCR Handbook, as it mentions the definition of refugee *sur place* while the UN Convention does not. Paragraphs 94 to 96 of the UNHCR Handbook read:

“94. The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee ‘*sur place*’.

95. A person becomes a refugee ‘*sur place*’ due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.

96. A person may become a refugee “*sur place*” as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.”<sup>20</sup>

#### *B) The Cartagena Declaration of 1984*

In this matter, the Cartagena Declaration does not contain any reference to the definition of refugees ‘*sur place*’.

#### *C) The Mexican Refugee Law*

Although the Mexican legislation does not mention the term “refugee *sur place*” specifically, it does contain provisions regarding this classification of refugees, as mentioned in Article 13:

“Article 13 - The refugee status will be recognized to all foreigners in the national territory, under the following reasons: [...]

**III. That because of circumstances which have emerged in their country of origin** or as a result of carried activities while in the national territory, their have well-founded fear of being persecuted for reasons of race, religion,

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<sup>20</sup> UNHCR Handbook available at: <http://www.unhcr.org/3d58e13b4.html> [accessed 21.02.2012]



nationality, gender, membership of a particular social group or political opinion, or that their lives, safety or freedom could be threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”<sup>21</sup>

### **Positive Aspect # 3: Inclusion of refugees ‘sur place’**

The Mexican Refugee Law adds a criterion to grant refugee status to those who, despite not having the refugee status at the time of leaving their country, become refugees as a result of subsequent events occurring in their country after their departure. In this case, the asylum seeker is defined as ‘refugee sur place’ in international law. Therefore, in accordance with both Mexican Refugee Law and international standards, the refugee sur place enjoys legal protection designed to prevent them from facing any danger caused by their returning to their home country. This protection is granted as a result of a radical change of the circumstances in the country of origin, or as a result of the asylum seeker’s activities during their stay in Mexican territory (i.e. human rights activism).

### **3.4 Refugee rights: freedom of movement**

The right to freedom of movement is protected under Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights, which state the following:

“1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence; 2) Everyone shall be free to leave any country, including his own; 3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant; 4) No one shall be arbitrarily deprived of the right to enter his own country.”<sup>22</sup>

#### *A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

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<sup>21</sup> Mexican Asylum and Subsidiary Protection Law 2011 available at: [http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404\\_LeySobreRefugiados.pdf](http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404_LeySobreRefugiados.pdf) [accessed 21.02.2012]

<sup>22</sup> International Covenant on Civil and Political Rights, 16 December 1966 Available at: <http://www2.ohchr.org/english/law/ccpr.htm> [accessed on 20.03.2012]

In this respect the 1951 Convention on Refugees highlights in its Article 26 that:

“Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”<sup>23</sup>

*B) The Cartagena Declaration of 1984*

The Cartagena Declaration does not contain any provisions or references to the refugee’s freedom of movement within the host country.

*C) The Mexican Refugee Law*

The Mexican legislation related to refugees and the right to the freedom of movement consider the follow:

“Article 49. Refugees and foreigners who require additional protection of accordance with international treaties of obligatory observance in Mexico and other jurisdictions applicable, may reside anywhere in Mexico and must report to the Secretariat changes of residence, as provided in the regulations. The Secretary may determine the place of residence seekers, refugees or foreign require or receive supplementary protection, only when issued in accordance with guidelines article 26 of this Law”

**Positive Aspect # 4: Change in former practice regarding freedom of movement**

On this subject, it is important to mention that the former procedure governing the refugee’s freedom of movement within Mexican territory required the refugee to live permanently in the city where he began his RSD procedure. Although this stipulation was not written in the law, it was the common practice<sup>24</sup>.

The new law asylum law in Mexico allows refugees to reside anywhere within the country and choose their place of residence. This change in both the law and, hopefully, in practice represents an important step forward in the improvement of the quality of the lives of refugees in Mexico.

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<sup>23</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [21.02.2012]

<sup>24</sup> This information was stated in the interviews with COMAR protection officials, and I attest to the veracity of this information, as I myself worked as a COMAR protection official and can attest to the requirement of adherence to this stipulation.

## **CHAPTER 4. THE MEXICAN LAW FOR REFUGEES AND SUBSIDIARY PROTECTION AND THE INTERNATIONAL LEGAL STANDARDS RELATING REFUGEES AND ASYLUM SEEKERS: THE CHALLENGES**

The new Mexican legislation has a considerable amount of positive aspects and represents a step forward in the approach to refugee issues in the region. However, it should be acknowledged that there are still numerous aspects in which the legislation needs to improve in order to fulfil the commitments made by Mexico at international level. This chapter aims to mention some of the challenges that this researcher considers require major attention, as they represent important gaps in the protection of refugees within the new Mexican legislation.

### **4.1 Non-Refoulement principle**

Various international and regional refugee mechanisms and instruments have defined and considered within their provisions the principle of non-refoulement. It is thus important to highlight that the non-refoulement principle is one of the keystones of international refugee and asylum law.

When an asylum seeker or refugee is returned to his country of origin, his rights to life, liberty and security may be jeopardized; moreover, they may encounter persecution, torture or cruel, inhuman or degrading treatment or punishment, or worse. Therefore, the refugee law mechanisms have enhanced the non-refoulement principle.

Through this principle the international community signals its commitment to assure asylum seekers and refugees that they will not be returned to a country where their enjoyment of human rights is restricted or endangered.

#### *A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

The UN Convention considers in Article 33 the prohibition of the refoulement of refugees under any circumstances:

“1.No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”<sup>25</sup>

### *B) The Cartagena Declaration of 1984*

The Cartagena Declaration does not contain any reference to this matter.

### *C) The Mexican Refugee Law*

The Mexican Refugee Law considers in its Article 5 the principle of non-refoulement.

Moreover, Article 6 states the following:

“Article 6: no asylum seeker or refugee in any manner may be rejected at the border or returned in any way to another country where his life threatened on the grounds mentioned in Article 13 of this Act, or where there are reasonable grounds to believe that would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment.”<sup>26</sup>

### **Challenge # 1: chain refoulement**

Although the Mexican Refugee Law considers the provisions of non-refoulement as is stipulated in the UN Convention, it is important to take into account and to establish safeguards in response to a phenomenon known as “chain refoulement”.

Even though the international and national legal mechanisms for refugees consider non-refoulement principles, there are situations where asylum seekers are deported to third countries when they are not granted the refugee status. Moreover, there are situations where the refugees are expelled from the host country for security reasons and where “chain refoulement” may then ensue.

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<sup>25</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [21.02.2012]

<sup>26</sup> Mexican Asylum and Subsidiary Protection Law 2011 available at: [http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404\\_LeySobreRefugiados.pdf](http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404_LeySobreRefugiados.pdf) [accessed 21.02.2012]

“Chain refoulement” occurs when the refugee or asylum seeker is expelled or returned to a third country. Sometimes refugees are asked to leave the national territory with no further specifications. In these situations, the refugees or asylum seekers could either migrate or they could be returned to a third country where they will be immediately deported to their country of origin, where their life, freedom or safety is threatened.

In this regard, some Mexican Non-Governmental Organisations, such as Sin Fronteras<sup>27</sup>, have exhorted the national authorities to create legal protection from “chain refoulement”, which jeopardizes the life, freedom or safety of the person being deported. In this respect, this dissertation considers that although the new asylum law mentions protection from non-refoulement as one of its main principles, there is a great need to create legal safeguards within the asylum law to prevent chain expulsions from occurring. These chain expulsions undermine the rights and freedoms of refugees and asylum seekers that are expelled from national territory, and jeopardize their right to life.

#### **4.2 Subsidiary Protection**

International protection for asylum seekers who have not been granted recognition of refugee status should go beyond simply preventing their refoulement. Responsibility for this lies arguably within the international community since not all States set the minimum human rights standards that every foreigner (this dissertation opts not to use the term alien as it is a term that can be seen to have a pejorative component) should enjoy at the same level, contrary to various international instruments.

Moreover, it is undeniable that the asylum seekers who have been denied refugee status have similar and sometimes even identical needs to those who have been granted refugee status. Indeed, both asylum seekers and refugees do not enjoy any support from their home country authorities. Both groups usually arrive with psychological or physical problems stemming from the events that forced them to flee

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<sup>27</sup> Information available at: <http://www.scribd.com/doc/64223767/Mexico-Litigio-Estrategico-y-Deportacion-de-Extranjeros-en-Mexico> [accessed 10.03.2012]

their countries, and both commonly arrive with scant financial resources.

Hence, there is a mechanism in place to provide certain international protection, different from that granted to refugees, but which still protects those whose life, freedom and safety is threatened and who consequently cannot return to their country of origin despite not having been granted refugee protection. This international aid is well known as “subsidiary protection”. In accordance with the United Nations High Commissioner for Refugees (hereafter UNHCR), subsidiary protections<sup>28</sup> are “[...] legal mechanisms for protecting and according a status to a person in need of international protection who does not fulfil the refugee definition of the 1951 Convention, as interpreted by States”<sup>29</sup>.

*A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

The UN Convention of 1951 and its Protocol of 1967 do not have any provision relating to subsidiary protection. Nonetheless, as mentioned above, the UNHCR has several statements that define subsidiary protection, and has issued guidelines regarding this international protection mechanism. For instance, the UNHCR has stated that “complementary protection is not a term of art defined in any international instrument. Rather this phrase has emerged over the last decade or so as a description of the increasingly apparent phenomenon in industrialised countries of relief from removal/deportation being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. It is essentially a generic phrase, with the actual terminology used by states to describe such forms of protection in their territory, including any attached immigration status, varying enormously - ‘subsidiary protection’, ‘humanitarian protection’ and ‘temporary asylum’ to name but a few

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<sup>28</sup> The UNHCR has repeatedly expressed that it prefers the term “complementary protection” rather than “subsidiary protection”. However for the purpose of this paper the term used will be subsidiary protection as it is considered that it refers more accurately to the term used in the Mexican Asylum Law.

<sup>29</sup> UN High Commissioner for Refugees, *UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008, available at: <http://www.unhcr.org/refworld/docid/479df7472.html> [accessed 10.03.2012]

examples.”<sup>30</sup>

### *B) The Cartagena Declaration of 1984*

The Cartagena Declaration does not contain any reference to this matter.

### *C) The Mexican Refugee Law*

The Mexican asylum law represents a step forward in subsidiary protection. In this respect, it is the first time in Latin America that the legal precept of subsidiary protection has been included in a country's legislation. The Mexican legislation has, therefore established a legal precedent in this area.

Nonetheless, this is also the reason why it is important to enhance this legal precept with the necessary safeguards. While the Mexican asylum law does consider subsidiary protection, the range of people who could enjoy subsidiary protection has been restricted, as shown in Article 28:

“Article 28: The Secretary may grant subsidiary protection to the foreigner who, not being within the context of Article 13, require protection from being returned to another country where **his life** would be threatened or where there are reasonable grounds to believe that would be danger of being subjected to torture or other cruel, inhuman and degrading treatment. [...] It will not be granted subsidiary protection to the foreigners in respect to whom there are serious reasons to believe that they are in any of the assumptions provided in the article 27.”

“Article 27: The refugee status will not be recognized to the foreigner in respect to whom, once his claim has been analyzed, there are serious reasons for considering that:

- I. He has committed a crime against peace, genocide, or a crime against humanity or war crimes, as defined in the international instruments ratified by Mexico;
- II. He has committed a serious crime outside the country of refuge prior to his admission to that country as a refugee; or
- III. He has been guilty of acts contrary to the purposes and principles of the United Nations.

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<sup>30</sup>Information available at: <http://www.unhcr.org/refworld/pdfid/435e198d4.pdf> [accessed on 22.03.2012]

In the assumption of the Section II it should be addressed the nature of the crime and its punishment under the national law and the law of the country of origin or the country where it was committed.”

### **Challenge # 2: Scope of subsidiary protection**

The Mexican legislation has established an important step forward when considering subsidiary protection in asylum law. Nonetheless, this protection has been restricted to foreigners whose **life** is in danger. In this regard, the Mexican legislation has diminished the range of the beneficiaries of this protection. It is important to mention that before the asylum law was enacted, the legal precept of subsidiary protection was already considered in the Mexican legislation. The migration regulation circular for the subsidiary protection<sup>31</sup> considered as beneficiaries all foreigners who were not granted with the recognition of refugee status but whose **life, freedom or safety** were in danger in their home country.

### **Challenge # 3: Exclusion clauses for subsidiary protection**

As mentioned before, subsidiary protection is a complementary protection that is granted with the purpose of preventing gaps in protection that occur in the legislation and to protect those people who do not fulfil the criteria for refugee status but whose human rights are still in jeopardy in their home country. In this respect, subsidiary protection is granted, according to Article 28 of the Mexican asylum law, when the life of the foreigner is in danger in his home country. Hence, it is not correct to apply “exclusion clauses” to subsidiary protection, as the underlying meaning of these clauses is that in certain cases the lives of certain persons do not merit international protection, which is contrary to the fundamental principle of human rights protection. Therefore, it is the view of this author that it is necessary to eliminate exclusion clauses from subsidiary protection, as they contradict the most fundamental human right: the right to life - a right that should be enjoyed by all people in all circumstances.

## **4.3 Expulsion**

When an asylum seeker has been granted the recognition of the status of refugee by

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<sup>31</sup> Migratory Regulation Coordination “Circular No. CRM /016/2007 - Complementary Protection” Mexico, 2007 Document available at: <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/6012> [accessed on 22.03.2012]



the State, it means, among other things, that he has been granted the right to lawful residence. Hence, a refugee needs the guarantee that this right will not be taken away from him, leaving him again an unprotected foreigner in search of asylum. For that reason Article 33 of the 1951 Convention and Article 5 and 6 of the Mexican asylum law assure the asylum seeker and refugee of this right, taking into consideration the non-refoulement principle.

The States, however, also need provisions to recognize that when certain circumstances arise they may consider expulsion measures. For this reason, in the international and national instruments, these provisions are considered.

*A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

Concerning this, the UN Convention highlights the following:

“Article 32: 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.  
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.  
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”

*B) The Cartagena Declaration of 1984*

The Cartagena Declaration does not contain any reference to this matter.

*C) The Mexican Refugee Law*

In this respect, the Mexican legislation considers:

“Article 52. If there are substantial grounds to believe that the asylum seeker, refugee, or foreigner that has been granted with subsidiary protection, is a threat to national security, or if having been subjected to final conviction of a felony whose nature is a threat to society, may be deported or returned to another country.”

#### **Challenge # 4: Expulsion specifications**

As explained by the UNHCR, the main challenges in exclusion provisions include; “[...]the difficulty in drawing the line between the basic protection of the refugee and the legitimate interests of his State of residence, the extremely serious consequences of expulsion for the refugee and any members of his immediate family residing with him, and the difficulty, indeed impossibility in many cases, of enforcing an expulsion measure.”<sup>32</sup>

In accordance with Article 32 of the Convention of 1951 relating to the Status of Refugees and Article 13 of the International Covenant of Civil and Political Rights<sup>33</sup>, for the sake of national security a State may expel a refugee lawfully from their territory to another country other than the country where the refugee has a well-founded fear of persecution, in conformity with national law.

In this respect, for a national security threat to be the justification for the expulsion of an asylum seeker or refugee, similar considerations should be applied to those of "security of the country" provided by the non-refoulement principle in Article 33.2 of the Convention of 1951, which reads as follows: “[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”<sup>34</sup>

To this end, the expulsion of a refugee resulting from the application of one of the exceptions provided in Article 33.2 of the 1951 Convention is considered legal only

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<sup>32</sup> UN High Commissioner for Refugees, Note on Expulsion of Refugees, 24 August 1977, EC/SCP/3, available at: <http://www.unhcr.org/refworld/docid/3ae68cbf14.html> [accessed 20.03.2012]

<sup>33</sup> Article 13: “An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” Information available at: <http://www2.ohchr.org/english/law/ccpr.htm> [accessed 19 March 2012]

<sup>34</sup> Information available at: <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [accessed 19.03.2012]

when it is necessary and proportional. This means that:

- There must be a rational nexus between the expulsion of the refugee and the elimination of the threat he represents to the security or to the community of the host country;
- The expulsion should be applied as a last option and one necessary to eliminate the danger posed toward the security or the community of the host country;
- The danger posed to the host country must exceed the risk that the expelled refugee may suffer as a result of the expulsion.

Therefore, any decision aimed at the expulsion of a refugee should be made according to a due process. It is important to mention that "due process" includes substantive procedural aspects. This is explained by P. Weis when he states that due process "[i]n terms of procedure, refers to a decision reached in accordance with the procedures established by law and that includes the safeguards provided by law for the type of cases involved, including equality before the law and the right to have a fair trial. In terms of substance, it means that the decision should be based on the law and cannot be unreasonable, arbitrary or unreliable, in addition it must have a real and substantive relation with its object."<sup>35</sup>

In this respect, this dissertation highlights what can be considered an important gap in protection in the Mexican asylum law when it comes to the consideration of expulsion. Concerning this, it seems crucial for the new national law to include more criteria that specify under which circumstances a refugee or asylum seeker could be expelled from the territory. Moreover, it is important to reflect on the serious consequences that an expulsion implies for a refugee and apply this article with the greatest caution. It is the strong assertion of this dissertation that further reflection is required in light of the following issues relating to the expulsion of refugees, which Article 52 of the legislation must carefully address:

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<sup>35</sup> Weis, P. (1995) *The Refugee Convention, 1951 The travaux preparatoires analysed with a commentary by Dr Paul Weis*, Cambridge University Press. Available at: <http://www.unhcr.org/4ca34be29.html> [accessed 19.03.2012]

- The exclusion represents an exception to the non-refoulement principle, thus, considerations must be taken to ensure that the expulsion is interpreted and implemented in a restrictive manner.
- The consequences the refugee could face after an expulsion are serious, thus, it is necessary to take these considerations into full account. The law must ensure access to due process and ensure a careful examination of the principle of proportionality between the gravity of the crime or the danger the refugee represents to the host country, and the persecution or danger the refugee fears.
- The expulsion of a refugee should be contemplated only when the possibilities of reintegration within society have been considered. Thus, it seems necessary to include provisions in this respect.

#### **Challenge # 5: legal entry to a third country**

In the new Mexican refugee law there are no specifications regarding the time granted to the refugees or asylum seekers to apply for legal entry to a third country. It seems important to include this specification in order to prevent the occurrence of human rights violations.

Hence, it is important to bear in mind that when an asylum seeker is not granted refugee status or a refugee is expelled from the host country, they might fear persecution, execution, arbitrary arrest, enforced disappearance, torture including sexual violence, or other situations that will endanger the enjoyment of his human rights and fundamental freedoms, in the event of his return to his country of origin. Furthermore, for the expelled asylum seeker or refugee to be granted legal entry to a third country could take considerable time.

Therefore, reflecting on the serious consequences of a rushed expulsion, it is crucial for the new Mexican refugee law to include provisions to deal with the time granted to the foreigner to undertake procedures in order to be admitted to a third country.

#### 4.4 The Best Interest of the Child

Children’s rights are protected under the Convention on the Rights of the Child. This convention is the very first legally binding international instrument that considers the full spectrum of the human rights that every child should enjoy. Moreover, “[t]he Convention sets out these rights in 54 articles and two Optional Protocols. It spells out the basic human rights that children everywhere have: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child.”<sup>36</sup>

Even though it could seem obvious how to determine what is in the best interests of the child, the truth is that no precise definitions are offered in this area. Nonetheless, while common sense leads to the assumption that it refers to the well being of the child, the challenge remains as how to determine what is best for the children. As the UNHCR Guidelines on Determining the Best Interest of the Child highlight “[s]uch well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child’s environment and experiences.”<sup>37</sup>

Nonetheless, it is important to set clear legislation that complies with the international standards on the rights of the child, in order to avoid subjectivity in such a delicate topic. In this respect, the Convention on the Right of the Child “neither offers a precise definition, nor explicitly outlines common factors defining the best interests of the child, but stipulates that:

- the best interests must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from its parents against their will (Article 9);
- the best interests must be a primary (but not the sole) consideration for all

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<sup>36</sup> Information available at: <http://www.unicef.org/crc/> [accessed on 23.03.2012]

<sup>37</sup> UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: <http://www.unhcr.org/refworld/docid/48480c342.html> [accessed 23.03.2012]

other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).”<sup>38</sup>

Hence, the best interest of the child is a topic of great debate and complex consideration, as dealing with children is delicate, and even more so when they are unaccompanied. For that reason, it is important to consider provisions within the national legislation that specify as much as possible the procedures to follow when the law deals with foreign children.

*A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

In this respect, the 1951 Convention on Refugees does not mention provisions related to the best interest of the child, nonetheless, the UNHCR Handbook does mention the following:

“The question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enroll the services of experts conversant with child mentality. A child--and for that matter, an adolescent--not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests. In the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.”<sup>39</sup>

The Convention on the Rights of the Child also mentions the best interests of the children all the way through the document. The first statement on this topic appears in Article 3:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>40</sup>

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<sup>38</sup> Ibidem

<sup>39</sup> UNHCR Handbook available at: <http://www.unhcr.org/3d58e13b4.html> [accessed on 23.03.2012]

<sup>40</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [accessed 23.03.2012]

### *B) The Cartagena Declaration of 1984*

The Cartagena Declaration does not contain any provisions regarding or references to the best interests of the child.

### *C) The Mexican Refugee Law*

The Mexican legislation mentions the best interests of the child as part of the principles enabled in the new law, and mentions in Article 9 that:

“Article 9. In the recognition of the refugee status the family organization and development, as well as the best interest of the child should be protected”

### **Challenge # 6: Best interests of the Child determination**

Although the Mexican refugee law mentions among its principles the best interests of the child and states that the best interests of the child should be protected, there is no explanation of what the best interests of the child means. It does, however, give a definition of the other core principles (i.e. non-refoulement, non discrimination, familiar unity, no sanction for illegal entry and confidentiality). More importantly, there are no specifications on how a determination on the child’s best interests would be conducted.

The UNHCR guidelines define the Best Interests Determination as “A best interests determination (BID) describes the formal process with strict procedural safeguards designed to determine the child’s best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option.”<sup>41</sup>

It is important to reflect on the risks of not having specific provision on how to determine the best interests of the child, since the procedure could be undertaken on a subjective basis which would jeopardize the protection of children’s human rights.

It is, therefore, of the utmost importance that the provisions outlining the procedure to

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<sup>41</sup> UN High Commissioner for Refugees, UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, available at: <http://www.unhcr.org/refworld/docid/48480c342.html> [accessed 23.03.2012]

be applied when dealing with child asylum seekers and refugees are issued in detail.

#### **4.5 Non-political nature of the asylum**

It is important to bear in mind that the refugee status determination (RSD) is a procedure that should remain non-political, impartial, and fair, as it represents the humanitarian and social commitment of the States towards refugees.

##### *A) The UN Convention of 1951 and its Protocol of 1967 relating to the Status of Refugees*

The 1951 Convention on Refugees, its 1967 Protocol and its Handbook do not contain any provisions in this respect.

##### *B) The Cartagena Declaration of 1984*

The Cartagena Declaration does not contain any provisions in reference to this matter.

##### *C) The Mexican Refugee Law*

Although the Mexican refugee law does not contain any reference to the apolitical nature of asylum, it is important to highlight some inconsistencies that have been founded in relation to the impartiality of the procedure. Thus, the national refugee law mentions in Article 15 that:

“On refugees issues, it is up to the Secretariat to perform the follow:

I. To undertake the refugee status recognition to the foreigners whom, being in national territory, have claimed for asylum according with the provisions consider in this law. In every case referred in this section, the Secretariat will request, previously, an opinion to the Foreign Affairs Ministry; [...]”

Moreover, the national refugee law mentions in Article 24 that:

"the Secretariat will request an opinion about the circumstances prevailing in the country of origin of the asylum seeker to the Foreign Affairs Ministry [...]"

#### **Challenge # 7: Enhance non-political nature of the RSD**

From the careful examination of the material undertaken in preparation for this dissertation, clear concerns arise over the possible influence of the diplomatic or even political position of the Foreign Affairs Ministry toward the asylum seekers' countries



of origin.

During the different stages of the RSD, it is possible that political considerations stemming from the relationships between Mexico and the country of origin could interfere with the decision making process. Furthermore, it is important to emphasize the humanitarian and apolitical nature of asylum.

Hence, the refugee status determination should be preserved as an act of peace and should not be allowed to create hostility between countries. Moreover, there is no precedent in the region's refugee practices indicating that in order to undertake the RSD, the Foreign Affairs Ministry is somehow required to have an opinion about the prevailing circumstances in the asylum seekers' country of origin.

Therefore, it seems that in order to preserve the apolitical nature of the refugee status determination, it is necessary for the Mexican authorities to re-think the role of the Foreign Affairs Ministry in this procedure.

## **CHAPTER 5. THE MEXICAN COMMISSION FOR REFUGEE AID (COMAR) AND THE NEW MEXICAN LAW FOR REFUGEES AND SUBSIDIARY PROTECTION: RHETORIC AND PRACTICES**

The study presented here has been designed to reflect on what has been achieved and what remains to be achieved in terms of Mexican asylum law's approach to asylum seekers and refugees, and its applicability through the Mexican Commission for Refugee Aid (hereafter COMAR).

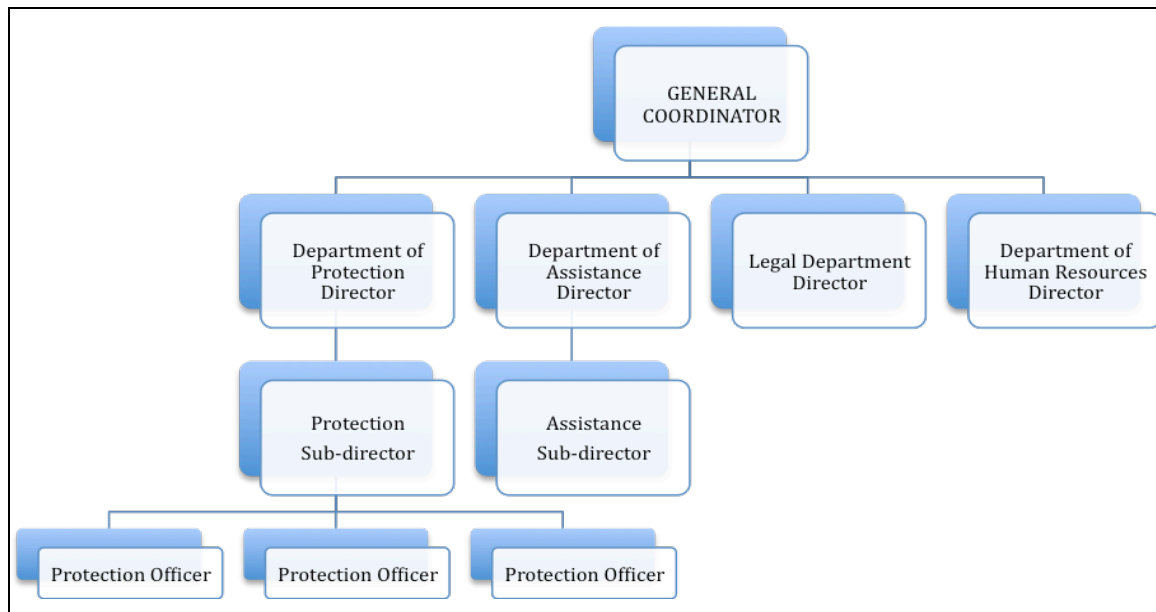
Hence, this assessment aims to identify the need for changes in COMAR practice that would enhance its efficiency when applying asylum law. Therefore, this chapter will not only highlight best practice but also the gaps in protection that were found in COMAR practices, according to the interviews.

As the governmental institution responsible for applying the new asylum law is COMAR, I first will explain COMAR's structure and duties. Secondly I will analyze the data collected from interviews with COMAR officials and asylum seekers, as beneficiaries of the law, in order to analyze the practices that have been used to apply the law since it was enacted.

### **5.1 COMAR**

The introductory chapter of this study pointed out that COMAR is a Mexican governmental institution, part of the Ministry of the Interior. It has been responsible for dealing with asylum claims, refugee and subsidiary protection issues since the year 2002, having been created as part of the governmental response to the massive influx of migration into Mexico as a consequence of recent instability in Central and South America.

Since then COMAR has been divided into four departments that report to the General Coordinator:



**Figure Organisation chart.** The chart above was elaborated by the researcher in accordance with oral descriptions made by a senior official since COMAR was not able to provide any official documentation in this matter.

Thus, in accordance with the Regulations Handbook of Mexican Asylum and Subsidiary Protection Law 201<sup>42</sup> (hereafter Regulations Handbook), COMAR General Coordination has the responsibility for the promotion, development, monitoring and coordination of refugee protection and assistance programs and strategies with different governmental institutions.

Moreover, COMAR’s legal department is in charge of dealing with legal issues, such as COMAR guidelines, asylum appeals, revocation and cancellations of refugee status, and maintaining updated figures on asylum seekers and refugees. In terms of social care and integration, the Department of Assistance is in charge of giving assistance and guidance to refugees once they have been recognized as refugees, and foreigners who have been granted with subsidiary protection.

Furthermore, in accordance with Article 15 of the Regulations Handbook<sup>43</sup>, the Department of Protection is in charge of the very first attention asylum seekers receive, informing them about their rights and obligations. It is charged with establishing and sharing criteria about the social care required for asylum seekers, and

<sup>42</sup> Regulations Handbook of Mexican Asylum and Subsidiary Protection Law 2011. Articles 15-16

<sup>43</sup> Ibidem

the undertaking of both the refugee status determination (RSD) and the subsidiary protection recommendation.

For the purpose of this research, the author has performed interviews with officials and senior officers from the Department of Protection , as they are the ones dealing with asylum seekers, carrying out their refugee determination interviews and the subsequent analysis of their evidence. Moreover, interviews with asylum seekers were undertaken in order to obtain an insight from the beneficiaries of these law.

## **5.2 Interviews and data analysis**

### 5.2.1 Methodology

Indicators to assess the efficacy of a new law can vary from one law to another depending on the nature of the law, the length of time since it was enacted and the context in which the law is being applied. To this end, and in order to assess the efficiency of the Mexican authorities when applying the new law, this study has chosen to assess, categorize and measure the following information:

Refugees:

- Knowledge of their rights and obligations within the procedure and the detail involved in the process itself (including how did they acquire the information)
- Level of satisfaction with COMAR treatment and the help received in having their basic need fulfilled

COMAR Officials:

- Knowledge of their rights and duties
- Pragmatic knowledge of the procedures to be undertaken with asylum seekers
- Knowledge of the law in relation to these procedures

COMAR Senior Officials:

- Knowledge of the procedures to be undertaken with asylum seekers
- Knowledge of the gaps in protection that occur within the new law
- Knowledge of the steps forward achieved with the new law

### *5.2.2 Sample size*

Concerning this, the sample size of the assessment had to be reduced considerably, as in January and February, there were two refugees and five asylum seekers being processed by COMAR. Nonetheless, the statistical data showed that this is the average number of asylum claims COMAR receives per month. This represents a significant change that has taken place since the new law was enacted as the number of applications has considerably decreased.

Thus, in accordance with official statistical data<sup>44</sup>, in 2010 Mexico processed 1044 asylum claims and 224 asylum seekers were granted refugee status. In 2011 Mexico processed 702 asylum claims, showing a 33% drop in applications, and 190 asylum seekers were granted refugee status.

This fall in applications could be due to the lack of information among foreigners about the possibility of applying for asylum in Mexico, or perhaps due to the escalating violence toward and even and assassination of migrants in Mexico since last year. Although, this research will present some statistical data, no further investigation and analysis will be performed regarding the decreasing number of applications, as it is not the main focus of this study.

### *5.2.3 Limitations of analysis*

The Mexican asylum law was enacted in January 2011, thus it has been thirteen months since the law was put into action.

As there are no official Mexican indicators to measure when the application of a law is effective, the data collection focused on the satisfaction level of the beneficiaries of the law regarding the treatment and the information they received, and whether they consider that their needs were fulfilled while applying for asylum.

In order to try to avoid subjectivity in this matter, the questions were oriented to obligations that COMAR has towards asylum seekers in accordance with the new law.

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<sup>44</sup> COMAR Official Statistical Data 2010-2011

In addition, the findings of these interviews will be compared with the interviews with COMAR Protection Officials about their obligations under the law when dealing with asylum seekers.

#### 5.2.4 Analysis

##### A. Interviews with asylum seekers

The interviews with asylum seekers provided an important insight into whether the beneficiaries of the new law consider their needs to have been fulfilled.

It is important to mention that three of the interviews took place in a detention center and the other three in an office of a Non-Governmental Organisation (NGO)<sup>45</sup> that provides aid to migrants in general.

Also, two of the asylum seekers were native English speakers, two were non-native English speakers, and the remaining two were native Spanish speakers.

The information collected was firstly categorized and then measured, as indicated below:

- **Categorization of qualitative data**

	Question	Categories
Rhetoric (Law)	How long have you been waiting for your RSD? *	RSD timing
	Do you know how long will take your RSD?	Awareness of RSD timing
	Do you know your rights and obligations?	Awareness of rights
	Do you think your social needs have been fulfilled?	Social care
Practices (COMAR)	Who has informed you about your RSD timing?	Awareness RSD timing
	Who has informed you about the refugee in Mexico?	Information about asylum
	Who has informed you about your rights and obligations as an asylum seeker?	Awareness of rights
	How was the information and treatment you have received from COMAR?	COMAR information and treatment
	How it has been the help provided by COMAR?	COMAR helpfulness

\* Note: all the interviewees got their Refugee Status Determination (hereafter RSD) resolution 5 days after the interviews took place.

<sup>45</sup> The NGO requested to the author of this research to keep its name anonymous.

- **Measurement of categories**

Categories		Advanced*	Medium / Basic*	Low*
Rhetoric (Law)	RSD timing (waiting)	AS2: 20 days AS3: 21 days AS5: 16 days	AS1: 40 days AS4: 35 days	AS6: 60 days
	Awareness of RSD timing (knowledge)	AS4: 45 days		AS1: n/a AS2: n/a AS3: n/a AS5: n/a AS6: n/a
	Awareness of rights	AS1: aware AS4: aware AS5: aware AS6: aware		AS2: n/a AS3: n/a
	Social care	AS5: Good AS2: Good	AS6: Indifferent	AS1: bad AS3: bad AS4: bad
Practices (COMAR)	Awareness of RSD timing (information provided)	AS4: COMAR Officer	AS5: COMAR Officer	AS1: friend AS2: nobody AS3: nobody AS6: nobody
	Information about asylum	AS2: INM Official AS5: INM Official AS6: COMAR Officer	AS1: UNHCR	AS3: nobody AS4: nobody
	Awareness of rights	AS4: COMAR Officer AS5: COMAR Officer AS6: COMAR Officer	AS1: UNHCR	AS2: nobody AS3: nobody
	COMAR information and treatment	AS5: good AS6: good	AS1: Indifferent AS2: Indifferent AS3: Indifferent	AS4: bad
	COMAR helpfulness	AS5: good AS6: good		AS1: bad AS2: bad AS3: bad AS4: bad

\* Advanced: When the asylum seeker (AS) receives accurate information or the procedure as described in law is and the applied comprehensively by the institution in charge of doing so.

\* Medium / Basic: When the asylum seeker (AS) receives incomplete information or the procedure applied is different to the one described in law and / or it applied by an institution that is not in charge of doing so.

\* Low: When the asylum seeker (AS) receives inaccurate information, is subject to an improper procedure, receives no information, or is not subject to a procedure at all.

- **Findings**

RSD timing	<p>According to the interviews, 3 out of 6 (50%) asylum seekers got their RSD resolution before the established deadline, 2 out of 6 (33.2%) got it on time and 1 out of 6 (16.6%) got their resolution late.</p> <p>On this subject, the new asylum law establishes that every asylum seeker must be aware of the RSD timing and COMAR should inform them<sup>46</sup>. According to the interviews, 1 out of 6 (16.6%) asylum seekers received accurate information about their RSD timing and 5 out of 6 (83.3%) did not know their RSD timing.</p> <p>In addition, 1 out of 6 (16.6%) asylum seekers received the information from COMAR, 1 out of 6 (16.6%) asylum seeker received incorrect information from COMAR, and nobody provided 4 out of 6 (66.6%) asylum seekers information related to their RSD timing.</p>
Awareness of rights	<p>The interviews show that 4 out of 6 (66.6%) of the asylum seekers are aware of their rights and obligations and 2 out of 6 (33.2%) do not know them.</p> <p>On this subject, 3 out of 6 (50%) of asylum seekers received this information through COMAR, 1 out of 6 (16.6%) asylum seeker received it through an organization that is not in charge of doing so and for 2 out of 6 (33.2%) asylum seekers, nobody provided them this information.</p>
Information about asylum	<p>The interviews reveal that 3 out of 6 (50%) asylum seekers were informed by a COMAR or migration officer about asylum in Mexico. 1 out of 6 (16.6%) asylum seekers was informed through an organization that is not in charge of doing so and 2 out of 6 (33.2%) asylum seekers were not informed through any organization.</p>
Social care	<p>The interviews indicate that 2 out of 6 (33.2%) asylum seekers consider the standard of social care to be good, 1 out of 6 (16.6%) consider that it is indifferent and 3 out of 6 (50%) consider that the social care provided is bad.</p>
COMAR information, treatment and helpfulness	<p>In this respect, the interviews revealed that 2 out of 6 (33.2%) asylum seekers considered that the information and treatment provided by COMAR is good, and 4 out of 6 (66.6%) considered that it is bad.</p>

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<sup>46</sup> Mexican Asylum and Subsidiary Protection Law 2011 Article 15 available at: [http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404\\_LeySobreRefugiados.pdf](http://www.comar.gob.mx/work/models/COMAR/Resource/114/2/images/1404_LeySobreRefugiados.pdf) [accessed 21.03.2012]



	<p>Concerning the helpfulness of the organisation and its officials, 2 out of 6 (33.2%) asylum seekers considered that COMAR officials were helpful in improving their situation, and 4 out of 6 (66.6%) asylum seekers considered that the help provided by COMAR was insufficient.</p> <p>It is important to highlight that the two asylum seekers that considered the information, treatment and help given by COMAR officials to be good are native Spanish speakers, whereas the other four interviewees speak foreign languages and considered COMAR's treatment of them and the helpfulness they were shown to be bad and insufficient.</p>
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- **Outcomes (correlations between the law and COMAR practices)**

#### RSD timing

In accordance with Article 24 of Mexican asylum law, COMAR will review and evaluate all applications for recognition of the condition of refugee and shall issue, in each case, a written decision with reasons, within 45 working days of the day after the application for asylum has been filled out. The deadline can be extended in cases of extreme circumstances which are stipulated in the same article.

In this respect, COMAR officials have fulfilled their obligations established in Article 24, as **83.3%** of the asylum seekers interviewed got their RSD resolution before the time or in the time established. Nonetheless, **83.3%** of the asylum seekers did not receive accurate information regarding the time that the resolution of their procedure would take and **66.6%** did not receive information about their procedure through COMAR officials, although this is an obligation of COMAR officials in accordance with Article 15.

#### Awareness of rights

Throughout, especially from articles 5 to 10, the new asylum law mentions that the asylum seekers and refugees must be informed by COMAR of their rights and obligations.

On this subject, the interviews revealed that **66.6%** of the asylum seekers had complete and accurate information about their rights and obligations and this information was provided by COMAR officials.

#### Information about asylum

In accordance with articles 15, 16 and 20 of the Mexican asylum law, every foreigner must be informed about the possibility of claiming asylum in Mexico. The obligation to provide information relies on COMAR or the migration officials when the foreigners are detained.

To this end, the interviews revealed that **50%** of the asylum seekers received complete and accurate information about the possibility of claiming asylum in Mexico from COMAR or migration officials.

#### Social care

The social care (the provision of physical and physiological healthcare, food, accommodation and legal aid) of every asylum seeker is protected through articles 15, 20, 55 and 56 of the Mexican asylum law. Articles 61 to 66 of the Mexican asylum law regulations handbook stipulate that COMAR is in charge of ensuring the protection of these social rights.

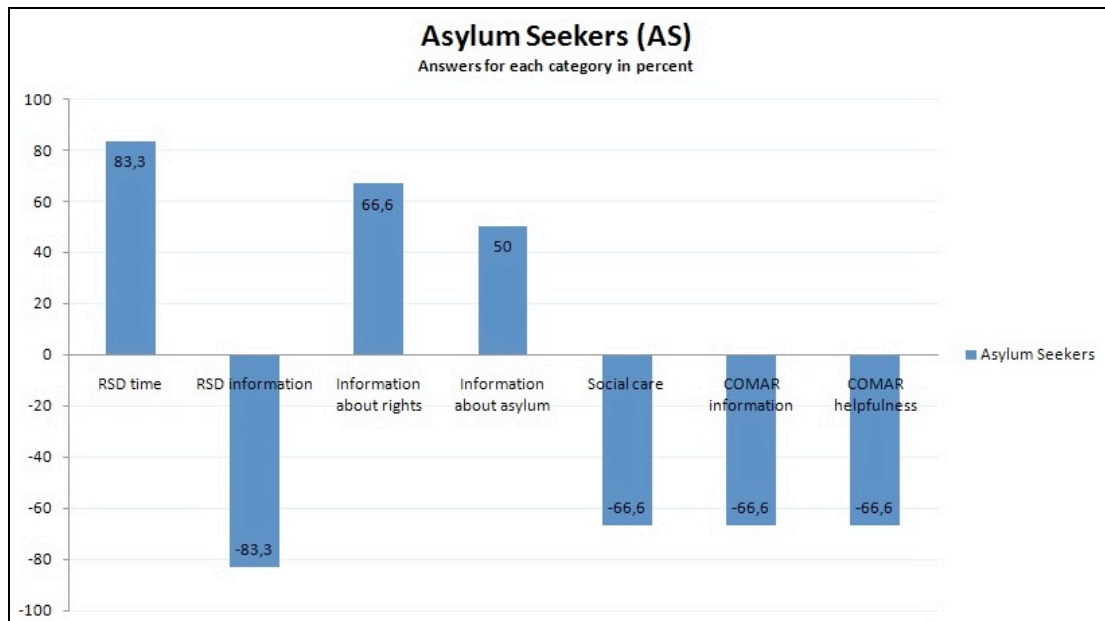
To this end, the interviews revealed that **66.6%** of the asylum seekers interviewed considered the social care provided as not fulfilling their needs completely.

#### COMAR information, treatment and helpfulness

This question was related to COMAR practices. The law details extensive provisions and safeguards for asylum seekers and refugees, and this question was intended to reveal if these services reach the beneficiaries.

The result showed that **66.6%** of the asylum seekers interviewed for this research considered that the information and treatment provided by COMAR officials was indifferent, incomplete and in some cases not accurate.

Moreover, they did not consider that COMAR officials were helpful in fulfilling their needs or improving their living situation while they were waiting for their RSD resolution.



**Figure 1.** Negative Values means that AS (AS) received inaccurate information or were subject to an improper procedure.

**Assessment finding # 1:** Although in general COMAR officials resolved the RSD in due time, they failed in the provision of accurate and complete information to asylum seekers. Moreover, according to the asylum seekers, in this case the beneficiaries of the law, their needs in terms of social care were not been fulfilled and the treatment and help they received from COMAR officials to improve their situation were inadequate.

## **B. Interviews with COMAR Officials**

The purpose of the interviews with COMAR protection officials was to assess their knowledge of the considerations contained in the new asylum law and establish certain comparisons with the way they apply it. They are three protection officials in charge of assisting the asylum seekers during the whole RSD procedure and solving the RSD in the required length of time. The interviews revealed the following information:

- **Categorization of qualitative data**

	<b>Question</b>	<b>Categories</b>
COMAR Practices (Knowledge of duties)	Which are your rights and duties as a protection official?	Knowledge of rights and duties
	Which are the rights and duties of an asylum seeker?	Information for asylum seekers
	How do you identify a vulnerable asylum seeker?	Vulnerable asylum seeker
	How do you determine the Best Interest of the Child?	Unaccompanied children (BID)
	Which are the procedures you follow when dealing with unaccompanied child asylum seekers or a member of a vulnerable group?	Procedures for vulnerable groups and unaccompanied children
	What is the procedure to follow when an asylum seeker has legal aid?	Legal aid
	What is the length (in time) of the RSD procedure and is this information provided to the asylum?	RSD timing

- **Measurement of categories**

	<b>Categories</b>	<b>Advanced*</b>	<b>Medium / Basic*</b>	<b>Low*</b>
COMAR Practices (Knowledge of duties)	Knowledge of their duties and rights	PO3: yes	PO1: yes	PO2: no PO1: no PO2: no PO3: no
	Information for asylum seekers	PO1: yes PO3: yes	PO2: yes	
	Vulnerable asylum seekers		PO1: yes PO2: yes	PO3: no
	Unaccompanied children (BID)		PO3: yes	PO1: no PO2: no
	Special procedures for vulnerable groups and unaccompanied children			PO1: no PO2: no PO3: no
	Legal aid		PO1: yes PO2: yes PO3: yes	
	RSD timing	PO1: yes PO3: yes		PO2: no

\* Advanced: When the protection official (PO) provides complete and accurate information about the procedure to follow.

\* Medium / Basic: When the protection official (PO) provides incomplete information about the procedure to follow.

\* Low: When the protection official (PO) provided vague or inaccurate information about the procedure to follow.

- **Findings**

<p>Knowledge of their rights and duties</p>	<p>In this respect, 1 out of 3 (33.3%) of the protection officials have a low knowledge of their duties. 1 out of 3 (33.3%) provided accurate but incomplete information about their duties, and 1 out of 3 (33.3%) provided complete and accurate information about their duties. 3 out of 3 (100%) mentioned they were not aware of their rights as COMAR employees.</p>
<p>Information for asylum seekers</p>	<p>2 out of 3 (66.6%) protection officials provided complete and accurate information about the rights and obligations of an asylum seeker, and 1 out of 3 (33.3%) provided accurate information about an asylum seeker's rights but wrong information about their obligations.</p>
<p>Vulnerable asylum seekers</p>	<p>On this subject, 2 out of 3 (66.6%) protection officials were able to identify members of a vulnerable group, although, they provided incomplete information about the procedure. Moreover, 1 out of 3 (33.3%) provided inaccurate information about who the members of a vulnerable group were and incomplete information about the procedure.</p>
<p>Unaccompanied children (BID)</p>	<p>The interviews revealed that 1 out of 3 (33.3%) protection official provided accurate but incomplete information about how to deal with unaccompanied children asylum seekers and the determination of the BID. Moreover, 2 out of 3 (66.6%) protection officials provided inaccurate information about how to deal with unaccompanied children asylum seekers and the BID.</p>
<p>Procedures for vulnerable groups and unaccompanied children</p>	<p>The interviewer asked the three protection officials to identify the special measures or procedures to undertake when dealing with unaccompanied children asylum seekers or members of vulnerable groups. 3 out of 3 (100%) protection officials answered that these cases have priority, although they had no knowledge of special procedures.</p>
<p>Legal aid</p>	<p>3 out of 3 (100%) of the protection officials knew that every asylum seeker has the right to a lawyer, nonetheless, they did not know the procedure to follow and had never handled cases with the presence of asylum seekers' lawyers.</p>
<p>RSD timing</p>	<p>2 out of 3 (66.6%) protection officials provided complete and accurate information about the timing of the RSD, declaring that they have informed the asylum seekers under their care and they respect the RSD timing. However, 1 out of 3 (33.3%) of the protection officials provided accurate information about the RSD timing, but declared generally that he exceeds the RSD timing, adding 30% (15 working days) to the allowed time.</p>

- **Outcomes (correlations between the law and COMAR practices)**

Knowledge of their rights and duties

The interviews with the three protection officials revealed that none of them have been informed about their rights as COMAR employees. Moreover, although one of them provided accurate and complete information about their duties, 2 officials (66.6%) showed an incomplete knowledge of their duties as stipulated in the new legislation.

Information for asylum seekers

In this respect, 2 officials (66.6%) provided complete and accurate information about the rights, obligations and procedures for regular asylum seekers, although 1 out of 3 officials provided inaccurate information about the asylum seekers' obligations.

Vulnerable asylum seekers

The Mexican asylum law defines in its Article 20 those who are to be considered part of a vulnerable group. Furthermore, the law established in its Article 54 the procedures to follow in order to provide them with the necessary care.

On this subject, 2 officials (66.6%) were accurate in defining the asylum seekers that must be considered vulnerable, while all three officials (100%) provided incomplete information about the procedure to follow when dealing with vulnerable asylum seekers. They described not knowing in detail the procedure they should follow and stated that they have not received any training in this respect.

Unaccompanied children (BID)

The Mexican asylum law considers the Best Interest of the Child Determination (BID) in Article 9 and the Article 35 of the regulations handbook. Concerning this, 3 officials (100%) indicated that they were unaware of the procedure to follow when dealing with the BID.

### Legal representative

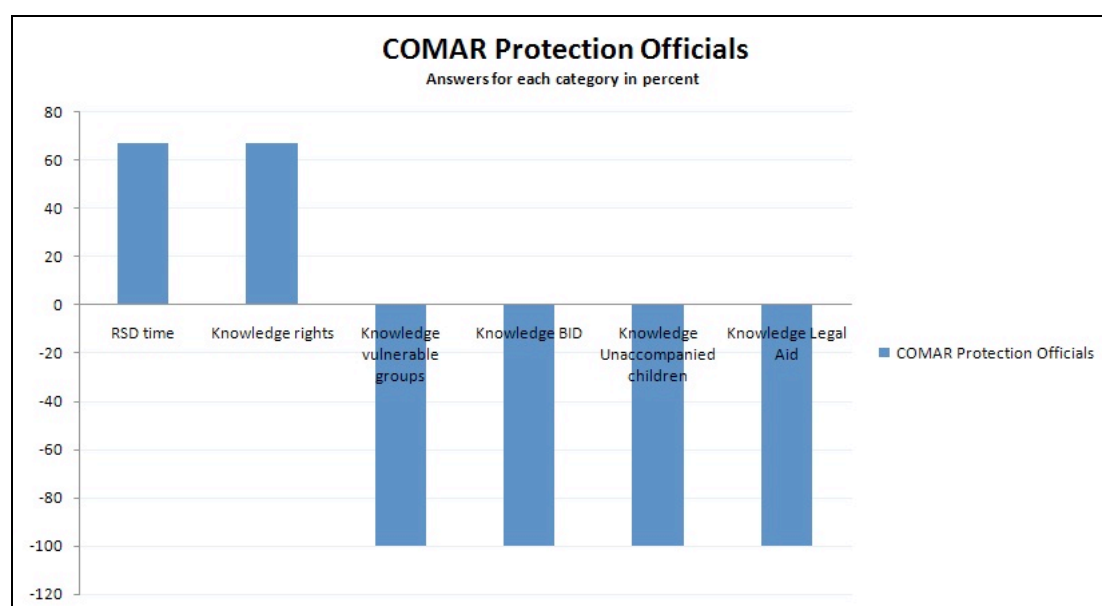
The Mexican asylum law makes several mentions to the legal representative of the asylum seeker. The law is more specific in its Article 21 and in Article 20 of the handbook about the asylum seeker's right to be assisted at any stage of the asylum claim procedure by a legal representative.

In this respect, 3 out of 3 (100%) officer indicated that they were unaware of the procedure to follow when the asylum seeker has a legal representative, and declared that they have not had any case where the asylum seeker has had a legal representative.

### RSD timing

In accordance with Article 24 of the Mexican asylum law, COMAR will review and evaluate all applications for recognition of the condition refugee within 45 working days.

Concerning this, 2 out of 3 (66.6%) officials provided complete and accurate information about the RSD timing and solved their cases in due time. However, despite providing accurate information about this procedure, the other official (33.3%) stated that they needed 60 days in order to complete a RSD, exceeding the allowed time by 30 per cent.



**Figure 2.** Negative values mean that the protection official provided vague or inaccurate information or performed a procedure inaccurately.

**Assessment finding # 2:** The officials have a basic knowledge of what is contained in the new asylum law. Although they have knowledge of how to undertake the RSD procedure, they have no specific knowledge about which actions must be taken when dealing with special cases, i.e. unaccompanied children asylum seekers or members of a vulnerable group.

Moreover, it is important to highlight that the three officials mentioned that they have not received any kind of training or attended any seminars to explain the changes that have been introduced to the RSD procedure with the enacted asylum law.

Furthermore, the three officials mentioned that they were not involved at any stage in the creation of the new law and did not take part in any internal consultation regarding its formulation. It was, however, COMAR's legal department that was in charge of drafting the new asylum law before it was presented to Members of Parliament. Also, the three officials stated that they did not have access to a copy of the new law until it was uploaded on the COMAR website. Therefore, they pointed out that they had neither read the full text of the new law nor developed deep knowledge of its contents.

Finally, two officials mentioned that when they did not know how to proceed, they used their common sense. Also, they stated that there are so many small procedures to undertake that they forget which ones come first.

### **C. Interviews with COMAR Senior Officials**

The purpose of the interviews with COMAR senior officials was to ascertain their appreciation of the gaps in protection found in the new asylum law and the steps forward that it represented in this area. Moreover, it was important to assess their knowledge of the new law, as they are the superiors of the protection officials that have to deal with the beneficiaries of the law. For the purpose of this research three senior officials were interviewed and the following information was revealed:



- **Categorization of qualitative data**

Question		Categories
	In praxis, what has it changed with the application of the new asylum law?	Knowledge of the law
	What are new asylum law's major advances?	Identification of progresses
	What are the new asylum law's setbacks and challenges?	Identification of challenges

- **Measurement of categories**

Categories	SPO1	SPO2	SPO3
Knowledge of the law	Advanced	Advanced	Advanced
Inclusion of gender	Progress	Progress	Progress
BID	Challenge	Challenge	n/a
Subsidiary Protection considerations	Progress	n/a	Progress
RSD timing	Progress	Progress	Progress
Plan to provide assistance	Progress	Challenge	Progress
Freedom of movement	Progress	Progress	n/a
COMAR mandate for solving RSDs with consultative opinion of Foreign Affairs Ministry	Progress	n/a	Challenge*
Legislation on Refugee issues	Challenge (we need more laws)	Progress	Challenge (we need more guidelines)
Legal Aid	n/a	Progress	Progress
Due process considerations	n/a	Progress	Progress
Revision			Progress
Lack of budget and infrastructure	Challenge	Challenge	Challenge
Training and Psychological care for employees	n/a	n/a	Challenge
Emergency aid	n/a	n/a	Challenge

- **Findings**

<b>Knowledge of the law</b>	The interviews revealed that 3 out of 3 (100%) senior officials have a detailed, complete and accurate knowledge of the considerations in the new asylum law.
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<p><b>Identification of progresses</b></p>	<p>3 out of 3 (100%) senior officials considered the inclusion of gender to represent progress and the establishment of RSD timing as the major piece of progress.</p> <p>2 out of 3 (66.6%) senior officials considered subsidiary protection, legal aid, considerations on due process and the asylum seekers' freedom of movement as examples of progress.</p> <p>1 out of 3 (33.3%) senior official considered the right to appeal as a piece of progress.</p>
<p><b>Identification of challenges</b></p>	<p>3 out of 3 (100%) of the senior officials considered the limited budget and poor quality of infrastructure as one of the major challenges.</p> <p>2 out of 3 (66.6%) senior officials considered the clarification of the Best Interest of the Child (BID) determination as a challenge.</p> <p>1 out of 3 (33.3%) senior officials considered the training and psychological care for employees, as well as the regulation of the emergency aid as challenges.</p>

- **Outcomes (correlations between the law and COMAR practices)**

Plan to provide assistance to asylum seekers and refugees

The interviews revealed that 3 out of 3 (100%) senior officials mentioned the plan to provide assistance to asylum seekers and refugees. Nonetheless, 2 out of 3 (66.6%) senior officials considered it to represent progress whereas 1 out of 3 (33.3%) senior officials considered it a challenge.

Legislation on refugee issues

2 out of 3 (66.6%) of the senior officials considered that there is a need for more legislation and guidelines on refugee issues. However, 1 out of 3 (33.3%) senior official considered that there is enough legislation and considered that it represented progress.

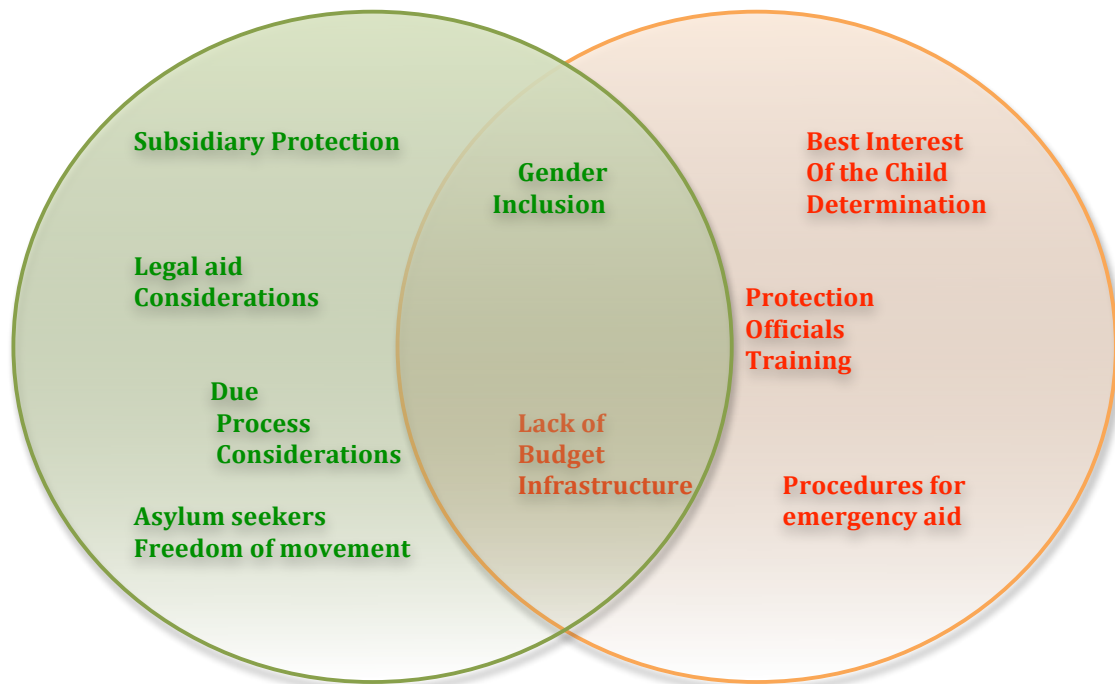
COMAR mandate to solve RSD with consultative opinion of Foreign Affairs Ministry

1 out of 3 (33.3%) senior official mentioned it as a challenge whereas 1 out of 3 (33.3%) senior official mentioned it as representing progress.

## COMAR Senior Official Diagram

### PROGRESSES

### CHALLENGES



**Figure 3.** The intersection in the middle of the two figures represent the areas in which the senior officials had similar opinions.

**Assessment finding # 3:** According to the interviews with senior officials, their knowledge about the new asylum law is comprehensive and extensive. They provided details about the content of the law and the way it must be applied on the ground. Nonetheless, when asked about the gaps in protection and the progress made by the new law, the three senior officials did not reach agreement.

There is an evident lack of communication between the senior officials and the protection officials, as the protection officials have basic knowledge of the content of the law and how they should apply it. Therefore, the information is not reaching the ground and, thus, there are deficiencies in the practice of applying the law.

Furthermore, it is important to note that COMAR was unable to provide official documentation regarding its own structure, such as an organisational chart, vacancy descriptions and documents about COMAR's mission and objectives. In the opinion of the researcher, the deficiency of structural information provides some evidence of a

deficient internal structure, which has a negative impact on the organization's performance and consequently damages the efficiency of the application of the new refugee law.

## CHAPTER 6. CONCLUSIONS

It is true that the Mexican refugee law fills a gap in the national legislation and represents a step forward in the protection of refugees, since it fulfils the implementation of international commitments made by Mexico in this regard.

Moreover, it is important to note that political will on the part of governments is one of the key elements required in order for refugee protection to advance, and that the Mexican government has shown this political will by enacting a refugee law at a national level.

Furthermore, as Nathwani's thesis points out, the main problem related to refugee law is that it is perceived as an obstacle for the efficiency of migration controls. Hence, this perception leads critics to demand that refugee law is practiced restrictively (Nathwani: 2003). Therefore, it is important to strengthen refugee protection regimes and create strong awareness of the differences between migration and refugee policies.

In this respect, the new Mexican refugee law establishes a clear distinction between economic migrants and refugees, and recognises that each of these phenomena demand a different legal approach. Nonetheless, this assessment has found several gaps in protection that endanger the life, freedom and safety of asylum seekers and refugees. Therefore, the new legislation faces several challenges ahead that must be met as soon as possible.

In response to the question of how the Mexican law complies with the rights of asylum seekers according to the international standards, the legal assessment has revealed that urgent legal reforms should be made in specific areas in order to eliminate legal provisions that undermine the rights of asylum seekers and refugees.

Furthermore, this assessment has shown that there is a need to add certain legal considerations, described in the previous chapters, in order to fully comply with international standards.

Thus, some of the legal reforms that this assessment has identified as necessary are the inclusion of safeguards for “chain refoulements”, the inclusion of risks to freedom and safety as reasons for being granted with subsidiary protection, the elimination of exclusion clauses for subsidiary protection, the need for specifications regarding the expulsion of refugees, considerations regarding the application for legal entry to a third country, provisions regarding the Best Interest of the Child determination, and the preservation of the apolitical nature of the refugee status determination.

The second part of the study responds to the question of how COMAR officials’ practices respond to asylum seekers’ legal entitlements. In this respect, the findings of this study’s assessment of COMAR’S practices have revealed that the asylum seekers’ perspective is that their needs in terms of social care have not been fulfilled. Also, they stated that the treatment and help provided by COMAR officials to improve their situation were inadequate.

Hence, bearing in mind that the asylum seekers, together with the refugees, are the main beneficiaries of the refugee law, the researcher urges COMAR to take actions in order to consider the asylum seekers and refugees opinions about COMAR services. Thus, a periodic review of this service that includes asylum seekers and refugees opinions should be implemented as soon as possible.

In addition, the interviews with protection officials have revealed that there is a serious lack of knowledge regarding specific procedures dealing with vulnerable groups, unaccompanied children and legal aid.

Moreover, an inadequate communication with senior officials makes the possibility of improving the protection official’s work unlikely. In this respect, measures in order to supervise and assess the protection officials’ work should be implemented.

In the opinion of the researcher, the protection officials should have a periodical evaluation in order to keep them up to date in the latest changes in the procedures and the law.

Similarly, although the interviews with senior officials revealed they have an extensive and comprehensive knowledge of the procedures within the new refugee law, their lack of agreement about the advantages and disadvantages of the new legislation highlighted the need to improve communications among senior officials in order to clearly stress COMAR's main objectives.

However, it is even more alarming to note that the senior officials do not communicate their knowledge about the law and the procedures to the protection officials, who are in charge of implementing these procedures. Therefore, the implementation of measures in order to improve communication between senior management and protection officials is crucial.

In this respect, this study has identified the need to implement regular meetings among senior and protection officials in order to discuss objectives, to perform evaluations and to monitor the progress of practical implementation of the law, in order to prevent COMAR from suffering from a form of institutional complacency.

Additionally, documentation regarding COMAR's structure and organization was found by this study to be inexistent. Thus, efforts towards improving COMAR's organizational design may substantially improve the efficiency of the applicability of the new legislation and, therefore, contribute to the successful accomplishment of COMAR's mission and objectives.

In the opinion of the author, the design and structure of an organization is crucial to maintaining an efficient workforce, and advancements at COMAR in this area would go a long way to ensuring quality service provision for asylum seekers and refugees with greater efficiency.

Hence, it is important for COMAR to bear in mind that the creation of a refugee law is not enough. The fair and efficient application of the law is crucial to the humane treatment of asylum seekers and refugees (individuals and families who are already in

extremely vulnerable situations) and to the prevention of their human rights from being further undermined.

Finally, this study reveals that more efforts to train personnel to respond effectively to vulnerable asylum seekers' complex cases and emergency situations are required. Thus, COMAR should open a network with refugee law researchers and practitioners worldwide, in order to provide their staff with the best training in refugee issues first-hand.

In this respect, it is important to point out that despite great progress made in Mexico with the new legislation, systematical inadequacies when applying the law could jeopardize the legal progress in protection of asylum seekers' and refugees' rights.

The Mexican government must therefore provide sufficient institutional support to COMAR, in order to improve the implementation of the law with sufficient human and financial resources.

Finally, it seems important to keep in mind that there is less room for experimentation with refugee law than in other areas of aid or development, since it could have dire or even potentially fatal consequences for those involved. Therefore, it is important to take immediate action to improve the efficiency of the application of the new Mexican legislation.



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