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Prima facie determination of refugee status

An overview and its legal foundation

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Nulli vendemus, nulli negabimus aut differemus rectum aut justitiam.
To no one will we sell, to no one will we refuse or delay right or justice.
Magna Carta 1215, Article 40

It was very bad it took a long time. You don't have confidence whether you are accepted or not... It is better if you have status; status is everything. Without status you have nothing... with status it is good.
Alemu, Refugee in Kenya, 2003
(in Odhiambo-Abuya 2004: 196)

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Glossary

Source: Oxford English Dictionary

ex hypothesi

adv. phr.

From or according to the hypothesis; as a result of the assumptions made; supposedly, hypothetically.

ex parte

adv.

Law

On one side only: said respecting an affidavit, application, commission, evidence, testimony, etc.

inter partes

adv.

Law

Of an action: relevant only to the two parties in a particular case; of a deed or the like: made between two parties.

prima facie

adv. and adj.

A. adv. At first sight; on the face of it; as it appears at first without investigation.

B. adj. Arising at first sight; based or founded on the first impression; (of evidence, etc.) acceptable unless contradicted.

quia timet

adj.

Law

Of an action, injunction, bill, etc.: brought or granted so as to prevent a probable future injury.

sui generis

lit.

Of one's or its own kind; peculiar.

Abbreviations

| | |
|--------|--|
| EU | European Union |
| ExComm | Executive Committee of the United Nations High Commissioner for Refugees |
| ICJ | International Court of Justice |
| OAU | Organisation of African Unity |
| PFRS | Prima facie refugee status |
| PFRSD | Prima facie refugee status determination |
| RSD | Refugee status determination |
| UNGA | United Nations General Assembly |
| UNHCR | United Nations High Commissioner for Refugees |
| USCRI | United States' Committee for Refugees and Immigrants |

Please note that citations are in parenthesis in the main body of the text. Footnotes are used only for case law citations, internal paper references and tangential commentary.

Introduction

The vast majority of refugees in the world at present have attained their refugee status as a result of a refugee status determination ('RSD') on a prima facie basis.¹ Despite its widespread use, the legal foundation of RSD on a prima facie basis ('PFRSD') has received very little attention and equally little discussion has occurred as to what, if anything, makes it unique. The legal commentary that exists on RSD focuses on individualised RSD rather than PFRSD and is therefore out of keeping with the RSD experience of most refugees. This paper seeks to redress this and to explore the legal implications and legal foundation of PFRSD.

The Office of the United Nations High Commissioner for Refugees ('UNHCR'), States that are signatories to the 1951 Convention Relating to the Status of Refugees ('Convention') as amended by the 1967 Protocol Relating to the Status of Refugees ('Protocol'), as well as those who are yet to sign any international refugee instrument conduct PFRSD as an expedited method of granting a refugee legal status. However, the term 'prima facie' does not appear in any international legal instrument pertaining to refugees. In addition, the Executive Committee of UNHCR, which is charged with giving non-binding guidance on the Convention, has never used the term in a conclusion. Nor is the term relevantly mentioned in the *travaux préparatoires* of the Convention.

Specifying what constitutes and results from PFRSD is difficult in the absence of an authoritative statement. This vagueness has led refugees to experience a 'legal status [that] remains insecure[,] ambiguous' (Dryden-Peterson and Hovil 2003: 8) and 'precarious' (Mecagni 2005: 48, see also CRC 2003: para 573). In addition, '[r]efugees... do not understand the meaning of... prima facie protections' (KANERE 2009: 2). PFRSD is 'a topic of mixed understanding' (Van Beek 2001: 15). Commentators lament that it is 'not unambiguous' and that 'the definition to which logically reference should be made is rarely formulated: it seems to be a suppressed, tacitly held, premise of the syllogistic reasoning involved' (Zieck 2008: 255).

The objective of this paper is to clarify the use of PFRSD in practice and explore its legal foundation. UNHCR has previously called for 'a comparative study of protection-based responses to mass influx' (UNHCR 2001(a): para 21(d)) as well as 'a clearer articulation of the criteria for [prima facie recognition] for multilateral consideration and endorsement' (UNHCR 2004: para 7). Similarly, in 1979, the Pan-African Conference on Refugees called for a study of 'group determination practices' (Rutinwa 2002: 6). None has yet been done (Durieux 2009: 35). This paper aims to answer these calls. By reference to practice

¹ 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). Durieux and Hurwitz put it at the same level in Africa in 2002 (2005: 106). An interviewee for this paper at UNHCR estimated that 99% of refugees worldwide were prima facie refugees (Anonymous interview 24 March 2009).

and law from States acting as countries of first asylum, this paper also seeks to avoid the tendency of scholars ‘to focus primarily on refugee determinations as they play out in industrialised nations’ domestic courts’ (Cuellar 2006: 18).

Understanding the legal foundation of PFRSD is necessary for numerous reasons. Primarily, it clarifies the rights afforded to refugees who are subject to PFRSD. Second, it elucidates the procedural elements of PFRSD. Third, it gives legal force to the outcome of PFRSD. Finally, it clarifies the limits and qualities of PFRSD, especially in comparison with other forms of RSD.

This paper is a State-centric, law and legal (rather than policy) analysis of PFRSD. It takes this perspective because this most closely reflects the prevailing approach of States to the refugee regime.² Moreover, while ‘scholars and non-state actors [including UNHCR] may influence the course of interstate agreement... states, and only states, make international law’ (Hathaway 2005: 18, see also Alexander 1999: 259).

The first section seeks to clarify the characteristics that make PFRSD legally and practically unique. It does so by reference to State practice (or UNHCR practice where it has been delegated the State’s responsibility in RSD).³ It finds that PFRSD does not provide scope for exclusion or non-inclusion⁴ from Convention protection. The first section concludes that the process of PFRSD is a form of individual RSD that is used when the pragmatic need to conduct RSD has overwhelmed the host State’s RSD infrastructure.

The second section assesses the legal foundation of PFRSD. It does this by analysing each document mentioned in commentaries on PFRSD as the legal foundation on which it is based. The section concludes that the foundation of PFRSD is the Convention, although domestic legislation can also be the legal foundation of PFRSD. It finds that PFRSD is a means for host States to fulfil their human rights obligation for due process to refugee claimants.

The third section is an exploration of the legal conception of PFRSD. The term ‘prima facie’ is not unique to refugee law. The prevailing orthodoxy is that the term, as it is used in refugee law, refers to the general law relating to presumptions. In this sense, it is legal

² ‘Primary responsibility for protection lies with States’ (UNGA 2004: para 32, see also Kagan 2006: 3 and 13).

³ UNHCR conducted RSDs in at least 60 countries in 2001 (Kagan 2003: 5) and 45 countries in 2007 (Simeon 2009: 6-7). It is especially common for UNHCR to conduct RSD in the Middle East (Kagan 2006: 3) and Asia (Alexander 1999: 251). One region which is notable for its lack of delegation of RSD to UNHCR is Latin America, in which PFRSD has been conducted by States on numerous occasions (UNHCR 2004: 258).

⁴ A person is not included in the scope of the refugee definition of the Convention if their claim for refugee protection is inconsistent with the humanitarian purposes for which Convention protection is intended. Such a person would not be excludable, since exclusion is clearly defined in the Convention pursuant to Article 1F and takes precedence. For example, current or former combatants may be non-includable despite having fled a situation that would constitute persecution for others (Salomons 2001: 372).

shorthand for a presumption arising in favour of the refugee claimant. This paper finds that this conception inadequately explains how prima facie refugee status ('PFRS') operates. It argues that the term 'prima facie' should be understood in refugee law as a shorthand reference to the general law relating to injunctions. That is, 'prima facie' is shorthand for a lower standard of proof, rather than a shifted burden of proof. PFRS can therefore be conceived as a *quia timet* injunction granted, in haste and *ex parte*, at the discretion of the host State with both prohibitory and mandatory elements. The injunction persists until, but is without prejudice to, RSD that considers exclusion and non-inclusion from Convention protection. The paper finds that this injunctive conception is founded in the Convention, accords with State and UNHCR practice, and clarifies the rights attached to PFRS. The paper ends by suggesting that PFRSD practice be clarified by way of an Executive Committee conclusion.

1 Definition of prima facie refugee status determination

State and UNHCR practice explored throughout this paper indicates that PFRS arises in the following situation. Host State A, in its discretion, decides to afford refugee status as a result of PFRSD, rather than other RSD. This decision is usually reserved for situations in which State A's capacity to conduct RSD that has regard to exclusion and non-inclusion is surpassed. In such a situation, State A affords PFRS to all those individuals who enter from place B in period C. Place B may be a region, another State or part of another State.⁵ Because it is an urgent means of affording interim refugee status, PFRSD will usually occur during and soon after period C. When State A's RSD capacity is sufficient to conduct RSD that has regard to exclusion and non-inclusion for each individual, interim PFRS can be replaced with a final refugee status by means of a final, complete RSD. In practice, this may take many years, or not happen at all (for example, see KANERE 2009a: 2-3). The decision to accord PFRS is based on 'objective information' known to State A about the conditions in place B during period C. All RSD decision-makers use objective (or country of origin) information to discharge their part of the shared burden of proof in RSD (Hathaway in Gorlick 2003: 360, Noll 2005: 144-5), however PFRSD relies on it more heavily (Durieux 2009: 31).⁶ When each claimant in State A provides evidence that she or he is from place B and fled in period C, State A assumes that that person could prove all elements of the refugee definition under the Convention (Article 1A). PFRSD therefore relies on an inference that, by proving this low standard of evidence, each individual has a

⁵ Kourula argues that, in principle, PFRSD could be invoked for a cohort within a refugee group from a particular place, such as women (1997: 146). To the author's knowledge, this has not happened previously.

⁶ Many commentators claim that reliance on objective information is a key characteristic of PFRSD (Jackson 1999: 3 and quoting Schnyder at 108, Rutinwa 2002: 1, UNHCR 2004: para 6, Hyndman and Nylund 1998: 30, O'Neill et al. 2000: 169, UNGA 1994: para 35, Durieux and Hurwitz 2005: 119, Durieux and McAdam 2004: 11, Van Beek 2001: 28, O'Connor 2001: 5, UNHCR 2001a: para 6, Durieux 2009: 4, Kourula 1997: 294).

‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ (Convention Article 1A). This paper argues that the use of the term ‘prima facie’ is an indicator that PFRSD requires a lower standard of proof than other RSD.⁷ By deeming that those fleeing from place B in period C are entitled to PFRSD, the host State acknowledges that the usual, higher standard of proof need not be fulfilled by each applicant for the grant of refugee protection pending final RSD.

1.1 A form of individual determination

It is the contention of this paper that PFRSD is a form of individual RSD, even though UNHCR and commentators often synonymise PFRSD with so-called ‘group determination’ (Goodwin-Gill 1983: 45, UNHCR 2006: 44, UNGA 1994: para 46, Hyndman 2001: 49, Cuellar 2006: 22, Schreier 2008: 13, Rutinwa 2002: 1, KANERE 2009a: 2, Kourula 1997: 44). This is important because some commentators claim that the Convention definition of refugee, by referring to ‘a person’, requires that RSD must be done person-by-person (Naldi in Okoth-Obbo 2001: 87, Goodwin-Gill and McAdam 2007: 529, Jackson 1999: 2 and 471, Cuellar 2006: 19, UNGA 1994: para 22 and 35, Schreier 2008: 13, Van Beek 2001: 15, Zieck 2001: 144, Kourula 1997: 144 and 157). It follows that, if the Convention requires individual RSD, then by definition, group determination is outside the scope of the Convention.

There is nothing known to law as ‘group determination’. No legal instrument, domestic or international, uses this term. Moreover, commentators are silent as to what ‘group determination’ means.⁸ They tend to merely juxtapose it with ‘individual’ RSD, the essential elements of which, in turn, are not explained.

This paper argues that individual determination requires, at a minimum, some information about each individual claiming refugee status. This, in turn, requires interaction or communication between that individual and the decision-maker. PFRSDs are made on the basis of assumptions about the context of flight coupled with individual evidence that the claimant is from place B in period C. Thus, some individual information is necessary. This information can be readily and efficiently established, but it requires some individual contact with the host State, directly or through UNHCR. Such contact, in most PFRSD case loads, occurs in the process of registration (Rutinwa 2002: 10, ExComm 2004 No 91(b)(6)). This paper contends that this level of individual interaction is a sufficiently individual element to the determination as to allow it to fall within the Convention’s requirement that ‘a person’ be considered for refugee status.

It is not the refugee quality of the refugees of the entire group that is determined, but that of each individual in the group. Groups do not accrue refugee status, be it prima facie or by other means. Only individuals do. (Durieux and Hurwitz 2005: 118, see also Jackson 1999: 627)

⁷ See 3.2.2.

⁸ Even Jackson, in his text titled ‘The Refugee Concept in Group Situations’, ‘neither addressed nor analysed... what a group actually is’ (Zieck 2001:145).

In this sense, PFRSD is not group determination. It is a different form of individual determination.

Empirical evidence supports the contention that PFRSD is a form of individual determination. Both the duration of the PFRSD process and the nature of the questions required for some PFRSD are comparable with so-called 'individual' RSD. Kenya uses PFRSD for Sudanese and Somali refugee claimants (Hyndman and Nylund 1998: 30, Kagan 2003: 13, Odhiambo-Abuya 2004: 190). For others, it undertakes individual RSD. The average length of an individual RSD in Kenya is two hours but it can be as short as 20 minutes (Odhiambo-Abuya 2004: 194 and 198).⁹ In a procedure regarded as individual RSD, Ethiopian students who fled to Kenya were asked little more than that which is required of prima facie refugees for registration: 'why I came here, which border point I crossed and if I can go back to Ethiopia' (Odhiambo-Abuya 2004: 198). PFRSD often takes as much or more time and goes into as much detail as these individual RSD procedures. For example, the Tanzanian process¹⁰ for PFRSD can be just as detailed (Rutinwa 2002: 9-10) and lengthy. It has multiple stages and it is time-consuming for each individual. Claimants are individually screened by an Eligibility Committee (USCRI Tanzania 2008) or UNHCR to ascertain 'basic bio-data, date and place of entry into Tanzania, route followed into Tanzania and reasons for leaving the country of origin'.

The average interview length is 45 minutes (O'Neill et al. 2000: 163).¹¹ Thus, if time taken or the nature of the questions is an indicator of what constitutes individual RSD, then PFRSD is a form of individual RSD because it takes a comparable length of time and involves comparable questions to other forms of individual RSD. PFRSD is therefore an individual RSD procedure. As such, prima facie refugees are not excluded from benefits under the Convention (as is implied by Cuellar 2006: 19 and 22, Schreier 2008 and UNGA 1994: para 22 and 46).

For ease of reference, PFRSD will be contrasted hereafter with the term 'individual RSD'. This term is not meant to imply that PFRSD is not individual. 'Individual RSD' is merely shorthand for RSD that accounts for exclusion and non-inclusion from Convention protection.¹²

⁹ At the extreme end, there are reports from other countries that state that UNHCR conducts individual RSD at a rate of 20 interviews per decision maker per day in Indonesia, or one interview every 24 minutes (Burnside 2009). Similarly, a process called 'individual RSD' under South African domestic legislation has been conducted at a rate of 1000 cases in an hour (Van Beek 2001: 25).

¹⁰ See 2.4.

¹¹ Liberia and Guinea have previously adopted a similar procedure (Rutinwa 2002: 10). Similarly, South African RSD in situations of 'mass influx' includes an interview, a questionnaire and a form (Van Beek 2001: 19). The process for all Afghans in Pakistan was similarly detailed. Yet again, it was regarded as PFRSD (Zieck 2008: fn 57). According to Zieck, each claimant was asked the following, among other questions: 'Where are they? What are they doing? When they came? Where are they from in Afghanistan? Whether they intend to repatriate? How do they support themselves in Pakistan?'

¹² See 1.3.1.

1.2 Circumstances in which PFRSD is used and its benefits

Many commentators note that PFRSD is conducted when the host States' RSD apparatus is overwhelmed, rather than in response to a numerically large influx (Okoth-Obbo 2001: 119-120, Durieux 2009: 4, Durieux and Hurwitz 2005: 120, Kourula 1997: 67). Kagan explains that 'in a state without any RSD apparatus, even a small number of asylum-seekers could justify the use of prima facie recognition' (2006: 18, see also Okoth-Obbo 2001: 119).

Empirical evidence severs the link between large numbers and PFRSD, as commentaries cited above assert.

In 2000, UNHCR reported that "some 4,500 Sudanese refugees arrived in Kenya during the first part of the year." These Sudanese in Kenya were recognized on a prima facie basis ... But in the same year, Sudanese asylum seekers arrived in Egypt ... at more than twice the Kenyan rate. If numbers... were decisive, one would have expected UNHCR to use prima facie recognition in Egypt as well. (Kagan 2003: 13)

Refugee arrivals to the USA serve as another example. Although the USA hosted 281,219 refugees in 2007 (UNHCR 2008), it did not and has never used PFRSD because its RSD procedures have not been overwhelmed. Thus, large refugee numbers alone have not been the trigger for PFRSD by States or UNHCR. PFRSD is utilised when a State lacks capacity to conduct individual RSD (Schnyder 1965: para 16, Hyndman and Nylund 1998: 30, Rutinwa 2002: 2, Odhiambo-Abuya 2007: 87, Kagan 2006: 18, Van Beek 2001: 16, Durieux 2009: 4 and with Hurwitz 2005: 106, Okoth-Obbo in Salomons 2001: 374).¹³ PFRSD thus accords with one of the two conceptions of the term 'mass influx'. The conception it is inconsistent with has regard only to the numbers of people fleeing. For example, the European Community has defined mass influx as requiring 'a large number of displaced people' (EU 2001 Article 2(d)).¹⁴ The South African *Refugee Act* 1998 similarly uses the term 'mass influx' by reference to people 'who entered the Republic on a large scale' (s 35(2), see also Schreier 2008: 36, Van Beek 2001: 18 and fn 35).

The other conception has regard to both the numbers fleeing and the capacity of the receiving State (Durieux and Hurwitz 2005: 145-6). UNHCR policy states that a 'mass influx' is defined by:

the size and speed of the influx balanced against the size and capacity of the receiving country to process the cases in individual status determination systems. (UNHCR 2001, see also ExComm 2004 No 100: para (a))¹⁵

¹³ It is worth noting that PFRSD should be used uniformly in a country that lacks capacity to conduct individual RSD because '[i]nternational refugee law guarantees refugee rights regardless of geography' (Kagan 2003: 11).

¹⁴ The terms of this Directive have been incorporated into many pieces of European domestic legislation. See for example s 5(3) of the *Act on Granting International Protection to Aliens* (Estonia) or Part V of *Act LXXX of 2007 on Asylum* (Hungary).

¹⁵ This definition, in turn, derives from UNHCR (2004: §3). UNHCR described situations where individual RSD is not conducted when it is 'too unwieldy, costly and protracted in the face of large numbers of arrivals'.

This more nuanced conception of mass influx does not require that the ‘mass’ be any more than a few people, so long as those few result in the host State’s RSD capacity being surpassed (Durieux and Hurwitz 2005: 146).¹⁶ This definition of mass influx conforms with the circumstances in which PFRSD is conducted.

In situations where the RSD apparatus is overwhelmed, the benefits of PFRSD are significant for both host States and refugees. In particular, PFRSD can be both expeditious (Durieux 2009: 1) and cost-effective (Kourula 1997: 294), which, in turn, allows for up to half of UNHCR’s funds to be diverted from administering RSD to material assistance for refugees (Kagan 2003: 40, 42-43, Kagan 2006: 18). In cases where no RSD has already been undertaken, PFRSD gives the State ‘a measure of control by having all refugees register with’ them, while providing refugees with a legal document on which they can rely for protection from *refoulement* or interventions from law enforcement authorities (Kagan 2003: 44). For refugees, it has the additional benefit of giving expeditious access to ‘health services... food and other privileges to which recognized refugees are entitled’ (KANERE 2009: 1). It also affords each and every claimant an individual, personal and independent refugee status (Kourula 1997: 355). This contrasts with derivative refugee status, which is most commonly given to women and children. It is most commonly derived from, and dependent upon, a continuing relationship with the male head of household (De La Hunt and Valji 1999:12, Staver 2008: 25-26).

PFRSD is a legal response to a pragmatic need to afford refugee status when a host State’s RSD capacity is surpassed. However, while PFRSD may well have ‘evolved for pragmatic and strategic reasons’ (O’Connor 2001: 8), it has legal consequences. PFRSD is a status in law. It is therefore legal as well as pragmatic. Pragmatic considerations are routinely part of legal ones. For example, injunctions are granted, in part, because a decision-maker does not have time to thoroughly consider the matter.¹⁷ The claim that PFRSD is just a pragmatic tool (Hyndman and Nylund 1998: 33)¹⁸ is therefore an incomplete description.

1.3 Characteristics of PFRSD

PFRSD is a unique procedure in refugee law and it leads to a unique status. Numerous characteristics make PFRSD different from other legal concepts in refugee law. It could even be said that the use of the term ‘prima facie’ in some refugee situations but not others is itself prima facie evidence that it is describing something distinctive. The purpose of this section is to define aspects of State practice that indicate that PFRSD is different.

¹⁶ For a discussion of the different approaches, see Goodwin-Gill and McAdam 2007: 335.

¹⁷ See 3.2.

¹⁸ Hyndman and Nylund contend that ‘prima facie determination [is] pragmatic and strategic, as opposed to legalistic’ (1998: 33, see also Durieux and McAdam 2004: 12) and that ‘prima facie refugees... have not been granted status under any legal instrument’ (1998: 38). They even suggest that prima facie RSD is not formally within the refugee regime, such that they coin the term ‘prima facie regime’ and describe it as ‘legally insufficient’ (1998: 29). Okoth-Obbo similarly argues that PFRSD is ‘only a managerial tool’ (in Salomons 2001: 373), ‘a means to enable urgent measures to be taken’ and ‘a device for preliminary decision-making on what is the separate question of refugee status’ (2001: 119, see also Schreier 2008: 13).

Refugee law commentaries that mention ‘prima facie’ attach it to a range of words and phrases. The variety is indicative of the lack of clarity about its legal meaning. In the refugee context, ‘prima facie’ has been attached to the words methodology, mechanism, concept, basis, device (Okoth-Obbo 2001: 118-121), regime (Hyndman and Nylund 1998: 29), approach, tool, (Rutinwa 2002: 19), category, protections (KANERE 2009: 2), protection system (Kagan 2003: 42), recognition (UNHCR 2004: para 6), collective eligibility (Zieck 2001: 149), asylum determination (Van Beek 2001: 15), refugee population (UNHCR 2001a: para 4 and 11), automatic refugee (Mecagni 2005: 48) and refugee (Rutinwa 2002: 19, Hyndman and Nylund 1998: 22). It has even been referred to, lackadaisically, as just ‘prima’ (Okoth-Obbo 2001: para 84).

This paper contends that the ‘prima facie’ term in refugee law should be primarily regarded as an adjective to attach to ‘RSD’ and ‘status’. This accords with UNHCR (UNHCR 2001a: para 4 and 11), Zieck (2008: 255-6), Goodwin-Gill and McAdam (2007: 341), Van Beek (2001: 15) and a report to the US Congress (Margesson 2007: 15) who all refer to ‘prima facie refugee status’. Moreover, two of the four domestic instruments that use the term ‘prima facie’ in relation to RSD refer to prima facie as a refugee status.¹⁹ The appendage ‘status’ indicates that PFRS is a qualitatively different legal result compared with status from individual RSD.

PFRS is unique in numerous respects. It does not have regard to the possibility that those subject to PFRSD could be excludable or non-includable from refugee protection under the Convention. In other words, PFRSD does not consider if a person is undeserving of humanitarian protection because of past reprehensible acts that fall within the meaning of Article 1F. It places prima facie refugees at a disadvantage at the time that a cessation clause is applied to them because no thorough individual records can be relied upon to justify the non-application of a cessation to a person with prima facie refugee status. It gives access to the durable solution of local integration but not resettlement. Finally, it is granted for an indefinite duration. Each of these features is discussed below.

1.3.1 Exclusion and non-inclusion

PFRSD is concerned almost entirely with inclusion in Convention protection (Rutinwa 2002: 20). A complete RSD must also have regard for exclusion from Convention protection. A person is excluded from international refugee protection if there are ‘serious reasons for considering’ that he or she has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country of refuge or has been guilty of acts contrary to the purposes and principles of the United Nations (Convention Article 1F).

Exclusion procedures require ‘a thorough and meticulous examination of facts and law’ (O’Neill et al 2000: 169) because the obligations for due process are especially high

¹⁹ See 2.4. Okoth-Obbo argues that PFRSD’s ‘essential purpose is not directed to the question of refugee status as such’ (2001: 119) although later he states that ‘the prima facie approach... attributes a provisional status’ (2001: 121).

(UNHCR 2003: 538, Rutinwa 2002: 21). As a result, UNHCR has stated that exclusion determination must be highly individualised (UNHCR 1998 Exclusion: para 7, UNHCR 2003: 538, ExComm 2004 No 100 (j)(vii)). Given that PFRSD is used in situations where a State is incapable of conducting individual RSD, proper exclusion processes are incompatible with PFRSD (UNHCR 2003: 537, UNHCR 2004: para 7, Durieux and Hurwitz 2005: 123, Van Beek 2001: 15).²⁰

Similarly, PFRSD does not allow for a process to determine whether a refugee claimant is non-includable in the Convention (UNHCR 2003: 537). By definition, refugee status has a humanitarian character (Convention Preamble). The Convention does not protect those who do not have a humanitarian need for it (Durieux and Hurwitz 2005: 124). For example, current or former combatants may be non-includable despite having fled a situation that would constitute persecution for others (Salomons 2001: 372).²¹ Even though exclusion and non-inclusion are rare,²² consideration of both for each individual refugee claimant is important in giving the international and host community trust that the refugee regime is protecting only those determined to be deserving of international refugee protection. The absence of such consideration makes the outcome of PFRSD qualitatively different from individual RSD in that it is not as reliable as an indicator of inclusion in the Convention definition (Rutinwa 2002: 11-12).

1.3.2 Cessation

The Convention ceases to apply when the circumstances causing the refugee claim have 'ceased to exist', unless a person 'is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality' (Article 1C(5)). Cessation can mark the end of the refugee law life-cycle. Article 1C(5) is most commonly invoked in relation to a defined group *en masse*. In such circumstances, each individual should have the opportunity to substantiate a claim of 'compelling reasons' not to lose their refugee status. Such reasons must be grounded in fact and, ideally, supported by objective evidence. The original reasons for claiming refugee status, as recorded during RSD by the decision-maker, are valuable for this purpose.

²⁰ The lack of scope for exclusion procedures in PFRSD famously resulted in international protection being given to *génocidaires* from Rwanda in Tanzania (Durieux and Hurwitz 2005: 123, Durieux 2009: 30). Durieux and Hurwitz argue that exclusion is compatible with so-called 'group determination'.

²¹ Non-inclusion under the Convention may not preclude a person gaining complementary protection. The absence of a non-inclusion element in PFRSD is routinely exploited by combatants who would otherwise be members of a group entitled to PFRSD. For example, army personnel from the Sudanese Peoples' Liberation Army use attainment of PFRS by Sudanese in Kenya to take a break at Kakuma refugee camp from fighting in South Sudan (Eidelson and Horn 2008: 25). PFRSD can also lead to abuse of the system in that it has led to multiple registrations (Rutinwa 2002: 14). The attainment of material entitlements at multiple refugee camp or registration sites is also arguably exploiting the humanitarian character of refugee protection.

²² For example, between 1997 and 2000, the Tanzanian authorities excluded one person and made recommendations for further investigation about the possibility of exclusion for only 10 others (O'Neill et al 2000: 167, see also Rutinwa 2002: 13).

The Article 1C(5) caveat has unique ramifications for prima facie refugees. Prima facie refugees are at a disadvantage when cessation of refugee status may apply to them. Unlike individual RSD, PFRSD usually results in registration, rather than a thorough individual record. Consequently, prima facie refugees are likely to have greater difficulty evidencing a claim to have ‘compelling reasons’ to be excluded from cessation of status and to thereby retain their refugee status. This is a further qualitative difference between the result of PFRSD and individual RSD.

1.3.3 Access to durable solutions

The Statute of UNHCR classifies three types of ‘permanent [or durable] solution’ for refugees: repatriation, integration and resettlement (Preamble, Articles 1, 7 and 9).

Repatriation is the solution that results in the return of a refugee to her or his country of origin. Even people who have not undergone any RSD can and do benefit from UNHCR and State-supported efforts in repatriation operations.²³ Thus, prima facie refugees have access to repatriation (Hyndman and Nylund 1998: 37).

Local integration is the durable solution that results in a person attaining rights akin to those of, and ultimately becoming, a citizen of the country of first asylum. Prima facie refugees have access to the possibility of local integration. Prima facie refugees have been granted citizenship in countries of first asylum on many occasions (Durieux 2009: 19, UNHCR Local Integration 2002: 4). Burundians in Tanzania (Bush 2008: iv), Angolans in Botswana (Salomons 2001: 376, see also Rutinwa 2002: 23 and 26), Croatians in Bosnia and Yugoslavs (as they then were) in Serbia (Feijen 2008: 414) have all been prima facie refugees and become citizens in the country of first asylum. As such, PFRS does not preclude the possibility of being locally integrated as a durable solution. This contrasts PFRS holders with temporary protection holders. They cannot locally integrate (UNGA 1994: para 48-50, Kourula 1997: 112-113) because that status is premised on the expectation of repatriation (Durieux and Hurwitz 2005: 138, Goodwin-Gill and McAdam 2007: 340, Durieux 2009: 15).

State practice indicates that prima facie refugees are not considered for resettlement. Resettlement results in a refugee being moved to a country which takes a quota of refugees from other host States to be locally integrated. In practice, resettlement is almost exclusively offered by wealthy nations. Resettlement screening and RSD are related but separate processes. However, unlike refugee status, ‘resettlement is not a legal right’ (Kagan 2003: 18). It is arguable, however, that consideration for resettlement is (Kamanga 2005: 106). Even though there is an increasing willingness by the major resettlement countries²⁴ to accept groups for resettlement (UNGA 2004: para 54),²⁵ none of these

²³ For example, the current repatriation operation to South Sudan involves Internally Displaced Persons, prima facie refugees and those who have undergone individual RSD.

²⁴ USA, Canada and Australia accounted for 90% of all UNHCR referrals for resettlement in 2007 (Bush 2008: 3).

²⁵ UNHCR routinely engages in group resettlement referral (ExComm 2004 No 100(m)(iii)). Under US legislation, the President has the power to specify groups within countries who UNHCR can refer as a

resettlements are being conducted solely in reliance on PFRSD. Each resettled group has been subject to PFRSD in the first instance and in the country of first asylum but, at the time of consideration for resettlement, each individual has undergone a one-on-one interview. These can last for 90 to 180 minutes (Odhiambo-Abuya 2004: 192). State practice indicates that resettlement requires, *inter alia*,²⁶ that the individual be screened to be a refugee in respect of all elements of the Convention, including exclusion (UNHCR 2001a: para 11, Anonymous interview 25 March 2009, USBPRM 2009, Bush 2008: 8-9, Salomons 2001: 374, Kagan 2003: 17, Zieck 2001: fn 26, Goodwin-Gill 1983: 22). The absence of a procedure for exclusion in PFRSD has caused resettlement countries to undertake individual RSD after PFRSD (Rutinwa 2002: 12, Davies 2008: 713). Thus, *prima facie* refugees do not have direct access to consideration for resettlement.²⁷

1.3.4 Duration

PFRS is not of a pre-determined duration. State practice indicates that it persists until there is a thorough RSD that includes, *inter alia*, consideration of exclusion or non-inclusion from Convention protection, or until cessation of status. This makes it distinct from temporary protection, although these concepts are occasionally conflated (USBDHRL 2006, see also Hyndman and Nylund 1998: 36, Van Beek 2001: 28).²⁸ Temporary protection is also a mechanism by which protection is given without an individual RSD (UNGA 1994: para 46, Rutinwa 2002: fn 3). However, it is revocable or reviewable after a prescribed, and often codified, period of time (UNHCR 2001a: para 4 and 12, Durieux and Hurwitz 2005: 139 and 152, Rutinwa 2002: 24).²⁹

group (Immigration and Nationality Act 1952 s101(a)). In the last decade, the USA has accepted large groups for resettlement under its 'priority 2' group resettlement scheme (Bush 2008: 6) from Kenya including the 'Lost Boys' of South Sudan and the Somali Bantu (UNGA 2004: para 54). Somalis and Sudanese in Kenya are granted RSD on a *prima facie* basis (Hyndman and Nylund 1998: 30, Kagan 2003: 13, Odhiambo-Abuya 2004: 190). Similarly, at the instigation of UNHCR, both Canada and Australia have committed to resettle groups including, for example 5,000 Bhutanese refugees from Nepal each, up to 2012 and 2013 respectively (CIC 2007, Evans 2008).

²⁶ It should be acknowledged that, even those who have undergone individual RSD are also often re-interviewed for resettlement (US Interview 2009). In these situations, however, the purpose of the interview is different from the resettlement interviews for *prima facie* refugees. Such interviews are solely to assess compliance with the additional resettlement criteria. By contrast, *prima facie* refugees will be interviewed for the dual purpose of establishing that the person is not subject to non-inclusion or exclusion under the Convention and that they satisfy the resettlement criteria. Thus the rule remains that *prima facie* refugees cannot be resettled without a further substantive RSD interview.

²⁷ There has been one notable exception to this rule that came about pursuant to a unique international agreement. For 15 years from 1979, Vietnamese refugees were determined on a *prima facie* basis (Bronce 1993: 541). They were resettled 'in an arguably pragmatic exercise' without individual RSD (*SZEGG v Minister for Immigration and Multicultural Affairs* [2006] FCA 775: para 2).

²⁸ Protection under the Convention is, by definition, temporary (UNGA 1994: para 28, Rutinwa 2002: 24). Article 1C of the Convention provides six ways in which protection ceases. Despite this, a concept has emerged called 'temporary protection'. In its absence, temporary protection should be regarded as time-limited protection, since the time limit is its most distinctive and universal feature. It is also the feature which makes it most significantly different from PFRSD.

²⁹ Regarding European Union, see EU Directive 2001/55/EC Article 4; regarding Australia see McMaster 2006: 136. Although they do not refer to it as 'temporary protection', there is similarly time-limited protection provided for elsewhere in domestic legislation; regarding Botswana, see *Refugees (Recognition and Control) Act* 1968 s11(1); regarding Panama, Venezuela and Peru, see Gottwald 2004: fn 28.

There are no instances known to the author of PFRS being granted for a pre-determined duration.

‘Prima facie’ thus describes the nature of a procedure that is qualitatively different from other RSD. The number of rights attached to PFRS under the Convention are the same as for Convention refugee status (Durieux and Hurwitz 2005: 120-1, Durieux and McAdam 2004: 10). However, State practice confirms that, in limited respects, prima facie refugees receive different treatment from refugees determined through other forms of RSD, often because they have arrived in large numbers and thereby stretch the resources of the host State (Rutinwa 2002: 3, 15 and 18, see also ExComm 2004 No 22).³⁰ The rights which flow from prima facie status are therefore also qualitatively different.

1.4 Conclusion on the nature, circumstances of use and characteristics of PFRSD

PFRSD is used not only when the number of arrivals is large, but when the receiving capacity of the host State is surpassed. PFRS is a form of individual RSD. PFRSD, like all RSD, relies on objective information. However, objective information plays a greater role in PFRSD because it is the trigger for PFRSD to be utilised.

PFRSD results in a legal status that is qualitatively different from statuses from other RSD, most especially temporary protection status and individual RSD. PFRSD is focused on inclusion of individuals into the protections provided by the Convention. Unlike individual RSD, PFRSD does not include consideration of exclusion or non-inclusion from Convention protection. These are qualitative shortcomings of PFRSD when compared with individual RSD. The application of cessation clauses affects prima facie refugees differently from individually-determined refugees. Prima facie is not of a pre-determined duration and it allows for local integration, which makes it dissimilar from temporary protection. However, prima facie refugees cannot be considered for resettlement. As such, PFRS is a unique legal status.

2 Legal foundation of PFRSD

The Convention and many other principles and documents other than the Convention have been cited as the legal basis on which PFRSD is conducted.³¹ Each of them is discussed below, with a particular focus on how such a document may or may not be the legal foundation for PFRSD.

³⁰ Durieux and McAdam (2004) argue that this should give rise to grounds for derogation from the Convention.

³¹ Over time, High Commissioners themselves and the Office of UNHCR have given mixed messages as to the legal foundation of PFRSD. In their personal capacity, its officers (including Jackson, Okoth-Obbo, Durieux, Hyndman and Nylund) have similarly cited a wide variety of sources. This may reflect either the time of each commentary or the political objectives that each author was trying to achieve.

This paper seeks to focus solely on the law as it applies to States. In other words, it is primarily focused on international law, not UNHCR policy. This section leads to the finding that the Convention, supplemented by due process principles from human rights law, is the only international legal foundation of PFRSD and that domestic law can be an alternative, jurisdiction-specific source.

2.1 Convention Relating to the Status of Refugees

The Convention and its attendant Protocol have 147 signatories, thereby establishing them as ‘the only universal instruments [and] the clearest expression of international solidarity for the protection of refugees’ (UNGA 1994: para 15) and the most authoritative statement of international refugee law to date (UNHCR 2009). However, neither instrument uses the term ‘prima facie’, nor does either contain any express provisions regarding the procedure to achieve RSD on any basis, prima facie or otherwise (Noll 2005: 141, Okoth-Obbo 2001: 100 and 119, Hyndman 2001: 46).³² Despite this silence on the mechanics of RSD procedure, the Convention assumes the existence of one by defining who should benefit from refugee status (Article 1A).³³ Therefore, it is necessary to interpret the Convention to see whether it could provide a legal foundation for PFRSD.

There are two means of interpreting the Convention and Protocol in international law: the 1969 Vienna Convention on the Law of Treaties (‘Vienna Convention’), and litigation before the International Court of Justice (‘ICJ’).

The primary instrument guiding interpretation of international conventions is the Vienna Convention. It applies to the 1951 Convention, which predates it, because it is a codification of customary international law on the interpretation of treaties. Article 31 sets out the sources that can inform the interpretation of a treaty.³⁴

Article 31(3) states, *inter alia*, that:

There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...

³² Gorlick argues that this is reflective of two things. Firstly, a wariness in prescribing a procedure that would be limited to ‘particular legal traditions and constitutional and administrative arrangements’. Second, the embryonic stage of development of administrative law (which now governs RSD) at the time the Convention was adopted (2003: 357). Justice Kirby of the High Court of Australia has stated that ‘a process whereby a person, who already is a refugee, gains formal “recognition” as such within the country of refuge’ is connoted by the use of the word ‘recognised’ in Article 1C(5) of the Convention, see *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at para 96.

³³ See Annex for full text.

³⁴ See Annex for full text.

As a matter of international law, the only means of validly interpreting the Convention on refugees are those set out in this provision of the Vienna Convention. However, some of the documents cited by commentators³⁵ on which PFRSD is said to be founded are outside the scope of the Vienna Convention.

The second means of interpreting the Convention is through the international body charged with jurisdiction to judicially interpret international legal instruments. By virtue of Article 38 of the Convention, Article IV of the Protocol³⁶ and Article 36(1) of the 1945 Statute of the International Court of Justice ('ICJ Statute'), the Convention and Protocol can be subject to interpretation by the ICJ. This is complicated in the refugee regime by the fact that the ICJ will only hear disputes between States parties (ICJ Statute Article 34(1)). Because the Convention is more concerned with individuals than States and, moreover, individuals who are necessarily disowned by their States of nationality, it is not surprising that the Court's jurisdiction has never been extended to an interpretation of the Convention (Hathaway 2005: 994: fn 18, Gorlick 2003: fn 2). However, the mere possibility of interpretation by the ICJ remains open and is instructive as to the legal remedies that are available under the Convention.³⁷

It is the contention of this paper that the Convention is the legal foundation of PFRSD. This is based on three conclusions. Firstly, an interpretation of the Convention pursuant especially to Article 31(3)(b) of the Vienna Convention does not preclude, and in some respects supports, PFRSD. This conclusion is discussed next. Second, PFRSD can be conceptualised as a status anticipating or reflecting a remedy from the ICJ. This conclusion is reached at 3.2 below. Third, there is no better foundation in international law for PFRSD. This conclusion is made in the discussion in the remainder of this section.

Widespread and long-term State and UNHCR practice in States that are signatory to the Convention (as detailed in the first section and below) indicates that the Convention does not preclude, and in some respects supports, PFRSD. State practice is a permissible source of interpretation under Article 31(3)(b) of the Vienna Convention. Indeed, the Convention was expressly referred to as the foundation of PFRSD almost immediately after its signing. In 1956, Paul Weis, the High Commissioner's legal adviser, engaged in 'legal gymnastics' (Davies 2008: 713) to use the Convention as the justification for the PFRSD of those fleeing Hungary (Loescher 2001: 86, Cuellar 2006: 56). Since then, it has repeatedly been cited as the foundation of PFRSD by UNHCR and others (UNHCR 2006a: 44, Rutinwa 2002: 4, Jackson 1999: 2).

³⁵ See 2.2.

³⁶ Article VII(1) of the Protocol permits States to make a reservation in respect of Article VI. There is no corresponding capacity to reserve Article 38 of the Convention (see Article 42(1)). As such, only those States that reserve Article IV of the Protocol and are not party to the Convention can oust the jurisdiction of the ICJ. The only State that has done this is Venezuela. Eight other states purported to make a reservation to Article IV of the Protocol, while already being signatories to the Convention. According to Hathaway, these reservations could only have effect if the matter was uniquely within the remit of the Protocol but outside the remit of the Convention (2005: 111-112). For part of the history of this provision see Schnyder 1965: 4.

³⁷ See 3.2.

State and UNHCR practice in the use of the Convention's cessation clause is further evidence that PFRSD is founded in the Convention. The Convention's cessation clause is equally applied to refugees who have been subject to PFRSD, as it is to those who have their refugee status from another form of RSD (Zieck 2008: 271, Rutinwa 2002: 22).³⁸ The assumed application of the cessation clause to prima facie refugees is strong evidence that prima facie refugees attain their status under the Convention (Feller interview 2009, Zieck 2008: 256). After all, ceasing to grant rights under a treaty at one point indicates that those rights existed beforehand pursuant to that instrument (Kjaer 2003: 257 and 273). This, among other,³⁹ evidence of State and UNHCR practice suggests that the Convention is the foundation of PFRSD (UNHCR 1999: para 12).

2.2 Office of the UN High Commissioner for Refugees

The term 'prima facie' in the refugee context was significantly elucidated by the 'politically astute [and] expansionist' High Commissioner Felix Schnyder (Cuellar 2006: 55 and 60). Schnyder wrote a memorandum critical in the legal history of PFRSD (1965) as part of the negotiations leading to the 1967 Protocol (Davies 2008). The memorandum is the only known document from a High Commissioner that directly confronts the question of the source, or lack thereof, for PFRSD.

On 6 August 1965, the High Commissioner wrote to the Legal Counsel at UN Headquarters about the Colloquium concerning 'Legal Aspects of Refugee Problems' in April 1965, and enclosed the memorandum.⁴⁰ The High Commissioner stated that '[t]his Memorandum is intended for consultation with Governments' and that he was seeking 'any comments you may wish to make before it is finalised'. The memorandum reiterates the recommendations of, and contentious issues from, the Colloquium and then closes with additional thoughts.

The penultimate paragraph states:

Since the Colloquium met, the High Commissioner has given consideration to a further legal problem, which arises in connexion with the substantive definition of the term "refugee" in the 1951 Convention. Experience, and more especially recent experience of new refugee situations in Africa, has shown that certain States, for various reasons, may not be able to resort to individual eligibility determination. These States have dealt mainly with groups of refugees in the light of criteria affecting the particular group to which these refugees belong. Having regard to this experience, it might be of advantage if the existing definition were supplemented by certain criteria for the prima facie determination of such group eligibility. As, however, it is important that the proposed

³⁸ Zieck notes that the following groups granted collective refugee status were subject to cessation of refugee status: 'Angolan refugees in 1979; Zimbabwean refugees in 1981; Uruguayan refugees in 1985; Equatorial-Guinean refugees in 1980; Argentine refugees in 1984, Polish refugees, Czechoslovakian and Hungarian refugees in 1991; Ethiopian refugees in 2000; Eritrean refugees in 2002' (2008: fn 73, see also Durieux and Hurwitz 2005: fn 32). UNHCR has also stated that PFRS 'may be terminated [if] the circumstances justify its cessation, cancellation or revocation' (in Zieck 2008: 256, see also Rutinwa 2002: 20).

³⁹ See 3.2 and footnotes in section 1.

⁴⁰ Curiously, the memorandum is dated three days later than the letter.

international instrument should be simple and generally acceptable, it might not be desirable to propose the inclusion of provisions regarding various matters in the Protocol.⁴¹

The Legal Counsel replied briefly by cable that ‘the outline appears suitable for the purpose’ and that he ‘share[s] your view that questions of procedure can be deferred pending [the] outcome of consultation’ (Stavropoulos 1965).

This memorandum is significant because it indicates that the High Commissioner was either of a view that PFRSD was not founded in the Convention, or a view that clarification of RSD procedures in international law would be beneficial, or both.⁴² If the High Commissioner had thought otherwise, he would not have advocated the need for a Protocol on the matter in this memorandum. This paper disagrees with the first view⁴³ but concurs with the second. Indeed, it ultimately recommends an Executive Committee conclusion detailing the procedures for PFRSD.⁴⁴

2.2.1 Statute and Mandate

The High Commissioner has a supervisory role in the application of the Convention (Convention Articles 35 and 36, Protocol Article 2). That role, however, is defined by the terms of the Statute of the Office of the United Nations High Commissioner for Refugees (‘Statute’), which was an annex to UN General Assembly (‘UNGA’) Resolution 428(V).⁴⁵

The Statute has been regarded as an attractive legal foundation for PFRSD for two reasons. Firstly, it extends the ‘competence of the High Commissioner... to’ any person who would have fallen within the original scope of the Convention if it were not for, *inter alia*, the State party not being a signatory to the Convention (s6B). Second, it, unlike the Convention, refers to ‘groups’ of refugees (Jackson 1999: 2, Hyndman and Nylund 1998: fn 34). Section 2 of the Statute provides that ‘the work of the High Commissioner shall... relate, as a rule, to groups and categories of refugees’.

For three reasons these provisions are an inadequate legal foundation for PFRSD. Firstly, since PFRSD is a form of individual RSD, a reference to ‘groups’ is not a relevant point of

⁴¹ It should be noted that this passage was selectively quoted in Davies (2008: fn 18). That quote is misleading because of two substantial and relevant oversights. Firstly, it started mid-sentence so as to exclude reference to the fact that this was the opinion of the High Commissioner, not the Colloquium. Secondly, Davies added the word ‘further’ before ‘consideration’ in the first sentence. Such wording would suggest that it had been discussed before. It is clear though, in the absence of that word that this was a new thought of the High Commissioner since the Colloquium or, at least, one he did not mention at it.

⁴² Legal Counsel at UN headquarters did not advise against these views (Stavropoulos 1965).

⁴³ See 2.1.

⁴⁴ See 4.3.

⁴⁵ UNHCR’s role is meant to be secondary to and only supportive of the role of States in protecting refugees pursuant to the Convention (UNGA 2004: para 32, see also Kagan 2006: 3 and 13, UNHCR 1995: para 9). However, State practice and omission, and legal limitations have resulted in UNHCR having a much more active role in RSD. In more than 60 States, UNHCR acts as the *de facto* or delegated decision-maker for the State’s obligations under the Convention (Kagan 2003: 5, Durieux 2009: 12).

differentiation with the Convention (Kourula 1997: 175).⁴⁶ Second, while the Statute does say that ‘the work of UNHCR shall relate ‘to groups and categories’, it does not say how ‘the work’ would so relate and nor does it specify that ‘the work’ would extend to RSD. As Jackson states, the Statute ‘is not... linked to the granting of a specific legal status’ (1999: 7). Third, the entire Statute is a UNGA resolution and is therefore not binding on States. If the Statute is the proper basis of PFRS, then that status could effectively be ignored by States. Thus, although the Statute is a convenient basis for UNHCR activity as it relates to PFRSD, it is not its legal foundation in international law.

In support of the above conclusion, High Commissioner Schnyder expressly dissociated PFRSD from his mandate in relation to the Hungarian exodus in 1956. He stated that UNHCR had ‘resorted to the concept of prima facie eligibility in order to avert the paralysis which would have resulted from a strict interpretation of the mandate’ (Cuellar 2006: 56). Instead, he regarded PFRSD to be under the ‘good offices’ mandate (Jackson 1999: 108 and 465, see also Zieck 2001: 146 and 148). High Commissioner Lindt had earlier made the same connection in regards to Algerians in 1958 (Davies 2008: 715). The ‘good offices’ mandate was said to have ‘accommodated the need for prima facie eligibility’ (Goodwin-Gill and McAdam 2007: 27, Hyndman 2001: 47, Kourula 1997: 179). Whether the good offices mandate was a foundation of PFRSD or not is now moot. ‘Good offices’ has disappeared from the contemporary lexicon of the refugee regime (Jackson 1999: 110, Goodwin-Gill and McAdam 2007: 25). Moreover, the advent of the Protocol made the exclusive use of UNHCR’s mandate in RSD almost obsolete (Loescher 2001: 124).

2.2.2 Handbook

Almost every commentator who has addressed the question of the legal foundation of PFRSD makes reference to paragraph 44 of the ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ (‘Handbook’) (Okoth-Obbo 2001: 119, Kagan 2003: fn 5, Hyndman and Nylund 1998: 29, Schreier 2008: fn 40, O’Connor 2001: 6, Durieux and Hurwitz 2005: 118, Durieux and McAdam 2004: 12, Durieux 2009: 2, Van Beek 2001: 16, Kourula 1997: 44). It is asserted by Durieux to be ‘the most authoritative reference on the subject’ (Durieux 2009: 2, Durieux and Hurwitz 2005: 118).

Paragraph 44 states:

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.

⁴⁶ See 1.1.

This paragraph has remained unchanged in the 1988 and 1992 revisions of the original Handbook of 1979 (UNHCR). Paragraph 44 could have been given legal weight in the year it was drafted. The Executive Committee released its first conclusion on ‘large-scale influx’ in that year (ExComm 2004 No 15: para (f)-(g)).⁴⁷ However, that conclusion makes no reference to the term ‘prima facie’. The Handbook was drafted by UNHCR pursuant to its statutory mandate to supervise the application of the Convention (s 8(a)) and in response to a request from the Executive Committee (2004 No 8 para (g)). It was drafted at the request of, but without decisive input from, States (Gorlick 2003: 359).

Reliance on the Handbook as a source of international refugee law is questionable, at best. The Handbook does not carry the weight of international agreement, nor is it directly⁴⁸ given the force of international law. The Vienna Convention prescribes the sources which may be used to interpret international treaties, including the Convention.⁴⁹ The Handbook is not a source for interpretation of the Convention because it is not an agreement or an instrument,⁵⁰ nor is it a rule of international law.⁵¹ It is arguable that the Handbook could be regarded as reflecting ‘subsequent practice in the application of the treaty’ (Hathaway 2005: 54). However, since the Handbook has not formally or substantially received ‘the agreement of’ most States, it is not a valid tool for interpretation (Vienna Convention Article 31(3)(b)).

Judicial decisions referencing the Handbook agree. Only on one occasion has a superior national court described the Handbook as having ‘high persuasive authority’ that is non-binding. However, even that court, two years later, downgraded it to a ‘source of guidance’ (per House of Lords in Gorlick 2003: fn 4). Where other superior courts have considered it, they too have regarded it as a non-binding guide⁵² and not as being legal authority (Hathaway 2005: 115, Gorlick 2003: fn 4, Odhiambo-Abuya 2004: 195, McAdam 2010: 37 and 40) Hence, the Handbook cannot be regarded as a source of or for the interpretation of international law, nor is it a foundation for PFRSD.

2.3 OAU Convention and Cartagena Declaration⁵³

Some commentaries have cited either or both the OAU Convention and the Cartagena Declaration as the legal foundations for PFRSD (O’Neill et al 2000: 156 and 163).⁵⁴

⁴⁷ See 1.2.

⁴⁸ It could be argued that UNHCR is indirectly empowered to draft such a guide by virtue of Articles 35 and 36 of the Convention, Article 2 of the Protocol; contra UNHCR Statute: para 8

⁴⁹ See 2.1.

⁵⁰ As defined for the purposes of Article 31(2) or (3)(a) of the Vienna Convention.

⁵¹ As defined for the purposes of Article 31(3)(c) of the Vienna Convention.

⁵² The foreword to the Handbook itself states that it was ‘conceived as a practical guide’ (1979: para v).

⁵³ 1969 Organisation for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (‘OAU Convention’) and 1984 Cartagena Declaration on Refugees (‘Cartagena Declaration’).

⁵⁴ In regards to the OAU Convention, the Kenyan *Refugee Act* defines a ‘prima facie refugee’ as a person who is afforded refugee status under the OAU Convention (see 2.4). Gottwald cites the Cartagena Declaration as the legal basis on which Ecuador granted PFRS to Colombians from 2000 until 2002 (2004: 531 and 533). Unlike the OAU Convention, the Cartagena Declaration is not, on its own, legally binding (Hyndman 2001: 48). It does have force, however, in the ten States which have incorporated it into legislation, including Ecuador (UNHCR 2006: 267).

Evidence of the use and operation of PFRSD outside countries that have signed these instruments,⁵⁵ as well as before these instruments came into operation,⁵⁶ indicates that these two regional instruments are not the foundation of PFRSD (Rutinwa 2002: 2). However, this is not to say that PFRSD cannot be conducted under these instruments. Indeed, both expressly incorporate and are complementary to the Convention. Thus, the regional instruments can guide PFRSD, for example, in regard to their expanded refugee definitions (O'Connor 2001: 6, Jackson 1999: 461 and 467). They 'facilitate prima facie recognition [and provide] an extremely useful evidentiary benchmark' in signatory States (O'Connor 2001: 3). However, the procedure and rights under PFRSD are founded ultimately in a document that predates and extends to States not signatory to these regional instruments, namely the Convention.

2.4 Domestic legislation

UNHCR has encouraged States to ground PFRSD and other mechanisms used in response to mass influxes in national asylum legislation (UNHCR 2004: para 5). United Nations monitoring bodies have similarly recommended that States amend domestic legislation to 'offer... a clear legal status to prima facie refugees' (CRC 2003: para 573). States' domestic law has the considerable benefit of being directly enforceable through local courts. Many parties to the Convention have done so. PFRSD could be sourced from domestic legislation and, in some cases, it evidently is. In such States, PFRS usually results from a legislative power given to the Minister responsible for refugees to declare the 'refugee status of all individuals belonging to a specific group' (Bourassa 2008: fn 70).⁵⁷ This section explores the domestic legislation of those States that conduct PFRSD on that legal foundation.

Ministerial declarations of refugee status are especially prevalent in the domestic legislation of African states (Durieux and Hurwitz 2005: 121, Rutinwa 2002: 7-8). The table below summarises a sample of those domestic instruments, ordered by year of enactment. It shows those provisions that provide for individual RSD and for Ministerial declarations of refugee status, as well as the means specified by legislation for making the declaration public.

⁵⁵ For example, see Zieck 2008.

⁵⁶ For example, see Schnyder 1965: para 16, see also reference to pre-OAU Convention PFRSD in Africa at Hyndman and Nylund 1998: 32.

⁵⁷ This is the author's translation from the original French text.

Where no number appears, no relevant provision exists in that instrument.

| State | Year | Convention definition | OAU definition | Ministerial declaration | Advising Minister | Declaration gazetted | Declaration published |
|--------------|------|-----------------------|----------------|-------------------------|----------------------------|----------------------|-----------------------|
| Uganda | 1960 | | | 2(2) | | | |
| Zambia | 1970 | | | 3(1) | | 18(3) | |
| Zimbabwe | 1983 | 3(1)(a) | 3(1)(c) | 3(2) | | 3(3) | 3(3) |
| Lesotho | 1983 | 3(1)(a) | 3(1)(b) | 3(1)(c) | 5(3)(b) – Committee | | |
| Liberia | 1994 | 3(1)(a) | 3(1)(c) | 3(2) | 3(2) – UNHCR | 3(3) | 3(3) |
| Tanzania | 1998 | 4(1)(a) | 4(1)(b) | 4(1)(c) | 8(1) - Committee | 4(1)(c) | |
| South Africa | 1998 | 3(a) | 3(b) | 35(1) | 38(2) – Provincial premier | 35(1) | |

The table demonstrates that, over time, legislation has become more nuanced in its use of declarations. The ‘first generation’ Acts are exclusive of individual determination (Kamanga 2005: 105) while the second generation allow for individual and declared refugee status. More recent enactments show the possibility of refugee status as a result of fulfilling the definitions of the Convention, OAU Convention or Ministerial declaration (see Okoth-Obbo 2001: 97). Moreover, there is an increasing trend towards the Ministerial declaration being made on the advice of another entity. Indeed, the Ugandan *Refugee Bill* (2003) as compared to its 1960 Act follows this trend (s25).

Acts permitting the declaration of collective refugee status are a legislative basis for PFRSD (Durieux and Hurwitz 2005: 121-2).⁵⁸ There are many examples of refugees being regarded as having PFRS as a result of a Ministerial declaration.⁵⁹ Among other features and unlike the Ministerial declaration under the Batswana Act, the refugee status resulting from the tabled Acts is not of a pre-determined duration.⁶⁰ Ministerial declarations can lead to PFRSD, albeit that the status is legally founded in domestic rather than international law.

The Refugee Act 1998 (South Africa) has also been construed to give rise to PFRSD (Van Beek 2001: 18 and Schreier 2008: 36). This domestic instrument is unique in that it grants a power to issue a declaration for a group of refugees and it uses the term ‘mass influx’, but not ‘prima facie’. However, even in the absence of the Ministerial declaration, most

⁵⁸ In contrast, Okoth-Obbo has asserted that Ministerial declarations, like those of the tabled Acts, lead to formal group determination which is unlike PFRSD (in Salomons 2001: 373 and Rutinwa 2002: 9, see also Okoth-Obbo 2001: 120).

⁵⁹ Burundians, Congolese and some Rwandans in Tanzania have been widely regarded as having been beneficiaries of PFRSD pursuant to a Ministerial declaration (Rutinwa 2002: 8, Kamanga 2005: 104 and 109, O’Neill et al 2000: 162-4, USCRI Tanzania 2008). Similarly, Sierra Leoneans are regarded as having been the subject of PFRSD in Liberia under its Ministerial declaration provision (O’Neill 2000: 187, Durieux and Hurwitz 2005: 122).

⁶⁰ See 1.3.4.

RSD in South Africa is done on a prima facie basis (Schreier 2008: 14, Van Beek 2001: 18, 21 and fn 35). This is troubling and anomalous.

Even though they are said to permit PFRSD, none of the enactments discussed above uses the term 'prima facie'. Only four domestic refugee instruments in the world do so, those from Albania, Kenya, Sierra Leone and Burundi. A review of these Acts illustrates that legislative use of 'prima facie' in a refugee context contorts the meaning of the term as it is used in international law and practice. The Acts are discussed below and ordered by year.

The Albanian *Law on Asylum* 1998 uses the term 'prima facie' solely in the context of explaining when its legislative temporary protection regime is enlivened. Albania's legislation links the term 'mass influx' with temporary protection (Article 19(5)). The section of the Act in which 'prima facie' appears is also concerned with temporary protection (Article 31(2)). The Act is therefore primarily concerned with that form of refugee protection, rather than PFRS.⁶¹ The use of the term 'prima facie' in the Albanian Act is unrelated to PFRS.

The Kenyan *Refugee Act* 2006 is the only legislation to use the term 'prima facie' but not 'influx'.⁶² Section 3 provides a two-part definition of the term 'prima facie refugee': 3(2) defines it to mean a person who falls within the OAU Convention definition of refugee,⁶³ and 3(3) defines it to relate to persons subject to a Ministerial declaration defining a 'class of persons' that fall within the OAU Convention definition. In this latter respect, the Kenyan Act is like the other African Acts in the table, except that such a declaration is only for OAU Convention refugees. The definition of 'prima facie refugee' under the Kenyan Act uniquely links its meaning to protection under the OAU Convention.

Like the tabled Acts above, the *Refugees Protection Act* 2007 (Sierra Leone) allows for refugee status to be declared. However, such a declaration is made by an Authority constituted by two Ministers and UNHCR representatives, amongst others. The Act defines the declaration of the Authority as being one that relates to 'large scale influxes' (s4(2)(c)) and to 'a prima facie declaration of refugee status' (s6(2)(a)). 'Large scale influxes' is not defined. However, such a situation allows the Authority to take 'emergency measures' only after consultation with UNHCR (s22). The Sierra Leonean Act therefore largely codifies PFRSD practice under international law in that it links PFRSD with a 'large-scale influx' and results in a unique status.⁶⁴ The involvement of UNHCR in the process also reflects most PFRSD practice.

⁶¹ See 1.3.4.

⁶² It should be noted that Sudanese and Somali refugees to Kenya have been granted PFRS even though almost all of them entered Kenya before this Act and during the time Kenya had no refugee legislation (Hyndman and Nylund 1998: 30, Kagan 2003: 13, Odhiambo-Abuya 2004: 190). In this sense, the 2006 Act had a large retrospective impact of providing legal legitimacy for a well-established practice.

⁶³ See 3.3.2.

⁶⁴ See 1.2.

Like its Sierra Leonean equivalent, the Burundian *Asylum and Refugee Protection Act* 2008⁶⁵ expressly provides for the grant of PFRS. Article 81 provides that the Act shall apply in cases of mass influx to people fleeing general danger in their state of origin or former country of residence. Mass influx is not defined. Article 82 states that if there is a mass influx as a result of people fleeing danger in an international or civil war, or generalised violence, the Interior Minister may grant refugee status collectively on a prima facie basis. The provision mandates that such a designation must happen within six months of arrival. Pursuant to Article 85, an Ad Hoc Committee can be convened by the Minister with the purpose of identifying those who are members of the collective designation. The same Committee is required to gather information about the reasons for the mass influx (Article 85(1)). In important respects, the Burundian legislation also codifies PFRSD practice, except that it does not necessarily involve UNHCR.

Acts empowering a Minister to declare refugee status, as well as those from Kenya, Sierra Leone and Burundi which expressly provide for PFRSD, are the legal foundation of PFRSD in the domestic law of each of these States. In some respects, these Acts redefine the character of prima facie refugee status in the relevant jurisdiction. These re-definitions prevail over international law in those jurisdictions.

2.5 Human rights law and due process

International law provides not only for the guarantee of substantial rights, but also procedural rights. Indeed, the denial of procedural rights can foreclose the exercise of substantial rights. Such a basic principle has been recognised since the time of the Magna Carta (1215).⁶⁶

Refugees are entitled to all the protections offered by general human rights law. Chetail argues that the requirements of due process and procedural fairness in human rights law necessitate that refugee status be granted without unreasonable delay (Interview 2009). Many others have acknowledged a general obligation to accord due process to refugees. Marx agrees that, in the refugee context, ‘for their effective protection, rights require a procedural framework, founded upon due process and the rule of law’ (1995: 401). Goodwin-Gill also acknowledges ‘that the process of refugee determination [involves] a requirement of due process’ (2005: 4). UNHCR has similarly stated that RSD conducted by it and by States are subject to obligations of due process (in Kagan 2006: 19 and 9, see also Odhiambo-Abuya 2004: 196, ECRE 2005: para 2.2.1).

Human rights law promotes minimising delayed access to rights through a requirement for due process. The requirement to accord due process is shorthand for a duty on decision-makers ‘to respect a range of technical, procedural requirements associated with basic fairness’ (Hathaway 2005: 674). This paper contends that the right of due process accrues to refugees implicitly from general human rights law in regards to the attainment

⁶⁵ This analysis relies on the author’s translation from the original French text.

⁶⁶ See quotation p.3.

of refugee status under Article 1A.⁶⁷ The source of the right to due process and procedural fairness in international human rights law is Articles 6–11 of the Universal Declaration of Human Rights (1948) and Articles 13 and 14 of the International Covenant on Civil and Political Rights (1966) (see Alexander 1999: 258-9).⁶⁸ These provisions are, for the most part, a matter of customary international law (Naqvi 2002: fn 55).

In the prisoner of war context, a general requirement for due process in the granting of legal status has been recognised by reference to general human rights law. As with RSD, a right to due process is not expressly provided in the relevant specialist international legal instrument.

Thus, the analysis of the same is instructive for the refugee regime. Naqvi writes:

As status determination procedures may be seen as tantamount to a trial, given that a person can be found to have taken an illegal part in hostilities [or engaged in excludable activity], having their status determined in an expeditious, fair and properly constituted way is not just an obligation on States under international humanitarian law but is also strong evidence of a State's commitment to human rights and the rule of law (2002: 594).

Delaying RSD gravely prejudices the situation of those awaiting and entitled to refugee legal status (KANERE 2009: 2, KANERE 2009a: 2), even though refugee status is declarative not constitutive (Kjaer 2003: 259, Durieux and Hurwitz 2005: 110, Goodwin-Gill 1983: 20). The substantive rights which flow from refugee status cannot be withheld by denial of procedural rights, namely a right to a decision within a reasonable time.

Refugee status is a threshold requirement for the attainment of specific entitlements set out in the Convention and/or domestic law. Refugee status is often the only form of legal security available to those able to claim it. Moreover, the granting of refugee status forecloses the possibility of exclusion from or denial of access to international protection. Documentation resulting from refugee status 'is an important safeguard for [all refugees'] legal and physical protection' (UNHCR 2002: 664). 'The stakes are high' in RSD (Kagan 2006: 12). Thus, delaying the attainment of legal status denies access to rights owed to a refugee. The initial grant of PFRS is therefore implicitly referable to a general requirement for due process in the application of the Convention.

⁶⁷ Article 32(2) of the Convention expressly recognises the right to due process. However, this requirement only relates to a process for expulsion. Thus, this paper argues against reasoning that express reference in Article 32 to due process precludes implied obligations for due process elsewhere in the Convention.

⁶⁸ There is yet to be an authoritative statement that these provisions apply to RSD (Alexander 1999: 259); however, the effect of these provisions is akin to the explicit protection afforded to those seeking asylum under the *African Charter of Human and People's Rights* (1979) Article 12(3) and (4). See also *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, AfrCommHPR, Communication No. 71/1992, 20th session, 21–31 October 1996, para 31 and *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v Angola*, AfrCommHPR, Communication No. 159/1996, 22nd session, 2–11 November 1997, para 20.

The requirement for due process thus carries with it a requirement for granting refugee status without unreasonable delay. Given its use in situations where the host State's RSD infrastructure is overwhelmed, PFRSD could be conceived of as a concession that refugee status will not otherwise be determined within a reasonable time period or on a fair basis, as is required under human rights law. Indeed, Kagan has noted that 'prima facie recognition [is a good practice] when the number of asylum seekers makes fair individual RSD impractical' (2003: 4). PFRS is therefore an implicit acknowledgment of the general obligation of the State to determine refugee status within a reasonable time.

2.6 Conclusion as to the legal foundation of PFRSD

PFRSD is founded in the Convention. This conclusion is derived from the text of Article 1A, the sources permitted as tools for interpretation in the Vienna Convention and the requirements of due process under general human rights law. The conclusion that PFRSD is founded in the Convention is also strongly supported by the findings of the next section.

PFRSD comes into being by virtue of the principles of general human rights law that require that the granting of a legal status be accorded through due process and therefore not be withheld for an unreasonable period. Without this requirement, refugee status could simply be withheld indefinitely in a situation where RSD apparatus is overwhelmed.

Domestic legislation can also be the legal foundation of PFRSD. PFRSD is expressly codified in legislation of Kenya, Sierra Leone and Burundi. The legislative power to declare a group or class of people to be refugees also suffices for this purpose.

3 Conceptions of prima facie refugee status determinations

In light of the discussions above on both the characteristics of PFRSD in practice and the legal foundation for it, the final section analyses the legal conception of PFRSD and the legal framework in which PFRSD should be understood.

At present, commentaries on PFRSD rely on only one conception. That conception frames the term 'prima facie' in the RSD context as a reference to the general law of presumptions and the burden of proof. This section analyses this conception against the general law from which it is said to derive. The paper concludes that the presumptive analysis of PFRSD is without legal foundation. Moreover, that analysis relies on a misconception of the operation of presumptions in law as well as a misconception of the burden of proof in RSD. This paper explores an alternative conception based on the use of the term 'prima facie' as it relates to an injunction.⁶⁹ The paper concludes that this

⁶⁹ The paper does not substantially engage with the argument that RSD is unique or *sui generis* and therefore should not be conceived of by reference to other areas of the law (Anonymous interview 24 March 2009).

injunctive analysis is founded in the Convention, as was found in the second section, and that it accommodates the characteristics of PFRSD discussed in the first section.

Each Article and phrase in the Convention has only one meaning in international law. This meaning is derivable from the sources mentioned in the Vienna Convention (Article 31).⁷⁰ This single meaning is universal and does not take ‘colour of the distinctive features of the legal system of any individual contracting state’.⁷¹ This section explores two meanings or conceptions of the Convention. In law, only one conception may be right.

3.1 Evidence law and the presumptive conception

The prevailing orthodoxy on PFRSD is that the term ‘prima facie’ is a shorthand reference to evidence law in relation to presumptions. In this context, the term ‘prima facie’ has a very different meaning from its colloquial use of ‘on its face’,⁷² a cursory or initial impression. It describes evidence that satisfies a presumption in favour of a claimant, the result of which is to shift the burden of proof to the other party.

In the refugee context, this conception of prima facie has been applied as follows. A person is afforded PFRS because her or his circumstances of flight give rise to a presumption in her or his favour that that flight has resulted from ‘a well-founded fear of being persecuted’ on a Convention ground. The effect of this presumption is said firstly, to relieve the refugee claimant of the burden to prove that she or he has a valid refugee claim and second, to afford the claimant refugee status.

Arguably the leading exponent of the presumptive conception of PFRSD is Rutinwa (2002: 5 especially). His study has been widely, but uncritically, cited by many other commentators (including Durieux and Hurwitz 2005: 120, Bourassa 2008: 28-30, Jacobsen 2005: 5). Others have similarly premised their commentaries on PFRSD by reference to the idea that PFRSD centres on a presumption in favour of the claimant of refugee status. The presumptive analysis has been adopted by Goodwin-Gill and McAdam (2007: 233), Durieux and McAdam (2004: 12-13), Jackson (1999: 4), Hyndman and Nylund (1998: 30), Zieck (2008: 272), Marx (1995: 405), Kourula (1997: 44) and O’Connor (2001: 6 and 16). Commentators have seemingly flocked to this view as it is the

Such an argument makes a non-sense of most legal commentary on international refugee law which derives instruction and information from the operation of the law in other related or analogous contexts. While refugee law is arguably sui generis in some relevant respects (for example, in relation to burden of proof), it is not generally sui generis.

⁷⁰ See 2.1.

⁷¹ *Regina v. Secretary of State for the Home Department, Ex Parte Adan, Regina v. Secretary of State for the Home Department Ex Parte Aitseguer* [2001] 1 All ER 593: para 68

⁷² UNHCR has used it in this sense on only one occasion known to the author. When discussing the Convention’s application in mass influx situations, UNHCR stated that ‘individualised assessment of the subjective element of fear would normally be rendered unnecessary, as being on its face self-evident from the event or situation which obviously precipitated the flight in Convention terms’ (2001a: para 18). Hyndman and Nylund (1998: 29) define ‘the prima facie regime... as determination of eligibility based on first impressions, or in the absence of evidence to the contrary’. This confused and confusing definition seems to be a misguided attempt to mix the presumptive conception of prima facie and colloquial use of prima facie.

only view that has been expressed. The following section tests this conception of PFRSD against the general law of presumptions. It finds that the prevailing view of PFRSD is misconceived and unfounded.

3.1.1 Burden of proof

Ordinarily, the law requires that ‘he who asserts must prove’ (Durstun 2007: 115, Gorlick 2003: 361). In other words, the person making a claim bears the burden or onus of proof to substantiate that claim. The concept of burden of proof is familiar to both common and civil law systems (Gorlick 2003: 361). The circumstances in which the burden of proof shifts from the person claiming a fact to the person opposing it are limited to situations where the claimant has both the benefit of a presumption⁷³ and prima facie evidence that they are entitled to that presumption. “Prima facie” evidence in its usual sense [means] prima facie proof of an issue the burden of proving which is upon the party giving that evidence.⁷⁴ By providing prima facie evidence, the burden of proof ‘switches... from the party who has made the prima facie showing to his opponent’ (Herlitz 1994: 397).⁷⁵

In general law decision-making, ‘the trier of fact [occupies a] unique position... because she does not go after evidence, the evidence is given to her’ (Ho 2008: 165). This is not the case in RSD. The burden of proof in RSD is *sui generis* (Durieux 2009: 28-9). Unlike the general law of evidence, the burden does not rest entirely on the claimant in any RSD.⁷⁶ The burden of evidence in RSD is shared between the claimant and the decision-maker (Rutinwa 2002: 6, Gorlick 2003: 362, Goodwin-Gill 1983: 22). Moreover, in RSD, the claimant ought to be liberally granted the benefit of the doubt (Gorlick 2003: 362, 365-366, UNHCR 2003: 540, Noll 2005: 150, UNHCR 1979: para 195–198⁷⁷). Thus, the burden of proof in RSD sits uncomfortably with the general law notion of a shift-able burden of proof.

There are two types of burden which can be shifted by a rebuttable presumption and prima facie evidence: a legal burden or an evidential burden (Stockdale 2007: 24). An evidential burden requires that the presumption be shown to be untrue, whereas a legal burden must be rebutted by evidence indicating the opposite conclusion (Stockdale 2007: 24, Cannon and Neligan 2002: 41). Therefore, an evidential burden is easier to rebut than a legal burden. Rutinwa is the only commentator to address this issue in the refugee

⁷³ See 3.1.2.

⁷⁴ *R v Jacobson* (1931) AD 466 at 478–9 per Stratford JA.

⁷⁵ The use of prima facie in the sense of a presumption has a curious etymology. It ‘arose merely through the poor choice of words of a [legal] reporting editor’ in 1841 (Herlitz 1994: 398).

⁷⁶ The shared burden and benefit of doubt granted to refugee claimants in the application of international refugee law reflects the unique situation and vulnerability that gives rise to a refugee claim (UNHCR 2003: 540). Refugee claims result from flight in circumstances where the collection of evidence and documents to support a claim is highly unlikely. ‘In the end the only available evidence [to the refugee applicant in RSD] may be an applicant’s oral testimony’ (Gorlick 2003: 362).

⁷⁷ It is worthy of note that those who rely on paragraph 44 of the same Handbook do not mention these paragraphs in their commentaries.

context. He claims that PFRSD results in a shift in the evidential burden (2002: 6).⁷⁸ Rutinwa then claims that the resulting presumption must be disproved (2002: 6). Evidential burdens can be rebutted, whereas legal burdens must be disproved. Rutinwa's analysis is inconsistent with the general law of presumptions. Without alternative commentary on this point, it seems the presumptive analysis of PFRSD as it relates to burdens of proof is inconsistent with the general law from which it is said to derive.

3.1.2 Presumptions

'Presumptions are inextricably linked to the concept of the burden of proof' (Cannon and Neligan 2002: 40). It is said that prima facie refugees attain rights under the Convention from a presumption of refugee status. The operational consequences of a presumption are therefore particularly relevant in a consideration of the presumptive conception of PFRSD. Each element of the general law of evidence concerning presumptions ought to fit with the PFRSD conception for it to be a correct legal characterisation of the status. Firstly, general law presumptions are of two kinds: rebuttable presumptions⁷⁹ and irrebuttable⁸⁰ or conclusive presumptions. The latter leads to a result in favour of the claimant. The former merely gives a procedural advantage, or, as Durieux acknowledges, a 'change [in] the allocation of the risk of losing regarding a particular issue' (2009: 28). O'Connor posits that 'prima facie recognition of refugee status is all about rebuttable presumptions' (2001: 6). Many adherents of the evidence law conception agree with this view (Okoth-Obbo 2001: 121, Jackson 1999: 4, O'Connor 2001: 3, Hyndman and Nylund 1998: 47, Kagan 2003: fn 6). They posit that the presumption can be rebutted by evidence of exclusion or non-inclusion. However, O'Connor impliedly contradicts herself when she later states that the process of exclusion for prima facie refugees is 'a process of cancellation' (2001: 7). This indicates that the status is conclusive. This is inconsistent with the claim that it is rebuttable. It is submitted that this view is contrary to the weight of scholarship as well as a natural reading of the Convention, that being, that exclusion occurs before a conclusive status is attained.⁸¹ Thus, PFRSD results in a rebuttable, not a conclusive, presumption.

⁷⁸ Rutinwa does not make clear to which standard of proof the presumption relates. Given the general lack of agreement internationally as to the standard of evidence required to gain refugee status, formulating the presumed standard of evidence made out by PFRSD is difficult (see footnote 121 below).

⁷⁹ See, for example, *R v Roberts* (1878) 14 Cox 101 CCR.

⁸⁰ As a matter of general law, conclusive presumptions, such as the (now maligned) conclusive presumptions that rape cannot occur within marriage or that a boy under 14 years cannot have sexual intercourse, are increasingly abolished. The conclusive presumption of *doli incapax* retains favour in many systems.

⁸¹ It may also be in breach of the principle of *res judicata* (Kagan 2006: 10). Rutinwa offers a similarly confused and confusing formulation that attempts to argue that the presumption is conclusive but rebuttable and that it can be cancelled or withdrawn (2002: 2, 4, 6 and 20). Durieux and Hurwitz do similarly when they argue that PFRSD is 'presumptive but conclusive' (2005: 120). However, later they describe it as 'rebuttable' (ibid: 121-5) and then 'conclusive but rebuttable' (ibid.: 157, see also Durieux and McAdam 2004: 12). In law, it can only be one or the other. UNHCR has sometimes characterised PFRSD as irrebuttable (in Zieck 2008: 255). Similarly, Kagan states that PFRSD means that 'all asylum seekers from particular countries or territories are *considered automatically to be refugees*' (emphasis added, 2003: 13).

Rebuttable presumptions alone do not give substantive legal rights.

The words *prima facie*... merely mean a fact [is] presumed to be true unless disproved by some evidence to the contrary, but they always imply that the proper party shall have the opportunity of offering proof in rebuttal. (Herlitz 1994: 399)

The role of a rebuttable presumption is merely to shift the burden of evidence when the issue of rights is considered finally. The benefit of a presumption is that it merely makes the task of gaining rights easier when the matter is finally determined. As such, a presumption in law is something that exists before a decision is made: it is not a decision of substance in itself. It relates only to the procedure by which a decision will be reached. If all that a beneficiary of PFRSD attains is a rebuttable presumption in their favour when and if an individual determination of their refugee status is made, they have no basis on which to expect any protection while waiting for that determination. This result is inconsistent with the practice of PFRSD. Every State that makes use of PFRSD procedure has accorded at least some basic rights to beneficiaries.⁸²

Second, presumptions in the general law can be either of fact or of law. The presumption that is being referred to in refugee law is one of fact (Durieux 2009: 28).⁸³ Presumptions of fact rely on inferences from objective information and positive proof (Cannon and Neligan 2002: 46).⁸⁴

There can be no inference unless there are objective facts from which to infer the other facts which [are] sought to [be] establish[ed]. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability.⁸⁵

All RSD relies on inferences from 'objective information' (Gorlick 2003: 360) but only PFRSD is said to relate to a presumption. 'It is the nature of presumptions that they disregard context and circumstances, and therefore also the principle of individual assessment' (Goodwin-Gill and McAdam 2007: 240). Durieux contends that evidence of identity and nationality must be positively proved in PFRSD to gain the benefit of the presumption (2009: 25-26). In other words, when a person provides positive proof to State A or UNHCR, of entry from place B in period C, they are given PFRS because UNHCR or State A makes inferences from well-known or 'objective information' about place B during period C (Durieux 2009: 21).⁸⁶

What precisely is inferred is an issue of disagreement. Some commentaries limit the presumption to the subjective element of the Convention definition, namely 'fear' (UNGA 1994: para 27, UNHCR 2001: para 18, Hyndman and Nylund 1998: 30). It is hard

⁸² See 1.2, 1.3.1.

⁸³ For discussion of the difference see Durston 2007: 148-9.

⁸⁴ Durston posits that presumptions of fact are not presumptions at all, but are rather 'common-sense inferences drawn from circumstantial evidence' (2007: 149).

⁸⁵ *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169 per Lord Wright

⁸⁶ See 2.3.

to see how any rights flow from a presumption on such a limited basis since a presumption of fear only would surely not give rise to refugee status. O'Connor recites the same limited presumption at one point (2001: fn 21), then defines it to be of 'well-founded fear and unavailability of national protection' (2001: 3 and 16) and then redefines it again to a presumption 'that a harm constituting persecution is feared, that the applicant is the member of a targeted group and that normal protection is unavailable to her' (2001: 6). This last formulation is the most tenable. It has the support of Durieux (2009: 28); see also Durieux and Hurwitz (2005: 120). Such a presumption would infer that all elements of the claim to refugee status are established if a person flees from a designated place during a designated period.

The final element to consider is how those promoting a presumptive conception regard cessation of PFRS.⁸⁷ Durieux and Hurwitz attempt to explain that in such a situation the presumption is 'abandoned' by the decision-maker, namely the State or UNHCR, such that the regular rules of evidence re-emerge (2005: 134). This idea is without precedent in the general law and, in the author's view, is not referable to it. Without alternative commentary of this point, it seems that this conception of PFRSD cannot account for cessation of status applying to prima facie refugees.

3.1.3 Legal foundation for a presumptive conception of PFRSD

Whether or not the application of the general law of presumptions applies in a PFRSD context, a presumption cannot be invented nor relied upon unless it is provided for by authoritative legal sources. The Convention, Statute and regional instruments do not refer to refugee status or any element thereof being presumed. Perhaps as a result, the Handbook is significantly relied upon by those promoting the presumptive conception of PFRSD (for example, Rutinwa 2002: 2). The Handbook is deficient as a legal source of rights or procedure in international law.⁸⁸ However, even if this is wrong, the Handbook does not relevantly point to PFRSD resulting from a presumption.

All of the commentators who rely on paragraph 44 of the Handbook regard PFRSD as giving rise to a 'presumption' in evidence law. Paragraph 44 does not use the word 'presume' or 'assume', nor indeed does it expressly refer to a body of law other than refugee law. As such, the notion that a presumption derives from paragraph 44 is problematic. It comes closest to so doing by using the following words in parenthesis: 'i.e. in the absence of evidence to the contrary'. On a plain reading, these words suggest nothing more than what is part of any RSD and indeed any reasonable decision: refugee status is granted to claimants when there is no evidence contrary to the idea that the person is a refugee.⁸⁹ The phrase in parenthesis is an inadequate expression of a presumption, if this is even what was intended. Interpreting paragraph 44 as the foundation for a legal presumption is, in the author's view, wishful legal thinking.⁹⁰

⁸⁷ See 1.3.2. Rutinwa flags this as an issue but does not address the effect of cessation on prima facie refugees (2002: 14).

⁸⁸ See 2.2.

⁸⁹ See 1.3.1.

⁹⁰ This phrase is borrowed from Hailbronner (1985-1986).

Presumptions used in other aspects of refugee and human rights law are expressly formulated as such. The absence of any express formulations in international refugee law indicates that there is no legal foundation for presumed refugee status. There are two notable examples of expressly formulated presumptions in refugee law, although neither relates to attaining refugee status.

Firstly, paragraph 93 of the Handbook is the only time other than paragraph 44 that the term ‘prima facie’ is used in the Handbook. It provides that ‘the possession of a national passport...creates a prima facie presumption that the holder is a national of the country of issue, unless the passport itself states otherwise.’ Thus, it expressly uses ‘prima facie’ in reference to a (rebuttable) presumption in evidence law. The drafters could have similarly made express mention of a presumption in paragraph 44. They did not.

Second, there is one example of domestic refugee legislation that expressly provides for a shift in burden of proof (Durieux and Hurwitz 2005: 122).⁹¹ The *Refugee Control Act 1970* (Zambia) provides for the Ministerial declaration of refugee status as well as for the Minister to declare a person not to be a refugee.⁹² Subsection 3(3) states that:

If any question arises in any proceedings, or with reference to anything done or proposed to be done, under this Act as to whether any person is a refugee or not, or is a refugee of a particular category or not, the onus of proving that such person is not a refugee or, as the case may be, is not a refugee of a particular category, shall lie upon that person.

Subsection 3(3) is unhelpfully opaque.⁹³ The most tenable interpretation is that the ‘person’ referred to at the end is a different person from the ‘person’ claiming to be a refugee, namely the decision-maker. Thus, by virtue of falling into the category of persons, a presumption of refugee status arises in favour of the person claiming to be a refugee that shifts the burden of proving otherwise onto the decision-maker. This provision provides a rare example of a refugee law that expressly prescribes the operation of a presumption in the RSD context.

One presumption in favour of a legal status to ‘ensure the protection of one of the most vulnerable groups of victims of armed conflicts’ exists in international law and has clear legal foundations (Naqvi 2002: 593). However, this presumption relates to prisoners of war, not refugees. Prisoner-of-war status is presumed by international law.

⁹¹ The *Refugee Control Order 1978* (Swaziland) also expressly deals with the burden of proof. However, it merely partially reinforces the default position, namely that if a question arises as to whether a person, subject to the Ministerial declaration, is a refugee or not, the onus rests on the refugee claimant to prove that they are a refugee.

⁹² See 2.4.

⁹³ On a plain reading, it seems to suggest that the burden of proving that someone is not a refugee lies on the person who claims to be a refugee (O’Neill et al 2000: 167). This, however, is non-sensical and unimaginable.

Article 45(1) of the Protocol Additional to the Geneva Conventions provides that:

a person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war... if [*inter alia*] he claims the status of prisoner of war... Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status... until such time as his status has been determined by a competent tribunal.

This entitlement prescribes circumstances in which:

...doubt regarding the status of a combatant must give way to a presumption of prisoner-of-war status... By implementing a system of presumptions, [the] Protocol... reverses the burden of proof so that it is the competent tribunal which must provide evidence to the contrary every time the presumption exists and is contested (Naqvi 2002: 576).

The drafters of the Refugee Convention could have adopted words similar to those that provide for prisoner-of-war status to provide for presumptions in favour of claimants of refugee status. They did not.⁹⁴ Given the absence of such an express prescription of a presumption regarding PFRSD, the presumptive analysis of PFRSD lacks a legal foundation.

3.1.4 Analysis of the presumptive conception of PFRSD

The presumptive analysis of PFRSD is flawed. It ignores the operational effect of a presumption in the general law on which it is purportedly based. A rebuttable presumption of fact is not a decision, nor does it, on its own, result in a remedy or in the acquisition, even temporarily, of substantial rights. Rebuttable presumptions merely ease the burden on the party making the claim when the full determination is made. Every State that makes use of PFRSD procedure has accorded at least some basic rights to beneficiaries.⁹⁵ Therefore, the presumptive analysis does not fit with the practice of PFRSD.

The evidence law conception of PFRSD also misconceives the burden of proof in RSD. Refugee law is *sui generis* in that the burden of proof is shared between the claimant and the decision-maker. The claimant cannot be relieved of a burden, by operation of a presumption, which it was not responsible for in the first place. As such, the notion of a shift in the burden of proof sits uncomfortably with the burden of proof in the refugee context.

In addition, there is no legal foundation for PFRSD to be referable to a presumption analysis. This paper proposes that the presumptive conception of PFRSD be replaced with an injunctive interpretation.

⁹⁴ This leads to the unpalatable situation that prisoners of war may well have a better legal entitlement to basic rights pending determination of their status by a competent tribunal than refugees awaiting status from a competent decision-maker.

⁹⁵ See 1.2, 1.3.1, 1.3.3.

3.2 Civil procedure and the injunctive conception

As previously noted, the phrase ‘prima facie’ is not only used in refugee law and in the general law of evidence relating to presumptions. It is also used in the law of civil procedure. In this context its meaning is similar to that in relation to presumptions, but its effect is significantly different. In short, evidence that meets a prima facie standard in civil procedure is sufficient⁹⁶ to meet the standard of proof for the granting of a form of legal relief that is interim (or provisional) but can ultimately be a final form of relief (Zuckerman 2006: para 9.29). The relief is known as an injunction.

A swathe of commentary already supports the conception of PFRSD as being interim or provisional,⁹⁷ like an injunction. Okoth-Obbo has expressly described PFRSD as ‘provisional’, ‘preliminary... without... being decisive’ and ‘not a conclusive process’ (2001: 119 and 121, see also Schreier 2008: 13). Odhiambo-Abuya has also described it as a ‘provisional status’ (2007: 87).⁹⁸ UNHCR has stated that ‘determination on a prima facie basis [is] subject to subsequent review’ (UNGA 1994: para 27). Even Rutinwa, exponent of the presumptive conception, has described PFRSD by reference to the language of injunctions. He stated that PFRSD is ‘simply an “interim solution” aimed at extending to beneficiaries full refugee rights but *without prejudice* to the duration of their sojourn nor the eventual durable solution to their plight’ (emphasis added, 2002: 23).

It is the contention of this paper that the term ‘prima facie’ in refugee law is more accurately conceived as being a shorthand reference to its use in relation to injunctions, rather than presumptions. It is further contended that, by exercising its discretion to afford PFRS (Hyndman and Nylund 1998: 32), the host State is provisionally deeming that each claimant is entitled to refugee status when they provide a prima facie standard of evidence. This standard of evidence is met by evidence that the claimant is from a particular place and arrived during a particular period. Once this low (prima facie) standard of evidence is fulfilled, an interim injunction-like status is granted in their favour until such time as a final determination (i.e. RSD including consideration of exclusion or non-inclusion from Convention protection) takes place. In the absence of a final determination, the interim (so-called prima facie) refugee status subsists and is the basis on which rights from the Convention are afforded such as to prevent irreparable harm. PFRS should therefore be conceived of as a form of interim injunction under the Convention. Like all interim injunctions, PFRS is granted on an urgent basis (Okoth-Obbo 2001: 119) in the absence of a party opposing the refugee claim and without prejudice to the final, individual determination whether or not it ever occurs (Atkin 2009: para 108).

⁹⁶ *Cambridge Nutrition Ltd v British Broadcasting Corporation* [1990] 3 All ER 523.

⁹⁷ The use of this word in the PFRS context has no relationship to the notion of provisional measures under Article 9 of the Convention. For discussion see Hathaway (2005: 261–270).

⁹⁸ Temporary protection has also been described as ‘an interim protection response’ (UNHCR 2001a: para 16, UNHCR 1999: para 12 and UNHCR 2004: para 6); however, it differs in that it is time-limited and exclusive of local integration, whereas PFRS is not. See 1.3.4.

3.2.1 Nature of injunctions

Interim injunctions are granted as a matter of discretion. Injunctions can prevent wrongs currently existing or prevent wrongs not yet done. By their very nature, interim measures are sought and, where successful, granted as a matter of urgency (Jennings 1995: 502). An injunction therefore gives ‘the best prediction ...of the final outcome...decisive weight.’⁹⁹ Because of the urgency to decide whether to grant an injunction, the decision-maker cannot have regard to all of the merits of the case. For these pragmatic reasons, the decision-maker therefore relies on evidence at a lower standard than that required at a final determination. The decision to grant an injunction is ‘provisional, that is, without conclusive effect on the final decision, but at the same time [it remains] binding on the parties’ (Westdickenberg 1999: para 4.145).

Interim injunctions are usually a short-term remedy (Sime 2007: 433). However, they can also be granted on the basis that they will subsist until another form of relief is given. Additionally, they can prevail indefinitely. Interim injunctions, left unchallenged, can thereby become final forms of relief. Failure to seek to terminate an injunction can give rise to a legal barrier to seek such termination. In other words, the party whose interests are not benefitted by an injunction can forgo those interests by not seeking a further, final decision or another remedy. Applied to the refugee context, the host State could forgo the opportunity to conduct final, individual RSD such that the protection offered by PFRS would become the last and prevailing form of relief.

An injunction can stop an action by, or force an action from, either party. Injunctions forbidding an action are described as prohibitory,¹⁰⁰ while those requiring a particular act are described as mandatory.¹⁰¹ Generally, interim injunctions are prohibitory and aim to preserve the status quo (Brown and O’Hare 2005: 458, Atkin 2009: para 169). Mandatory injunctions are used either for final determinations or for cases that demonstrate a strong chance of success. The higher the chance of success and therefore the likelihood of damage in the absence of an injunction, the lower the standard of evidence required to attain that injunction.¹⁰² Thus, a mandatory injunction may be available as interim relief in situations where the damage would be grave without it. It is arguable that RSD would pass the threshold for a mandatory interim injunction because it involves decisions relating to persecution (Article 1A) and loss of freedom and life (Article 33) of the claimant.

⁹⁹ *R v Secretary of State for Transport ex parte Factortame Ltd* No 2 [1991] 1 AC 603 per Bridge LJ.

¹⁰⁰ Such injunctions are also known as negative or restraining injunctions (Brown and O’Hare 2005: 458). They are the modern forerunner to the prerogative remedy of prohibition (Jolowicz 2000: 153).

¹⁰¹ Such injunctions are the modern forerunner to the prerogative remedy of mandamus (Jolowicz 2000: 153). It is worthy of note that cancellation of refugee status is much like the third of the prerogative remedies, namely certiorari.

¹⁰² *R v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd. and others* [2000] 1 All ER 572 per Laws LJ.

An injunction can restrain wrongful acts which are threatened or imminent but have not yet begun.¹⁰³ Such an injunction is known as a *quia timet* injunction.¹⁰⁴ *Quia timet* is a Latin phrase meaning ‘because he fears’. The link between this phrase (the word ‘fear’ especially) and the Convention definition of a refugee is self-evident.

In defining the purpose of a *quia timet* injunction, the Master of the Rolls stated:

... in a *quia timet* action you have to satisfy the court that what the defendant is doing will prove an imminent and substantial damage to the plaintiff's property, or his business, whatever it may be. The court has to draw an inference from all the circumstances of the case; *ex hypothesi* you cannot prove actual damage...¹⁰⁵

The purpose of *quia timet* injunctions and RSD are similar in the sense that RSD is also ‘an essay in prediction’ (Goodwin-Gill and McAdam 2007: 542).

Quia timet injunctions are granted especially in cases where damages will not be an adequate remedy for the violation which the injunction is designed to prevent.¹⁰⁶ Persecution (Article 1A) and loss of freedom or life (Article 33) would readily pass this threshold.

Injunctions can be granted *ex parte* or *inter partes* (Sime 2007: 433). Since there is no party actively opposing most refugee claims, it could be said that RSD is, by its nature, *ex parte*.

Taking into account the characteristics of both injunctions and PFRSD, this paper argues that PFRS is best conceived as, in effect, a *quia timet* injunction granted, in haste and *ex parte*, at the discretion of the host State with both mandatory and prohibitory elements. It is mandatory in that it requires States to protect those Convention rights that prevent irreparable harm to the refugee claimant,¹⁰⁷ and it is prohibitory of *refoulement*. As Kagan has acknowledged, ‘prima facie protection is the best means of preventing *de facto* *refoulement*’ (2003: 43). The injunction persists until, but is without prejudice to, RSD that considers exclusion and non-inclusion from Convention protection.

3.2.2 Evidentiary threshold for injunctions

Courts have variously described the standard of proof required for the granting of interim relief, including injunctions. Standards of proof are the ‘threshold to be met by the

¹⁰³ *Fletcher v. Bealey* (1884) 28 Ch.D. 688 and *Jordeson v Sutton, Southcoates and Drypools Gas Co* [1899] 2 Ch 217.

¹⁰⁴ See for example, *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 or, even more recently, *Luxottica Retail Australia v Grant and Ors* [2009] NSWSC 126.

¹⁰⁵ *Royal Insurance Co Ltd v Midland Insurance Co Ltd* (1908) 26 RPC 95 at 97. This dictum has been widely adopted: see *Bendigo and Country Districts Trustees and Executors Co v Sandhurst and Northern District Trustees Positive* (1909) 15 ALR 565.

¹⁰⁶ *Fletcher v. Bealey* (1884) 28 Ch.D. 688 and *Jordeson v Sutton, Southcoates and Drypools Gas Co* [1899] 2 Ch 217.

¹⁰⁷ See 3.2.2.2.

claimant in persuading the decision-maker of the truth of his or her actual assertions’ (Gorlick 2003: 367-8). The courts’ formulations all indicate that the requisite standard for injunctions is low or, as it is relevantly termed, *prima facie*.¹⁰⁸

The *prima facie* standard of proof in civil procedure has been the subject of considerable commentary and jurisprudence. One can read the formulations below from common law jurisdictions¹⁰⁹ and apply them readily to the refugee context.¹¹⁰ By so doing, the general law arguably informs the understanding and clarifies the meaning of PFRS.

A *prima facie* case has been defined as being one where, ‘if the evidence remains as it is, it is probable that at the hearing of the action [the plaintiff] will get a decree in his favour.’¹¹¹ Alternatively, the High Court of Australia has opined that:

...the phrase “*prima facie* case” [does] not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.¹¹²

The Federal Court of Australia has stated that a *prima facie* case is:

...an “arguable case”, bearing in mind that this requirement is to be met at the outset of the action, “without the advantage of discovery and other procedural aids to the making out of a case”... [The threshold] is whether on the material before the Court, inferences are open which, if translated into findings of fact, would support the relief claimed.¹¹³

Applying these formulations to the refugee legal context, a *prima facie* refugee could be said to be a refugee in whose case it is ‘probable’ that refugee status would be recognised or who has a ‘sufficient likelihood of’ or ‘an arguable case’ for getting refugee status by means of individual RSD. A *prima facie* case in civil procedure is one that provides a low but sufficient standard of evidence. This fits with the standard of evidence required to attain PFRS.

Like the presumptive conception, the term ‘*prima facie*’ in relation to injunctions also relies on inferences drawn from the objective situation from which a refugee flees;

¹⁰⁸ *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* [No 3] [2007] FCA 2082 per Gilmour J. This low standard reflects the alternative Latin term used to describe a *prima facie* case, namely *fumus boni juris* meaning ‘having the scent of being good in law’ (Atkin 2009: para 108).

¹⁰⁹ Notions of the standard of proof are not unique to the common law. In the civil law system, the requisite standards of proof generally are formulated as the *liberté de la preuve* (freedom of proof) that results in *intime conviction* (deep conviction) on the part of the decision-maker as to the truthfulness of the claim (Gorlick 2003: 361).

¹¹⁰ To do so with the following quotations, replace the word ‘Court’ and ‘defendant’ with ‘host State’, the word ‘plaintiff’ with ‘refugee claimant’, ‘action’ with ‘status determination’, ‘trial’ with ‘individual determination’ and ‘relief’ or ‘decree’ with ‘refugee status’.

¹¹¹ *Chandler v Royle* (1887) 36 Ch D 425 per Cotton LJ. This view has been endorsed by the High Court of Australia in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

¹¹² *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57.

¹¹³ *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* [No 3] [2007] FCA 2082 per Gilmour J [citations omitted]

however, it uses these inferences in a different test for a different result.¹¹⁴ This paper argues that the inferences are made from evidence to a standard which constitutes the prima facie standard (as it is known and used in relation to injunctions) in the context of refugee law.

The standard of proof required to evidence a final refugee claim is the subject of significant disagreement (Goodwin-Gill 2005: 6).¹¹⁵ Suffice it to say, all of the formulations said to be required in final RSD require a higher standard of proof than that described as prima facie. As such, this paper argues that the use of the term 'prima facie' indicates that PFRSD requires a different and lower standard of proof than other RSD. For this reason perhaps, Kagan describes PFRSD by reference to what it implies, namely a 'manifestly well-founded' claim to refugee status (2003: 42, see also Van Beek 2001: 18). Rutinwa similarly describes it as the status for 'those patently in need of it' (2002: 1). This paper argues that by designating people fleeing a particular place in a particular period as beneficiaries of PFRSD, the host State acknowledges that, pending final determination, the higher standard of proof need not be fulfilled by each applicant for the grant of refugee protection and need only satisfy a lower, prima facie standard (see Durieux 2009: 25-26).

3.2.2.1 *Balance of convenience*

The exercise of discretion as to whether to grant an injunction requires the decision-maker to 'balance the magnitude of the evil against the chances of its occurrence'.¹¹⁶ This is known as the 'balance of convenience'.¹¹⁷ The 'balance' requires consideration of both the likelihood of harm and the magnitude of that harm (Zuckerman 2006: para 9.24). In public law,¹¹⁸ the decision to grant an injunction requires the decision-maker to 'place a value on the public interest, and balanc[e] that against the financial or other consequences suffered by the individual' if the injunction is not granted (Atkin 2009: para 169). It requires the decision-maker to 'ask: [c]ould it hurt the claimant [i.e. host State] more to go without the injunction... pending trial than it would hurt the defendant [i.e. refugee claimant] to suffer it?' (Brown and O'Hare 2005: 460). The importance of the likelihood of harm alters depending on the nature of the injunction being sought. The requisite magnitude of harm to tip the balance in favour of granting an injunction is discussed next.

¹¹⁴ See 1, 3.1.2.

¹¹⁵ For example, UNHCR has stated that 'the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood' (1998). Alternatively, the standard has been formulated in the United Kingdom as a 'reasonable chance', in Canada as a 'less than a 50 per cent chance... but more than a minimal or mere possibility', in the USA as 'a reasonable possibility' and in Germany as a 'considerable likelihood'. Reconciling these standards is beyond the scope of this paper (but see Gorlick 2003: 367-8).

¹¹⁶ *Earl of Ripon v Hobart* (1834) 3 My & K 169 at 176.

¹¹⁷ Latterly, 'balance of convenience' has come to be regarded as 'an unfortunate expression. [After all, the law's] business is justice, not convenience' per *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 at 898.

¹¹⁸ Law involving a State or public authority as one party, as in the refugee context.

3.2.2.2 Irreparable prejudice

The evidentiary threshold for some forms of injunction is evidence of irreparable harm or prejudice. In general law, irreparable harm is regarded as harm which cannot be compensated with damages (Zuckerman 2006: para 9.23).¹¹⁹ The ICJ has repeatedly held¹²⁰ that evidence of ‘irreparable prejudice . . . to rights which are the subject of dispute’ is required for it to grant a provisional measure.¹²¹ Rules and procedures for other international courts confirm ‘irreparable prejudice’ as a threshold for the grant of provisional measures also.¹²² However, no instrument of international law ‘spell[s] out which violations are to be regarded as causing irreparable’ prejudice (Noll 2000: 464). International courts and UN treaty bodies have attempted to define the scope of what rights violations give rise to ‘irreparable prejudice’. The ICJ referred to ‘irreparable prejudice’ in the process of granting provisional measures for the protection of individual rights to life, liberty, protection and security (Goodwin-Gill and McAdam 2007: 435). The UN Human Rights Committee (2004: para 12) and the Committee on the Rights of the Child (2005: para 27) have both stated that denial of the right to life, or torture, cruel, inhuman or degrading treatment, among other ill-treatment, would give rise to ‘irreparable harm’.¹²³

‘The concept of irreparability fits well’ in the refugee context (Noll 2000:465, see also Goodwin-Gill 1983: 136). This further illustrates the appropriateness of the injunctive conception of PFRSD. Noll suggests the following, non-exhaustive definition of what constitutes harm that is ‘irreparable’ in the refugee context:

A violation [of international human rights law] is irreparable *inter alia* when it directly or indirectly terminates the life of the victim, when it produces a trauma resistant to therapy or when there are no legal remedies available to redress the violation (2000: 466).

In the author’s view, persecution (Article 1A) and loss of freedom or life (Article 33) would constitute ‘irreparable prejudice’.¹²⁴ By definition, refugees are at risk of these

¹¹⁹ See also *Attorney-General v Hallett* (1847) 16 M and W 569 per Alderson B.

¹²⁰ See *Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, ICJ Reports 1973: 103; *United States Diplomatic and Consular Staff in Tehran*, Provisional Measures, Order of 15 December 1979, ICJ Reports 1979: p36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, ICJ Reports 1993: para 34; *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998: para 36.

¹²¹ *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999: para 23.

¹²² See for example, Human Rights Committee Rules of Procedure 2005 Rule 92; American Convention on Human Rights 1969 Article 63; African Commission on Human and People’s Rights, Rules of Procedure 1995, Rule 111.

¹²³ ‘Irreparable harm’ was considered as part of a test for complementary protection in Australia in 2009. At the time of writing, it seems unlikely to be included in the final Bill due to strong criticism of the complexity of the test in public submissions to the Senate Committee considering the draft Bill, see Senate 2009: para 3.8 – 3.18.

¹²⁴ It is arguable that children could be ‘irreparably harmed’ by an even lower threshold of ill-treatment than adult refugee claimants, see Article 22 and 37 (b)-(d) of the Convention on the Rights of the Child 1989.

forms of harm. This tips the ‘balance of convenience’ in their favour. This harm greatly outweighs the possible harm caused to the host State by the refugee claimant’s presence pending final, individual RSD.

3.2.3 Legal foundation for the injunctive conception of PFRSD

Unlike the presumptive analysis, the injunctive analysis has a legal foundation even beyond the inherent power to grant an injunction for ‘any decision that determines questions affecting the rights of subjects’ (Jolowicz 2000: 153).¹²⁵ Interim measures, like injunctions, are familiar not only to international law and international legal decision-making generally, but to the Convention specifically.

The Convention is capable of interpretation as a matter of international law by the ICJ (Article 38).¹²⁶ The Statute of the ICJ (‘ICJ Statute’) expressly provides for the ICJ to grant injunctions that are binding on the parties.¹²⁷ Article 41(1) provides that:

The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

As Goodwin-Gill and McAdam have stated, ‘the possibility of interim measures ordered by the [ICJ in the refugee context] under article 41 of the Statute should not be discounted’ from legal consideration of refugee law (2007: 435, see also Goodwin-Gill 1983: 136).

Article 41 is an international law codification of the common law *quia timet* injunction (Jennings 1995: 501).¹²⁸ The ICJ has already stated that in order for such an injunction to be granted, the party requesting it must prove, on a *prima facie* basis, that their matter falls within the jurisdiction of the Court (Jennings 1995: 502).¹²⁹ The Court has also held that it can determine a provisional measure ‘on the basis only that it has *prima facie* jurisdiction, both *ratione personae* and *ratione materiae*,¹³⁰ under’ an international human rights convention.¹³¹ ‘[T]he power of the Court to indicate interim measures of protection is part of its incidental jurisdiction and is not dependant on its competence to determine the merits. [This] view [is] supported by the preponderance of authority’ (Plender 1991: 16). It is on this firm and explicit legal foundation that PFRSD should be seen to be based. PFRS has not, to date, arisen from an injunction from the ICJ. This paper contends that PFRS is given at the discretion of, and by, host States in anticipation that the ICJ would

¹²⁵ Of course, in many jurisdictions, Courts are also prescribed the power to grant an injunction. See for example *Supreme Court Act 1981* (UK) s 37(1) or *Civil Procedure Rules 1998* (UK) 25A: para 1.3.

¹²⁶ See 2.1.

¹²⁷ As to the procedure for the granting of interim measures, see Subsection D (1) of the ICJ *Rules of the Court* (1978).

¹²⁸ See 3.2.1.

¹²⁹ *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999: para 13.

¹³⁰ Meaning, for the relevant reasons and the relevant persons.

¹³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 8 April 1993, ICJ. Reports 1993: para 32.

grant such refugee claimants injunctive relief under Article 41 of the ICJ Statute were the situation of those claimants to be considered pursuant to Article 38 of the Convention. This foundation has the additional benefit of shedding light on the injunctive nature of PFRS.

In addition, the Convention provides both mandatory and prohibitory rights to refugees. Article 33 is especially important in this regard. It prohibits return. This prohibition is an entitlement of refugees even before they attain refugee status.¹³² Article 33 is like a prohibitory injunction in nature. As an effective codification of current international customary law, it can therefore also be a basis for a limited form of injunctive PFRS in those States that are not signatories to the Convention.

3.2.4 Application of an injunctive analysis to PFRSD

The law around the term '*prima facie*' in relation to injunctions can be readily applied to refugee law. In general law, the determination as to whether or not to grant a *quia timet* injunction involves a weighing of the degree of probability of apprehended harm, the degree of seriousness of that harm, and finally, the requirements of justice as between the parties.¹³³ Without PFRS, the refugee claimant could be returned to the frontiers of territories where their life or freedom would be threatened (Convention Article 33) for want of a lawful reason to remain in the foreign State ('probability of apprehended harm'). The fear of return to persecution, rather than the fear of persecution itself, is the basis of the injunction ('*quia timet*'). Were they forced back, the person's life or freedom may be threatened ('seriousness of that harm'). Justice requires that the status quo be preserved so as to ensure that this does not occur and because the cost to the host State is, relative to the potential loss of a life, small and insignificant ('justice as between the parties'). The provision of evidence only of flight from a particular place during a particular period is a low standard of evidence to substantiate a refugee claim. It is on this low standard that PFRS is proved. The result of PFRSD is the grant of interim refugee status that is injunctive in nature. This analysis is grounded in the legal foundation of PFRS, namely the Convention.¹³⁴

It is the contention of this paper that, in the refugee context, the term '*prima facie*' is therefore referable to, or shorthand for, a *quia timet* injunction in favour of a refugee claimant that is:

- (a) granted on a discretionary basis by the host State pursuant to:
 - (i) Articles 1A and 33 of the Convention and taking cognisance of Article 38, or
 - (ii) in non-signatory States, the customary international law norm of *non-refoulement* (whether conceived in the limited scope provided in the Convention, or otherwise),
- (b) prohibitory of *refoulement*,

¹³² See 1.2.

¹³³ *Copyright Agency Ltd v Haines* [1982] 1 NSWLR 182.

¹³⁴ See 2.6.

- (c) mandatory of fundamental rights that prevent irreparable harm as set out in:
 - (i) the Convention, or
 - (ii) in both signatory and non-signatory States, human rights instruments to which the State is a signatory,
- (d) interim and prevailing until and without prejudice to RSD that has regard to non-inclusion and exclusion under Article 1F from Convention protection,
- (e) *ex parte* for want of, or in the absence of, an appropriate opposing party,
- (f) for the purpose of preventing wrongs that have not been committed by the host State but may be if no refugee status is granted.

This conception of PFRSD indicates that those with PFRS are staying in the host State within the law, i.e. ‘lawfully staying’. The Convention accords ‘gradations in treatment’ depending on the legal status of the refugee (UNGA 1994: para 29, Durieux and Hurwitz 2005: 111 and 127). Those ‘lawfully staying’ in a country are entitled to significantly more rights¹³⁵ than those who only attain rights extended to ‘all refugees’.¹³⁶ As such, *prima facie* refugees are legally entitled to the larger range of rights under the Convention.

The injunctive analysis accommodates the key features of the real world application of PFRSD set out in the first section. PFRS is like an injunction in that it is:

1. not final, since those who gain PFRS can be subject to further screening to determine whether they are excludable or non-includable from Convention protection,
2. without prejudice to the final determination, at which point decisions as to excludability and non-includability can be made,
3. made in situations of urgency, when the host State’s RSD apparatus does not have the capacity to conduct an exhaustive individual RSD,
4. a means to preserve the status quo, in that it prevents the irreparable harm that would result from *refoulement* and affords rights that preserve the life and safety of the refugee.

While the rights attached to PFRS may be no fewer in number than those resulting from individual RSD (Durieux and Hurwitz 2005: 126), they may be lesser in quality (ExComm 2004 No 22, see Rutinwa 2002: 15, Hyndman and Nylund 1998: 32, 34 and 37, contra Durieux and McAdam 2004: 10) such as only to prevent irreparable harm. This is for two reasons. Firstly, PFRS is the result of RSD that did not consider exclusion and non-inclusion from Convention protection.¹³⁷ Second, PFRS is the result of an expedited, injunctive process that is, by its nature, initially interim but will prevail in the absence of further, individual RSD. These qualitative differences account for *prima facie* refugees not being considered for resettlement.¹³⁸ Resettlement requires final, rather than interim, RSD that has regard for all elements of the Convention refugee definition, including exclusion and non-inclusion from Convention protection (UNHCR 2001a: para 6 and 8, see also Hyndman 2001: 47, Durieux 2009: 32, contra Rutinwa 2002: 2 and 14).

¹³⁵ Convention Articles 15, 17, 19, 21, 23, 24 and 28.

¹³⁶ Convention Articles 3 and 33.

¹³⁷ See 1.3.1.

¹³⁸ See 1.3.3.

3.3 Reform – Executive Committee conclusion

There is a marked lack of clarity about the nature and purpose of PFRSD. The law around PFRSD would benefit from authoritative clarification. A Protocol to clarify the situation was mooted by High Commissioner Schnyder in 1965 (Davies 2008: 708) and recommended by UNHCR in 2004 (UNHCR 2004: para 12, contra UNHCR 1999: para 15). A Protocol would indeed be ideal, but the prevailing political climate makes it unlikely (UNGA 1994: para 53).

Alternatively, a conclusion of the Executive Committee of UNHCR would be easier to achieve. The Executive Committee is charged with responsibility for giving non-binding interpretations of the Convention. To date, the Executive Committee has never used the term ‘prima facie’, even though it is part of the common vocabulary of UNHCR and many host States. An Executive Committee conclusion would be an appropriate mechanism to promote the formalisation of PFRS and to be a guide to all States (see McAdam 2010: 39-40).

Such a conclusion would benefit from recitals that acknowledge that the majority of the world’s refugees are recognised on a prima facie basis. The conclusion could then confirm the Convention as a source of PFRSD citing Articles 1A and 33 and, by operation of Article 38 of the Convention, Article 41 of the ICJ Statute. It would be most beneficial for the conclusion to explain the nature of PFRS by express reference to the operation of the term ‘prima facie’ in relation to injunctions. This would have the additional benefit of clarifying the confusion arising from the presumptive analysis of PFRSD. Finally, the conclusion should commend States to PFRSD as a way of ensuring that refugees are afforded rights under the Convention without draining the resources of the host State by undergoing individual RSD and without subjecting claimants to unreasonable delay.

Conclusion

Since the earliest attempts to codify human rights, as recorded in the Magna Carta (1215), there has been concern to ensure recognition that justice delayed is justice denied. Today, the same concern arises in the interpretation and application of the Convention Relating to the Status of Refugees (1951). This concern is perhaps borne out nowhere more clearly than in the analysis of refugee status for those who have the misfortune of fleeing to a country that lacks the capacity to determine their individual refugee status in a timely manner.

Those who attain refugee status on a prima facie basis constitute the vast majority of those who are refugees today. Yet the legal status and the process by which they attain it has received scant attention. This paper aimed to inform and alter the debate around PFRS. It did so by explaining State practice around this term in the refugee regime and by seeking guidance from other areas of the law that also use the term ‘prima facie’.

The paper concluded that PFRSD is a unique procedure that leads to a unique legal status, in the sense that it is different qualitatively from other RSD. PFRSD is a form of individual RSD. A significant difference from other individual RSD is that PFRSD does not have regard to exclusion or non-inclusion from Convention protection. This qualitative difference results in prima facie refugees not being considered for resettlement. PFRS is different from temporary protection status because it allows for local integration and is not of a pre-determined duration.

The paper also concluded that the source for PFRSD is Articles 1A and 33 of the Convention and, by operation of Article 38 of the Convention, Article 41 of the ICJ Statute. These provisions, read in combination, give scope within the Convention on its existing terms for grants of provisional refugee status on a prima facie basis. A complete understanding of PFRS is therefore informed by the use of the term 'prima facie' in relation to injunctions. PFRSD is thereby, in effect, an injunction granted in haste and *ex parte* within the reasonably exercised discretion of the host State, but guided by human rights obligations to accord procedural fairness and due process. States decide to grant refugee status under the Convention on a prima facie basis when they do not have capacity to individually determine each refugee claim. This shortcut in favour of States, however, does not affect the breadth of rights of those who are entitled to refugee status. PFRSD gives rise to an injunction in favour of each refugee granted refugee status in this way. That injunction prohibits the State from sending back the person to the 'frontiers of territories where his life or freedom would be threatened' and compels the State to accord the beneficiary rights established in the Convention that prevent irreparable harm. Such refugee status is without prejudice to the result of a final, subsequent, individual determination during which exclusion and non-inclusion are considered.

This paper was limited by the scant commentary on and study of PFRSD. Future studies on this subject would benefit from additional research into the practical implementation of PFRSD. Further analysis of State practice may also determine whether there is an emerging norm of customary international law of PFRSD itself, or perhaps RSD conducted by reference only to country of origin and time period of flight.¹³⁹ A review of the widespread and long-term use by States of PFRSD (UNGA 1994: para 38), as well as the utilisation of PFRSD in States that are not signatories to the Convention or Protocol,¹⁴⁰ would aid this enquiry. In addition, further analysis of the legal force of the bipartite Cooperation Agreements that operate between States that conduct PFRSD and UNHCR is required (see Kagan 2006: 4, Zieck 2008: 259).¹⁴¹

¹³⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands)* 41 ILR 29.

¹⁴⁰ PFRSD is already conducted in numerous countries that are not signatories to the Convention or Protocol, including Malaysia (USCRI Malaysia 2008) as well as Pakistan (Zieck 2008), Syria and Jordan which, in combination recently hosted over 4 million refugees (UNHCR 2008).

¹⁴¹ Indeed, in those States, Co-operation Agreements may be the only way to fill the legal lacuna for refugees apart from customary international law.

There is also scope for research into the gap between the law on the books and the law in practice, especially in regards to those countries in which Ministerial declarations of refugee groups are codified. Similarly, research into PFRSD would greatly benefit from the lived experiences of those who attain PFRS. This would usefully inform future scholarship on the drawbacks and benefits of this form of RSD for refugees themselves. In the absence of such research, it seems that the benefits of conducting PFRSD are many and varied. Done well, PFRSD gives refugee claimants certainty in their legal protection. As this paper has shown, that security derives from the fact that PFRS is, in effect, an injunction under the Convention. Additionally, there are benefits to refugees, UNHCR and States in relying on a less resource-intensive procedure to give a legally secure status (Kagan 2006: 25, Durieux 2009: 31, Van Beek 2001: 16, Kourula 1997: 294). If ‘status is everything’,¹⁴² PFRSD ensures that the Convention accords with the aspirations of its drafters, that it would become ‘a Magna Carta for the persecuted’ (Habicht in United Nations Conference of Plenipotentiaries 1951).

¹⁴² See p.3.

Annex – Key provisions of international legal instruments

1951 Convention relating to the Status of Refugee, Article 1A.

For the purposes of the present Convention, the term “refugee” shall apply to any person who...

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

1969 Vienna Convention on the Law of Treaties, Article 31

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

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