NARROWING
THE IMPUNITY GAP?

How host states deal with alleged perpetrators of serious crimes excluded from international protection: a case study of the Netherlands.

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Narrowing the impunity gap?
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Table of content

1. Introduction

1.1. Exclusion from refugee protection

Conflicts and violent political repression cause forced displacement.[1] Forcibly displaced persons cross borders and move to neighbouring and more distant countries, in search of refuge. States on the receiving end may have obligations under international law to protect displaced persons in need. The principal legal instrument setting out international protection obligations is the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Article 1A(2) determines a 'refugee' is someone who is outside the country of his nationality and not willing or able to claim the protection of that country due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Article 14(1) of the Universal Declaration of Human Rights states that "everyone has the right to seek and to enjoy in other countries asylum from persecution." While about a third of the forcibly displaced persons in 2015 qualified as refugees, the number of persons making individual applications for an asylum or refugee status is only 3 percent of the total number of forcibly displaced persons.[2] Nonetheless, the absolute number of individuals applying for asylum in Europe, for instance, in 2016 still amounted to about 1,26 million; hence, the number of asylum seekers that reaches Europe is substantial.[3]

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1 The United Nations High Commissioner for Refugees (UNHCR, 2016) reported that by 2016, global forced displacement had reached record-high numbers, with 65.3 individuals forcibly displaced worldwide – a 75 percent increase compared to 1996 – as a result of persecution, conflict, generalized violence (i.e. violence that not only affects targeted individuals or groups but also those "who have no stake in an armed conflict or socio-economic-political order"; see V. Türk, 'Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalized Violence', 2011, available online at <http://www.unhcr.org/4d3703839.html> (last visited 19 July 2017), pp. 4-5) or human rights violations. The number of forcibly displaced persons relative to the world population has increased from 6 per 1.000 persons between 1999 and 2011 to 9 per 1.000 at the end of 2015 (UNHCR, 2016, p. 6).

2 This low proportion could be explained from the fact that not all asylum seekers reach a country where a functioning asylum determination mechanism is in place, or a country where they want to apply for asylum. The total of 65,3 million forcibly displaced persons worldwide includes 16,1 million persons who are refugees under UNHCR's mandate, 5,2 million Palestinian refugees registered by the United Nations Relief and Works Agency for Palestine refugees in the near east (UNRWA), 40,8 million internally displaced persons and 3,2 million persons awaiting a decision on their asylum application. According to UNHCR (2016, p. 37), the number of new ('first instance') asylum applications reached a record-high number of 2,0 million in 2015.

3 Eurostat, 'Asylum and first time asylum applicants – annual aggregated data (rounded)', available online at <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00191>. The number of asylum applications differs considerably per country, however. In 2016, Germany received most first time applications (745.155), followed by Italy (122.960) and France (84.270), while the Baltic states and Slovakia received tens up to a few hundred applications in total. Article 2(h) of Qualification Directive 2011/95/EU defines first time applicants as persons who lodged an application for asylum for the first time in a given EU member state, irrespective of whether they have applied for asylum earlier in another EU member state.

Among those seeking asylum are also individuals who are unwanted by the host state because of their (alleged) past or possible future criminal conduct. Three categories of these 'undesirable' asylum seekers can be distinguished: those who have allegedly committed crimes before arriving in the host state; those who had their residence status revoked for having committed crimes in the host state; and those who were not granted a status or had their status revoked because they are considered to pose a current or future threat to national security. This study focuses on the first category of unwanted asylum seekers: those who are allegedly guilty of serious crimes prior to their arrival in the state of refuge.[4]

It is generally held that this latter group of individuals should not benefit from refugee protection.[5] Article 1F of the Refugee Convention[6] determines

> "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

4 How the other two categories of undesirable aliens are being dealt with by host states will, however, be addressed in Chapter 3.

5 This becomes clear from the fact that provisions to that effect are included in the major legal instruments setting out obligations relating to refugee protection; see *infra* note 6.

6 Convention Relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entry into force: 22 April 1954). Similar provisions are to be found in para. 7(d) of the 1950 UNHCR Statute and Article I(5) of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) (UNHCR, 2003). The equivalent of Article 1F in European legislation are Articles 12(2) and 17(1) of the 'Qualification Directive', Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

On the basis of Article 1F, individuals shall therefore be *excluded* from refugee protection,[7] in relation to 'international crimes'[8] under 1F(a), other serious crimes (including 'common' crimes such as murder and assault) under 1F(b), and acts contrary to the purposes and principles of the UN under 1F(c).

It is often said, with reference to the *travaux préparatoires*, that the drafters of the Refugee Convention had two objectives in mind with this 'exclusion clause' (Fitzpatrick, 2000; United Nations High Commissioner for Refugees (UNHCR), 2003a; Gilbert, 2003).[9] A first objective was to ensure that persons suspected of committing serious crimes would not benefit from refugee protection. The gravity of the acts would deem them inherently 'undeserving' of such protection. A second objective was to ensure that such persons did not escape prosecution (Gilbert, 2003: 428).[10] However, in the four decades following the adoption of the Refugee Convention, there was little attention for, and use being made of, the exclusion clause of Article 1F. This changed suddenly and significantly halfway the 1990s. In academic literature, this sudden change is attributed to different developments that occurred roughly around the same time.

A first – and for the purposes of this study particularly relevant – development to which this sudden interest in the exclusion clause is attributed (e.g. by Beyani, Fitzpatrick, Kälin & Zard, 2000; UNHCR, 2003b; Bond, 2012), is the emergence and

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7 The study will thus not concern itself with Article 33(2) of the Refugee Convention, the exception to the prohibition of expulsion or return for "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". The main difference between Article 1F and Article 33(2) is that the former is part of the refugee definition, while the latter concerns the treatment of certain individuals who have been recognised as refugees; hence, the latter is not a ground for exclusion from refugee protection. Where it is said that the former serves to protect the 'integrity of the asylum system', the latter serves to protect the community of the host state (UNHCR, 2009: 8).

8 The term 'international crimes' is often used to refer to the crimes that are subject to the jurisdiction of the International Criminal Court, as listed in Article 5 of the Rome Statute: the crime of genocide; crimes against humanity; war crimes; and the crime of aggression.

9 In this thesis, the term 'exclusion' refers solely to Article 1F; the exclusion grounds in Articles 1D (which concerns persons who already receive protection or assistance from UN organs or agencies other than UNHCR, such as the UNRWA) and 1E (which concerns persons who have been recognized as having the same rights and obligations as nationals of the state of residence) of the Refugee Convention are not addressed, because these forms of exclusion concern people who are not in need of the protection of the Refugee Convention, rather than people who may be in need of such protection but to whom it is not afforded because of alleged criminal behaviour.

10 Hathaway & Foster (2014: 525) argue that the most fundamental concern of the drafters, however, was that "if state parties were expected to admit serious criminals as refugees, they would simply not be willing to be bound to the Convention". They argue the fundamental purpose of Article 1F is to protect the integrity or credibility of the system of refugee protection, a view also held by *inter alia* the Court of Justice of the European Union (CJEU) in the *B. and D.* judgment (Joined Cases C-57/109 & C-101/09, *Bundesrepublik Deutschland v. .B and D.*, 9 November 2010).

aftermath of the crises in the Great Lakes and the former Yugoslavia in the 1990s.[11] In both of these crises the international community's initial inaction eventually led to a strong international legal response, with the establishment of the two *ad hoc* criminal tribunals (International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)).[12] The establishment of these tribunals has propelled the development of the field of international criminal law and the establishment of a permanent International Criminal Court (ICC). By adopting the Rome Statute that established this permanent court, a large number of states affirmed that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and showed themselves "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[13] International criminal justice has not remained confined to the international level, as in subsequent years individual states increasingly started acting to hold perpetrators of international crimes criminally accountable (Handmaker, 2003; Rikhof, 2009; 2012). Because of these different developments at both the international and national levels, there is increased awareness of the possibility that perpetrators of international crimes are among migrants arriving from conflict areas.

Secondly, the arrival of 'spontaneous' asylum seekers from conflict regions increased substantially in the 1990s.[14] With the arrival of these "new asylum seekers" in Western countries, Western governments generally became more hesitant to accept their entitlement to the benefits traditionally associated with the 'refugee'-label (Martin,

11 Gilbert (2014) argues that it is not so much that the nature of conflicts changed in the 1990s, but rather that the "horrors of war" became more visible in the media and widely known, which also meant states were increasingly expected to respond.

12 UN Security Council Resolution 827 of 25 May 1993 established the ICTY, Resolution 955 of 8 November 1994 established the ICTR.

13 See the fourth and fifth preambular paragraphs of the Rome Statute. Through a declaration by state leaders put out at the UN High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels in 2012, state leaders again committed themselves to "ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law…"; General Assembly resolution 67/1 of 24 September 2012.

14 "During the 1990s, the number of applications submitted [in 37, mostly industrialized, countries in Europe, North America, Australia, New Zealand and Japan] reached 6,1 million, an almost three-fold increase compared to the previous decade, when some 2,3 million applications were lodged. In 1992, a peak was reached when some 856.000 applications were submitted, whereas the lowest number of applications during the past two decades was recorded in 1983 (115.000). Since 1996, the number of asylum applications has increased to reach some 652.000 in 1999 […]" (UNHCR, 2001: vii). UNHCR statistics show that the total number of asylum applications to 15 European Union countries increased from a total of 278.200 between 1970-1979, to 1.552.500 between 1980-1989 and 4.033.300 between 1990-1999 (Hatton, 2004: 10).

1988: 9-10).[15] Increasing mobility has led to awareness on the part of host states that their societies are, in the words of Hathaway and Harvey (2001: 257), "vulnerable to the fallout of an increasingly brutal and chaotic world".

Several authors link the increased attention for Article 1F more specifically to increasing security concerns in the states of refuge (e.g. Hathaway & Harvey, 2001; Dauvergne, 2007; Saul, 2008; Gilbert, 2014), in particular in relation to terrorism. After the terrorist attacks in the United States on 11 September 2001, the UN Security Council called upon member states to deny a safe haven to those who commit terrorist acts,[16] and the UN has done the same on several other occasions (Gilbert, 2003: 429; Singer, 2015: 1). With an increasing focus on security, Article 1F became a means within the existing range of legal instruments to be applied to address these concerns.[17]

It follows from the above that, analogous to the different reasons for the increasing interest in Article 1F, the exclusion clause is being used to fulfil different functions: excluding undeserving individuals from refugee protection, promoting criminal accountability for perpetrators of serious crimes, and protecting the community of the state of refuge. The function of promoting criminal accountability is not served by the application of Article 1F in itself, but requires active follow-up by a capable and willing actor. The question is: who should take up this task? The Refugee Convention does not assign responsibility to any actor in particular.[18]

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15 Martin (1988) quotes former UN High Commissioner for Refugees Poul Hartling, who observed in 1984 with respect to the changing nature and scale of the population of asylum seekers and states' responses to these developments: "[W]e live in an age when asylum-seekers are no longer only border crossers, but arrive by sea and by air in increasingly large numbers in countries far away from their homelands, in Europe, in North America and elsewhere. Their very presence and the problems resulting from the dimensions of this new phenomenon are exploited by xenophobic tendencies in public opinion. I well understand the dilemma facing many host countries, but I fear that these difficulties might tempt some Governments to consider adopting restrictive practices and deterrent measures which in my view should never be resorted to in dealing with refugees."

16 Through its resolution 1373 of 28 September 2001 the UN Security Council called upon member states to "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens" and "[e]nsure […] that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts".

17 While concerns for the national public order or security are understandable in light of the alleged nature of the conduct excluded asylum seekers are generally associated with, it is subject to debate whether applying Article 1F actually is the appropriate measure to address such concerns. Some authors have argued that it is Article 33(2) that serves to address those concerns; see e.g. Hathaway & Harvey (2001: 259) and the discussion in Chapter 6. Moreover, it is arguably questionable what the 'war on terror' that was initiated after 9/11 has to do with refugees, as the attackers were no refugees. Hathaway & Harvey (2001: 258) point out how something similar happened a few years earlier: "One of the truly ironic results of the Oklahoma City bombing of 1995, a terrorist act with no foreign connections, was that it led to the enactment of unprecedented restrictions on the admission of noncitizens to the United States. As President Clinton conceded when signing the anti-terrorist legislation into law, '[this bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.'"

18 Nor does it refer to an obligation to prosecute (Larsaeus, 2004: 76-77).

States of refuge have a crucial role to play in this respect. First of all, because international criminal courts and tribunals by definition have a limited jurisdiction and focus. The jurisdiction of the *ad hoc* tribunals ICTY and ICTR and other international criminal tribunals is limited to specific periods, areas and conflict situations. The ICC's jurisdiction is limited to crimes committed after the coming into force of the ICC Statute on 1 July 2002 (Article 11 Rome Statute) and can only be invoked in states party to the Court or by resolution of the UN Security Council (Article 13 Rome Statute). Moreover, the jurisdiction of the ICC is complementary to national jurisdictions,[19] meaning the main responsibility to prosecute international crimes rests with states. Besides limited jurisdiction, both the *ad hoc* tribunals and the ICC also lacked or lack the means to prosecute large numbers of suspects and have consequently focused on the 'most responsible' suspects.[20]

Secondly, domestic criminal justice systems in post-conflict states are generally not willing or capable of prosecuting these cases. In the aftermath of conflict, governance infrastructures including the domestic criminal justice system are often in ruins and bringing perpetrators of international crimes to justice may not be the most urgent priority.[21] Willingness to prosecute these perpetrators may also depend on whether or not the alleged perpetrators are (still) part of the ruling government. Thirdly, excluded asylum seekers often remain in the states of refuge that have excluded them because they cannot return or be expelled.[22] In short, if it were not for states of refuge, the 'impunity gap' could not be narrowed or closed.[23]

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19 The tenth preambular paragraph to the Rome Statute establishing the ICC and Article 1 of the Statute, establishes that the ICC "shall be complementary to national criminal jurisdictions". This is worked out in Article 17 of the Statute, which determines that a case is inadmissible if a state that has jurisdiction over it, has been unwilling or unable to carry out an investigation or prosecution, or a decision not to prosecute resulted from unwillingness or inability of the state. On the complementarity of the ICC, see e.g. Schabas (2008).

20 As a result of these limitations, the ICTY has in more than twenty years of existence e.g. indicted only 161 persons, the ICTR 90 (Smeulers, Hola & Van den Berg, 2013). The ICC has since 2002 indicted 42 individuals and convicted 9 (5 of whom not for international crimes, but for offences against the administration of justice in the 'Bemba et al.' case; see <https://www.icc-cpi.int/Pages/defendants-wip.aspx>).

21 See Chapter 4.

22 Excluded individuals can be 'unreturnable' for a variety of reasons, as will be explained in Chapter 3.

23 The term 'impunity gap' is often used to describe the gap between the limited number of perpetrators that are convicted before international courts, and the much larger actual number of crimes and perpetrators that remain unpunished and are assumed to be the responsibility of national states in conformity with the complementarity principle (see Aptel, 2012; Ambos & Stegmiller, 2013; Moffett, 2015). In an early policy paper, the Office of the Prosecutor (OTP) of the ICC remarked: "The strategy of focussing [sic] on those who bear the greatest responsibility for crimes within the jurisdiction of the Court will leave an impunity gap unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used." ICC OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 7 (available online at <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf>).

Depending on the crimes an asylum seeker is believed to have committed, states of refuge may have an obligation under international treaties and customary international law to extradite or prosecute these individuals. In this context, the principle of *aut dedere aut judicare* is often cited: the obligation to extradite or prosecute.[24] Extradition can take the form of extradition to the country of origin or to a third country, or transfer to an international criminal tribunal; prosecution in this context refers to *domestic* prosecution in the state of refuge. Besides this obligation stemming from international law, there may also be other – domestic – reasons for states of refuge to promote the criminal prosecution of the crimes under Article 1F through extradition or domestic prosecution.[25] One reason could be that states do not want to become a 'safe haven' for war criminals.[26] Another reason may be that Article 1F concerns the most serious crimes, crimes for which impunity should not be tolerated, as was noted above.

Notwithstanding the above, it is however also very well possible that states of refuge in practice do not subject 1F-excluded asylum seekers to any criminal investigation and/or do not consider rendition to an international or national court, but instead choose to expel these asylum seekers, relocate them, or grant them a status other than on the basis of international protection.

Considering that one of the initial aims of the exclusion clause was to prevent perpetrators of serious crimes from escaping criminal prosecution, and given the international dedication to the aim of ending impunity for these crimes, it is important to know to what extent states of refuge in practice contribute to these aims. What are states of refuge required to do with people who allegedly have 'blood on their hands' residing on their territory and claiming asylum, and what can and do they actually do to promote accountability for these alleged perpetrators? What is realistically possible in this respect? These questions will continue to be relevant, as the situation arising from the conflict in Syria has made clear in more recent years: while there was a substantial increase in the number of asylum seekers arriving from Syria, no international forum for criminal prosecutions in relation to

24 The scope and limits of this obligation are elaborated upon below.

25 As Rikhof (2012: 464) notes, international law permits states to "go beyond the duty to undertake prosecutions" and a number of states in Europe have initiated criminal cases on the basis of universal jurisdiction, including cases "not regulated by international law but common crimes" (*ibid*.).

26 Gilbert (2003) argues: "The true fear that finds voice in Article 1F is not that refugee status might be besmirched if it were to be applied to those falling within Article 1F, it is that the receiving State will be a safe haven". Several countries explicitly refer to the 'no safe haven' notion, including Canada (Rikhof, 2001; 2004), the UK (Singer, 2015: 161) and the Netherlands (see *Kamerstukken* II 2007/08, 31200 VI, no. 160, 9 June 2008).

Syria had been established, while the ICC's hands were also tied with respect to the situation.[27]

1.2. Objectives, case selection and research questions

The purpose of this study is to empirically study the role that states of refuge play in the administration of criminal justice to alleged perpetrators of serious crimes who flee from the territory where these crimes have been committed and are excluded from refugee protection on the basis of Article 1F Refugee Convention.[28] The study will focus on the Netherlands. In relation to the questions raised above, the Netherlands is particularly interesting and relevant. It is a country with a relatively high number of 1F exclusions, dedicated – as will become clear – to the development and implementation of international criminal law on the domestic level. Based on the findings in the Netherlands, possible broader implications of the findings will be assessed, with the aim of contributing to ongoing discussions on policy- and decision making in relation to Article 1F and the criminal prosecution of international crimes. The central research question that will be answered in this study is:

How has the Netherlands as a state of refuge contributed to administering criminal justice to asylum seekers who have been excluded under Article 1F of the Refugee Convention?

The reasons why the Netherlands offers a good case study for answering the central research question are briefly expanded on here. First of all, it is a state that since the 1990s has consistently been receiving a considerable number of asylum applications,[29] but has also been very proactive in applying Article 1F since 1F gained renewed attention halfway the 1990s.[30]

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27 Syria is no state party to the ICC, nor has accepted its jurisdiction, which means that the only way the ICC could obtain jurisdiction would be through a UNSC referral. So far, Security Council members, most notably Russia, have blocked referral of the Syria situation to the ICC. See Mark Kersten, 'Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?' Justice in Conflict blogpost, 17 October 2016, available online at <https://justiceinconflict.org/2016/10/17/calls-to-prosecute-war-crimes-in-syria-are-growing-is-international-justice-possible/>.

28 The approach chosen here is an empirical one, rather than a legal one. This means that the study is not comprehensive or complete in its discussion of relevant case law or the development of legal principles.

29 Eurostat data show that over the period 2008-2016, the Netherlands received about 3,84 percent of all first time asylum applicants in the EU28 (see <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00191>), which means it ranks as the ninth of the twenty-eight countries. The population of the Netherlands as a percentage of the total population of the EU28 in the same period was slightly lower at 3,3 percent (see <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00005&plugin=1>). The number of first time asylum applicants is much higher, also relatively, in e.g. Germany, Sweden and France.

30 According to the most recent figures, from the first invocation of Article 1F in 1992 until 1 January 2017, Article 1F has been invoked against 1.000 individuals; see *Kamerstukken* II 2017/18, 34775 VI, no. 94, 5 March 2018, p. 7. This means that on average, about 38 individuals have been excluded every year. Especially in the early days, the Netherlands together with Canada had an exceptionally "rigorous" 1F policy (Gilbert, 2014).

Secondly, the Netherlands has a good data infrastructure for research. Much information on the application of Article 1F in the Netherlands is publicly available.[31] In its annual reports to parliament on the efforts with respect to international crimes undertaken by the police, the prosecution service and the immigration service, the responsible Minister provides detailed information and numbers on the number of cases excluded by the immigration service and cases under investigation or prosecuted.[32] These communications stem from the strong demand from parliament to be informed about these cases, because of the sensitivity connected to the residence in the Netherlands of unwanted and possibly dangerous individuals, but they also underline the degree of priority that is given to the 1F exclusion and criminal prosecution of international crimes by the Dutch government. Such availability of information on the application of Article 1F, and subsequent prosecutorial steps, in the public domain is not self-evident in other countries.[33] Apart from publicly available information, the relative openness of the Dutch government about these cases becomes clear from the fact it is generally willing to grant researchers access to data. In the context of the current study, access to the immigration files of all cases in which a decision to invoke Article 1F was taken between 2000 and 2010 in the Netherlands was indeed obtained.[34]

A third reason why the Netherlands offers a good case is that it offers an opportunity to analyse the efforts of a state of refuge to criminally prosecute 1F-excluded asylum seekers, because the Netherlands has gone to great lengths to promote the criminal prosecution of these individuals and equip its justice system to process international crimes cases. This is inextricably linked to the creation of the international criminal tribunals; first the *ad hoc* UN tribunals for Rwanda and Yugoslavia, and later the permanent ICC. As Rikhof (2009) notes, the coming into force of the Rome Statute pushed a review and change of domestic legislation in relation to international crimes in many countries; the Netherlands is no exception.[35] Moreover, as host of

31 The fact that a documentary maker was allowed to film the work of the specialized 1F unit for a year is telling. The documentary was broadcast in April 2017 <https://www.npo.nl/2doc/10-04-2017/KN_1688926>.

32 See e.g. *Kamerstukken* II 2016/17, 34550 VI, nr. 105, 8 March 2017.

33 Bolhuis & Van Wijk (2015b: 20), for instance, found that in a country like Sweden1F cases were not centrally registered which makes it difficult to produce accurate statistics. Even if this kind of statistics are registered, it may be difficult to access them. As Singer (2017: 10) notes, the availability of data in the UK is also quite different from the Netherlands. Singer has been able to get some information through Freedom of Information (FoI) requests, but she also notes that this was a time-consuming process.

34 This dataset will be elaborated in §1.3.

35 In the Netherlands, this process led to the introduction of the International Crimes Act (*Wet Internationale Misdrijven*, WIM), which came into force on 1 October 2003.

the ICC and other international criminal tribunals[36] and self-proclaimed 'legal capital of the world', the Dutch government sees a "special role and responsibility" for itself in the prevention of impunity for persons who are guilty of international crimes.[37]

This study is not the first on criminal prosecution of individuals excluded under Article 1F. Because of the increasing interest in refugee exclusion in general, academic interest in exclusion from refugee protection and criminal prosecution as a follow-up to exclusion, has also increased. While the willingness on the part of states of refuge to extradite or prosecute excluded asylum seekers may have increased over the last years (Broomhall, 2001; Rikhof, 2009; 2012), several studies suggest that this is fraught with difficulties (e.g. Fitzpatrick, 2000; Broomhall, 2001; Larsaeus, 2004; Speckmann, 2011; Rikhof, 2012). Different factors emerge from the literature that can explain why this is the case. These factors relate to the scope and nature of the legal obligations that states have, and to legal and practical challenges and obstacles to criminal prosecution of crimes that fall under 1F.

Firstly, the exact scope and nature of the obligation to extradite or prosecute (*aut dedere aut judicare*) in relation to 1F crimes are unclear and, consequently, it is unclear what is expected from states of refuge in this respect. There seems to be a consensus that an obligation that is explicitly part of different international treaties or accepted as a principle of customary international law exists for certain crimes, in particular the international crimes that fall under Article 1F(a).[38] For war crimes that constitute 'grave breaches', and for torture, conventional international law imposes an obligation to extradite or prosecute (Larsaeus, 2004: 81; Rikhof, 2012: 461), and the same is true in relation to other crimes of 'serious international concern' such as terrorism.[39] As Article 1 of the 1948 Genocide Convention requires state parties to undertake action to "prevent and punish" the crime, an obligation arguably exists with respect to genocide (Speckmann, 2011; Gilbert, 2017). With respect to crimes against humanity, there is a consensus that an obligation to prosecute only exists for the authorities in

36 The ICTY, the Special Tribunal for Lebanon (STL) and the Special Court for Sierra Leone (SCSL; in the Charles Taylor case) were or are based in The Netherlands.

37 *Kamerstukken* II 2009/10, 32475, no. 3, published on 14 September 2010. See also Speckmann (2011). The Dutch Minister of Justice said earlier: "The Netherlands has chosen to lead the way internationally in the criminal investigation and prosecution of international crimes" [translation by author]. *Kamerstukken* II 2008/09, 31200 VI, no. 193, 9 September 2008.

38 With respect to serious non-political crimes under 1F(b), such as manslaughter or robbery, no obligation to extradite or prosecute exists.

39 See Final Report of the Working Group on the Obligation to Extradite or Prosecute (aut dedere, aut judicare), UN Doc. A/CN.4/L.844, 5 June 2014. Treaties in relation to other crimes such as torture, hijacking, hostage-taking and drug-trafficking also entail an obligation to extradite or prosecute, or mandate universal jurisdiction (Speckmann, 2011).

the country where the crimes occurred (territorial jurisdiction); however, it seems to be undisputed that if there is no obligatory universal jurisdiction for these crimes, there certainly is permissive universal jurisdiction (Broomhall, 2001: 404; Rikhof, 2012: 464; Lafontaine, 2014: 95). Hence, while the obligation to extradite or prosecute may be limited to some of the crimes that fall within the scope of Article 1F, willing states arguably can assume universal jurisdiction beyond this obligation, for a broader category of crimes than grave breaches, torture and genocide. It is unclear, however, whether they actually do so (Larsaeus, 2004: 85-86; Speckmann, 2011).

Secondly, various legal challenges and obstacles may complicate criminal prosecution. First of all, legal complications may result from the difference between the thresholds employed in the exclusion clause on the one hand, and in criminal law on the other hand. Article 1F presupposes 'serious reasons for considering', a standard that is much lower than standards employed in criminal law (Fitzpatrick, 2000; Speckmann, 2011; Dauvergne, 2013).[40] This means that there is a significant gap between the evidence needed for an exclusion decision and the evidence needed for a criminal conviction, and hence that additional evidence needs to be gathered to prosecute and convict an excluded asylum seeker. This suggests that the number of exclusion cases that actually leads to criminal prosecution may be much more limited than the total number of exclusion cases.

In relation to extradition, one legal obstacle is that apart from the question whether the state making the extradition request has jurisdiction, there also has to be an extradition relationship as a basis for extradition, in the form of a bilateral or multilateral treaty to which both the requesting and the requested state are a party. Furthermore, only the country where the crime has been committed can request extradition (Fitzpatrick, 2000; Rikhof, 2012). Lastly, concerns relating to due process and human rights may be an obstacle to extradition (Speckmann, 2011; Gilbert, 2017).[41]

In relation to domestic criminal prosecution, an important challenge is jurisdiction. As the alleged crimes that form the basis for a 1F exclusion decision have been committed outside the state of refuge, traditional forms of territorial jurisdiction are insufficient as a basis for criminal prosecution. The principle of universal jurisdiction may solve this problem, but like the obligation to extradite or prosecute, universal jurisdiction does

40 According to Dauvergne (2013: 80), "criminal law has the highest standard of proof in our legal system and refugee law has the lowest".

41 They relate to a broad range of issues, such as impartiality of judges, access to legal representation, but also whether or not the death sentence can be imposed or detention conditions. Chapter 4 will discuss these in more detail.

not exist for all of the crimes that fall under the scope of Article 1F. It applies only to the most serious crimes. Which crimes exactly are to be seen as the most serious is subject to debate (Larsaeus, 2004). Traditionally they include genocide, war crimes, crimes against humanity, torture and piracy (Rikhof, 2012). This means that when the exclusion on the basis of Article 1F relates to e.g. serious non-political crimes under Article 1F(b), prosecution in the state of refuge is not possible. Extradition can also only take place to a state that has jurisdiction to prosecute the crime.[42]

Besides legal challenges, different kinds of practical complications to the criminal prosecution of excluded asylum seekers emerge from academic literature. In relation to extradition, Fitzpatrick (2000) notes that besides the legal preconditions, a state seeking prosecution of a certain individual who happens to be excluded in another state, has to be aware of the individual's whereabouts. In relation to domestic criminal prosecution on the basis of universal jurisdiction, different authors stress the challenges inherent to criminal investigations that focus on crimes committed outside the territory of the prosecuting state, most notably the costs of the investigation and logistical difficulties connected to evidence collection (Fitzpatrick, 2000; Broomhall, 2001; Rikhof, 2012; Bond, 2012; Dauvergne, 2013). The fact that criminal investigations into international crimes rely heavily upon witness testimony presents several challenges. As Rikhof (2012: 468) points out, being able to collect evidence from witnesses requires access to them and hence cooperation with the country where they are located, but also appreciation of cultural differences and the fact that – usually – much time has passed between the crimes and the hearings.

The abovementioned legal and practical challenges and obstacles may also be among the factors that will be taken into account by criminal prosecutors who enjoy prosecutorial discretion,[43] in deciding whether or not to pursue a criminal case (Rikhof, 2012). While since the 1990s there has been a growing number of universal jurisdiction prosecutions (Rikhof, 2012; 2017),[44] on the basis of the challenges presented above, the prospect of criminal prosecution as a follow-up to exclusion under Article 1F is not promising.

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42 Final Report of the Working Group on the Obligation to Extradite or Prosecute (aut dedere, aut judicare), UN Doc. A/CN.4/L.844, 5 June 2014, para. 22.

43 See §2.1.2.

44 As Rikhof (2017: 102) notes: "In Europe, between 1994 and 2017, 13 countries initiated criminal prosecutions for crimes committed elsewhere, resulting in 58 indictments, in which 51 persons were convicted (with one person in two countries) and six were acquitted (including one on appeal) in 46 cases (since some cases involved multiple accused). In North America, two countries – Canada and the United States – completed four criminal trials for such crimes: three in Canada (with one acquittal) and one in the United States." These figures, however, do not only concern individuals excluded on the basis of Article 1F, or universal jurisdiction cases, but also cases against nationals of the country that initiated the proceedings.

The current study will add to the existing body of literature by looking at a state of refuge that has been particularly proactive in the application of Article 1F and committed to promoting the criminal prosecution of 1F-excluded individuals. It assesses how the abovementioned challenges emerge in practice and to what extent they can be overcome, in order to gain an understanding of the role states of refuge *can*, but also *cannot* play.

It does so by 1) mapping and analysing the population of 1F-excluded asylum seekers in the Netherlands, in order to assess the potential for criminal prosecution for the entire group; and 2) mapping and analysing the efforts undertaken by the Netherlands to promote the criminal prosecution of 1F-excluded asylum seekers. The study relies on an extensive dataset consisting of all files of cases where Article 1F was applied between 2000 and 2010 in the Netherlands. The availability of these data make it possible, for the first time, to give an overview of a complete population of 1F-excluded asylum seekers in a given country. This can offer new insights into the potential for prosecuting 1F-excluded asylum seekers. In order to assess the potential for criminal prosecution in the population, however, it is also necessary to understand the policy in the Netherlands in relation to this group.

The foregoing leads to the following sub questions:

- How does the application of Article 1F relate to other modes for exclusion of (allegedly) criminal immigrants, how is Article 1F being applied in the Netherlands, and what does the population of individuals excluded under Article 1F look like?
- To what extent and in what ways has the Netherlands facilitated and/or promoted criminal prosecution of individuals excluded under Article 1F *outside* the Netherlands?[45]
- To what extent and in what ways has the Netherlands prosecuted individuals excluded under Article 1F *within* the Netherlands?
- What happens to those individuals excluded under Article 1F who are not criminally prosecuted but remain in the Netherlands?

45 'Outside the Netherlands' should in this context be understood to include the criminal prosecution of an individual excluded in and transferred by the Netherlands, to an international criminal tribunal or court that is *de facto* situated in the Netherlands, such as the ICC (although this situation has so far not occurred).

1.3. Methodology

In order to answer the research questions formulated above, this study takes a mixed-methods approach. The different methods are elaborated below, followed by an overview of the methods that have been used to answer each of the respective research questions and what period is covered.

1.3.1. File analysis

It was mentioned already that relatively much information about 1F cases in the Netherlands is publicly available. As rich as the available information may be compared to other countries, however, it is not enough for a thorough analysis of the possibilities for a state of refuge to prosecute 1F-excluded asylum seekers. This requires more insight into the actual cases. For this reason, access has been obtained to a rich and complete dataset,[46] consisting of all refugee status determination decisions taken between 2000 and 2010 by the Dutch Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*, hereafter: IND) where Article 1F has – at a certain point in the refugee status determination process – been *considered* or actually *invoked*. When access was granted to the administrative system of the IND containing all immigration files, the IND provided a list of 1.498 file numbers of asylum seekers who, according to its administrative system, were associated with Article 1F and had had their asylum requests processed between January 2000 and November 2010. This list included individuals with a total of 67 nationalities; 720 of them had the Afghan nationality. On the basis of these file numbers, the corresponding digitized copies of the files in IND's administrative system could be accessed. Among these files, the files of individuals who had received a 1F decision ('beschikking') that was definitive in the sense that it was not revoked or had not (yet) been successfully appealed at the moment of data collection (November 2010–February 2011) were identified. 745 definitive decisions were identified, of which 448 related to Afghans and 297 to non-Afghans. Considering the heavy workload and anticipated homogeneity of the Afghan group, which will be explained in Chapter 3, it was decided to take a systematic sample (n = 61) of the Afghan files. The 297 non-Afghan and 61 Afghan files (358 files in total) were scored and analysed with the help of three research assistants. The remaining 753 files were dismissed from the analysis for various reasons. The majority concerned relatives of 1F-excluded persons (442 cases). In 139 cases a 1F decision by the IND had been overruled in court or revoked in anticipation of a court decision. In 160 cases the IND had not (or not yet) come to a decision to exclude, or files were inaccurately labelled as 'possible 1F files' since no 1F lead whatsoever could be found. Finally, a limited number of 12 files

46 Access to these files was obtained from the Ministry of Justice.

were – owing to the fact that we analysed digitized copies – incomplete or (partially) inaccessible and for that reason left aside. The foregoing is presented schematically in Figure 1.1.

Four different categories of variables have been scored: 1) personal characteristics of the individual (current/former nationality, country and year of birth, sex, year of asylum application, last known legal representative, travel route); 2) legal characteristics of the case (status of procedure, outcome of decision, whether or not there was a prohibition of *refoulement* in place under Article 3 of the European Convention of Human Rights (ECHR) or whether Article 8 ECHR blocked removal,[47] which of the different limbs of Article 1F (a, b and/or c) applied); 3) characteristics relating to the alleged behaviour (period, country and situation in country where alleged crime(s) occurred, membership of organisation, type of organisation, role or rank within the organisation, way of entry into and exit out of organisation, the level of participation in the alleged crime(s)); and 4) the sources used to substantiate the 1F decision (personal statements and documents presented by the applicant, witness statements, reports by governmental and non-governmental organisations or media, evidence of the membership of/rank within an organisation and (other) evidence of involvement in the alleged crime(s)).[48]

Files of 1F-excluded asylum seekers typically contain hundreds of pages of documents, ranging from extensive reports of the different asylum hearings and correspondence with or from legal representatives, to country reports from the Ministry of Foreign Affairs and non-governmental organizations (NGOs) and court files. The fact that information most relevant to the study was not always clearly listed in IND's registration system often made scrolling through the large number of documents necessary. Coupled with the complexity of the files and the limitations of the registration system, this made determining the (then) current status of a decision both time-consuming and at times difficult. Throughout this study, whenever information from the file analysis is used, reference will be made to the file codes used for internal communication such as '(J6)' or '(C5)'.[49]

47 I.e. cases where forced removal to the country of origin is not allowed because of a real risk of serious harm to the individual, or because of the right to family life. See Chapter 3.

48 The scoring list can be found in appendix 1.

49 These denominations have no value other than for the researchers' recording purposes.

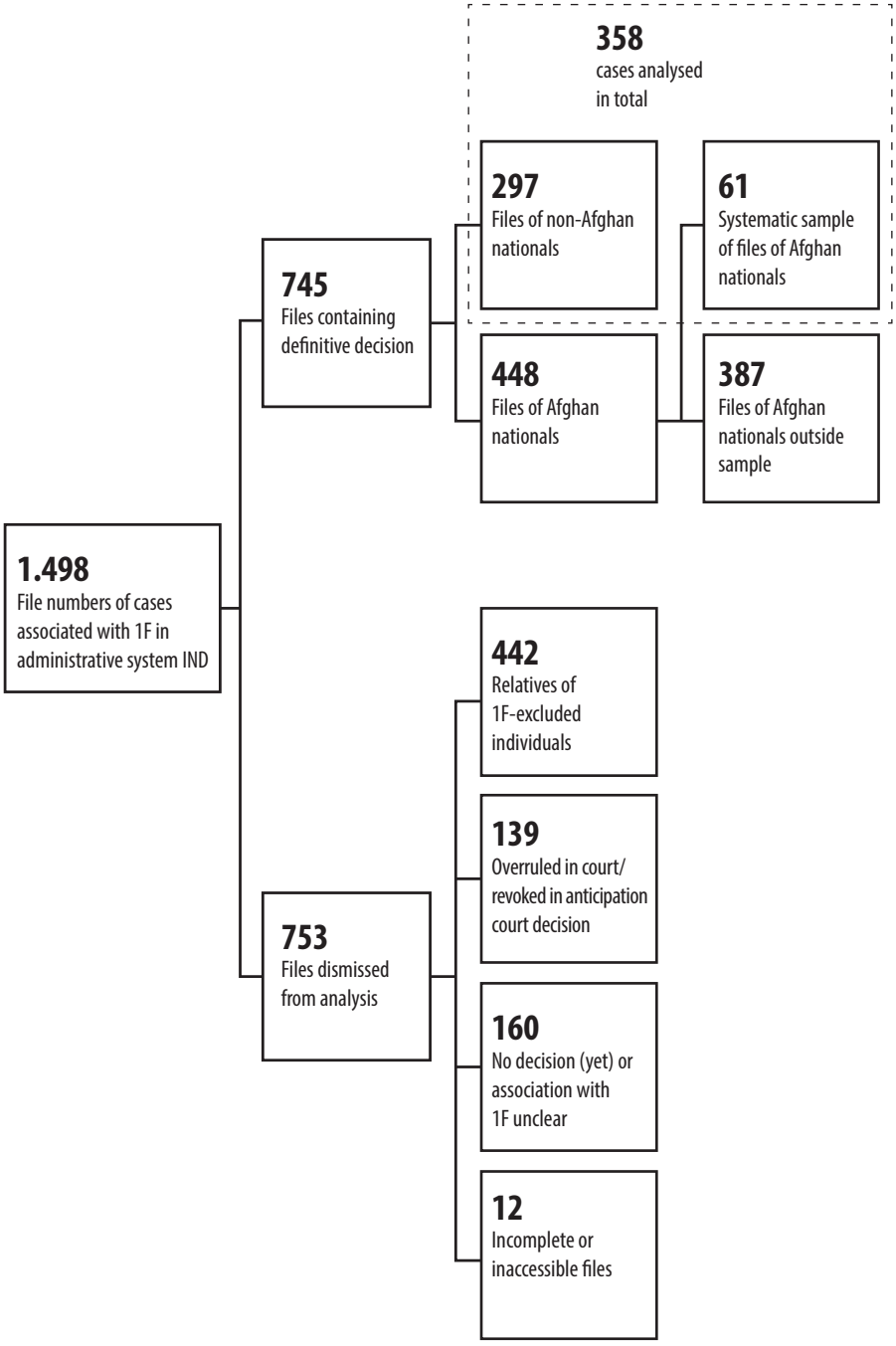

Figure 1.1. Sample

1.3.2. Review of literature, case law, policy documents, reports and other material

Besides the file analysis, a review of academic literature, case law and policy documents was conducted. As has already been mentioned, a significant body of literature has developed on the topic of 1F exclusion. This literature has been collected mainly through digital 'snowballing' by making use of different search engines, including Web of Science,[50] and Google Scholar.[51] Where relevant, use has been made of case law produced by Dutch and other national administrative and criminal courts, as well as international criminal tribunals, the International Court of Justice, the Court of Justice of the European Union and the European Court of Human Rights. References to case law originate from different sources and literature, but were also collected by making use of search engines and databases such as Rechtspraak,[52] Migratieweb,[53] Refworld,[54] Rechtsorde,[55] and search engine alerts. Besides academic literature and case law, use has been made of national legislation and policy documents on 1F exclusion. The policy documents include communications from Ministries, the annual reporting letters on international crimes prosecutions from the responsible Ministry to Dutch parliament, reports of parliamentary debates et cetera. These documents have also been collected by making use of search engines such as Rechtsorde, Officiële bekendmakingen,[56] and search engine alerts. Finally, information including research reports, advisory reports and media reporting has been collected from NGO websites, search engines and databases such as LexisNexis Academic,[57] Refworld and Google, and media outlets.

1.3.3. Interviews

In the context of this study, interviews were held with different experts. Chapter 4 will draw from interviews with two experts on transitional justice in Rwanda: the Vice Rector Academic Affairs and Research at the Institute for Legal Practice and Development (ILPD) in Nyanza, Rwanda in the period May 2011-December 2013 and a Senior Policy Advisor Rule of Law at the Dutch Ministry of Foreign Affairs, previously Vice Rector Academic Affairs and Research at the ILPD in the period 2008-2010. Chapter 5 will draw from interviews with 4 representatives of the Dutch Immigration

50 See <https://www.webofknowledge.com/> (last visited 4 October 2017).

51 See <https://scholar.google.nl/> (last visited 4 October 2017).

52 See <https://www.rechtspraak.nl/> (last visited 4 October 2017).

53 See <http://www.migratieweb.nl/> (last visited 4 October 2017).

54 See <http://www.refworld.org/> (last visited 4 October 2017).

55 See <https://www.rechtsorde.nl/> (last visited 4 October 2017).

56 See <https://zoek.officielebekendmakingen.nl/> (last visited 4 October 2017).

57 See <https://academic.lexisnexis.nl/> (last visited 4 October 2017).

and Naturalisation Service IND, 2 representatives of the National Prosecution Office's Department for International Crimes and 2 investigators from the police's War Crimes Unit. Chapter 2 will draw from the study by Bolhuis and Van Wijk (2015b) into the information exchange between immigration, law enforcement and prosecution services in 6 European countries, commissioned by the Norwegian immigration service (*Utlendingsdirektoratet*, UDI). In the context of that study, between January and November 2015, 43 interviews with 64 respondents have been conducted. Of these respondents 18 represented immigration authorities, 21 represented law enforcement and prosecution services, 15 represented ministries. The remaining 11 respondents represented different intergovernmental and non-governmental organisations or were academics.[58] The method for all these interviews was the same. The interviews were semi-structured and lasted from 30 minutes up to two hours. Interviews were typically not taped, but conducted by two interviewers, one of whom took notes. Reports of these interviews were sent to respondents with the request to correct or clarify any inaccuracies.

1.3.4. Research questions: methods and period covered

The different research questions have been answered using the data collected through the different methods described, and covering different periods. The question of how the application of Article 1F relates to other modes for exclusion of (allegedly) criminal immigrants and how Article 1F is being applied in the Netherlands, is answered primarily using Dutch legislation and policy documents, covering the period up until October 2017. The question what the population of individuals excluded under Article 1F looks like has been answered primarily on the basis of the file analysis, which covers the period January 2000 to November 2010. This has been complemented with figures and other information from the annual reporting letters on Dutch international crimes prosecutions from the responsible Ministry to Dutch parliament, which cover the period 1992 to 2017. The questions to what extent and in what ways the Netherlands has facilitated and/or promoted criminal prosecution of individuals excluded under Article 1F outside the Netherlands has been answered using information from the international crimes prosecutions reporting letters, case law, academic literature and media reporting up until July 2014. Furthermore, information was used from interviews with 2 experts on transitional justice in Rwanda conducted in April and May 2014 and information on the Dutch 1F population from the file analysis (covering the period January 2000 to November 2010). The question to what extent and in what ways the Netherlands has prosecuted individuals excluded under Article 1F within the Netherlands has been answered using information from the international crimes

58 A complete overview of the exact affiliations can be found in Bolhuis and Van Wijk (2015b: 75-76).

prosecutions reporting letters, case law, academic literature and media reporting up until July 2014. Finally, the question what happens to those individuals excluded under Article 1F who are not criminally prosecuted but remain in the Netherlands has been answered using legislation, policy documents, case law, academic literature, research and advisory reports, information from the file analysis, and media reports, up until October 2016.

1.4. Outline of the study

Chapter 2 will set the stage by discussing how the Dutch policy came about and what its key points are; how the Dutch policy relates to 1F policies in other European states, and how these states cooperate with respect to criminal prosecution of crimes that fall within the scope of Article 1F. Chapter 3 sets out the legal framework and discusses which policy measures the Dutch government takes to deal with individuals excluded under Article 1F and other undesirable and unreturnable migrants, in particular in relation to access to permits, return, relocation, and prosecution. Chapter 4 focuses on the challenges connected to facilitating or promoting the prosecution of individuals excluded under Article 1F(a) outside the Netherlands. Chapter 5 discusses the challenges that come to the fore from efforts undertaken by the Netherlands to domestically prosecute individuals excluded under 1F(a). Chapter 6 discusses a particular group of excluded asylum seekers who cannot be prosecuted on the basis of universal jurisdiction, namely those excluded under Article 1F(b).[59] Chapter 7 answers the different research questions and assesses the broader implications of the findings in this study.

The different chapters are based on five earlier publications that have been published in the period 2014 to 2017. Chapter 2 draws from a research report by Bolhuis and Van Wijk (2015b), published in November 2015. Chapter 3 is based on an article published in Refugee Survey Quarterly on 1 March 2017. Chapter 4 is based on a contribution to the Journal of International Criminal Justice, published on 1 December 2014. Chapter 5 is based on an article published in the European Journal of Criminology on 1 March

59 For the purposes of this study, the third limb of Article 1F, 1F(c), will not be addressed separately. Article 1F(c) is considered to overlap with 1F(a) and (b) and should, according to the UNHCR, be applied restrictively because of the lack of clarity in relation to its broad scope (see e.g. UNHCR, 1992 para. 162; UNHCR, 1996, paras. 60-63; UNHCR 2003a). In its 2003 guidelines on the application of Article 1F, UNHCR noted: "Indeed, it is rarely applied and, in many cases, Article 1F(a) or 1F(b) are anyway likely to apply. Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence." For this reason, in some states, including Belgium and France (Kapferer, 2000) and the Netherlands (see §5.3 and §6.4), 1F(c) is considered not to be sufficient in itself to serve as an independent ground for invoking Article 1F. In relation to terrorism cases, Article 1F(c) has in more recent years been relied upon more often (UNHCR, 2009, p. 14). This has been the case for instance in the United Kingdom, although the UK Supreme Court has now endorsed the restrictive approach recommended by UNHCR (see Singer, 2015: 120-122).

2015. Finally, Chapter 6 is based on an article published in the Journal of Refugee Studies on 1 March 2016. The moment of publication needs to be taken into account in reading the mentioned chapters; when reference is made to 'recent' developments, this concerns the period preceding publication. The content of these publications has not been changed, except for minor textual corrections, e.g. for reasons of consistency in the terminology used. Where updates on important changes since the moment of publication have been added in footnotes, this is explicitly mentioned.

2. Article 1F in the Netherlands and in Europe

As mentioned in the introduction, the Netherlands can be characterised by a relatively proactive 1F exclusion policy, as well as its commitment to limiting impunity for international crimes. Before this study will turn to a close examination of the population of 1F-excluded asylum seekers in the Netherlands, the 1F policy and the efforts undertaken by the Netherlands to promote the criminal prosecution of 1F-excluded asylum seekers, this chapter will discuss some key characteristics of the Dutch exclusion policy, how this compares to 1F policies in other European states, and how and to what extent states (can) cooperate with respect to criminal prosecution of 1F-excluded asylum seekers.

2.1. Key characteristics of the Dutch 1F policy and their background

2.1.1. Background and rationale of the Dutch 1F policy

This study focuses on the Netherlands. For the reasons discussed in the previous chapter, the Netherlands can be regarded as a frontrunner where it concerns the application of Article 1F. But the Netherlands also offers a particular case. Whereas internationally the increased attention for Article 1F, as mentioned earlier, is often linked to the crises in the former Yugoslavia and Rwanda and the terrorist attacks in the United States on 11 September 2001, the increase in the attention for and use of the exclusion clause in the Netherlands specifically were set in motion a few years before 2001 and in relation to another group of alleged perpetrators of international crimes.[1]

Already in 1994 and 1995, questions were asked in the Dutch parliament on how the government dealt with asylum applications by alleged leaders of the former Afghan communist regime.[2] Early 1995, the Dutch Council of State ruled in one case that there was not enough concrete evidence that Hasjmatoella Kaihani, an alleged public prosecutor at the revolutionary court during the 1980s communist rule, had

1 The following is not a complete overview of all relevant early 1F case law in the Netherlands, but rather a description of developments underlying the political and societal unrest that culminated in the formulation of a special 1F policy in 1997 (see below).

2 See Vragenuur d.d. 6 December 1994, Handelingen II, no. 12 and 'Vragen van de leden Weisglas en Rijpstra (beiden VVD) over het verblijf van leiders van het voormalige communistische regime in Afghanistan. (Ingezonden 16 februari 1995)'. Aanhangsel Handelingen nr. 534, Vergaderjaar 1994–1995; see <http://parlis.nl/pdf/kamervragen/KVR1169.pdf> (last visited 28 March 2017).

'blood on his hands'.[3] A few years later in 1997, an article in the Dutch magazine *Vrij Nederland* led to a public outcry because it listed thirty-five senior leaders from the former Afghan communist regime who resided in the Netherlands, some in possession of an asylum status, while their involvement in war crimes had reportedly not been thoroughly investigated. Out of discontent over this situation, members of the Afghan community in the Netherlands, including victims who had reportedly encountered their tortures on the streets in the Netherlands, drew attention to the presence of these former senior officials and formed a working group to collect evidence against them.[4] In the *Vrij Nederland* article, the then head of the Dutch Immigration Service's executive branch (and former UNHCR employee) Peter van Krieken, called for a new approach to Article 1F and the standard of proof to be employed in 1F cases.[5] Later that year, the Dutch government announced a special policy for 1F cases.[6] In her letter announcing this policy, State Secretary Schmitz referred to the societal unrest:

> In view of the many questions from parliament, the critical notes from society and the concerns from refugee organisations about the assessment of asylum claims of persons suspected of international crimes and violating human rights, I deem it appropriate to do justice to the intention of the Refugee Convention to protect those that flee from injustice, and not those who flee from justice. This means that where I […] see reason to apply Article 1F, I will not hesitate. I will see to it that the possibilities to apply Article 1F […] will be maximally utilized.[7]

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3 See J. Slats, 'Het barst hier van de Afghaanse oorlogsmisdadigers', Vrij Nederland, 22 February 1997. Last visited 1 February 2017 via <https://www.vn.nl/het-barst-hier-van-de-afghaanse-oorlogsmisdadigers/>. R02.93.5844, ECLI:NL:RVS:1995:ZA1201, 17 January 1995.

4 J. Slats, 'Het barst hier van de Afghaanse oorlogsmisdadigers'.

5 Slats reports, quoting Van Krieken, "'In the past – see the Kaihani case – [the Ministry of] Justice has had many problems with the standard of proof with respect to Article 1F. But when you analyse the Refugee Convention, it says that you can deny someone when you can reasonably assume that this person has been guilty of certain crimes. The required standard of proof is much lower than you would expect', says Van Krieken. […] 'If someone has had an important position for years at a security service of which it is known that it has in general been guilty of torture, you can assume that such a person at least is co-responsible. Of course this person needs to get a chance to prove that this is not the case. But the burden of proof rests with the other party, not with [the Ministry of] Justice.' This 'way of thinking' has been elaborated in a report by a working group of the Ministry that is now on the desk of State Secretary Schmitz and will be sent to parliament shortly." [translation by author]; J. Slats, 'Het barst hier van de Afghaanse oorlogsmisdadigers'.

6 *Kamerstukken* II 1997/98, 19637, no. 295, 28 November 1997.

7 *Ibid*. [translation by author].

The State Secretary also quoted the international obligations:

> It cannot be the case that where the Netherlands has on the one hand obliged itself morally *and* legally to prevent [war crimes, genocide and torture], it admits persons who have committed such crimes abroad as refugees on the other hand.

Returning to the different functions that Article 1F can fulfil, it seems that the 'no safe haven' notion was (at least presented as) an important rationale for the policy that has resulted in the relatively frequent invocation of Article 1F in the Netherlands, as it originates from societal unrest about alleged former senior members of the Afghan communist regime who were in possession of an asylum status.[8] A decade later, the 'no safe haven' notion echoes vividly in a letter from the minister of Justice to parliament accompanying an advisory report on the Dutch 1F policy by the Advisory Committee on Migration Affairs (*Adviescommissie Vreemdelingenzaken*, ACVZ):[9]

> It is our conviction that the Netherlands should not be a safe haven for those persons [excluded under 1F]. It is in the interest of the Dutch society and the international legal order that they are not granted a residence permit. The position of the victims of these persons who have found protection in this country is at stake. We believe it is equally important that these persons do not escape the (international) penal consequences of their acts. For this reason, we strive to let justice take its course as much as possible with respect to persons to whom Article 1F Refugee Convention applies, here or elsewhere [...].[10]

The most recent annual report on the efforts in relation to the criminal prosecution of international crimes confirms that this is currently still an important aspect of how the Dutch government sees the function of Article 1F:

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8 Speckmann (2011: 5) argues that the coming into being of a "tough, invigorated" 1F policy in the Netherlands should also be understood from public discontent over increasing asylum inflow since the mid-1980s and developments in the EU, that led to a – in the words of the Dutch government – "fast" and "sober" asylum policy, eventually culminating in the adoption of the Aliens Act (*Vreemdelingenwet*) of 2000.

9 The ACVZ is an independent Committee that advises the Dutch government and parliament on immigration law and policy. It was installed in 2001 as a result of the coming into force of the Aliens Act 2000 and reports on immigration policy issues. The advisory reports are directed primarily at the government. See <https://acvz.org/en/organisatie/>.

10 *Kamerstukken* II 2007/08, 31200 VI, no. 160, 13 June 2008, a letter accompanying a report of the Advisory Committee on Immigration Affairs (ACVZ, 2008) [translation by author].

> The core of the 1F policy is that there is protection for the victims, not the perpetrators. […] The starting point is that the Netherlands does not want to be a safe haven: 1F-excluded individuals do not qualify for legal residence and have to leave the Netherlands. Applying Article 1F is inherent to warranting the integrity of and the societal support for the system of international protection for refugees [translation by author].[11]

2.1.2. Guiding principles and distinctive elements of the Dutch 1F policy

In its 1997 letter announcing the Dutch 1F policy, the State Secretary formulated three guiding principles.[12] The first is that, considering *inter alia* the consequences of exclusion and consistent with UNHCR guidance, Article 1F is to be interpreted restrictively. According to the State Secretary, this warrants careful investigation of possible 1F cases and thorough motivation of 1F decisions. The second guiding principle, which seems to contradict the first to some extent, is that the opportunities to apply Article 1F must be maximally utilized; in other words, Article 1F is applied as often as possible. To make this possible, the investigation and decision in relation to the applicability of Article 1F was made the exclusive responsibility of a designated unit within the immigration service, whose staff receive special training in e.g. international humanitarian law.[13] In 1998, the Netherlands became one of the first countries[14] to designate a specialised unit dedicated to Article 1F cases within the immigration service.[15] The third and final guiding principle is that further consequences are to be connected to any exclusion on the basis of 1F. For this reason, in the Netherlands Article 1F does not only entail exclusion from refugee protection, but excluded individuals are declared *persona non grata* and have to leave the territory. Furthermore, the public prosecutor is notified of all 1F-decisions.[16] The prosecutor assesses the feasibility of criminal prosecution on the basis of *inter alia*

11 *Kamerstukken* II 2016/17, 34550 VI, no. 105, 8 March 2017, 5.

12 *Kamerstukken* II 1997/98, 19637, no. 295, 28 November 1997.

13 *Ibid*.

14 In Canada, specialized sections within police, prosecution and immigration services were already existing for a few years, within the Royal Canadian Mounted Police and the Department of Justice since 1987 (which initially dealt with alleged war criminals from the Second World War) and the Department of Citizenship and Immigration since 1996 (Rikhof, 2001).

15 According to a Human Rights Watch report (2014: 33), in 2001 the IND transformed the team into an International Crimes Unit, referred to as the '1F unit'. "As of 2014, the 1F unit has a full-time staff of 25, most of whom are senior immigration officers with years of prior experience."

16 *Kamerstukken* II 1997/98, 19637, no. 295, 28 November 1997, 3. In practice, not all 1F decisions are submitted to the prosecutor, but only those that possibly concern international crimes; cases that (exclusively) concern 'common' crimes are not submitted by the IND (personal communication with representative of the Dutch public prosecution service, 10 October 2017).

the 1F case file submitted by the immigration service.[17] In this way, an assessment of the feasibility of criminal prosecution was made an inherent component of the 1F-policy. Besides these three guiding principles, the State Secretary's letter announced another distinctive element of the Dutch policy that has remained until today, namely the fact that refugee status determination on the basis of Article 1A Refugee Convention would no longer take place before an assessment of the applicability of Article 1F. In other words, from that moment on, *exclusion* under 1F would be considered before *inclusion* under 1A.

In the years following the introduction of the Dutch policy in 1997, several other elements of the policy have developed from the abovementioned principles, that set the policy apart from the policies in other countries (see paragraph 2.2) and are relevant to discuss briefly here (these will also be addressed in subsequent chapters). The first is the categorical exclusion of certain designated groups. Membership of such a group is sufficient for the application of Article 1F. For people belonging to these groups, mere association with a certain position within a designated organization suffices as a basis for exclusion. In addition, the burden of proof in these cases is reversed: it is up to the individual concerned to prove that his case is an exception and that the categorical exclusion does not apply to his case (Wijngaarden, 2008: 410).[18] The categorical exclusion applies for instance to persons in certain positions within the Afghan KhAD/WAD security service,[19] the Hezb-i-Wahdat (Islamic Unity Party of Afghanistan) and the Sarandoy (Afghan police),[20] high officials of the Iraqi security services under Saddam Hussein's rule, and corporals and non-civilian

17 The 1997 letter of the State Secretary (*supra* note 12) also mentions that the prosecutor has a discretionary competence and decides, on the basis of *inter alia* the 1F case file, whether or not it is 'opportune' to pursue a given case. Currently, this practice is still in place. Once the prosecutor receives a 1F file, there are several steps before a case could reach the level of a 'suspicion' in the sense of Article 27 of the Dutch Criminal Procedure Code (*Wetboek van Strafvordering*) or formally reach the phase of prosecution. After an initial assessment of jurisdiction and the feasibility of the case among other things, the next step would normally be that the prosecutor requests the police to do an exploratory investigation; the majority of cases do not reach this phase e.g. because there is not enough concrete information, the information cannot (easily) be verified from other sources, or the individual is believed not to be in the Netherlands anymore. Subsequently, the prosecutor decides whether or not to start an investigation (personal communication with representative of the Dutch public prosecution service, 10 October 2017; *Kamerstukken* II 2008/09, 31200 VI, no. 193, 9 September 2008, 3; *Kamerstukken* II 2017/18, 34775 VI, no. 7, 10 October 2017). The State Secretary noted in the 1997 letter that "criminal prosecution is not a *conditio sine qua non* for the application of Article 1F". As according to the Minister of Justice in 2006, Hirsch Ballin, the application of Article 1F is about "more than merely a suspicion of 1F crimes", all the files would in principle qualify for investigation. See §5.6.

18 This reversal of the burden of proof seems to be the result of the departmental working group (*supra* note 5).

19 The KhAD (Khadimat-e Atal'at-e Dowlati was the Afghan state intelligence service from 1980 to 1986, its successor the WAD (Wazarat-e Amaniat-e Dowlati), the Ministry of State security, existed until 1992.

20 *Kamerstukken* II 2000/01,19673, no. 553, 19 December 2000 and *Kamerstukken* II 2002/03,19637, no. 695, 7 November 2002.

leaders of the Sierra Leonean Revolutionary United Front (RUF).[21] The second is that individuals excluded from refugee protection are not only declared *persona non grata* or – since 2012 – receive an entry ban (Bolhuis & Van Wijk, 2015b: 17), but also *by definition* are considered to pose a danger to public order, because of the nature of the crimes they have allegedly been involved in.[22] The third element is a blanket bar of 1F-excluded individuals to all residence statuses: because of the entry ban or *persona non grata* declaration, no other residence permit (for instance on the basis of family reunification) can be obtained by an excluded asylum seeker.

Some of the policy elements discussed above have been subject to substantial criticism from national and international observers. The UNHCR has for instance criticized the 'exclusion before inclusion' approach,[23] and in relation to categorical exclusion, the reversal of the burden of proof, the lack of an individual assessment and the use of a country report issued by the Dutch Ministry of Foreign Affairs on the Afghan security and intelligence services.[24] The reversal of the burden of proof and the lack of an individual assessment have also been criticized by the Dutch Section of the International Commission of Jurists (NJCM, 2008). The Dutch 1F policy has been evaluated on two occasions by the Advisory Committee on Migration Affairs, in 2001 and in 2008 (ACVZ, 2001; 2008). These advisory reports can be seen as consolidating the key elements of the Dutch policy formulated above. The ACVZ (2001) for instance concluded that considering exclusion before inclusion is a legitimate approach that should be sustained,[25] and reached the same conclusion on the blanket bar to all other residence statuses. It also approved and called for strengthening the cooperation between the immigration service and prosecution

21 *Kamerstukken* II 2003/04, 19637, no. 811, 8 April 2004 and *Kamerstukken* II 2003/04, 19637, no. 829, 23 June 2004.

22 Art. 3.77(1)(a) *Vreemdelingenbesluit* (Aliens Regulation) 2000 forms the basis for the policy. The Council of State has confirmed that acts listed in Article 1F by their nature represent a long term or even lasting "present threat affecting one of the fundamental interests of society" as required by CJEU jurisprudence, e.g. in decisions ECLI:NL:RVS:2008:BF1415 of 12 September 2008 and ECLI:NL:RVS:2015:2008 of 16 June 2015 (paras. 7.6 and 7.7). See Chapter 3.

23 *UNHCR's views on Dutch policy relating to the application of Article 1F of the 1951 Convention*, 10 March 1998, as cited in ACVZ, 2001.

24 See 'Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992', May 2008, available online at <http://www.refworld.org/docid/482947db2.html>, Letter of the UNHCR Deputy Regional Representative dated 9 July 2009 and Letter of the UNHCR Assistant High Commissioner dated 17 November 2009. This criticism has been dismissed e.g. by the Minister of Foreign Affairs; see *Kamerstukken* II 2009/10, 27925, no. 363, 2 October 2009 and *Kamerstukken* II 2009/10, 27925, no. 377, 7 January 2010.

25 Some authors have taken the same position. Kosar (2013: 88-89), for instance, argues that exclusion before inclusion is the correct interpretation of the Refugee Convention and that "the European Asylum Acquis endorses the 'exclusion before inclusion' position […] even more overtly" than the Refugee Convention, and identifies a "growing consensus in the case law of top national courts, which has shifted significantly in favour of the 'exclusion before inclusion' position".

service (ACVZ, 2008). In relation to the government's country report on the Afghan security services, the ACVZ did however recommend further research. Furthermore, it called upon the government to only declare those excluded individuals *persona non grata* who have a realistic settlement alternative (ACVZ, 2008), a suggestion that was turned down by the responsible State Secretary.[26] Finally, the *automatic* assumption that the conduct of someone who is excluded under Article 1F *forever* poses a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" in the meaning of Article 27 Citizenship Directive,[27] has been criticised for contradicting the notion that national authorities must base restrictions of the right of freedom of movement on a case-by-case assessment, having regard for e.g. the time that has passed and the likeliness that the individual will commit similar acts in the future (Bruin, 2015: 281; Beversluis et al., 2016).

2.2. The Dutch 1F policy in a European context

In order to be able to place this Dutch policy – which is central to this study – in a broader context, it is useful to assess whether policies of other European countries reflect the same elements that were described in the previous paragraph. So far, only limited research has been carried out in other European countries;[28] as was already noted, not many governments in Europe are as open about the application of Article 1F as the Dutch government. In this section, use is made of the study by Bolhuis and Van Wijk (2015b), who compared policies and practices in relation to the application of Article 1F in six European states: Belgium, Denmark, the Netherlands, Norway, Sweden and the United Kingdom.[29]

In relation to both the first and second guiding principle of the Dutch policy, it is difficult to assess to what extent the application of Article 1F is "restrictive" and/or whether the possibilities to apply Article 1F are indeed "maximally utilized".[30] The 1997 statement by the State Secretary does suggest a broad interpretation of Article 1F, which should result in a (relatively) high number of 1F exclusions. The study

26 *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, attachment to *Kamerstukken* II 2007/08, 31200 VI, no. 160, 9 June 2008, p. 42.

27 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

28 But see UNHCR (2007), Rikhof (2012), Aas (2013), Singer (2017), and Peyronnet (2017).

29 These countries were selected because they are all known to have a specific policy with respect to 1F cases and/or have specially designated units within the immigration and/or law enforcement and prosecution services for these cases.

30 See §2.1.2 above.

referred to above confirms that the number of 1F exclusions in the Netherlands is higher (both in absolute and relative numbers) than in the other states. While in none of the other countries the average annual number of 1F decisions exceeds 20 (e.g. in the UK, Belgium, Sweden) or is even considerably lower (e.g. in Denmark and Norway; Bolhuis & Van Wijk, 2015b), the number of 1F exclusion decisions in the Netherlands averages 38 per year.[31] Of these six countries, the Netherlands only ranks fourth when looking at the number of first instance decisions taken on an annual basis.[32] It is therefore safe to say that the number of 1F invocations in the Netherlands, compared to other European countries, is exceptionally high. This is possibly partly because the Netherlands considers exclusion before inclusion, as was noted above.[33] The handling of 1F cases by specialised staff is less exceptional, as also Norway and the UK have specialised and dedicated units for such cases. In contrast, in Belgium, Denmark and Sweden, exclusion cases are handled by officers from all asylum departments (Bolhuis & Van Wijk, 2015b: 22).

In relation to the third guiding principle and the consequences of 1F-exclusion, the study shows that only in the Netherlands and Belgium the application of Article 1F results in a blanket bar to other forms of residence statuses. All the other states provide temporary permits to 1F-excluded individuals who cannot be returned, and periodically assess whether return is possible. Remarkably, and in stark contrast to the Dutch situation, in Norway and Sweden, 1F-excluded individuals can under certain circumstances also successfully apply for other residence permits. With respect to an assessment of the possibilities for criminal prosecution as a follow-up to 1F exclusion, in all of the countries studied a strong cooperation has developed between the immigration, law enforcement and prosecution services. The approach differs per country, however. Where in Belgium, like the Netherlands, all 1F files are forwarded to the police or prosecution office, in the other states the immigration services make a selection of cases to forward to the prosecution (Bolhuis & Van Wijk, 2015b: 30). In Denmark and the UK, the selection is informed by formal or informal

31 See *supra* note 30, Chapter 1. It must be noted, that the average annual number of 1F decisions in the Netherlands has decreased over the last few years. Still, over the period 2013-2016, the number of decisions averages 32,5 (30 in 2013, 50 in 2014, 30 in 2015, 20 in 2016; see *Kamerstukken* II 2014/15, 34000 VI, no. 4, 25 September 2014; *Kamerstukken* II 2014/15, 19637, no. 1952, 3 March 2015; *Kamerstukken* II 2015/16, 34000 VI, no. 89, 23 May 2016; and *Kamerstukken* II 2016/17, 34550 VI, no. 105, 8 March 2017).

32 Between 2008 and 2016, the Netherlands ranked fourth in the absolute number of first instance asylum decisions: Sweden (364.280), UK (243.715), Belgium (173.955), Netherlands (155.830), Norway (107.305) and Denmark (52.065). Data retrieved from the Eurostat asylum statistics, available online at <http://ec.europa.eu/eurostat/data/database>.

33 This approach possibly pushes the numbers because persons who would not fall within the refugee definition of Article 1A are still excluded. In other countries, in cases where someone falls outside the Article 1A definition, the assessment whether Article 1F applies will not be carried out.

guidelines. In the UK, criminal prosecution will for instance not be considered if there is a possibility of removal (*ibid*., p. 31). In all of the states studied, however, law enforcement and prosecution services have full access to the immigration files, once there is a final decision that Article 1F is invoked (*ibid*., p. 32).

In short, there are similarities between the Dutch policy and the policies in the other European states, especially when it concerns the element of criminal prosecution as a follow-up to 1F exclusion: in all of the six states studied by Bolhuis and Van Wijk (2015b), there is cooperation between the immigration services and law enforcement or prosecution services, and the latter have access to the files underlying 1F decisions. In relation to the other elements, it is striking that in the Netherlands substantially more individuals are excluded and that only in the Netherlands and Belgium individuals become illegal aliens after they have been excluded; in the Netherlands, the individuals also are declared *persona non grata*. This shows that states enjoy considerable discretion on how to fulfil their obligations under international treaties and EU law, which results in a plethora of different 1F policies. These inconsistencies can have the effect of making one country more 'attractive' for alleged war criminals than other countries.

2.3. International cooperation and criminal prosecution

This study focuses on the role a single state of refuge plays in administering criminal justice to asylum seekers who have been excluded under Article 1F of the Refugee Convention. However, in order to contribute to the administration of criminal justice to excluded asylum seekers states of refuge do not act alone. Successful criminal prosecution of international crimes is often dependent on close cooperation between states of refuge and states where the crimes occurred, but also other states of refuge. Furthermore, information from exclusion cases and more generally from immigration cases in one state, may be relevant to criminal cases in other states, because they may for instance hint to witnesses. The criminal prosecution of excluded individuals could thus benefit not only from strong national,[34] but also international cooperation.[35] In the context of the European Union, different initiatives have developed to facilitate cooperation between in particular law enforcement agencies, with a view of facilitating the criminal prosecution of

34 The European Council noted in its Decision 2003/335/JHA of 8 May 2003: "The relevant national law enforcement and immigration authorities, although having separate tasks and responsibilities, should cooperate very closely in order to enable effective investigation and prosecution of such crimes by the competent authorities that have jurisdiction at national level."

35 It is for these reasons that the Advisory Committee on Migration Affairs (ACVZ, 2008) recommended to intensify international cooperation between national and international law enforcement and immigration services with respect to Article 1F cases and to create an international 1F register.

amongst others excluded individuals; the Netherlands has played an important role in these different initiatives.

A first initiative is the EU Genocide Network.[36] This network of national contact points was initially set up to facilitate judicial cooperation, but its function was broadened to also exchange information and share best practices (Human Rights Watch, 2014). The network is part of Eurojust in The Hague and has met annually since 2004 and biannually as of 2014. Meetings are attended by representatives of most of the 28 EU member states, as well as Norway, Switzerland, Canada, and the United States as observer states. The meetings not only serve to exchange information, but in the margins, bilateral relationships between practitioners from these countries are created and sustained, which can be valuable in individual cases. Not only prosecutors but also police investigators and sometimes immigration officials attend the meetings (*ibid*.). A second initiative is the extension of the mandate of Europol to include genocide, crimes against humanity and war crimes through the new Europol Regulation that came into force on 1 May 2017 (Regulation (EU) 2016/794 of 11 May 2016).[37] With this, a 'focal point' was created for these crimes, on the initiative of the Dutch war crimes unit (Human Rights Watch, 2014). The idea is that information is collected centrally, which makes it possible to see relations between pieces of information and increases the efficiency of investigations.[38] According to Human Rights Watch (2014), this could take the form of a shared database that could facilitate confidential information exchange between police investigators. A third initiative is the development of a Treaty on Mutual Legal Assistance and Extradition for domestic prosecution of the most serious international crimes (the 'MLA initiative'), led by Belgium, the Netherlands, Slovenia, and Argentina, Mali and Senegal; final negotiations about this treaty are expected in the course of 2019,[39] and by March 2018 the treaty was supported by 59 states according to the Dutch

36 Formally the Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes was set up by European Council Decision 2002/494/JHA and reaffirmed with Council Decision 2003/335/JHA to ensure a close cooperation between the national authorities in investigating and prosecuting international crimes. See <http://www.eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx>.

37 Article 3(1) and Annex 1 of Regulation (EU) 2016/794.

38 *Kamerstukken* II 2016/17, 34550 VI, no. 91, 21 December 2016; *Kamerstukken* II 2017/18, 34775 VI, no. 7, 10 October 2017.

39 S. Cocan, 'Fighting against impunity: The Mutual Legal Assistance initiative for domestic prosecution of the most serious crimes', Intlawgrrls blogpost, 7 December 2017, available online at <https://ilg2.org/2017/12/07/fighting-against-impunity-the-mutual-legal-assistance-initiative-for-domestic-prosecution-of-the-most-serious-crimes/> (last visited 16 February 2018).

Minister of Justice.[40] The purpose of the treaty is to make it easier and less time-consuming to obtain mutual legal assistance for the purpose of international crimes prosecutions.

Besides cooperation between law enforcement and prosecution agencies, there have also been suggestions to increase cooperation between immigration services in relation to 1F exclusion and criminal prosecution as a possible follow-up. Bolhuis and Van Wijk (2015b) show that the cooperation between (European) immigration services is currently much more limited than between law enforcement and prosecution services and that much is to be gained. One suggestion has been to create an EU immigration network (see e.g. Human Rights Watch, 2014; Bolhuis & Van Wijk, 2015b), consisting of focal points for matters relating to 1F exclusion, modelled on the EU Genocide Network. In its most recent strategy paper, the EU Genocide Network has endorsed this suggestion.[41] The feasibility of such a network was explored in a study by Human Rights Watch (2014: 91) and by Bolhuis and Van Wijk (2015b). The latter concluded that there seemed to be no major obstacles for creating such a network. They did note, however, that a network offers a forum, but does in itself not offer an infrastructure, nor a legal basis for exchanging information. Again on the initiative of the Netherlands, a meeting was organised in 2016 to set up such a network. The network was established under the auspices of the European Asylum Support Office (EASO) in 2017.[42]

40 *Kamerstukken* II 2017/18, 34775 VI, no. 94, 5 March 2018, p. 10. See also W. Ferdinandusse, 'Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?' ASIL Insights blogpost, 21 July 2014, available online at <https://www.asil.org/insights/volume/18/issue/15/improving-inter-state-cooperation-national-prosecution-international> (last visited 14 August 2017).

41 Eurojust, 'Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States', p. 38. Available online at <http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/Strategy%20of%20the%20EU%20Genocide%20Network%20(November%202014)/Strategy-Genocide-Network-2014-11-EN.pdf>.

42 *Kamerstukken* II 2016/17, 34550 VI, no. 105, 8 March 2017, 9. A kick-off meeting of this 'EASO Exclusion Network' took place on 27-28 February 2017; see <https://www.easo.europa.eu/easo-exclusion-network-0>.

3. 1F-excluded individuals and other 'undesirable but unreturnable' migrants in the Netherlands[1]

3.1. Introduction

States are increasingly confronted with migrants who are undesirable but unreturnable (UBUs). This chapter discusses to what extent and how this issue affects the Netherlands, in particular regarding persons excluded from legal status on the basis of Article 1F of the 1951 Convention relating to the Status of Refugees.[2] The chapter first discusses the relevant legal framework that sets out the parameters of undesirability and unreturnability. Next, it describes the size and key characteristics of UBUs in the Netherlands and considers what policy measures exist to deal with UBUs. We will subsequently discuss strategies and activities that can be used to promote forced and independent return to the country of origin, prosecution within or outside the Netherlands, and relocation to third countries. *Ad hoc* measures that address vulnerable UBUs in protracted situations of unreturnability include the discretionary competence to grant a temporary residence permit and a unique and tailored approach for 1F-excluded individuals, the "durability and proportionality" assessment. The chapter continues by discussing the compatibility with European Union (EU) law of the blanket bar of 1F-excluded persons to all other residence statuses, including those covered by the Family Reunification Directive and the Citizenship Directive,[3] and concludes that elements of the "Dutch approach" to dealing with 1F-excluded individuals may be at odds with EU law.

3.2. UBU in the Netherlands

3.2.1. The legal framework

In the context of this chapter, UBUs are considered *undesirable* individuals when they are asylum seekers believed to have committed crimes before arriving in the state of refuge under Article 1F of the Refugee Convention; immigrants who had their status revoked for having committed crimes in the Netherlands; or immigrants who were not granted a status or had their status revoked because they are considered to pose

1 This chapter was originally published as M.P. Bolhuis, H. Battjes & J. van Wijk (2017). Undesirable but Unreturnable Migrants in the Netherlands, *Refugee Survey Quarterly*, *36*(1), 61-84.

2 189 UNTS 137, 28 July 1951 (entry into force: 22 April 1954).

3 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12; and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

a current or future security concern to the Netherlands. They can be considered *unreturnable* because of different legal and practical reasons. Legal reasons in particular stem from the principle of *non-refoulement* which does not allow forced removal to the country of origin where there is a real risk of serious harm to the individual, e.g. under the European Convention on Human Rights (ECHR) or the Convention Against Torture.[4] Practical reasons that may lead to unreturnability include in particular lack of travel documents or non-cooperation by the excluded individual or the state of origin.[5]

When there are serious reasons for considering that asylum applicants have committed serious crimes prior to arrival in the Netherlands, the Dutch Government can exclude them from international protection under certain conditions on the basis of Article 1F of the Refugee Convention, its equivalents in Articles 12(2) and 17(1) of the Qualification Directive 2004/83/EC[6] as implemented in Article 30b(1)(j) of the *Vreemdelingenwet* (Aliens Act, Vw) and 3.105e of the 2000 *Vreemdelingenbesluit* (Aliens Regulation, Vb), elaborated in paragraph C2/7.2.10 in the 2000 Dutch *Vreemdelingencirculaire* (Aliens Act implementation guidelines, Vc).[7] Crimes committed prior to arrival that fall outside the scope of 1F exclusion can also be a reason to refuse residence, when they are considered to have shocked the legal order ("*geschokte rechtsorde*") and are serious crimes according to Dutch law.[8] Individuals excluded from refugee protection are *by definition* considered to pose a danger to public order, because of the nature of the crimes they have allegedly been involved in.[9] In this regard, it does not matter whether someone is believed to have personally committed a crime against humanity in Syria in 2015, or facilitated a war crime in Afghanistan in the 1980s.

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4 European Convention on Human Rights (ECHR), ETS No. 005, 4 November 1950 (entry into force: 3 September 1953); and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987). An analysis of the development of the principle of *non-refoulement* and its relation to Article 1F is beyond the scope of this study. For an overview, see e.g. Spijkerboer & Vermeulen (2005).

5 This definition is derived from Refugee Law Initiative/Center for International Criminal Justice (2016).

6 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

7 For an extensive description of the application of Art. 1F of the Refugee Convention worldwide, see Rikhof (2012).

8 Para. C2/7.10.1 Vc 2000.

9 Art. 3.77(1)(a) Vb 2000. Art. 3.77(1)(a) Vb 2000 forms the basis for the policy. The Council of State of the Netherlands has confirmed that acts listed in Article 1F by their nature represent a long term or even lasting "present threat affecting one of the fundamental interests of society" as required by Court of Justice of the European Union (CJEU) jurisprudence, e.g. in decisions ECLI:NL:RVS:2008:BF1415 of 12 September 2008 and ECLI:NL:RVS:2015:2008 of 16 June 2015 (§§7.6 and 7.7). See §3.4 below.

The issue of how to deal with foreign nationals who commit crimes after arrival in the Netherlands has been the subject of much debate in Dutch parliament. Under new legislation that came into force in June 2016,[10] holders of a refugee or subsidiary status can have their residence permit revoked if they are considered to pose a danger to the public order and to the community. A *danger to public order* is assumed when someone is convicted by final judgment of a crime that can be qualified as "particularly serious" (in case of refugee protection) or "serious" (in case of subsidiary protection), to an unconditional custodial sentence of at least 10 or 6 months, respectively. If part of the custodial sentence is suspended, this part also counts if it concerns drug-related crimes, sexual and violent crimes, arson, human trafficking, and committing, preparing, or facilitating terrorist crimes.[11] In deciding whether someone poses a danger to the public order a community sentence can also be taken into account, as can crimes committed abroad. A *danger to the community* is assumed based on the nature of the crime and the sentence imposed, but is assumed in any case when the crimes committed constitute drug-related crimes, sex and violent crimes, arson, human trafficking, and illicit trade in weapons or human organs. Applications for non-asylum permits can also be denied when someone is deemed to constitute a danger to the public order. This is *inter alia* the case when someone, because of a criminal offence, has accepted a transaction offer, been imposed a penalty order, or has been convicted to *inter alia* a custodial sentence, community service, or a fine in the Netherlands.[12] Furthermore, a request for an extension of a temporary residence permit can be denied or a granted permanent permit can be revoked because of a danger to public order in case someone has been convicted to a custodial or certain non-custodial sentences.[13] This is subject to a "sliding scale" (*glijdende schaal*) whereby a balancing test between the duration of the sentence and the duration of the legal stay is performed.[14] The application of the sliding scale is not restricted to offences committed in the Netherlands; it is also possible to take into account breaches of public policy committed outside the Netherlands.[15]

10 Besluit van de Staatssecretaris van Veiligheid en Justitie van 22 juni 2016, nummer WBV 2016/8, houdende wijziging van de Vreemdelingencirculaire 2000, Stcrt 2016, no. 33891, 30 June 2016.

11 Para. C2/7.10.1 Vc 2000.

12 Para. B1/4.4. Vc 2000.

13 Arts. 3.86(2) and 3.98 Vb 2000.

14 *Ibid*.

15 Memorie van Toelichting bij art. 65 Vw 2000, *Kamerstukken* II 1999/2000, 26732, no. 3, 22 September 1999.

Except for a danger to the public order, a danger to national security can also be a reason to end or revoke a legal status. Article 32 of the Refugee Convention determines that reasons of national security can be a ground to expel a convention refugee. A danger to national security is assumed on the basis of an individual report drafted by the national or a foreign intelligence service; assuming such a danger is not dependent on a criminal conviction.[16]

Denial or termination of a residence permit means that, unless there is another ground for legal stay, the migrant has to leave the Netherlands within 28 days or immediately in case he or she is considered to constitute a danger to public order, public security, or national security.[17] In principle, when the alien is to independently leave the Netherlands, assistance is available via the International Organization for Migration (IOM). The Dutch Government will start forced removal proceedings in case the alien does not independently leave the country. Additional measures can be taken to emphasise the undesirability of these migrants and to encourage the individuals to leave the country, namely by means of issuing an entry ban,[18] or by declaring the individual *persona non grata*.[19] Since its introduction in 2012, when the Return Directive was implemented in Dutch legislation,[20] the entry ban prevails over the *persona non grata* declaration;[21] the latter is now reserved for EU citizens. An entry ban can be imposed when an individual who has no legal residence has to leave the country immediately or has not left within the designated period. The entry ban is imposed for a maximum period of five years, unless the alien, in the opinion of the responsible Minister, forms a serious threat for public order, public security, or national security, in which case the entry ban can be imposed for up to 20 years (this is referred to as a "heavy," as opposed to a "light", entry ban) (Leerkes, Boersema & Chotkowski, 2014). Non-compliance with an entry ban or *persona non grata* declaration is a criminal offence on the basis of Article 197 of the Dutch Criminal Code. When an undesirable immigrant, for whatever legal or practical reasons, is also unreturnable or otherwise unremovable this does not lift the obligation to leave the Netherlands.

16 Para. B1/4.4 Vc 2000.

17 Art. 62 Vw 2000.

18 Art. 66a Vw 2000.

19 Art. 67 Vw 2000.

20 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

21 Art. 67 Vw 2000 reads: "Unless [Articles 66a and 66b] apply, our Minister can declare the alien persona non grata" (authors' translation).

3.2.2. Key characteristics of UBUs in the Netherlands

One of the first and most notorious undesirable and unreturnable migrants in the Netherlands is José Maria Sison, founder of the Communist Party of the Philippines (CPP) in the 1960s. Sison is also said to have been involved in founding the military wing of the CPP, the New People's Army, which is regarded as a terrorist organization by *inter alia* the United States (US)[22] and the EU.[23] He has been living in the Netherlands since 1987 and his repeated requests for asylum and a permanent residence permit have consistently been turned down. Courts established that the suspicions of his involvement in criminal activities are well-founded, but cannot lead to the conclusion that there are serious reasons for considering that he is guilty of one of the crimes listed in Article 1F. For this reason, he is not excluded from refugee protection under 1F. The State Secretary of Justice decided that, although he qualifies for a residence permit, residence should be refused because there is a "significant interest of the state of the Netherlands", namely the integrity and the credibility of the state in relation to its responsibilities towards other states.[24] Article 3 ECHR blocks removal to the Philippines. In August 2002, the US and the EU placed Sison on a list of terror suspects, as a consequence of which his assets were frozen and he could no longer obtain insurance and travel documents, limiting his free movement. This decision was overruled; on 30 September 2009, the Court of Justice of the European Union (CJEU) ruled that Sison had to be removed from the list.[25] At the time of writing, Sison still resides in the Netherlands from where he runs his own website and regularly publishes articles and books.[26]

Sison is not the only UBU who makes it to the headlines. As will be elaborated below, in particular the issue how to deal with unreturnable Afghan 1F-excluded individuals is highly politicised in the Netherlands. The Dutch Government has for this reason over the past years regularly informed parliament about this particular group of UBUs. Supplemented with our earlier research on 'post-exclusion' policies in the Netherlands, we can give quite an accurate description of unreturnable 1F-excluded individuals in the Netherlands. This is unfortunately not the case with respect to unreturnable immigrants whose legal residence is revoked because of committing serious crimes *in* the Netherlands (foreign national offenders, FNOs) or due to

22 For organizations considered on the terrorist list in the US, see <http://www.state.gov/j/ct/rls/other/des/123085.htm#> (last visited 30 November 2016).

23 For organizations considered on the terrorist list in the EU, see <http://www.consilium.europa.eu/en/templates/content.aspx?id=26698> (last visited 17 August 2017).

24 See District Court of The Hague, ECLI:NL:RBSGR:2010:BM8018, 16 June 2010.

25 CJEU, Jose Maria Sison v. Council of the European Union, Case T-47/03, 30 September 2009.

26 José Maria Sison Website, available online at <http://josemariasison.org/> (last visited 30 November 2016).

security concerns. Very little accurate (statistical) information is published in this regard and academic work on this topic is similarly sparse.[27] An article by De Vries (2014), however, provides some information on procedures and developments with regard to FNOs. A special unit ('Vreemdeling in de strafrechtketen', VRIS) within the Ministry of Security and Justice's Repatriation and Departure Service (DT&V) is tasked with the removal of FNOs. Table 3.1 shows the number of FNOs that flow out of the VRIS per year and the number of independent departures without supervision (those FNOs who have not been removed because of legal or practical impediments). The table demonstrates that the total number of unremovable FNOs over the years 2010–2013 is 950 (the sum of all independent departures without supervision). In many instances these individuals proved unremovable because they either did not cooperate themselves or because the governments of their (alleged) countries of origin did not (De Vries, 2014: 7-9).

Table 3.1
Outflow VRIS and independent departure without supervision, 2010–2013 (rounded)[28]

	2010	2011	2012	2013
Outflow	840	840	970	1.200
Independent departure without supervision	240	230	220	260

Since 2012 VRIS' work has been eased by the introduction of regulations that allow for a suspension of sentences for this group of individuals (*Regeling Strafonderbreking*). Only FNOs who fully cooperate with their removal and also actually leave the Netherlands can benefit from the suspension; aliens with a sentence of three or more years can make use of it after having served at least two-thirds of the sentence, in case of a sentence lower than three years at least half of the sentence has to be served. Since the introduction of this policy on 1 April 2012 until 1 January 2014 about 520 aliens made use of it (De Vries, 2014, 7). Because of the lack of further information on criminal and security cases, we will in the remainder of this chapter concentrate on undesirable and unreturnable 1F-excluded individuals.

27 The lack of available accurate figures on foreign nationals convicted of crimes was also highlighted in a recent letter by the Advisory Committee on Immigration Affairs (ACVZ): 'Brief over wijziging van de Vreemdelingencirculaire 2000 i.v.m. aanscherping van het beleid inzake weigeren en intrekken asielvergunning na ernstig misdrijf', 10 March 2016, 6.

28 De Vries (2014: 9).

1F-excluded individuals: nationalities and types of alleged crimes

In the Netherlands, Article 1F has between 1992 and 2017 been invoked against 1.000 persons.[29] In most 1F cases, Article 1F(a) is applied, which means that the Dutch Government considered there are serious reasons for considering that the applicant has committed "a crime against peace, a war crime, or a crime against humanity". Exclusion is considered before inclusion: before it is determined whether an individual would qualify for asylum, it is first assessed whether he would qualify to be excluded on the basis of Article 1F. The consequence is that the number of 1F-excluded in the Netherlands individuals is relatively high compared to countries that consider inclusion first. A second consequence is that all excluded individuals in the Netherlands are in principle considered to be deportable, unless human rights put a bar on *refoulement*. An analysis of all 1F decisions between 2000 and 2010 showed that the most prevalent countries of origin among 1F-excluded individuals in that period were Afghanistan (448 individuals), Iraq (62), Angola (26), Democratic Republic of the Congo (23), Sierra Leone (20), former Yugoslavia (20), Turkey (18), and Iran (17).[30] The top five of countries of origin in 2015 (30 1F-excluded individuals in total) were Syria, Eritrea, Nigeria, Sudan, and Georgia.[31]

Because about half of exclusion cases so far concern Afghan nationals, and Afghanistan has for a long time been considered too unsafe to deport to, the biggest group of unreturnable 1F-excluded individuals consists of Afghans.[32] Earlier figures on this group, from June 2012, show that of the about 190 1F-excluded Afghans still residing in the Netherlands at that time, 40 were in an on-going removal procedure, 20 had lawful residence, and about 45 were protected from deportation by Article 3

29 *Kamerstukken* II 2017/18, 34775 VI, no. 94, 5 March 2018, p. 7.

30 See Chapter 5.

31 *Kamerstukken* II 2015/16, 19637, no. 2152, 29 February 2016.

32 The question whether Afghanistan is safe enough for an excluded individual to return to differs from case-to-case, but in the period 2014-2016, the group of Afghans in the caseload was decreasing in absolute numbers (see the annual reporting letters to parliament, infra note 41), which may mean the number of unreturnable migrants will decrease significantly (see Chapter 7). In a recent case, the European Court of Human Rights (ECtHR) confirmed that an Art. 3 ECHR impediment was no longer in place for five excluded individuals from Afghanistan: S.D.M. and Others v. the Netherlands, Application No. 8161/07, 12 January 2016. In the period since the publication of the original article on which this chapter is based, the ECtHR reached a similar conclusion in the case of M.M. and Others v. the Netherlands, Application No. 15993/09, 8 June 2017. In October 2017, a report by Amnesty International confirmed that the overall number of deportations from Europe to Afghanistan increased significantly in 2016. Amnesty also sharply criticised these deportations, however, as it claimed the country was "deeply unsafe, and has become more so in recent years"; Amnesty International, 'Forced back to danger. Asylum-seekers returned from Europe to Afghanistan', available online at <https://www.amnesty.org/download/Documents/ASA1168662017ENGLISH.PDF> (last visited 5 October 2017), 10.

ECHR.[33] In less than five cases, deportation was not possible for medical reasons. In another 30 cases, the European Court of Human Rights (ECtHR) imposed an interim measure.[34]

The overrepresentation of Afghan nationals can – apart from a relatively large influx of Afghans to the Netherlands – be explained by the policy of categorical exclusion, which means that for some nationalities mere association with a certain position within a designated organization suffices as a basis for exclusion. The largest group to which categorical exclusion applies are people who held the military ranks of non-commissioned officer and officer who have served in the Afghan KhAD/WAD security service.[35] Persons in certain positions within the Hezb-i-Wahdat (Islamic Unity Party of Afghanistan) and the Sarandoy (Afghan police) are also categorically excluded.[36] Categorical exclusion has also been in place for high officials of the Iraqi security services under Saddam Hussein's rule, and corporals and non-civilian leaders of the Sierra Leonean Revolutionary United Front (RUF), which partly explains the high number of excluded individuals from these countries.[37] Excluded persons from Angola, the Democratic Republic of the Congo (DRC), Sierra Leone, and the former Yugoslavia are typically believed to have committed war crimes in the 1990s while fighting for either government or rebel forces. Since the security situation in their country has improved over the past years, they are by now generally not protected from refoulement. Excluded individuals from Iran are often excluded because they allegedly contributed to crimes against humanity in their capacity as employees of secret services or prison security.[38] As no regime change has taken place since, they are generally still unreturnable. Turks are often excluded on the basis of Article 1F(b) because of suspected links with organizations designated as "terrorist", such as the Kurdistan Workers' Party (PKK). They are typically protected from refoulement.[39] A new group of 1F-excluded individuals who also qualify for Article 3 ECHR protection

33 Other prohibitions of *refoulement* under the ECHR, such as the prohibition to expel a person who runs a real risk of suffering a flagrant denial of due process as meant in Art. 6 ECHR, play a role in Dutch practice only in extradition cases and are therefore not addressed in the context of this chapter.

34 *Kamerstukken* II 2011/12, 19637, no. 1547, 1 June 2012, 2. For more insights on interim measures, see Reijven and Van Wijk (2014a: 11).

35 It must be noted that many of them were initially granted asylum.

36 *Kamerstukken* II 2000/01, 19673, no. 553, 19 December 2000 and *Kamerstukken* II 2002/03, 19637, no. 695, 7 November 2002.

37 *Kamerstukken* II 2003/04, 19637, no. 811, 8 April 2004 and *Kamerstukken* II 2003/04, 19637, no. 829, 23 June 2004.

38 See Chapter 4.

39 See Chapter 6.

in most cases are Syrians. As the Netherlands – similar to many other European countries – is faced with a sharp increase of Syrian asylum seekers, the number of 1F-excluded individuals from Syria is likely to grow accordingly. Over the period 2014-2015 Syrians have comprised the biggest group of 1F-excluded individuals.[40]

Unreturnable 1F-excluded individuals: scale of the problem

The Repatriation and Departure Service DT&V monitors how many excluded individuals have "demonstrably" left the country, through forced deportation or independent departure. The overview in Table 3.2 shows that, according to the figures until 2016, a total of roughly 110 1F-excluded individuals have demonstrably left the country between 2007 and 2016.

Table 3.2

Forced deportations and independent departures 1F-excluded, 2008–2017[41]

	1F-cases monitored by DT&V (end of year)	Number of forced deportations	Number of independent departures
2008	270	5	Unknown
2009	210	6	10*
2010	160	<5	10
2011	145	5	<5
2012	160	5	5
2013	180	5	5
2014	170	<10	15
2015	150	<10	<10
2016	110	5	5
2017**	100	>5	<5

* This figure is not included in the Reporting Letter, but as a total of 60 persons "demonstrably" left the country between January 2009 and March 2014, it can be inferred that about 10 individuals should have left the country independently in 2009.

** The figures for 2016 and 2017 were not available online at the time of the publication of Bolhuis, Battjes and Van Wijk (2017) and have been added later on.

40 Until 2013, only a handful Syrians have been excluded. In 2014 as well as 2015 10 Syrians were excluded under 1F. See *Kamerstukken* II 2014/15, 34000 VI, no. 4, 25 September 2014, 19.

41 These figures were collected from the Ministry of Justice and Security's annual Reporting Letters on International Crimes: Minister of Justice, *Rapportagebrief opsporing en vervolging internationale misdrijven 2008*, no. 5589509/09, 19 May 2009, 3; Minister of Justice, *Rapportagebrief Internationale Misdrijven* 2009, 31 May 2010, 4; State Secretary of Security and Justice and Minister of Immigration and Asylum, *Rapportagebrief Internationale Misdrijven 2010*, no. 5702638/11, 5 July 2011, 5; State Secretary of Security and Justice, *Rapportagebrief Internationale Misdrijven 2011*, no. 220338, 21 June 2012, 6; State Secretary of Security and Justice, *Rapportagebrief Internationale Misdrijven 2012*, no. 435234, 13 November 2013, 5; *Kamerstukken* II 2014/15, 34000 VI, no. 4, 25 September 2014, 9; *Kamerstukken* II 2014/15, 19637, no. 1952, 3 March 2015, 3; *Kamerstukken* II 2015/16, 34300 VI, no. 89, 23 May 2016; *Kamerstukken* II 2016/17, 34550 VI, no. 105, 8 March 2017; *Kamerstukken* II 2017/18, 34775 VI, no. 94, 5 March 2018.

Article 3 ECHR blocked deportation in about 180 of 630 cases in the total number of cases monitored by the DT&V from 2007, when it started registering the number of departures, to 2014.[42] Thus, in this period about 30 percent of the individuals excluded under Article 1F can at least for a considerable period of time be regarded unreturnable because of an Article 3 ECHR impediment.

3.3. Policy measures to deal with the issue of unreturnable 1F-excluded persons

Once there is a 1F decision, the alien has no right to stay on Dutch territory because of the entry ban, and for this reason receiving any other residence permit is out of the question. Furthermore, access to other forms of residence permits is also explicitly blocked for excluded individuals.[43] 1F-excluded individuals do not receive any form of temporary leave to stay nor are they entitled to social allowances, work, or education.[44] They only have access to a minimal level of services, such as legal aid and urgent primary healthcare. Unreturnable 1F-excluded individuals are for many years, or even decades, destined to live a life in "legal limbo" and are faced with serious economic, social, and psychological challenges (Reijven & Van Wijk, 2014a: 12). Over the years, the Dutch Government has pushed more strongly for an increase in the capacity to promote the return of 1F-excluded individuals. It does not actively promote relocation, but does actively try to prosecute or facilitate the extradition of 1F-excluded individuals. Special policies are in place that allow for granting a temporary status for vulnerable 1F-excluded individuals in a protracted situation of unreturnability.

3.3.1. Return

Like many other European countries, the Netherlands for many years did not have a particularly proactive return policy. Expulsion of failed asylum seekers and other undocumented migrants only seriously started in 2007 with the establishment of the DT&V. At present, DT&V is actively monitoring and "pushing" 1F-excluded individuals to return to their country of origin. All excluded individuals – including those with Article 3 ECHR protection – are visited by DT&V case managers every six months. They are informed that they are not allowed to stay in the Netherlands and asked about their plans to leave the country. This includes individuals for whom it has been well established that they cannot be expected to return any time soon.

42 *Kamerstukken* II 2013/14, 19637, no. 1808, 14 April 2014, 16.

43 Art. 3.77 Vb 2000.

44 Art. 10(2) Vw 2000 allows for exceptions in certain specifically mentioned circumstances; in general, illegally present minors are allowed access to education, and emergency health care is being issued.

When DT&V considers a country of origin safe enough to return to and believes that there is a foreseeable chance of deporting the alien, it may request the 'aliens police' to apprehend the undocumented immigrant, place him/her in aliens detention, and start the removal process. Since the implementation of the 2008 EU Return Directive, aliens can be held in detention for a maximum period of six months, which can be prolonged to 18 months in special circumstances.[45] For a variety of reasons, the total number of individuals in aliens detention has significantly decreased since 2011 (Van Schijndel & Van Gemmert, 2014). There are no publicly available figures on the number of 1F-excluded individuals in aliens detention, but given the trend of using aliens detention only as an *ultimum remedium* it is likely that this number is low.

Similar to many other countries, (the threat of) deportation of 1F-excluded individuals leads to much legal arm wrestling and political controversy. If the excluded individuals can find a lawyer willing to take their case, excluded individuals will use all national and international legal procedures available to (temporarily) block such removal. Different from many other countries, in the Netherlands political controversies about (imminent) removals of 1F-excluded individuals are typically not given in by interest groups pushing for removal, but instead, by interest groups trying to block and frustrate expulsion. In particular, threats to deport 1F-excluded Afghans may create much media attention and serve as impetus for parliamentary debates.[46] 1F-excluded Afghan men generally reside with relatives who remain lawfully in the Netherlands and actively participate in social life in the local community (Reijven & Van Wijk, 2014). 1F-excluded individuals without family members may be taken care of by interest groups or church shelters.[47] While defined as alleged war criminals by the Immigration and Naturalisation Service (IND) (which is usually confirmed by the Council of State), neighbours of excluded claimants often perceive them as law abiding citizens who are well integrated in Dutch society. Since the excluded persons themselves have no access to paid lawful employment, many work as volunteers. Unique to the Dutch context is the collective – and relatively successful – lobby of Afghan 1F-excluded individuals for media attention and calls for sympathy.

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45 Art. 6 (sub. 5 and 6) Vw 2000.

46 E.g. H. Ede Botje, 'Vervolg ons dan!', Vrij Nederland, 29 May 2012, available online at <http://www.vn.nl/Archief/Politiek/Artikel-Politiek/Vervolg-ons-dan.htm> (last visited 30 November 2016); J. Van der Heijden, 'Geef mensen met 1F een eerlijk proces', De Volkskrant, 2012, available online at <http://www.volkskrant.nl/vk/nl/2844/Archief/archief/article/detail/3235597/2012/04/04/Geef-mensen-met-1F-een-eerlijk-proces.dhtml> (last visited 30 November 2016).

47 See, for example, reporting on Nader Shahjan's case: G. Dilweg, 'Nader is ondergedoken', Fransiscaans Milieuproject, 2014, available online at <http://www.stoutenburg.nl/Nader-Shahjan.htm> (last visited 30 November 2016).

On several occasions, entire villages have been mobilised to lobby for the fate of excluded Afghan men.[48] Neighbours and others in the communities in which the men and their families reside are often aware of the fact that they have been excluded but could not return for many years, and threats to deport their cherished neighbour often lead to critical questions about the Dutch 1F policy. The removal of a 54-year-old Afghan in January 2015, for instance, was one of such several episodes that made it to the national headlines when one of his daughters started a social media campaign in order to take him off the plane.[49] Teaming up with a relatively well-known artist, she regularly appeared on television and in national newspapers, often accompanied by the founder of "Stichting 1F", a foundation dedicated to lobbying for the fate of 1F-excluded individuals, in particular Afghans.[50] Local politicians (including mayors) and members of Parliament have also proved supportive. Disagreement between local representatives and the national Government led to much consternation in 2011 and 2012. In those years around 40 mayors began to advocate for a review of the current 1F policy with regard to Afghan men whose 1F-exlusion was based on a Ministry of Foreign Affairs report on Afghanistan of 2000.[51] An illustration of how tainted the relationship between municipalities and the national Government had become, is that one mayor had ordered the local police not to arrest and deport an excluded Afghan inhabitant of her municipality in spite of orders to that effect from the Minister for Immigration, Integration, and Asylum. Whereas the Minister argued mayors do not have a say on matters of alien removal, the mayor contested that public order in her municipality would be at risk if the beloved Afghan neighbours were to be deported.[52] The mayor feared that the Afghan's wife, who suffered from depression, would (threaten to) commit suicide, which would lead to fierce protests in the local community. Part of the ensuing discussion between mayors and the Minister was the mayors' demand for

48 See, for example, a petition calling for support to avoid deportation: 'De familie Akbari moet blijven', available online at <http://www.petities.nl/petitie/de-familie-akbari-moet-blijven> (last visited 30 November 2016). The efforts were in vain; the Minister decided he could be deported. See for reporting on the Akbari family situation: 'Geen uitzondering voor familie Akbari', August 2012, available online at <http://www.nu.nl/binnenland/2879247/geenuitzondering-voor-familie-akbari.html> (last visited 30 November 2016).

49 DutchNewsnl, 'Refugee Family Torn Apart as Father is Deported to Afghanistan after 18 Years', DutchNewsnl, January 2015, available online at <http://www.dutchnews.nl/news/archives/2015/01/refugee-familytorn-apart-as-father-is-deported-to-afghanistan-after-18-years.php/> (last visited 30 November 2016).

50 E.g. J. Wolthuizen, 'Kunstenares Tinkebell naar Afghanistan om vrouw te helpen bij zoektocht', Het Parool, 19 February 2015.

51 'Giessenlanden gemeente' petition. Their last letter to the Minister for Integration, Immigration, and Asylum is dated on 2 July 2012, available online at <http://www.tekenvoorrechtvaardigheidinnederland.nl/uploads/Brief-burgemeesters-aan-minister-Leers-2-Jul-2012.pdf> (last visited 30 November 2016).

52 J. Seegers, 'Burgemeesters 40 gemeenten massaal in verzet tegen Leers', NRC, 2012, available online at: <www.nrc.nl/nieuws/2012/04/01/burgemeesters-40-gemeenten-massaal-in-verzet-tegen-leers/> (last visited 30 November 2016).

more information on the reasons for the application of Article 1F to the cases of asylum claimants residing in their community. They also demanded suspension of the removal proceedings concerning excluded Afghans.

The Dutch Government does not facilitate the independent return of 1F-excluded individuals. Similar to all other immigrants with an entry ban for a period longer than five years, 1F-excluded individuals are barred from receiving reintegration packages that are offered by the IOM.[53] Interesting is that not all European countries take the same approach in this regard. IOM Norway, for example, provides reintegration packages of up to 2,300 Euros (20,000 Norwegian krones) for undocumented migrants who voluntarily return to their country of origin without making any reservations in relation to individuals with travel bans or 1F exclusions.[54]

3.3.2. Relocation

There are two ways in which undesirable and unreturnable immigrants can be relocated to third countries. The first modality concerns *institutionally arranged modalities of relocation*, whereby governments actively facilitate the relocation. Apart from rogue states, few countries willingly accept alleged war criminals or *génocidaires*, and institutionally arranged relocations generally involve a certain level of "wheeling and dealing". The most well-known institutionally arranged relocation scheme of UBUs concerns unreturnable Guantanamo Bay inmates. The Obama administration has over the past years managed to relocate a considerable number of unreturnable Guantanamo Bay inmates to a variety of countries, including Estonia, Oman, Kazakhstan, Uruguay, and Saudi Arabia.[55] No *quid pro quo* has become public, but even the tropical island of Bermuda has received four Uighurs from Guantanamo Bay in 2009.[56] There is no information in the public domain that the Netherlands has ever engaged in similar schemes in relocating its unreturnable 1F-excluded individuals.

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53 IOM policy Return and Reintegration Regulation (HRT), Info-sheet HRT Engels 2014-06-620. HRT funding is financed by the Ministry of Foreign Affairs from the development aid budget. We could not find any formal line of argumentation as to why the HRT allowance is not available for excluded persons.

54 IOM, 'Financial Support to Assisted Voluntary Return', IOM Norway webpage, undated, available online at <http://www.iom.no/en/varp/fsr> (last visited 30 November 2016).

55 For a complete overview, see 'Guantanamo Docket', The New York Times, undated, available online at <http://projects.nytimes.com/guantanamo/transfer-countries> (last visited 30 November 2016).

56 E. Eckholm, 'Out of Guantanamo, Uighurs Bask in Bermuda', The New York Times, 14 June 2009, available online at <http://www.nytimes.com/2009/06/15/world/americas/15uighur.html?_r%C2%BC0> (last visited 30 November 2016).

Rather than making use of institutionally arranged relocation schemes, 1F-excluded individuals in the Netherlands must engage in what we would refer to as *self-arranged modalities of relocation*. In this regard it is possible to differentiate between formal and alternative self-arranged schemes. An illustration of a formal self-arranged relocation scheme would be if an undesirable individual personally requests another state for a visa with the intention to apply for a residence permit there. 1F-excluded individuals in the Netherlands regularly try to do this because they have to demonstrate that they have done everything in their power to leave the Netherlands in order to qualify for a temporary residence permit on the basis of the "durability and proportionality test" (see section 3.3.4). We can take it from their experiences that it is far from easy to find a country willing to accept 1F-excluded individuals. Even if the receiving state is not obliged to deny 'undeserving' refugees asylum – for example, when it has not ratified the Refugee Convention – the (habitual) lack of identity documents, problems in obtaining the required visa, and limited financial means to purchase tickets seriously hamper self-arranged relocation attempts. This can be illustrated by the efforts of one unreturnable 1F-excluded individual from Afghanistan that is discussed by Reijven and Van Wijk (2014a). He requested Belgium, Denmark, Finland, Sweden, Italy, Malta, Lithuania and Switzerland to host him. All countries answered in the negative and referred to the Dublin Convention. He then, in vain, approached non-European countries such as Canada, Australia, the US, Turkey, and Mexico for a visa (*ibid*.). Notwithstanding these practical barriers, the Dutch government expects the 1F-excluded individuals to leave the Netherlands.

A number of unreturnable 1F-excluded individuals have started using alternative strategies in trying to relocate to other European countries. Rafiq Naibzay, an Afghan national, was one of them (Reijven & Van Wijk, 2014b). His case attracted much media attention when the Dutch government threatened to deport him. Early in 2013 it turned out that there was no need any more to obstruct his deportation. A press briefing on the website of the town where he used to live stated: "The man has fought for more than fifteen years to obtain a passport, just like his family had. He has given up hope and now chooses to leave his rightless situation in the Netherlands behind and to build a new life abroad".[57] Naibzay had obtained a residence permit in Belgium. How did he manage to do this? The State Secretary of Immigration Affairs informed the Dutch Parliament that he had used what is often referred to as the "Europe-route".[58] According to media reporting two of Naibzay's children,

57 'Afghaanse vluchteling Rafiq Naibzay uit Hoogblokland verlaat Nederland', Het Kontakt, 21 February 2013, available online at <http://site532.power15.drupalconcept.net/alblasserwaard/nieuws/afghaanse-vluchtelingrafiq-naibzay-uit-hoogblokland-verlaat-nederland> (last visited 30 November 2016).

58 Aanhangsel Handelingen, nr. 1774, Vergaderjaar 2012-2013, Ah-tk-20122013-1774, 27 March 2013.

who are EU citizens, lived and studied in Antwerp.[59] On the basis of Article 10 of the Citizenship Directive, an EU citizen has the right to live in another EU country for three months, as long as he/she does not "become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence" and is not considered to pose a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" in accordance with Article 27(2) of the Directive. Family members of EU citizens are free to travel and stay in the same EU countries as their kin as long as their identity and a sustainable family relation are determined. If after three months the family member meets the criteria posed by Article 7 of the Directive, he/she can apply for family reunification. In the case of Rafiq Naibzay, the Belgian immigration authorities apparently approved this application. For this reason, he could obtain a temporary residence permit for five years after which he and his children can apply for a permanent residence permit.

Naibzay is not the only 1F-excluded individual who has taken advantage of what has been referred to as the "Europe route".[60] There may be different reasons why other states, like Belgium in this case, are not denying residence permit requests to individuals who have been excluded in the Netherlands. Firstly, it is possible that they are simply not aware of the fact that someone has been excluded. A study issued by the Norwegian immigration authorities concluded there is currently little to no information exchange between European states on 1F exclusion (Bolhuis & Van Wijk, 2015b). Few states alert 1F-excluded individuals as a matter of standard practice in the Schengen Information System and alerts as such do not reveal *that*, let alone *why*, an individual was previously excluded. Secondly, it is possible that other European countries actually are aware of the fact that someone has been excluded in the Netherlands, but do not consider the individual to pose a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" in accordance with Article 27(2) of the Directive.

The above demonstrates that undesirable and unreturnable migrants, with some creative strategies, may not be 'unrelocationable'. The fact that these individuals still manage to find ways to legally reside in Europe can be seen as problematic. Unwanted and possibly dangerous individuals continue to live in Europe and are likely to

59 'Afghaan Naibzay krijgt verblijfsvergunning in België', Trouw, 22 February 2013, available online at <http://www.trouw.nl/tr/nl/5009/Archief/article/detail/3398166/2013/02/22/Afghaan-Naibzay-krijgt-verblijfsvergunning-in-Belgie.dhtml> (last visited 30 November 2016).

60 See, for example, Council of State of the Netherlands, ECLI:NL:RVS:2013:BZ8702, 27 March 2013; or Council of State of the Netherlands, ECLI:NL:RVS:2015:2008, 16 June 2015.

escape criminal accountability. At the same time, one could argue that the Europe route may be regarded a pragmatic solution not only for the individuals concerned, but also for the Netherlands, to a fundamental system error in international law. The Europe route offers a pragmatic solution for a 'deadlocked' situation: an alleged war criminal, who cannot be deported, has left the country, without complex legal procedures and without violating any international obligations.

3.3.3. Prosecution

For cases where return or relocation proves impossible, the Netherlands has over the years developed several strategies to promote prosecution within or outside the Netherlands. All files of 1F-excluded individuals are sent to the specialised domestic "war crimes prosecutor", who can deploy a dedicated team of investigators to work on these cases. Although a relatively large amount of time and energy is invested in the prosecution of 1F-excluded individuals, the fact that so far only four individuals have irrevocably been convicted proves that this is in practice very difficult.[61]

For this reason, the Netherlands also tries to improve the circumstances in countries of origin to allow for prosecution there: not so much by negotiating specific diplomatic assurances (Giuffre, 2017), but rather by trying to create more favourable conditions for extradition in general. This happened in particular with respect to Rwanda, where Article 3 ECHR and extradition law requirements blocked extradition to Rwanda for many years. The Netherlands has invested significant funds and energy in rebuilding Rwanda's criminal justice system. Although this may have started out as a form of development cooperation, these investments have now been presented as part of a policy specifically directed at facilitating extradition of 1F-excluded individuals for the purpose of criminal prosecution.[62] After many of the human rights concerns were taken away, partially because of foreign investments in the criminal justice system, extradition was accorded by *inter alia* the ECtHR and different states started to extradite suspects to Rwanda.[63] Initially, however, the extradition of a Rwandan national that was approved in 2014 was denied in November 2015, because the right to legal assistance was not sufficiently guaranteed.[64] Ironically, this conclusion was largely based on a report drafted by an expert who was stationed in Rwanda in the

61 See Chapter 5.

62 See Chapter 4.

63 *Ibid*.

64 District Court of The Hague, ECLI:NL:RBSGR:2015:13904, 27 November 2015.

context of the Dutch support programme.[65] In July of 2016, however, an appeals court ruled that the extradition was allowed.[66] He was extradited together with another Rwandan national on 12 November 2016.[67]

3.3.4. Ad hoc measures to deal with protracted situations of vulnerable UBUs

When return, relocation, and prosecution fail, 1F-excluded individuals may remain in legal limbo for many years. There are two *ad hoc* policy measures for vulnerable UBUs in protracted situations of unreturnability that could lift the applicability of Article 1F on humanitarian grounds or otherwise end the unlawfulness of residence. First, the Minister of Security and Justice has a discretionary competence to grant a temporary residence permit to an individual who has been refused residence on the basis of Article 3.4 para. 3 Vb 2000. This competence is not limited to 1F-excluded individuals but can extend to all aliens who have applied for asylum or a residence permit. In those cases that are not regulated by the policy laid down in Article 3.4 para. 1 Vb 2000, there have to be unique circumstances that relate specifically to the individual and that make that refusal of residence results in an "unintended extraordinary harshness", usually referred to as a "harrowing" (*schrijnende*) situation (ACVZ, 2011). The Minister has determined that a high level of integration and a long stay by themselves are insufficient to lead to acceptance of residence and that, in addition, there have to be compelling humanitarian circumstances (a harrowing situation). It is not known in how many cases the Minister has used his discretionary competence to grant a residence permit to 1F-excluded individuals. Reijven and Van Wijk (2014a: 18) report that it happened in at least one case, where the children of a 1F-excluded individual would have been left in the Netherlands without parents would the individual had been expelled.

A second and unique ad hoc measure for vulnerable 1F-excluded individuals is the so-called "durability and proportionality" assessment (*duurzaamheids- en proportionaliteitstest*), which was developed in the case-law of the administrative branch of the Council of State.[68] If an excluded individual is unreturnable for a considerable number of years, this test can be applied to revoke the application of Article 1F, upon request by the excluded individual. As the seriousness of the alleged offence is weighted against actual humanitarian concerns in the Netherlands

65 Former investigating judge Mr. Martin Witteveen, who provided the expert report the decision not to extradite was largely based on, worked as an advisor to the Rwandan National Public Prosecution Authority.

66 Appeals Court of The Hague, ECLI:NL:GHSGR:2016:1924 and ECLI:NL:GHSGR:2016:1925, 5 July 2016.

67 See Chapter 4.

68 Council of State of the Netherlands, ECLI:NL:RVS:2007:BB1436, 18 July 2007; and Minister and State Secretary of Justice, *Notitie betreffende de toepassing van artikel 1F*, 6 June 2008, 26.

or the country of origin, it is a kind of "post-exclusion balancing test" (Reijven & Van Wijk, 2014a). According to the State Secretary of Security and Justice, a durable bar to expulsion is assumed when: a) the alien has been in the Netherlands for 10 years without a residence permit, in a situation where he cannot be expelled to the country of origin because of Article 3 ECHR; b) there is no prospect for change in this situation; and c) the alien has made plausible that departure to a third country is not possible. A durable bar to expulsion exists only when these requirements are met, and only then the proportionality will be assessed. Proportionality will be determined by reviewing whether the alien has made plausible that there are highly exceptional circumstances on the basis of which permanently refraining from granting him a residence permit is disproportional.[69] The "exceptional circumstances" refer to a medical or other humanitarian emergency affecting the individual's family life, a concept that is well established in the Netherlands (Reijven & Van Wijk, 2014a: 17).

Application of the durability and proportionality test has so far led to the granting of a residence permit only in a very limited number of cases. The first requirement – that the person can demonstrably not be expelled due to human rights concerns during at least 10 years of uninterrupted stay in the Netherlands – is rarely satisfied because a human rights impediment to expulsion, such as Article 3 ECHR protection, is non-permanent (*ibid.*). To meet the second criterion the applicant has to make a convincing claim that it will in the foreseeable future be impossible to return to the country of origin. To meet the third requirement, the applicant has to show that he has done all that is in his capacity to depart to a third country, which could for example mean showing dozens of failed visa requests for third countries. If durability is accepted, the proportionality part of the test subsequently requires the applicant to show that his case is exceptional. Case-law shows that the standard for this requirement is rather high. Circumstances such as having "almost finished a university education", having "no right to housing or income during the waiting period" or a combination of several factors such as suffering from the accusation of being a war criminal, having been a victim of torture, and having achieved a high level of integration, among other things, have been found not to be disproportionate (Rikhof, 2012: 480). If the number of 1F-exclusions is high, as is the case in the Netherlands, more people will be in a comparable situation where they are undesirable and unreturnable at the same time, and it will be more difficult for the individual to claim that he/she is in an exceptional situation. However, as the test was specifically developed for unreturnable 1F-excluded individuals, determining the proportionality of the consequences of applying 1F for an individual, relative to

69 *Kamerstukken* II 2014/15, 34000 VI, no. 2, 16 September 2014, 21.

the consequences for other 1F-excluded individuals, has been accepted in case-law (Reijven & Van Wijk, 2014a: 17).

Until January 2016, in about 10 cases the durability and proportionality test has led to the granting of a residence permit to 1F-excluded individuals with an Article 3 ECHR impediment to removal.[70] Shortly after it was introduced, the Advisory Committee on Migration Affairs warned that the requirements of the test should not be so high that it would in practice be a dead letter (ACVZ, 2008: 16). According to the State Secretary, however, the fact that the durability and proportionality test can and does lead to residence permits in some very exceptional cases shows that it is an effective policy measure, while the fact that the policy is applied very strictly is justified by the nature and gravity of the applicability of Article 1F.[71]

3.4. Constraints on the Dutch approach posed by EU law and case law

EU migration law does not deal explicitly with the position of or required policies towards 1F-excluded persons in general; it leaves the matter to the domestic law of the Member States.[72] Still, EU law may set constraints on the Dutch practice, in particular on the blanket bar of 1F-excluded individuals to all residence statuses (the issue of a permit in "harrowing" situations being the only exception). This blanket exclusion also applies to persons who apply for family reunification as covered by the Family Reunification Directive or the Citizenship Directive.

Article 1F-excluded persons fall within the ambit of these Directives in the following situation. The Citizenship Directive is relevant for 1F-excluded persons who are married to or have an equivalent relationship with a Union citizen. If the Union citizen makes use of his/her right to freedom of movement, he/she has the right to be joined by his/her family members, including third-country family members. Would the Union citizen return to his/her Member State after enjoying his/her right of freedom of movement, the (third-country national) spouse must be admitted there.[73] The Family Reunification Directive states in which cases a third-country national family member must be issued a residence permit by the Member State where a third-country national family member resides (and who fulfils certain conditions).

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70 *Kamerstukken* II 2015/16, 19637, no. 2152, 29 February 2016.

71 *Kamerstukken* II 2013/14, 34000 VI, no. 2, 16 September 2014, 16 and 21.

72 As noted, 1F-excluded persons are usually not entitled to a residence permit and hence illegally present third-country nationals, to whom the Return Directive applies.

73 E.g. CJEU, S. *v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. G.*, Case C-457/12, 12 March 2014.

The Family Reunification Directive and the Citizenship Directive both state grounds for refusing admission for the third-country national spouse, most importantly for reason of public order. Article 1F is not, or at least not explicitly, mentioned as a ground for refusal. Hence, it is not self-evident that EU law, in particular the public order ground, allows blanket exclusion of 1F-excluded persons from the entitlements of both Directives. Below, we will discuss whether this blanket exclusion of Article 1F persons is compatible with EU law.

3.4.1. B and D and statuses other than international protection

The CJEU has not yet ruled on the issue of exclusion from other residence statuses of Article 1F-excluded persons, but did touch upon it in *B and D*.[74] It stated that exclusion from international protection is obligatory, hence from both refugee and subsidiary protection status.[75] But this obligatory exclusion is explicitly confined to these statuses defined in the Qualification Directive: national protection statuses fall outside the scope of that Directive.[76] In *B and D*, the CJEU held that, if national law permits "a clear distinction" between the national status and the international protection statuses as meant in the Directive, Member States are allowed to grant national protection to (*inter alia*) a person to whom Article 1F applies.[77] The Court did not state whether or not it is permissible to grant 1F-excluded individuals EU migration statuses other than international protection. But importantly, it stated that exclusion from international protection is obligatory because of the purpose underlying the exclusion ground, "which is to maintain the credibility of the protection system provided for in that directive".[78] That purpose does not apply to other statuses. Arguably, the case cannot be read as categorically excluding Article 1F-persons from all EU migration statuses.

Still, both the Citizenship Directive and the Family Reunification Directive allow Member States to exclude people from the status they would otherwise be entitled to if the public order ground applies.[79] Hence, we will subsequently address the question of how far the applicability of Article 1F may count as a ground for exclusion from other migration statuses on public order grounds.

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74 CJEU, *Bundesrepublik Deutschland v. B. and D.*, Joined Cases C-57/109 & C-101/09, 9 November 2010.

75 *Ibid*., para. 118.

76 *Ibid*., para. 118. Recital 9 of the 2004 Qualification Directive reads as follows: "Those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive."

77 CJEU, *Bundesrepublik Deutschland v. B. and D.*, para. 120.

78 *Ibid*., para. 115.

79 Art. 6 of the Family Reunification Directive; Arts. 27 and 28 of the Citizenship Directive.

3.4.2. Public policy threats

The CJEU has developed a well-established case-law on the notions of public policy and national security applying to Union citizens and their family members who make use of their freedom of movement under the Treaty. In general, Member States enjoy some discretion when adopting rules on and applying these exceptions. That discretion is, however, not unlimited.[80] In particular, the exclusion ground can only apply if the person poses a "real, actual and sufficiently serious threat" to public order or national security.[81] This case-law also applies to third-country national family members of migrated Union citizens. For some time, it was unclear whether it also applied to the public order ground for third-country nationals in the Family Reunification Directive and other Directives. Some authors held that Member States enjoyed much greater discretion in the latter case: when a Union citizen is concerned, or his third country national family member, the public order clause functions as an exception to a previously established right (freedom of movement, which is established by the Treaty).[82] That would not be the case if a third-country national applied, for instance, for family reunification.

But the CJEU ruled otherwise in the cases of *Zh.Z. and I. O. v. Staatssecretaris voor Justitie*[83] and, even more outspoken in *H.T.* The latter case concerned the repeal of a residence permit of a refugee by Germany because of the refugee's involvement with the PKK, an organization on the list of terrorist organizations. The issue was how to interpret the notions "public policy" and "public order" in Article 24 of the Qualification Directive, which requires the issue of a residence permit unless a public policy or public order ground applies. Having observed that the provision itself does not define these notions, the Court stated that:

> The Court has already had an opportunity to interpret the concepts of "public security" and "public order" contained in Articles 27 and 28 of Directive 2004/38 [i.e. the Citizenship Directive]. While that directive pursues different objectives to those pursued by Directive 2004/83 and Member States retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another [...], the extent of the protection a company [sic]

80 E.g. CJEU, *Rutili v. Ministre de l'intérieur*, Case C-36/75, 28 October 1975.

81 *Ibid*., para. 28, and CJEU, *Regina v. Bouchereau*, Case C-30/77, 27 October 1977, para. 28.

82 E.g. Hailbronner (2000: 98); Council of State of the Netherlands, ECLI:NL:RVS:2013:BZ8702, 27 March 2013.

83 CJEU, Z. *Zh. v. Staatssecretaris van Veiligheid en Justitie and Staatssecretaris van Veiligheid en Justitie v. I.O.*, Case C-554/13, 11 June 2015.

> intends to afford to its fundamental interests cannot vary depending on the legal status of the person that undermines those interests.[84]

The term "company" seems an erroneous translation – the French, German, and Dutch versions have "society" instead.[85] The Court added that "the concept of 'public order' contained in Directive 2004/38, in particular in Articles 27 and 28 thereof, has been interpreted in the case-law of the Court as meaning that recourse to that concept presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", referring to its freedom of movement case-law.[86] There is no reason whatsoever to assume that the outcome would be different as regards the Family Reunification Directive. Therefore, the real, actual, and sufficiently serious threat test must be applied if a Member State wishes to bar Article 1F-excluded persons from entitlements set out in the Citizenship and Family Reunification Directives.

3.4.3. The public policy standard and excluded persons: the Council of State

Does the public policy case-law allow for excluding all 1F-excluded persons from the benefits of the Citizenship and Family Reunification Directive? The Dutch Council of State stated so in a judgment it delivered eight days before the CJEU judgment in *H.T. v. Land Baden Wurttemberg*, but months after *Zh.Z. and I.O.*[87] The case concerned a third-country national to whom asylum application had been denied in 2007 because of his rank within the KhAD/WAD. This amounted to serious grounds for considering that he had committed war crimes and crimes against humanity. In 2009, he and his Dutch wife moved to Belgium, which issued him a residence permit as a family member of a Union citizen. In 2011, he requested that the entry ban, imposed when the asylum claim was denied, be lifted so that he and his wife could legally enter and settle in the Netherlands. The first instance court reasoned that, as Article 1F applied merely because of his position within the KhAD/WAD, hence not because of personal participation in torture and so on, it had not been substantiated that the threat was still "present". The Council of State however reasoned otherwise. As Article 1F had been applied, the Afghan could be held personally responsible, so the distinction drawn by the first instance court, between personally committing and other means of perpetrating crimes was not relevant. The Council continued to

84 CJEU, *H.T. v. Land Baden-Württemberg*, Case C-373/13, 24 June 2015, para. 77.

85 French "société'", German "Gesellschaft", Dutch "samenleving".

86 CJEU, *H. T. V. Land Baden-Württemberg*, para. 79.

87 Council of State of the Netherlands, ECLI:NL:RVS:2015:2008, 16 June 2015.

reason that several treaty provisions like Article 3 ECHR bear witness to how heinous the crimes set out in Article 1F(a) (war crimes and crimes against humanity) are considered to be. The seriousness of the crimes rendered the threat both "relevant" and "present".

Thus, under this analysis, because of the seriousness of the threat the other two elements of the CJEU test are automatically fulfilled and hence denied independent meaning. The Council of State gave two reasons why this conflation was allowed for. First, "this thought" (deze gedachte, i.e. that if Article 1F applies the threat is by definition present) was also embodied in Article 12 of the Qualification Directive (i.e. Article 1F of the Refugee Convention) as interpreted by the CJEU in B and D, where it stated that Article 12 serves the double purpose of excluding people "unworthy" of the status and ensuring that they cannot escape criminal justice. These purposes are also served by exclusion from the Citizenship Directive. Second, the Council of State stated that this approach "joined in with" (*vindt aansluiting bij*) the CJEU cases Bouchereau and P.I., as both cases showed that the CJEU does not "always" require assessment of future behaviour.

Arguably, both arguments beg questions. There is no reason to suppose Article 12 of the Qualification Directive serves to elaborate on public policy or national security in the particular case of war crimes, etc. On the contrary, in B and D, the CJEU drew a strict distinction between Article 12(2) of the Qualification Directive (i.e. Article 1F of the Refugee Convention) and the provisions addressing public order, Articles 14(4) and 21(2) – "[…] danger which a refugee may currently pose to the Member State concerned is to be taken into consideration, not under Article 12(2) of the directive but under (i) Article 14(4)(a) […] and Article 21(2)".[88] Exclusion pursuant to Article 12(2) on the other hand is "intended as a penalty for acts committed in the past".[89] Thus, according to the Court, the purpose of Article 12(2) is preserving the "credibility" of asylum, and the public policy the protection of the society of the state of refuge. Indeed, this reflects the difference between Article 1F on the one hand and Article 33(2) of the Refugee Convention on the other hand. Thus, the link to public policy and national security does not follow in any way from either the text of the Directive or the CJEU judgment.

88 CJEU, *Bundesrepublik Deutschland v. B. and D.*, para. 101.

89 *Ibid.*, para. 103.

As to the CJEU case-law referred to by the Council of State, in Bouchereau the CJEU reasoned that:

> The existence of a previous criminal conviction can […] only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. 29 Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.[90]

The Council of State concluded that this quote showed that "an assessment of the foreigner's future behaviour is not always required".[91] It added that this was "repeated" by the CJEU in the case of P.I., which reads as follows:

> The issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future.[92]

We may observe that in *P.I.* the CJEU does not repeat its statement of some 25 years before that "it is possible that past conduct alone may constitute such a threat to the requirements of public policy". The words "in general" in *P.I.* are insufficient to be understood as a confirmation as the judgment does nowhere refer to *Bouchereau*. But also if we assume that indeed past conduct may still exceptionally be sufficient for assuming an actual and serious threat to public order, there is no reason to assume that that reasoning would also apply if it has not been established that the foreigner did pose a threat to the society of refuge in the past. In other words, these cases do not lead to the conclusion that the seriousness of past behaviour by definition amounts to a threat. Indeed, the CJEU does not say that the actuality of a threat may follow from its seriousness. In this respect it is relevant to note that *Bouchereau* concerned a repeat drug offender, and *P.I.* a condemned paedophile, hence both persons who did pose a threat to public policy. Therefore, it appears that the Council of State has not sufficiently

90 CJEU, *Regina v. Bouchereau*, paras. 28–29; quoted by the Council of State of the Netherlands in ECLI:NL:RVS:2015:2008.

91 Council of State of the Netherlands, ECLI:NL:RVS:2015:2008, para. 7.7 (authors' translation).

92 CJEU, *P.I. v. Oberbürgermeisterin der Stadt Remscheid*, Case C-348/09, 22 May 2012, para. 30.

substantiated its interpretation that Article 1F-excluded persons by definition pose a genuine, actual, and sufficiently serious threat to public order.

3.4.4. The public policy standard and excluded persons: the Council for Aliens Disputes

How does the Dutch approach compare to that of other Member States? Bolhuis and Van Wijk (2015b) conducted a comparative study in a selected number of European states. It turned out that Denmark and the UK systematically bar access of 1F-excluded persons to residence on the basis of family reunification; Belgium, Norway, and Sweden on the other hand do not do so (*ibid.* p. 14, 15, 19, 22). The way in which the public policy exception of Articles 27 and 28 of the Citizenship Directive is being applied in these and other Member States was not a subject of this study.

What is most interesting in this regard is Belgium, as the country is directly confronted with the consequences of the Dutch policy: 1F-excluded persons who do have a relationship with a Union citizen did move to Belgium in order to invoke entitlements pursuant to the Citizenship Directive. In at least one case, the Council for Alien Law Litigation (*Conseil du Contentieux des Etrangers/Raad voor Vreemdelingenbetwistingen*), the highest Belgian court on aliens law, had to address the consequences of the Dutch 1F policy. The case concerned a family member of a Dutch man residing in Belgium. This family member had been denied asylum by the Netherlands as he had served as an officer in the KhAD/WAD; therefore, Article 1F applied.[93] The Belgian authorities argued that 1F crimes are so serious that they continue to pose a threat to society.[94] The Council did not follow this approach. It observed that the crimes had allegedly been committed "25 to 20 years ago"; therefore, the negative decision did not address the real, actual, and sufficiently serious nature of the threat the alien might pose; Article 1F rather concerns the past.[95] Accordingly, the decision was quashed.

This reasoning is far more in line with the application of the public policy exception by the CJEU proposed above. In any case, this interpretation differs markedly from the one given by the Dutch Council of State. According to well-established case-law, a domestic court whose rulings are not subject to domestic review must refer a question on interpretation of EU law to the CJEU, unless the answer is beyond

93 Council for Alien Law Litigation, Case No. 99.921, 27 March 2013, para. 1.4.

94 *Ibid*., para. 3.3.

95 *Ibid*., paras. 3.12–3.13.

reasonable doubt and the domestic court is convinced that the matter is equally obvious to the courts of the other Member States.[96] Obviously, the latter condition is not fulfilled. Rightly, both a Dutch and a Belgian first instance court referred questions on this issue to the CJEU.[97]

3.5. Conclusion

Between 1992 and 2017 the Netherlands has on the basis of Article 1F Refugee Convention excluded 1.000 asylum seekers who are believed to have committed serious crimes prior to arrival in the Netherlands. No figures are available on the number of foreign nationals who have had their residence permits revoked because they had committed crimes after arrival in the Netherlands. Neither are there publicly available data on the number of immigrants who have been denied legal residence because they are considered to pose a danger to national security. The Netherlands imposes an entry ban on all undesirable immigrants. They have to leave the country immediately or within the designated period. When an undesirable immigrant, for whatever legal or practical reasons, is also unreturnable or otherwise unremovable this does not lift the obligation to leave the Netherlands.

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96 CJEU, *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, Case C-283/81, 6 October 1982, para. 16.

97 K. v. Staatssecretaris van Justitie and H.F. v. Belgische staat, Joined Cases C-331/16 & 366/16. The Dutch court referred the following questions in Case C-331/16 "Does Article 27(2) of Directive 2004/38/EC1 permit a Union citizen, as in the present case, in respect of whom it has been established in law that Article 1F(a) and (b) of the Refugee Convention is applicable to him, to be declared undesirable because the exceptional seriousness of the crimes to which that Convention relates leads to the conclusion that it must be assumed that, by its very nature, the threat affecting one of the fundamental interests of society is permanently present? If the answer to question 1 is in the negative, how should an assessment be carried out, in the context of an intended declaration of undesirability, of whether the conduct of a Union citizen, as referred to above, to whom Article 1F(a) and (b) of the Refugee Convention has been declared applicable, should be regarded as a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society? To what extent does the fact that the 1F conduct, as in the present case, took place long ago – in this case: in the period between 1992 and 1994 – play a role therein? In what way does the principle of proportionality play a role in the assessment of whether a declaration of undesirability can be imposed on a Union citizen to whom Article 1F(a) and (b) of the Refugee Convention has been declared applicable, as in the present case? Should the factors mentioned in Article 28(1) of the Residence Directive be involved, either as part of such an assessment, or separately? Should the period of ten years' residence in the host country mentioned in Article 28(3)(a) be taken into account, either as part of such an assessment, or separately? Should the factors listed in paragraph 3.3 of the Guidance for better transposition and application of Directive 2004/38/EC, (COM(2009)313), be fully involved?"; the Belgian referred the following question in Case C-366/16: "Should Union law, in particular Article 27(2) of the Citizenship Directive 1, whether or not in conjunction with Article 7 of the Charter, be interpreted as meaning that a residence application, lodged by a third country family member in the context of family reunification with a Union citizen, who in turn has used his right of free movement and residence, can be refused in a Member State because of a threat resulting from the mere presence in society of that family member, who in another Member State was excluded from refugee status pursuant to Article 1F of the Refugee Convention and Article 12(2) of the Qualification Directive 2 because of his involvement in events within a certain socio-historical context in his country of origin, where the genuineness and the reality of the threat posed by the conduct of that family member in the Member State of residence is based solely on a reference to the exclusion decision in the absence of an assessment of the risk of recidivism in the Member State of residence?". For the status of the case, see <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-331/16> (last visited 24 October 2017).

As to the application of Article 1F exclusion, a decision to exclude is taken before inclusion: before it is determined whether an individual would qualify for asylum, it is first assessed whether he would qualify to be excluded on the basis of Article 1F. As a consequence, the number of 1F-excluded in the Netherlands individuals is relatively high compared to countries that consider inclusion first. Between 2000 and 2010 most excluded individuals stem from Afghanistan, Iraq, and Angola. More recently, also Syrians have been excluded. The overrepresentation of Afghan nationals can in particular be explained by the policy of categorical exclusion, which means that for some nationalities mere association with a certain position within a designated organization suffices as a basis for exclusion. 30 percent of the individuals excluded under Article 1F can at least for a considerable period of time be regarded unreturnable because of an Article 3 ECHR impediment.

Unreturnable 1F-excluded individuals do not receive any form of temporary leave to stay nor are they entitled to social allowances, work, or education. The Netherlands periodically assesses if deportation is feasible. Unique to the Dutch context is the collective lobby of Afghan 1F-excluded individuals for sympathy when threatened with deportation. Rather than making use of institutionally arranged relocation schemes, 1F-excluded individuals have engaged in self-arranged modalities of relocation by means of taking the "Europe route", whereby 1F-excluded persons who do have a relationship with a Union citizen moved to Belgium in order to invoke entitlements pursuant to the Citizenship Directive.

Despite much investment, only four 1F-excluded individuals have so far been successfully prosecuted. Extradition proves complex too. A unique ad hoc measure in dealing with vulnerable 1F-excluded individuals is the so-called "durability and proportionality" assessment, on the basis of which ill individuals who have not been deportable for more than 10 years and without much perspective to be deported any time can be granted a temporary status. Until January 2016, about 10 1F-excluded individuals with an Article 3 ECHR impediment have received such a status.

This chapter concluded by arguing that the blanket exclusion of 1F-excluded persons from all residence permits is in certain circumstances at odds with EU law. The Council of State misconstrues the Citizenship and Family Reunification Directives where it conflates Article 1F and public order. Exclusion on public policy grounds is allowed if a person poses a real, actual, and sufficiently serious threat to society. Obviously, there may be persons who in the past committed 1F crimes and who do now pose an actual threat to Dutch society, but such a threat does not follow from

the alleged 1F crime itself. As stated by the Belgian Council of Alien Law Litigation, Article 1F addresses the past and is therefore hardly informative of the actuality of a threat. Arguably, the diversity in approach among Member States in general and between the Dutch and Belgian Councils in particular warrant the questions referred to the CJEU for a preliminary ruling.

4. Prosecution of those excluded under 1F(a) outside the state of refuge[1]

4.1. Introduction

Over the last decade, states have increasingly prioritized the identification of alleged perpetrators of international crimes and serious non-political crimes with the aim of excluding them from refugee protection as per Article 1F of the Refugee Convention.[2] Pursuant to the principle of *aut dedere aut judicare* states should either extradite or prosecute international crimes suspects.[3] Since prosecution on the basis of universal jurisdiction has proven to be expensive and difficult,[4] extradition has emerged as a more attractive alternative for governments. Extradition has the supplementary advantage of justice being seen to be delivered in the country where the alleged crimes were committed. Extraditing alleged perpetrators of international crimes is, however, far from straightforward. For many years after the genocide, Rwandan requests to extradite suspects living outside of the country were consistently turned down by European states such as Germany, Switzerland, Finland, the United

1 This chapter was originally published as M.P. Bolhuis, L.P. Middelkoop & J. van Wijk (2014). Refugee Exclusion and Extradition in the Netherlands. Rwanda as Precedent? *Journal of International Criminal Justice*, *12*(5), 1115-1139.

2 The United Nations Convention relating to the Status of Refugees (hereinafter 'Refugee Convention') was adopted in 1951. Art. 1F reads: 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.' In this chapter the term exclusion refers solely to Art. 1F Refugee Convention; the other exclusion clauses (Arts 1(D) and (E)), are not addressed. Whenever mention is made of 'excluded' individuals, applicants who have been denied refugee protection due to Art. 1F are referred to with the masculine pronoun.

3 Lit.: 'to extradite or prosecute'. This obligation only pertains to international crimes and not to serious non-political crimes (Art. 1F(b) Refugee Convention). See Rikhof (2012: 461-462).

4 The Canadian Department of Justice estimates that the domestic prosecution of an African perpetrator of international crimes in Canada costs approximately 4 million Canadian dollars; see Department of Justice Canada, Crimes Against Humanity and War Crimes Program, Summative Evaluation, Final Report, October 2008, available online at <http://justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/08/war-guerre/war.pdf> (last visited 24 May 2014), at 92. On the difficulty of domestic prosecution of international crimes, see e.g. Van den Herik (2009a).

Kingdom,[5] Italy[6] and France.[7] Courts and governments were concerned that extradition would violate human rights obligations: in particular, the prohibition of torture and inhuman or degrading treatment; and the right to a fair trial. This trend started to turn in 2011, when the United States extradited, and the International Criminal Tribunal for Rwanda (ICTR) referred, alleged genocide perpetrators to Rwanda for the first time. Subsequently, the ICTR referred another detained suspect and the case files for six fugitives, while the United States and Canada deported two other suspects.[8]

5 See Ahorugeze v. Sweden, European Court of Human Rights (ECtHR) (2011), Appl. No. 37075/09, paras. 64-70 (hereinafter 'Ahorugeze v. Sweden').

6 The extradition of Emmanuel Uwayezu was denied by a Florence Court on 29 January 2010. See TRIAL, 'Emmanual Uwayezu', 25 November 2011, available online at <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/855/action/show/controller/Profile/tab/legal-procedure.html> (last visited 11 June 2014).

7 The extraditions of Marcel Bivugabagabo, Pascal Senyamuhara (alias Simbikangwa), Isaac Kamali, Claver Kamana Euge'ne Rwamucyo and Sosthe'ne Munyemana were declined in 2008-2010 (see Ahorugeze v. Sweden, paras. 62-63). The extradition of Agathe Habyarimana, was rejected by the Court of Appeal of Paris on 28 September 2011. See 'French Court Blocks Agathe Habyarimana Extradition', New Times, 29 September 2011, available online at <http://www.newtimes.co.rw/section/article/2011-09-29/35426/> (last visited 23 July 2014). On 19 December 2012, the same court declined the extradition of Hyacinthe Nsengiyumva Rafiki and Vénuste Nyombayire. See 'Kigali Slams Paris over Rwanda Genocide Suspects', Hirondelle News Agency, 22 January 2013, available online at <http://allafrica.com/stories/201301221476.html> (last visited 23 July 2014). On 13 November 2013, the Court of Appeal of Paris approved the requests for the extradition of Claude Muhayimana and Innocent Musabyimana. On 26 February 2014, however, the Court of Cassation overturned this decision, and confirmed the rejection of the extradition in the case against Laurent Serubuga. See 'Rwanda Genocide: France Blocks Extraditions', BBC, 26 February 2014, available online at <http://www.bbc.com/news/world-africa-26356286> (last visited 26 September 2014).

8 The United States deported Jean Marie Vianney Mudahinyuka (alias Zuzu) in January 2011. See 'US Deports Rwandan Genocide Fugitive', Radio Netherlands Worldwide (RNW), 28 January 2011, available online at <http://www.rnw.nl/africa/article/us-deports-rwandan-genocide-fugitive> (last visited 25 November 2013). Marie-Claire Mukeshimana was deported from the United States on 22 December 2011. See 'Rwanda: U.S. Extradite Woman Convicted for Genocide', Hirondelle News Agency, 22 December 2011, available online at <http://allafrica.com/stories/201112270934.html> (last visited 24 May 2014). The referral by the ICTR of Jean Bosco Uwinkindi was approved on 29 June 2011 and effected in April 2012. See 'Genocide Suspect Uwinkindi Sent for Trial in Rwanda', BBC News, 19 April 2012, available online at <http://www.bbc.co.uk/news/world-africa-17773357> (last visited 25 November 2013). Subsequently, the ICTR referred another suspect and the case files of six fugitives to Rwanda. See ICTR, Status of cases – Cases transferred to national jurisdiction, available online at <http://www.unictr.org/Cases/tabid/204/Default.aspx> (last visited 8 May 2014). The deportation of Leon Mugesera from Canada was approved on 11 January 2012 by the Federal Court. See TRIAL, Leon Mugesera, 25 February 2013, available online at <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/696/action/show/controller/Profile/tab/legal-procedure.html> (last visited 24 May 2014).

Thereafter, courts in Sweden,[9] Denmark,[10] Norway[11] and the Netherlands,[12] as well as the European Court of Human Rights (ECtHR) authorized further extraditions of suspects to Rwanda. In the Netherlands, the recent authorization of Rwandan extradition requests is framed as an important development in support of the State Secretary for Security and Justice's 'programmatic approach' towards international crimes.[13] This approach aims at preventing perpetrators from entering and settling in the Netherlands and ending their impunity. Part of the programme entails assisting countries of origin in strengthening their criminal justice system to facilitate prosecution of alleged perpetrators. In his latest annual report the State Secretary stated: 'Where possible, the Netherlands supports countries by enabling them to deal with cases in accordance with international standards regarding a fair trial, thus paving the road for extradition.'[14] According to the State Secretary, Rwanda serves as an example of how the programmatic approach works and he maintains that a similar approach should be pursued with respect to other countries.[15] The above proposition raises the question: how likely is it that the Netherlands will actually be able to extradite excluded individuals to other states in the future? To answer

9 The extradition request for Sylvère Ahorugeze was granted by the Supreme Court of Sweden on 26 May 2009 and was approved by the ECtHR in October 2011; the decision became final in June 2012. See TRIAL, Sylvère Ahorugeze, 17 January 2013, available online at <http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/476/action/show/controller/Profile/tab/legal-procedure.html> (last visited 25 November 2013).

10 The Supreme Court of Denmark approved the extradition of Emmanuel Mbarushimana on 6 November 2013. See Højesterets Kendelse (Order of the Supreme Court of Denmark), 6 November 2013, Director of Public Prosecutions vs. T., Case No. 105/2013; translation available online at <http://www.internationalcrimesdatabase.org/upload/ICD/Upload1215/200131106_Danish_Supreme_Court_decision_on_extradition_to_Rwanda.pdf> (last visited 21 July 2014).

11 On 10 March 2013, Charles Bandora was the first Rwandan genocide suspect residing in Europe who was actually extradited from Norway. See 'History Is Made As Norway Finally Extradites Bandora', The East African, 15 March 2013, available online at <http://www.theeastafrican.co.ke/Rwanda/News/History-is-made-as-Norway-finally-extradites-Bandora/-/1433218/1721814/-/e2ww6yz/-/index.html> (last visited 4 October 2013). On 3 September 2014, a court in Bergen approved the extradition of Eugene Nkuranyabahizi. See 'Norway to Extradite Another Genocide Suspect', New Times, 4 September 2014, available online at <http://www.newtimes.co.rw/section/article/2014-09-04/422/news-norway-to-extradite-another-genocidesuspect> (last visited 26 September 2014).

12 On 17 June 2014, the Dutch Supreme Court confirmed the approval of the extradition request for Jean Claude I. See Supreme Court of the Netherlands, 17 June 2014, ECLI:NL:HR:2014:1441. Soon after this first case was approved in first instance, another alleged génocidaire, Jean Baptiste M., was arrested in the Netherlands on 23 January 2014. His extradition was also approved on 11 July 2014. See District Court of The Hague, 11 July 2014, ECLI:NL:RBSGR:2014:8484. In the period since the publication of the original article on which this chapter is based, the case has continued: both individuals were extradited on 12 November 2016; see attachment to Kamerstukken II 2016/17, 34550 VI, no. 105, blg-802100.

13 State Secretary of Security and Justice, Rapportagebrief Internationale Misdrijven (reporting letter on international crimes), 13 November 2013, No. 435234, available online at <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/11/22/rapportagebrief-internationale-misdrijven.html> (last visited 21 July 2014), at 6-8.

14 *Ibid*.

15 *Ibid*.

this question, we analysed why Rwandan extradition requests to the Netherlands and other European countries – typically concerning individuals excluded on the basis of Article 1F – have been authorized. We will argue that, for a number of reasons, the Rwandan case could be considered exceptional. In the second section, we examine why it is unlikely in the near future that other, post-conflict countries will successfully request the extradition of Article 1F-excluded individuals from the Netherlands. In contrast to Rwanda, governments in many countries of origin lack the willingness – and capacity – to domestically prosecute excluded asylum seekers. Moreover, even if such willingness exists, extradition law and human rights law requirements are likely to obstruct future extraditions. This chapter is based on an analysis of case law, academic literature and information taken from popular media, such as news articles and websites. To contextualize our data, we refer to interviews with two experts on transitional justice in Rwanda.[16] In order to describe the characteristics of Article 1F-excluded individuals in the Netherlands, we refer to an analysis of 745 files of Article 1F-excluded individuals who had their asylum requests processed between January 2000 and November 2010.[17] This chapter focuses mainly on extradition for crimes that would fall within the scope of Article 1F(a), but also mentions extradition requests for crimes that would fall under 1F(b).

4.2. Extradition of alleged génocidaires from Europe to Rwanda: a long, bumpy road

Governments of post-conflict countries are not necessarily interested in holding alleged perpetrators of international crimes individually criminally accountable. Prosecutions – or threat thereof – may have destabilizing effects. Moreover, governments are particularly unlikely to prosecute people belonging to their own political, ethnic or religious groups. For such reasons, countries may opt to grant amnesties, appoint truth commissions, use restorative justice mechanisms or restrict prosecutions to a limited number of persons. In Rwanda, however, 'doing justice' has always set the tone. From December 1996 until 2006, Rwanda's national courts tried nearly 10,000 génocidaires.[18] Next to these 'classic' criminal trials, Rwanda also installed traditional grassroots *gacaca* courts which tried hundreds of thousands of

16 Vice Rector Academic Affairs and Research at the Institute for Legal Practice and Development (ILPD) in Nyanza, Rwanda, May 2011-December 2013 (R1) and Senior Policy Advisor Rule of Law at the Dutch Ministry of Foreign Affairs and Vice Rector Academic Affairs and Research at the ILPD 2008-2010 (R2). Whenever we refer to information provided by these experts, reference will be made to the respective codes (R1, R2).

17 For an elaborate description of this dataset, see §1.3.

18 See UN Outreach Programme on the Rwanda Genocide, 'The Justice and Reconciliation Process in Rwanda, Background Note', March 2012, available online at <http://www.un.org/en/preventgenocide/rwanda/pdf/bgjustice.pdf> (last visited 25 May 2014).

individuals between March 2005 and June 2012.[19] In other words, since 1994, Rwanda has been more than willing to prosecute perpetrators of genocide committed against the Tutsis, including those living abroad. Willingness to prosecute international crimes, however, is not enough for successful extradition. Before any viable request can be made, a country needs to have the organizational capacity and expertise to investigate, prosecute and try such complex cases. In post-conflict situations, the infrastructure for prosecuting conventional criminal cases, let alone for prosecuting international crimes may often be damaged or even eradicated. Directly after the genocide and the protracted civil war, Rwanda's criminal justice system was in ruins, lacking the necessary capacity and expertise.[20] Instead, prosecutions were initiated by the ICTR, which was established in November 1994.[21] Simultaneously, the international community contributed considerably to rebuilding and strengthening the criminal justice system in Rwanda. At first, development aid typically focused on investing in the construction of courthouses and prisons (R2). In the later phase, investments were expanded to offering training to judges, prosecutors and lawyers aiming at gaining expertise on dealing with atrocity crimes.[22] Additionally, a system of legal aid was instituted (R2).

Before domestic prosecutions could be expanded to accused residing out of the country, Rwanda had to invest in the identification and tracking down of this group while gaining the necessary expertise in extradition law. Although personal details and information on the crimes committed by foreign nationals may be known to the authorities of a state of refuge, this information is not necessarily transferred to countries of origin with an interest in prosecuting these individuals; particularly where the foreign national has applied for asylum. This means that countries of origin have to trace the people for whom they are searching. The Rwandan government has been active in this search; again with the assistance of the international community. In 2004, Interpol, together with the Rwandan National Prosecution Service and ICTR, set up the Rwandan Genocide Fugitives Project in order to support the localization

19 For figures, see Human RightsWatch, 'Rwanda: Justice After Genocide – 20 Years On', 28 March 2014, available online at <http://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years> (last visited 25 May 2014).

20 According to William Schabas, "only about 20 lawyers with genuine legal education" remained when he visited Rwanda in November 1994. See Schabas (2005: 883).

21 The ICTR was established by the UN Security Council through SC Res. 955, 8 November 1994.

22 For example, in 2011 several professionals from the Dutch police, public prosecution office and judiciary visited Rwanda to give training, while a training week was organized in the Netherlands for Rwandan judges and prosecutors. Such trainings sought to increase the quality of the administration of justice and to ensure the independence of the judiciary. See State Secretary of Security and Justice, Rapportagebrief Internationale Misdrijven (reporting letter international crimes) 2011, 21 June 2012, No. 220338; State Secretary of Foreign Affairs, (Kamerstukken II 2011/12, 29237, no. 142, 17 November 2011).

and apprehension of the fugitives wanted by these two organizations.[23] In 2006, the Rwandan government issued a list of 193 fugitives wanted for genocide related crimes.[24] In addition to the Interpol project, the Rwandan National Prosecution Services also established its own Genocide Fugitive Tracking Unit (GFTU) in 2007, tasked with identifying the whereabouts of genocide suspects abroad, investigating allegations and cooperating with national prosecution services and international judicial bodies to either prosecute the accused domestically or extradite them to Rwanda.[25] European states continue to assist Rwanda in building up relevant expertise. The Netherlands, in particular, signed a letter of intent with the Rwandan government in 2010 which allowed the exchange of non-operational knowledge between Dutch and Rwandan public prosecution, judiciary and bar associations.[26] In 2012, the GFTU issued a list with names of more than 70,000 genocide fugitives who had been convicted by *gacaca* courts in absentia. The list, according to the government of Rwanda, includes a substantial number of the architects, planners and key organizers of the genocide.[27] By November 2012, the GFTU had transmitted 156 arrest warrants to 27 countries.[28] When Rwanda issued its first extradition requests to European states in 2007, the country showed *willingness* to identify and prosecute alleged perpetrators of international crimes living abroad.[29] A specially dedicated unit with good international contacts had the *ability to track down fugitives*, while a trained staff of prosecutors and judges had the *capacity and expertise to prosecute* possibly extradited persons. However, legal obstacles posed another obstruction to authorization of extraditions: *national extradition law requirements* and *human*

23 See Interpol, 'Operational Support', available online at <https://www.interpol.int/Crime-areas/War-crimes/Operational-support> (last visited 3 June 2015). See also: 'Tracking Genocide Fugitives Is A Priority – Interpol', New Times, 21 April 2014, available online at <http://www.newtimes.co.rw/section/article/2014-04-21/74730/> (last visited 25 May 2014).

24 See 'Interpol To Do More on Genocide Fugitives', The Rwanda Focus, 18 April 2014, available online at <http://allafrica.com/stories/201405010323.html> (last visited 25 May 2014).

25 REDRESS and African Rights, 'Extraditing Genocide Suspects from Europe to Rwanda. Issues and Challenges', September 2008, available online at <http://www.redress.org/downloads/publications/Extradition_Report_Final_Version_Sept_08.pdf> (last visited 25 May 2014), at 33. See also Permanent Secretary of Ministry of Justice Rwanda, 'Terms of Reference International Technical Advisor on Research. Case Investigations and Advocacy on Genocide Justice', November 2012, available online at <http://www.rw.undp.org/content/dam/rwanda/docs/operations/Procurement/Notices/RW_operations_procurement_ToRs_GFTU.pdf> (last visited 25 May 2014).

26 See State Secretary of Security and Justice and Minister of Immigration and Asylum, 'Rapportagebrief Internationale Misdrijven (reporting letter international crimes) 2010', 5 July 2011, No. 5702638/11.

27 See Permanent Secretary of Ministry of Justice Rwanda, *supra* note 25.

28 See 'Interpol Seeks Arrests of 130 Genocide Fugitives', New Times, 25 November 2012, available online at <http://www.newtimes.co.rw/section/article/2012-11-25/90528/> (last visited 25 May 2014).

29 We propose that the italicized terms are factors determining the likelihood of extraditions of individuals excluded under Art. 1F Refugee Convention; we will use these factors in the analysis in §4.3.

rights law requirements. Below, we will discuss how Rwanda and a number of European states eventually managed to comply with those requirements.

4.2.1. Requirements of national extradition law

The key principles governing extradition in most European states are those of sovereignty, reciprocity, specialty and double criminality. The principle of double criminality will be discussed below. The other principles play less of a role in Rwandan extradition cases. In short, the sovereignty principle entails that no state is bound to extradite, unless so agreed by treaty. Reciprocity means that extradition takes place on the premise that any future request will be respectively honoured in return. Specialty means that, as a rule, a person may only be prosecuted for the offences for which he has been extradited. Exceptions are also largely the same across Europe and include political offences, death penalty, discriminatory prosecution, hardship and double jeopardy.[30] In this section we will not discuss the various principles, laws and procedures in relation to all European states. Instead, we will focus our attention on the most prominent elements which actually barred the extradition of alleged Rwandan génocidaires.

Legal Basis

In most of the researched states, extradition takes place on the basis of an ad hoc agreement between requesting and requested state. Although national laws may provide for bilateral or multilateral extradition treaties, they only serve to regulate extradition in general terms while formalizing trust between two states in each other's criminal justice system. Treaties may also ensure that extradition is reciprocal by making it mandatory for both states to cooperate with one another's requests. However, in general, the existence of a treaty is not a requirement per se. For example, in the United Kingdom, the Foreign Secretary may enter into special arrangements with another state if no other extradition provisions exist to define the conditions under which extradition is to take place.[31] This was done in relation to four extradition requests made by Rwanda in 2006.[32] In France, Sweden, Finland and Germany, extradition in absence of a treaty is also permissible, although higher evidentiary standards than usual will apply in the last three countries mentioned.[33] The idea behind a higher standard of proof is that the absence of a treaty implies that there is less trust in the

30 For a more exhaustive discussion of the meaning of these principles and exceptions, see Van Sliedregt, Sjöcrona and Orie (2008: 155-165); Jones and Davidson (2008, 15 et seq.).

31 Section 194 Extradition Act 2003 (United Kingdom).

32 See REDRESS and African Rights, *supra* note 25, at 11, 19.

33 *Ibid*.

requesting state's judicial system. Contrary to other states, under Dutch constitutional law treaties alone may form the legal basis for extradition.[34] Notably, although a letter of intent to conclude an extradition treaty had been exchanged between the governments of the Netherlands and Rwanda,[35] no such treaty ever materialized. Instead, the Dutch government focused on amending its own extradition laws. Unlike the Extradition Act, which governs most extraditions, the War Crimes Surrender Act of 1954 (*Wet Overlevering inzake Oorlogsmisdrijven*, WCSA) already designated certain multilateral conventions as the constitutionally required treaty basis, if no bilateral treaty between the Netherlands and the requesting state otherwise existed. However, the application of the WCSA is limited in scope: originally, only crimes listed in the four Geneva Conventions and the Convention Against Torture (CAT) were subject to extradition to countries with which the Netherlands had not concluded an extradition treaty. Consequently, genocide and crimes against humanity were not included. In 2012, as part of a series of legislative reforms, the list of treaties in the WCSA was expanded to include the Genocide Convention.[36] In this way, the Netherlands created a legal basis for extraditing alleged génocidaires to Rwanda, without having to negotiate a treaty or circumvent the constitution.

Double Criminality and Retroactive Application of Criminal Law

The double criminality principle entails that the offence for which extradition is requested must have been criminalized in both the requesting and the requested state, at the time of the alleged perpetration of the offence. The principle protects the sovereignty of the requested state, especially in cases where a state is bound by a treaty to extradite, so that it does not have to cooperate with the prosecution of behaviour it does not consider criminally reprehensible.[37] It also aims to prevent circumvention of the legality principle by the requested state, and thus serves human rights interests as well (Van Sliedregt, Sjöcrona & Orie, 2008: 197). The double criminality principle has complicated extradition of Rwandan génocidaires in several ways.

34 *Ibid*., at 9; see Art. 2(3) Constitution of the Netherlands, Art. 2 Extradition Act. This, by the way, also applies to Belgium. See Art. 1 Belgian Extradition Act.

35 See 'Rapportagebrief Internationale Misdrijven 2010', *supra* note 26, at 7.

36 See Wet van 8 december 2011, Stb. 2011 605, which came into effect on 1 April 2012. However, crimes against humanity still were not included in the WCSA, because no international treaty which obliges states to prosecute or extradite crimes against humanity exists. See *Kamerstukken* II 2009/10, 32475, no. 3, published on 14 September 2010.

37 For example: abortions and prostitution.

A requested state is not obliged to cooperate with an extradition for a crime which was not criminalized in the requesting state at the alleged time of perpetration if that would violate the prohibition of retroactive application of criminal law as laid down in Article 7 European Convention on Human Rights (ECHR).[38] In its judgment of 26 February 2014, the Court of Cassation of France ruled that genocide had not been properly defined as a crime in the 1994 Rwandan criminal code. Accordingly, the Court held that extradition would be a violation of the legality principle and the prohibition of retroactive application of criminal law.[39] It should be noted that the Court's interpretation of the double criminality requirement is rather unique, as the ICTR has consistently ruled that Rwanda has proper jurisdiction.[40] The double criminality principle also demands that the act for which extradition is requested be criminalized in the requested state. In the past, this principle has complicated extradition of Rwandans as well. In *Ahorugeze v. Sweden* and other cases, Rwanda not only requested Sweden to extradite for genocide, but also for 'formation, membership, leadership and participation in an association of a criminal gang, whose purpose and existence were to do harm to people or their property'.[41] As the described conduct did not constitute an offence under Swedish law, the extradition request was only partially granted. This means that, pursuant to the specialty rule, Rwanda is precluded from prosecuting this particular conduct after the factual extradition takes place, even though the suspect is in its custody. In the United Kingdom, a temporal limitation applies to the criminality of the offence in the requested state. As the 1969 Genocide Act of the United Kingdom already criminalized genocide committed outside the United Kingdom, this element of the double criminality principle has, however, never barred extradition to Rwanda.[42]

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38 See Harris et al. (2009: 332, footnote 16). Although Art. 7(2) derogates from this rule, it is thought to apply to war crimes and crimes against humanity committed during or immediately after the Second World War. See *ibid*., at 338-339.

39 *Cour de Cassation, Chambre criminelle* (Criminal Chamber, Court of Cassation), 26 February 2014, ECLI:FR:CCASS:2014:CR00810.

40 See P. Bradfield, 'France vs The Rest of theWorld – Who Is Right?' Beyond the Hague blogpost 3 March 2014, available online at <https://beyondthehague.com/2014/03/03/800/> (last visited 25 May 2014); Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, Munyagishari (ICTR-2005-89-R11bis), Referral Chamber, 6 June 2012, paras. 9-10. Referral Chambers at the ICTR have confirmed repeatedly that Rwandan law prohibits genocide and crimes against humanity and may therefore prosecute for such crimes if cases are referred from ICTR. However, this discussion was mostly held as a jurisdictional issue within the context of Rule 11bis RPE ICTR, and not framed as a human rights issue. See also Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, Kanyarukiga (ICTR-2002-78-R11bis), Referral Chamber, 6 June 2008, para. 19; Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda, Hategekimana (ICTR-00-55B-Rule 11bis), Referral Chamber, 19 June 2008, para. 17.

41 *Ahorugeze v. Sweden*, para. 13.

42 Genocide Act 1969 (United Kingdom). For crimes against humanity, however, this problem may exist as it appears such conduct was not criminalized if committed outside the United Kingdom before 2001.

Unlike British law, the Dutch Supreme Court does not require that the conduct was criminalized under Dutch law at the time of the offence. Instead, it is sufficient for the conduct to be criminal at the time of request.[43]

4.2.2. Requirements of human rights law

In its famous judgment in *Soering v. UK*, the ECtHR held that a state party may be in breach of the Convention if it extradites a person to a state where he is likely to be subjected to treatment which is contrary to Article 3 ECHR (prohibition of torture, inhumane or degrading treatment) or, in exceptional cases, Article 6 ECHR (right to a fair trial).[44] Human rights concerns in relation to the Rwandan criminal justice system, have been numerous and have previously obstructed extraditions from France, United Kingdom, Germany, Finland and Switzerland.[45] The main issues included the possible imposition of the death penalty or life imprisonment in isolation; general conditions in detention and prison facilities; the inability of the defence to have witnesses from abroad testify in court; witness protection; the independence of the judiciary and the availability of legal aid. Concurrent to extradition proceedings in Europe, the ICTR has carried out its completion strategy. This included the referral of outstanding cases to Rwanda. Pursuant to Rule 11bis (C) ICTR Rules of Procedure and Evidence, a case may only be referred if the accused is likely to receive a fair trial and if the death penalty is excluded. Instead of giving diplomatic assurances, as is often the case with interstate extradition, Rwanda enacted legislation which abolished capital punishment altogether and aimed to guarantee a fair trial in 2007.[46] With the help of international aid, Rwandan prison conditions were improved and the judiciary trained (R2). Nevertheless, despite the above measures in 2008 the Tribunal was still not convinced that the Rwandan criminal justice system met international standards.[47] In the apparent belief that the Tribunal was best equipped to make such assessments, the requested European states and the ECtHR largely follow the assessment of the ICTR with regard to the human rights situation in Rwanda from 2008 onwards. In this section we therefore

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43 Supreme Court of the Netherlands, 20 May 2003, ECLI:NL:HR:2003:AF1909. This case concerned the transfer of a convicted person to serve his sentence in the Netherlands, however it is likely to apply mutatis mutandis to extradition cases. See Van Sliedregt, Sjöcrona, and Orie (2008: 197).

44 *Soering v. United Kingdom*, ECtHR (1989) Series A, No. 14038/88, 7 July 1989, paras. 88 and 113 (hereinafter '*Soering v. United Kingdom*').

45 These cases are mentioned in the introduction.

46 Organic Law No. 31/2007 of 2007 Relating to the Abolition of the Death Penalty (Rwanda), 25 July 2007; Organic Law No. 11/2007 of 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States (Rwanda), 16 March 2007.

47 Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, Munyakazi (ICTR-97-36-R11bis), Trial Chamber, 28 May 2008, para. 32.

first analyse ICTR case law on this issue, before discussing the case law of some European states and the landmark ECtHR judgment in *Ahorugeze v. Sweden*.

ICTR Case Law

In 2008, an ICTR Trial Chamber denied the referral of a case to Rwanda. Although the Chamber was satisfied that Rwanda would not impose the death penalty, it held that the alternative sentence of life imprisonment spent in isolation remained an unacceptable possibility.[48] Secondly, because the competent court would try the accused with only a single judge, the Chamber was concerned that the court would be susceptible to undue governmental influence. The ICTR based this concern on the aggressive reaction of the Rwandan government towards the release of Jean-Bosco Barayagwiza on fair trial grounds by the Appeals Chamber. Investigations undertaken against Rwandan Patriotic Army officers by prosecutors and investigating judges in Europe were also met with strong criticism from Rwandan authorities.[49] Thirdly, the Trial Chamber was concerned that the defence would not be able to call witnesses in the same fashion as the prosecution would, which was an equality of arms problem. In particular, the Chamber questioned the protection of witnesses against intimidation, abuse and even killing, and expressed its concerns over cases in which defence witnesses were indicted for promoting 'genocidal ideologies' in court.[50] The Chamber was also concerned that Rwanda did not take the necessary steps to secure the attendance of witnesses from abroad or cooperate with other states for the purposes of testimony through video-link. In this respect the Chamber furthermore held that testimony delivered by witnesses from abroad through video-link may disadvantage the defence, as the prosecution, contrary to the defence, would in most cases be able to have its own witnesses testify viva voce in the courtroom.[51] In a ruling later that year, the Appeals Chamber upheld the objection regarding the possibility of a life sentence spent in isolation.[52] However, it overturned the Trial Chamber's finding that Rwanda did not respect the independence of the judiciary. According to the Appeals Chamber the evidence of government influence was not sufficient and the Trial Chamber, erroneously, had not taken the availability of monitoring and revocation procedures into account.[53] With regard to equality of arms issues the Appeals Chamber was satisfied that Rwanda had undertaken

48 *Ibid*., para. 32.

49 *Ibid*., paras. 41-44.

50 *Ibid*., paras. 60-63.

51 *Ibid*., paras. 64-65.

52 *Ibid*., para. 20.

53 *Ibid*., paras. 22-30.

steps to make video-link sufficiently available to have witnesses testify from abroad. However, it agreed with the Trial Chamber that equality of arms was still not guaranteed if the majority of defence witnesses testified through video, while the majority of prosecution witnesses could testify in person.[54] In its decision in Kanyarukiga of the same year, the Appeals Chamber found that there were reports of witnesses who had faced threats, beatings, torture, arrests, detentions and killings. Regardless the veracity of these reports, the Chamber found that such reports could affect witnesses' willingness to testify, and thereby the right of the defendant to a fair trial.[55] To satisfy all these objections, Rwanda amended the transfer law so that life imprisonment in solitary confinement would not be imposed. In addition, the witness protection programme was improved with new legislation and expanded with various new witness units under the authority of the courts, rather than the Ministry of Justice, as was previously the case.[56] In 2011, the Referral Chamber finally approved a first referral.[57] It was satisfied with the reforms made and observed that in 36 recent genocide cases tried before Rwandan courts, almost all defence teams were able to secure attendance of witnesses.[58] The Chamber acknowledged that fears may still be present among witnesses, but found that the new laws should be 'given a chance to operate before being held to be defective'.[59] Concerns regarding equality of arms in relation to witnesses testifying through video-link from abroad were largely dismissed, since judges were now deemed able to travel abroad to hear the witnesses. Before finally authorizing the referral, the Chamber noted the availability of monitoring mechanisms and the possibility for the ICTR to revoke the transfer if no longer satisfied of a fair trial.[60] It should be noted that the ICTR had been facing strong pressure by the Security Council to finish the completion strategy for quite some time when the first referral was approved. In light of this, the weight that was given to the availability of a revocation mechanism is not entirely proper as the ICTR and its successor Mechanism for International Criminal Tribunals (MICT) would have to withstand strong political resistance if it would actually revoke a referral.

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54 *Ibid*., para. 42.

55 Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, Kanyarukiga (ICTR-2002-78-R11bis), Trial Chamber, 30 October 2008, § 35.

56 Decision on Prosecutor's Request For Referral To The Republic Of Rwanda, Uwinkindi (ICTR-2001-75-R11bis), Referral Chamber, 28 June 2011, paras. 51 and 60.

57 *Uwinkindi*, *supra* note 56. The Decision was upheld on appeal, see: Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions, Uwinkindi (ICTR-2001-75-R11bis), Appeals Chamber, 16 December 2011.

58 *Ibid*., paras. 99-100.

59 *Ibid*., para. 103.

60 *Ibid*., paras. 109-113.

ECtHR and National Case Law

Having discussed the human rights issues surrounding referrals from the ICTR to Rwanda, we turn to the case law of the ECtHR and national courts in respect of extradition to Rwanda. At the outset, it should be noted that, in theory, the human rights protection offered by the ICTR differs somewhat from the human rights obligations of European states. As noted, pursuant to Rule 11bis (C) ICTR Rules of Procedure and Evidence, the Tribunal needs to be satisfied that the accused will receive a fair trial upon transfer. Pursuant to settled ECtHR case law, the extraditing state is only in violation of the ECHR if the individual who is to be extradited would risk a 'flagrant denial' of justice in the requesting country.[61] According to *Ahorugeze v. Sweden* 'a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself'. In other words, similar to the ICTR, a state party to the Convention must offer the full range of rights as laid down in Article 6. However, unlike the ICTR, if a state party extradites rather than prosecutes, the ECHR does not impose a duty upon the extraditing state to ensure that the extradited person enjoys all fair trial rights in the requesting state which he would be entitled to if the extraditing state chose to prosecute instead. Only the most serious denials of justice, which the court does not define, are an issue under ECHR law. Concerns over Rwandan prison conditions and the death penalty fall under the absolute prohibitions of Article 3 ECHR, which, contrary to Article 6 rights, permit no derogation. In theory, no difference between ICTR and ECHR standards exists.[62] Notwithstanding different fair trial standards, it would appear that most European national governments/courts fully relied on the ICTR's assessment of the human rights situation in Rwanda when examining extradition requests. For example, between 2008 and 2010 the Frankfurt Appeals Court and various French courts denied extraditions citing the ICTR's jurisprudence on fair trial rights.[63] In 2009, the Finnish Ministry of Justice denied an extradition request, reasoning that Finland had committed itself to conduct fair trials by acceding to the ECHR and that it thus could not cooperate with requests which raised justified concerns as to whether the trial would be conducted in a fair manner.[64] Finally, the Oslo District Court accorded extradition to Rwanda in 2011, citing the *Uwinkindi*

61 *Ahorugeze v. Sweden*, para. 113; *Soering v. the United Kingdom*, paras. 89-91, and *Mamatkulov and Askarov v. Turkey [GC]*, Appl. Nos 46827/99 and 46951/99, ECHR 2005-I, 4 February 2005, para. 67.

62 *Soering v. the United Kingdom*, paras. 90-91, *CruzVaras and Others v. Sweden*, ECtHR, 20 March 1991, Series A No. 201, paras. 69-70; *Chahal v. the United Kingdom*, ECtHR,15 November1996, Reports of Judgments and Decisions 1996-V, paras. 79-80.

63 *Ahorugeze v. Sweden*, paras. 62-64.

64 *Ibid*., para. 65.

decision and Norway's own experience with the Rwandan criminal justice system.[65] *Ahorugeze v. Sweden* thus far has been the only published case concerning extradition to Rwanda to appear before the ECtHR. This 2011 judgment focused on Articles 3 and 6 ECHR. The Court was brief on the Article 3 complaints. Since the ICTR, the Special Court of Sierra Leone (which uses a Rwandan prison to have convicts serve their sentence), the government of the Netherlands and the Oslo District Court all found that the detention and prison facilities where the transferred and extradited defendants are to be detained are up to international standards, the Court was satisfied that there was no risk of torture or ill-treatment. Ahorugeze's complaints in relation to Article 6 focused on the lack of a proper witness protection system and the lack of qualified lawyers in Rwanda. He also questioned the independence of the Rwandan judiciary. With regard to witness availability, the ECtHR noted the recent improvements made to the witness protection program and video link technology and readily dismissed the complaint. The Court also held that legal assistance would be sufficiently available and concluded that the criminal justice system operates sufficiently independently; again, by relying on the assessments of the ICTR, the Netherlands and Sweden. In obiter, the Court held that an invitation by Rwanda to monitor the proceedings was superfluous. Accordingly, the Court dismissed all fair trial complaints, and paved the way for future extraditions to Rwanda.

4.3. Factors determining the likelihood of future extraditions of excluded asylum seekers residing in the Netherlands

The above shows that Rwanda – in close cooperation with the international community – has taken many steps before successfully requesting extradition of alleged génocidaires from Europe. Extradition to Rwanda would never have become possible if Rwanda had not been willing to prosecute alleged perpetrators of genocide, developed the capacity and expertise to prosecute international crimes, invested in the ability to trace alleged perpetrators abroad, and if European countries and Rwanda had not initiated reforms to comply with national extradition law and human rights requirements. One of the states that played a significant role in this process has been the Netherlands, as it was an important contributor in strengthening the Rwandan criminal justice system (R1, R2).[66] Indeed, some of the investments by the Dutch government have resolved human rights concerns which had previously obstructed extradition. For example, in 2004, the Dutch government invested seven million dollars in constructing a model detention facility which would later become the main detention and prison facility for the transferred and

65 *Ahorugeze v. Sweden*, paras. 72-74.

66 State Secretary of Security and Justice to parliament, Letter of 31 January 2014, No. 477611, at 1.

extradited suspects.[67] The Netherlands also financed trainings for the judiciary and the fugitive tracking unit (R1, R2). As mentioned earlier, the Dutch State Secretary of Security and Justice argued that these Dutch efforts aimed to increase the possibilities for extradition and transfer of criminal prosecution for international crimes.[68] The State Secretary mentioned that the Ministries of Security and Justice, and of Foreign Affairs, invested in building the rule of law in Rwanda to ensure that 'a good and careful cooperation regarding extradition remains intact' and contends that a similar approach is pursued for excluded refugees from other states.[69] This leads to the question how likely it is that individuals excluded under Article 1F of the Refugee Convention from other countries will indeed in the near future also be extradited by the Netherlands. Focusing on the same elements as discussed above, in the remainder of the chapter we assess the likelihood of extradition of Article 1F non-Rwandan excluded individuals residing in the Netherlands. Acknowledging that more factors may be relevant in making such an assessment, this explorative exercise should be seen as a first step in developing a more thorough understanding of the challenges and possibilities related to (facilitating) the extradition of Article 1F-excluded individuals.

Characteristics of excluded asylum seekers in the Netherlands

Exclusion on the basis of Article 1F of the Refugee Convention is based on the threshold of 'serious reasons for considering' that someone committed any of the crimes listed in the provision. As this threshold is lower than the threshold for a criminal conviction, the statement of an asylum seeker that he has worked for a certain unit or organization may suffice, if 'authoritative reports' confirm that this unit or organization may have been responsible for international crimes at the time of

67 During trial, the accused are detained in Kigali Central Prison. See Decision On Prosecutor's Request For Referral To The Republic Of Rwanda, Uwinkindi (ICTR-2001-75-R11bis), Referral Chamber, 28 June 2011, para. 59. On Mpanga, see 'Mpanga, A Stronghold for the UN in Rwanda', RNW, 5 May 2008, available online at <https://www.justicetribune.com/articles/mpanga-stronghold-un-rwanda> (last visited 4 January 2014). To meet international standards, the Mpanga prison was partially reconstructed in 2008. Eight convicts of the Special Court for Sierra Leone currently serve their sentence in Mpanga; see 'SCSL: Convicts Serve Time in Rwanda', RNW, available online at <http://www.rnw.nl/international-justice/article/scsl-convicts-serve-time-rwanda> (last visited 4 January 2014). The two ICTR detainees who were transferred to Rwanda (Uwinkindi and Munyagishari), as well as Ahorugeze, Bandora and Emmanual Mbarushimana, were to serve their sentence in the special section of Mpanga. See Uwinkindi, ibid., paras. 52, 60; Tingrett (District Court) Oslo, 11 July 2011, 11-050224ENE-OTIR/01, at 13; Ahorugeze v. Sweden, para. 24; Højesterets Kendelse, supra note 10.

68 State Secretary of Security and Justice, *supra* note 13.

69 *Ibid*., at 6-8. One of our respondents (R2) disputes that Foreign Affairs investments in strengthening the Rwandan justice sector, in the context of development cooperation, should be seen in this light. He argues that these investments are first and foremost done to strengthen the rule of law in general, and that the fact that these investments may have promoted extradition is merely a side effect.

his employment.[70] In the Netherlands, Article 1F has been invoked against 870 persons between 1992 and 2013.[71] A total of 745 of those were excluded between January 2000 and November 2010. Our file analysis shows that the majority of excluded individuals in the Netherlands comes from Afghanistan (448 individuals), followed by Iraq (62), Angola (26), Democratic Republic of the Congo (23), Sierra Leone (20), the former Yugoslavia (20),Turkey (18) and Iran (17).With 12 excluded individuals, Rwanda ranks ninth in our database.[72] Nigeria completes the so-called 'top ten', with 11 excluded individuals. The remaining 88 individuals come from 28 other countries. The majority of individuals are excluded on the basis of Article1F(a), which concerns genocide, crimes against humanity, war crimes and crimes against peace. The over-representation of Afghans can – apart from a relatively large influx of Afghans to the Netherlands – be explained by the policy of categorical exclusion, which means that for some nationalities mere association with a certain position within a designated organization suffices as a basis for exclusion. The largest group to which this categorical exclusion applies are people who held military ranks of non-commissioned officers or higher within Afghan communist security services (Reijven & Van Wijk, 2014a). Excluded Afghans are typically associated with crimes committed in the 1980s. A similar type of categorical exclusion applies to Iraq, namely for high officials of the former Iraqi security services.[73] The last group to which a categorical exclusion applies are corporals and non-civilian leaders of the Sierra Leonean Revolutionary United Front (RUF).[74] Falling outside a categorical policy, the excluded Angolans are typically believed to have committed war crimes in the 1990s while fighting for either government or rebel forces. The same generally applies for excluded individuals from the Democratic Republic of the Congo (DRC), Sierra Leone and the former Yugoslavia. Turks and Nigerians form an exception, as they are often solely excluded on the basis of Article 1F(b): Turks because of suspected links with organizations designated as 'terrorist' by the Turkish government, such as Dev Sol or the Kurdistan Workers' Party (PKK); Nigerians, because they are believed to have committed serious crimes as members of radical occult or religious groups, such as the 'Egbesu Boys' and Ijaw youth groups. In conclusion, excluded individuals from Iran are typically excluded because they allegedly contributed to crimes against humanity in their capacity as employees of secret services or prison security.

70 See Chapter 5.

71 State Secretary of Security and Justice, *Kamerstukken* 2013/14, 19637, no. 1808, 14 April 2014, at 14.

72 As is the case with other countries, this number may be higher by now. Particular to Rwanda, however, is that the IND in 2008 started reassessing all asylum and regular permit requests on the basis of new information stemming from *gacaca* courts and the ICTR; see State Secretary of Security and Justice, *supra* note 66, at 3.

73 *Kamerstukken* II 2003/04, 19637, no. 811, 8 April 2004.

74 *Kamerstukken* II 2003/04, 19637, no. 829, 23 June 2004.

1. Willingness to Prosecute Article 1F Related Crimes

Without (political) willingness to domestically prosecute alleged perpetrators, a state is unlikely to request the extradition of excluded individuals. A quick scan of the countries appearing in our dataset suggests that many current administrations of the top ten countries lack such willingness. In 2008, Afghanistan provided a blanket amnesty for all parties in the conflicts of the past three decades (Kouvo & Mazoori, 2011: 495). Similarly, as part of a peace deal, Angola provided unconditional amnesty for all crimes committed during its thirty years of civil wars (Van Wijk, 2012). In Iraq, the establishment of the Iraqi High Tribunal may show that there has been willingness to prosecute international crimes, but its activities have been limited to prosecuting Saddam Hussein and a few other senior Ba'athists. The same goes for Sierra Leone. The Special Court for Sierra Leone has prosecuted a number of high level perpetrators, but the current government does not seem willing to do so with the scores of low level perpetrators who remain unpunished. To them an amnesty applies (Hayner, 2007). Sierra Leona and Iraq highlight another important caveat. Willingness to prosecute certain high level perpetrators does not necessarily imply an interest to prosecute the predominantly low level alleged perpetrators who are excluded in the Netherlands. Our analysis shows that most excluded from Sierra Leone, Angola, DRC, Nigeria and Iran are anonymous foot soldiers or bureaucrats. The top ten country most willing to prosecute – high as well as low level – excluded individuals residing in the Netherlands is probably Turkey. Over the years, Turkey has sought extradition of many alleged terrorists living in Europe.[75] The same goes for Bosnia-Herzegovina and Croatia, which in recent years requested the extradition of several alleged war criminals around the world.[76]

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75 See 'Turkish PM Increases Pressure on EU to Extradite PKK Members', European Forum, 1 November 2012, available online at <http://www.europeanforum.net/news/1547/turkish_pm_increases_pressure_on_eu_to_extradite_pkk_members> (last visited 25 May 2014) 'Turkey Calls on France, Spain to Extradite 20-plus PKK Members', Press TV, available online at <http://en.trend.az/azerbaijan/politics/2119843.html> (last visited 25 May 2014).

76 See e.g. the cases of Dragan Vasiljković (TRIAL, 'Dragan Vasiljković', available online at <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/478/action/show/controller/Profile/tab/legal-procedure.html> (last visited 25 May 2014); Gojko Eror ('Gojko Eror Extradited to Croatia', Independent Balkan News Agency, 24 March 2014, available online at <http://www.balkaneu.com/gojko-eror-extradited-croatia/> (last visited 25 May 2014)); Milutin G. ('Kroatië Stopt Vervolging van Roosendaalse "Oorlogsmisdadiger"', BN De Stem, 3 May 2014, available online at <http://www.bndestem.nl/regio/roosendaal/kroati%C3%AB-stopt-vervolging-van-roosendaalse-oorlogsmisdadiger-1.4342712> (last visited 25 May 2014)); Radomir Šušnjar, ('Visegrad Mass Killing Suspect Arrested in France', Balkan Investigative Reporting Network (BIRN), 4 April 2014, <http://www.balkaninsight.com/en/article/radomir-susnjar-arrested-in-france> (last visited 25 May 2014)) and Milan Martić ('Zagreb Demands Wartime Croatian Serb Leader's Extradition', BIRN, 14 July 2014, available online at <http://www.balkaninsight.com/en/article/zagreb-demands-wartime-croatian-serb-leader-s-extradition> (last visited 17 July 2014)). On 8 May 2014, two Bosnian nationals, one of whom also has the Dutch nationality, were arrested in the Netherlands (see 'Politie Pakt Twee Man uit Bosnië Op in Nederland om Oorlogsmisdaden', NRC, 8 May 2014, available online at <http://www.nrc.nl/nieuws/2014/05/08/politie-pakt-twee-man-uit-bosnie-op-in-nederland/> (last visited 8 May 2014). Since the publication of the article on which this chapter is based, it has turned out that one of them, Damir L., who had a permanent residence permit in the Netherlands, was indeed extradited to Bosnia-Herzegovina on 4 November 2015, where he was also convicted to a 7-year prison sentence for war crimes; see <https://www.om.nl/onderwerpen/kopie-international/rechtszaken-per-land/bosnie/> (last visited 7 November 2017); District Court of The Hague, ECLI:NL:RBDHA:2014:17274, 5 November 2014; Supreme Court of the Netherlands, ECLI:NL:HR:2015:1760, 30 June 2015.

2. Capacity and Expertise to Prosecute the Alleged Crimes Domestically

Apart from showing a clear willingness to prosecute international crimes domestically, countries also need to have the capacity and expertise to do so. Firstly, this implies that there is a functioning criminal justice system which has the capacity to investigate, prosecute and try crimes. In the direct aftermath of war this may be problematic, as already noted with respect to Rwanda. In particular, the two countries that have generated the majority of excluded individuals (Afghanistan and Iraq) face ongoing security issues, which inevitably affect the functioning of the criminal justice system. In Afghanistan, after the Taliban regime was overthrown in 2001, power was distributed among factional commanders; as a result, corruption, organized crime and religious and ethnic divisions have led to destabilization and re-emergence of conflict (Kouvo & Mazoori, 2011: 493), making 2011 and 2013 the most violent years since 2001.[77] In Iraq, the normal functioning of the criminal justice system has continuously been hindered by a high level of terrorist and insurgency attacks, which are often also directed at policemen and judges (Christova, 2013: 430). The recent invasion of the Islamic State (IS) – reportedly responsible for killing the judge who sentenced Saddam Hussein – has only complicated matters in this regard.[78] Moreover, it has to be taken into account that the prosecution of Article 1F related crimes is even more challenging than prosecuting conventional crimes. International crimes trials in particular are incredibly complex – both in legal and in practical terms. For this reason some countries have concentrated the required knowledge in specialized investigative and judicial bodies.[79] As happened in Rwanda, international donors have contributed to the establishment of organs for war crimes investigations and criminal proceedings in some of the top ten countries, such as Bosnia-Herzegovina, Croatia and Serbia.[80] The Iraqi High Tribunal (IHT) has also been politically and financially supported by international donors, in particular by the United States (Scharf, 2007: 259). However, while the domestic prosecution of

77 The Situation in Afghanistan and its Implications for international Peace and Security, Report of the Secretary-General, UN Doc. A/68/789-S/2014/163, 7 March 2014, para. 14.

78 See 'Murder of Saddam's Judge Brings Iraq Closer to the Brink', New York Post, 23 June 2014, available online at <http://nypost.com/2014/06/23/saddam-judges-slay-brings-iraq-closer-to-brink/> (last visited 15 August 2014).

79 See Chapter 5.

80 See ICTY, 'Development of the Local Judiciaries', available online at <http://www.icty.org/sid/10462> (last visited 20 May 2014).

war criminals got off the ground in the former Yugoslavia,[81] this cannot be said about Iraq. Although the IHT proceedings after the trial of Saddam Hussein did show that it had capacity and expertise to try complex cases, numerous other problems made it dysfunctional; this, and a lack of broader international involvement have hampered its functioning.[82] In all likelihood related to the lack of willingness to prosecute such crimes, other top ten countries – for example, Angola, Sierra Leone and Iran – are not known to have specific expertise to successfully prosecute international crimes. The recent upheaval about three detained witnesses at the International Criminal Court (ICC) illustrates the ill-functioning of the Congolese criminal justice system in dealing with international crimes. Before testifying in 2011, two witnesses had been detained in DRC in connection with allegations of war crimes for over six years. Although DRC demonstrates willingness to prosecute – certain – suspects of international crimes, it is generally acknowledged that it currently lacks capacity and expertise to properly do so.[83] Since its government in 2013 noted the importance of establishing 'specialized mixed chambers' to deal with war crimes, this may, however, change in the near future.[84] Although individuals from Turkey and Nigeria are mostly believed to have committed acts of terrorism rather than core international crimes, prosecution would also demand considerable expertise and knowledge. One of our experts (R2) was convinced that as soon as a country showed a sincere willingness to domestically prosecute international crimes, international donors would be prepared to fund such initiatives. The cause of pursuing accountability for international crimes is considered prudent and related investment leads to measurable output: convictions and acquittals. Arguably, however, financial support can more easily be mobilized when there is a strong international outrage regarding the alleged crimes, such as Rwanda, the former Yugoslavia and Sierra Leone, than when it concerns, what Baines calls, 'complex political perpetrators' such as members of the Kurdish independence movement or Iranian secret service defectors (Baines, 2009).

81 Although the domestic war crimes courts in Bosnia-Herzegovina, Croatia and Serbia are regularly criticized for e.g. their selectivity, low number of prosecutions or lack of political and popular support, the number of cases handled by these courts is substantial. The Organization for Security and Co-operation in Europe (OSCE) concluded in a 2011 report that in Bosnia-Herzegovina, '[o]verall, the state level institutions have delivered efficient, fair, and human rights compliant proceedings' and that 'certain courts and prosecutor's offices [on the regional/local level] demonstrated ample capacity, willingness, and professionalism to fairly and efficiently process war crimes cases, free of any indication of ethnic bias, although problems remain with some courts and prosecutor's offices.' See OSCE, 'Delivering Justice in Bosnia and Herzegovina', May 2011, available online at <http://www.osce.org/bih/108103?download=true> (last visited 19 August 2014), at 7.

82 See S. Sceats, 'The Iraqi High Tribunal Post-U.S. Involvement', Opinio Juris blogpost, 30 April 2008, available online at <http://opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement/> (last visited 19 August 2014).

83 See Human Rights Watch, 'Accountability for Atrocities Committed in the Democratic Republic of Congo', 1 April 2014, available online at <https://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo> (last visited 15 August 2014).

84 *Ibid*.

3. Ability to Trace Alleged Perpetrators Living Abroad

Establishing to what extent governments have the ability to trace wanted individuals living abroad is extremely challenging. Some countries undoubtedly have their intelligence services searching for fugitives abroad, but it is in the nature of such operations that information on such activities is not publicly available. The little we can establish, however, is that apart from Rwanda, Bosnia-Herzegovina, Croatia and Serbia, the rest of the top ten countries are not known to have units specialized in tracking international crimes suspects which share and discuss lists of fugitives with Interpol and national investigative bodies. As for Turkey, one of the few top ten countries likely to be interested in its Article 1F-excluded nationals in the Netherlands, recent allegations that its secret services ordered the killing of three PKK activists in Paris in 2013 are likely to complicate matters of exchanging information with European counterparts.[85]

4. National Extradition Law Requirements

Dutch law requires that extraditions can only occur on the basis of a (bi- or multilateral) treaty. Of the top ten countries of origin, Bosnia-Herzegovina, Croatia, Serbia and Turkey are party to the (multilateral) European Convention on Extradition. No bilateral treaty has been concluded between The Netherlands and any of the other top ten countries.[86] This means that for these countries, extradition can only take place on the basis of the multilateral treaties mentioned in Article 1(2) of the War Crimes Surrender Act and only since amendments to the Act came into force on 1 April 2012.[87] These amendments have made extradition for genocide, war crimes and torture possible. However, crimes against humanity as yet do not fall under these treaties. In so far there is no overlap with any of the other international crimes listed, this will continue to be a problem. For Afghans excluded in the Netherlands, this means that crimes against humanity such as rape, murder and persecution are not grounds for extradition. Other crimes that do not fall under these treaties include those mentioned in Article 1F(b), serious non-political crimes. This means, for example, that a treaty basis for the extradition of all 11 Nigerians in our dataset is currently lacking. Above, we indicated that countries which emerged from the former Yugoslavia and Turkey have requested the extradition of individuals suspected of committing international or serious non-political crimes in the sense

85 See 'Paris Investigation: Tensions Grow over Murder of Kurdish Activists', Spiegel Online International, 12 February 2014, available online at <http://www.spiegel.de/international/europe/suspicions-grow-of-turkish-involvement-in-murder-of-pkk-activists-a-952734.html> (last visited 20 May 2014).

86 See the Dutch Ministry of Foreign Affairs' treaty database, available online at <https://verdragenbank.overheid.nl/> (last visited 19 August 2014).

87 See *supra* note 36.

of Article 1F in the past.[88] Of these, only the Bosnian request for Senad A. has so far been approved and effected.[89] A Croatian and a Turkish request were both rejected on the ground that the double criminality requirement was not satisfied. Croatia was seeking extradition for the execution of a sentence imposed in absentia for war crimes. The Dutch court ruled that the Croatian verdict did not sufficiently substantiate the conclusion that the suspect's behaviour satisfied the relevant provisions of Dutch war crime law.[90] In the Turkish case, the court was not convinced that the requested accused participated in a 'criminal organization' in the sense of the Dutch Criminal Code, but rather merely participated in political protests.[91] In two other Turkish cases, extradition was judged inadmissible due to the political offender exemption. In both of these cases, the courts deemed the crimes to be of a political character.[92]

5. Human Rights Law Requirements

States that are party to the ECHR or an extradition treaty with the Netherlands, generally enjoy the benefit of the doubt when it comes to their respect for human rights. The request for the extradition to Bosnia-Herzegovina of Senad A. was approved on the basis of the principle of mutual trust and because the requested person had access to an effective remedy if his right to a fair trial was compromised.[93] Apart from countries which emerged from the former Yugoslavia and Turkey, however, there is no legal basis for mutual trust with any of the other top ten countries, nor do these countries fall under the supervision of the ECtHR. It is likely that extradition requests from these countries will be received with suspicion because of human rights concerns. As was the case with Rwanda, this could mean that these states would need to change laws (abolish the death penalty or life imprisonment in isolation), build new prisons, or train judges and prosecutors to foster an independent, non-corrupt and impartial judiciary. However, in specific cases, even with countries whose criminal justice system is generally trusted

88 Which not necessarily means that the requested persons were all excluded on the basis of Art. 1F Refugee Convention.

89 District Court of The Hague, 22 April 2010, ECLI:NL:RBSGR:2010:BM2047. Senad A. was, after his extradition, convicted to an eight-year prison sentence in Bosnia in May 2011. See Openbaar Ministerie (Public Prosecution Office of the Netherlands), Bosnia-Herzegovina, available online at <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/bosnia-herzegovina/> (last visited 3 October 2017).

90 District Court of Leeuwarden, 3 September 2008, ECLI:NL:RBLEE:2008:BG2721 (Ranko Š.). The case was also dismissed because original copies of the verdict and arrest warrant were not provided.

91 District Court of The Hague, 4 July 2006, ECLI:NL:RBSGR:2006:AY9726.

92 Supreme Court of the Netherlands), 17 April 2007, ECLI:NL:HR:2007:BA1764; Supreme Court of the Netherlands, 9 October 2012, ECLI:NL:PHR:2012:BX6945 (Abdulvahap E.).

93 See *supra* note 89.

extradition might be denied because of human rights concerns. A notable case concerns PKK leader Nuriye Kesbir. Although her extradition had initially been approved in 2004,[94] the Dutch Supreme Court, in 2006, decided that extraditing her would constitute a 'wrongful act' because the Turkish assurances that Article 3 ECHR would not be violated were too broadly formulated.[95] In a case against another PKK leader, Hasan Adir, the extradition request was deemed inadmissible, partly because the suspect had already been convicted and completed a sentence for the alleged crimes, and partly because the court established that he had been tortured during his detention.[96] Having a bilateral treaty and being party to the ECtHR, in other words, is no guarantee that extradition of excluded individuals will be authorized.[97]

4.4. Conclusion

Extradition or transfer of individuals who are excluded on the basis of Article 1F of the Refugee Convention may appear to be an attractive alternative to prosecution on the basis of universal jurisdiction. The Netherlands has even aimed to strengthen the criminal justice sector in countries of origin in order to facilitate the extradition of alleged perpetrators residing in the Netherlands. Since 1992, however, the Netherlands has extradited and transferred only four out of 1.000 1F-excluded individuals: two 1F-excluded individuals were extradited to Rwanda (Jean Baptiste M. and Jean-Claude I.) and two individuals were transferred to an international court, the ICTR (Simon B. and Ephrem S.). The number of 1F-excluded individuals that has been extradited or transferred thus represents only 0,4 percent of the total number of 1F-excluded individuals in the Netherlands.

This chapter described the numerous essential steps taken before Rwanda could successfully request extradition of alleged génocidaires from Europe, including the extradition of Jean Baptiste M. and Jean-Claude I. from the Netherlands. Rwanda has always been willing to prosecute alleged perpetrators of the genocide, but also developed the capacity and expertise to prosecute international crimes in addition to investing in the ability to trace alleged perpetrators abroad; while European countries and Rwanda have both initiated reforms to comply with national extradition law requirements and human rights law requirements. We argued that it is not likely

94 Supreme Court of the Netherlands, 7 May 2004, ECLI:NL:HR:2004:AF6988.

95 Supreme Court of the Netherlands, 15 September 2006, ECLI:NL:PHR:2006:AV7387.

96 District Court of Roermond, 26 March 2010, ECLI:NL:RBROE:2010:BL9029.

97 Apart from the cases mentioned here, more extradition requests brought to Dutch courts may have been declined because of human rights law requirements; we have limited ourselves here to requests made by the countries of origin in the dataset.

that many other (post-conflict) countries will, in the near future, successfully request the extradition of Article 1F-excluded persons residing in the Netherlands. Most countries producing Article 1F-excluded individuals seem to lack the political willingness – and the corresponding capacity and ability – to locate and domestically prosecute the type of alleged perpetrators residing in the Netherlands. For those willing, such as Turkey, serious challenges exist in relation to extradition law and human rights law requirements. The countries which emerged from the former Yugoslavia seem to be the exception. With willing governments and capable criminal justice systems Bosnia-Herzegovina, Croatia and Serbia are – next to Rwanda – the most likely to successfully request the extradition of Article 1F-excluded individuals residing in the Netherlands in the future. This is no coincidence. The international community not only invested substantially in the ICTY and ICTR, but also in the infrastructure which enables domestic prosecution in these countries. In all of these countries, many reforms were driven by the fact that the ad hoc tribunals, as part of their completion strategy, wanted to refer outstanding cases to the respective national jurisdictions. We conclude that it is possible to facilitate and promote extradition of Article 1F-excluded asylum seekers under certain circumstances. However, states hosting suspects of international crimes can only influence these circumstances to a limited extent. When (post-conflict) countries wish to prosecute international and serious crime, the international community could by means of capacity building, training and financial input create a situation in which extradition stands a chance of success. On the other hand, the findings also suggest that the Rwandan case is rather exceptional. In Rwanda, prosecuting perpetrators of international crimes was intrinsically motivated; soon after the 1994 genocide, the Rwandan government itself strongly pushed for domestic prosecution of its Hutu génocidaires. Similarly, the Turkish government has been keen to prosecute terrorism; however, these prosecutions are not broadly supported outside Turkey. Like in Rwanda, prosecuting perpetrators of international crimes in states which emerged from the former Yugoslavia may have been intrinsically motivated, but exogenous factors, like the perspective of accession to the European Union, may have been equally important. The question arises which other 'weak' states will be intrinsically interested in receiving assistance to strengthen the rule of law and to file a substantial number of extradition requests in relation to Article 1F-excluded asylum seekers in the foreseeable future. The above also leads to more questions. Although extradition from the Netherlands to Rwanda has turned out to be possible, and although Rwandan prosecutors and judges may have the capacity and expertise to deal with international crimes, it is not clear to what extent the Rwandan judicial

system is indeed capable of rendering an independent and impartial trial.[98] While the ICTR installed trial monitoring to ensure a fair trial in the cases it referred to Rwanda, the ECtHR did not impose monitoring as a precondition for the extradition of Ahorugeze, despite an invitation of the Rwandan government to do so.[99] The Dutch State Secretary of Security and Justice, who finally decides on extradition requests, did not intend to have the trial of Jean Claude I. monitored either.[100] What will happen if the trials of those extradited from the Netherlands – or any other European country – turn out to be unfair? Unlike the ICTR under Rule 11bis(F) ICTR Rules of Procedure and Evidence, national governments have no means to take back a case from another sovereign state. Another practical issue is who will pay the costs of the extradited persons' defence lawyers. They have the right to be represented by a lawyer of their choice.[101] Is there a limit to these costs? Moreover, one could argue that supporting Rwanda's transitional justice model, as the international community has done, comes at a price. A common critique is that only Hutu perpetrators – the ones responsible for the 1994 genocide – have been held accountable. Alleged Tutsi perpetrators of atrocities committed immediately before and after the genocide, generally remain unpunished.[102] By cooperating, through extraditions, with states whose judicial systems openly engage in 'victor's justice', European states are susceptible to similar criticism. It will be interesting to see how these states will deal with similar situations in the future.

98 Since the publication of the article on which this chapter is based, the UK High Court of Justice concluded that the Rwandan judicial is not capable of rendering an independent an impartial trial, and that five individuals for whom extradition from the UK was sought by Rwanda would be at risk of a flagrant denial of fair trial, confirming an earlier conclusion by a lower court. This may have consequences for future extraditions to Rwanda. The case is also interesting because it provides some answers to the questions raised here. High Court of Justice, *Rwanda v. Nteziryayo and others*, 28 July 2017, [2017] EWHC 1912 (Admin).

99 *Ahorugeze v. Sweden*, para. 127.

100 See Vaste Commissie voor Veiligheid en Justitie, Verslag van een Schriftelijk Overleg, Kamerstukken II 2013/14, 19637, No. 1808, 14 April 2014, 32. Since the publication of the article on which this chapter is based, it has turned out that in the end the Minister of Security and Justice decided to follow the advice of the extradition chamber of the The Hague Appeals Court (see ECLI:NL:GHDHA:2016:1924, 5 July 2016) to have the trials of these individuals monitored (see the Minister's Letter to parliament of 29 March 2017, reference no. 2058834, available online at <https://www.rijksoverheid.nl/documenten/kamerstukken/2017/03/29/tk-monitoring-uitlevering-jean-claude-i-en-jean-baptiste-m>; last visited 4 October 2017). The monitoring has been carried out by the International Commission of Jurists (ICJ). Reports of the monitoring are published on the website of the Dutch government; see the first report at <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2017/03/29/tk-bijlage-ii-monitoring-uitlevering-jean-claude-i-en-jean-baptiste-m/tk-bijlage-ii-monitoring-uitlevering-jean-claude-i-en-jean-baptiste-m.pdf> (last visited 4 October 2017).

101 See *Uwinkindi*, *supra* note 56, paras. 135-140.

102 See Human Rights Watch, *supra* note 19.

5. Prosecution of those excluded under 1F(a) in the state of refuge[1]

5.1. Introduction

An important field of criminological studies emerging these days deals with the complexities of crime and crime control in a globalized world. In this body of literature authors typically discuss, and critically reflect on, (inter)national policy developments in the war on terror, immigration control, the fight against transnational (organized) crime and cybercrime (Aas, 2013; Jaishankar and Ronel, 2013; Mullard and Bankole, 2007; Pakes, 2012; Stumpf, 2006). Surprisingly little attention, however, has been given to how law enforcement agencies and other institutional bodies in this increasingly globalized world deal with (the threat of) possible war criminals, *génocidaires* and other perpetrators of international crimes entering their territory. This lacuna is particularly striking because, over the last decade, major legal and policy developments have taken place in this regard and an increasing number of European and North American countries, in particular, in the context of so-called 'no safe haven policies' have been trying to identify alleged perpetrators of these crimes and exclude them from refugee protection.[2] Additionally, with the creation of the International Criminal Court in 2002, many countries have decided to prosecute the alleged perpetrators of war crimes, crimes against humanity and genocide residing in their territory.[3] If a person enters the European Union and 'serious reasons for considering' that he has been involved in the commission of war crimes and crimes against humanity arise, Article 1F of the Refugee Convention can be invoked to exclude him from refugee protection.[4] The European Council recited, in its Decision 2003/335/JHA of 8 May 2003, that:

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1 This chapter was originally published as M.P. Bolhuis & J. van Wijk (2015a). Alleged war criminals in the Netherlands: Excluded from refugee protection, wanted by the prosecutor, *European Journal of Criminology*, *12*(2), 151–168.

2 Refugee protection is understood here as the protection offered by the United Nations Convention relating to the Status of Refugees (hereinafter the Refugee Convention), adopted in 1951.

3 The preamble to the Rome Statute of the International Criminal Court of 17 July 1998 "recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

4 Article 1F reads: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations." In this chapter, the term 'exclusion' refers solely to Article 1F; the other exclusion clauses (Articles 1D and E) are not addressed. Whenever mention is made of 'excluded persons', that is, applicants who have been denied refugee protection due to Article 1F, for practical reasons the masculine pronoun is used.

Member States are to ensure that, where they receive information that a person who has applied for a residence permit is suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes, the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law.

This chapter evaluates the extent to which the Netherlands has prosecuted alleged perpetrators of international crimes who have been excluded from refugee protection. Our analysis is based on a review of academic literature, policy documents and eight interviews with experts, including four representatives from the Immigration and Naturalisation Service (Immigratie en Naturalisatie Dienst, IND), two representatives from the National Prosecution Office's Department for International Crimes and two investigators from the police's War Crimes Unit (Team Internationale Misdrijven). Additionally, we will present data from a file analysis of all the exclusion decisions in the Netherlands that were made between 2000 and 2010. As very few member states disclose information on their 'exclusion policy', little knowledge exists about the characteristics of this group. For most countries, for example, it is unclear what crimes these perpetrators are typically believed to have committed, what level of responsibility they are believed to have held and on what type of information the immigration authorities have based their decision to exclude them. The information that is available is incomplete, sketchy and dispersed. The file analysis enables us, for the first time, to provide a systematic overview of the characteristics of this group and offer new insights into the problematic relationship between the exclusion from refugee protection and the prosecution of international crimes.

5.2. File analysis

At our request, the IND provided a list of 1.498 file numbers of asylum seekers who, according to its administrative system, were associated with Article 1F and had had their asylum requests processed between January 2000 and November 2010. This list contained a total of 67 nationalities; with 720 files, Afghan nationals constituted the biggest group by far. With the file numbers in hand we gained access to the corresponding digitalized copies of the files in IND's administrative system and identified files of individuals who had received a 1F decision ('beschikking') that was definitive in the sense that it was not revoked or had not (yet) been successfully appealed at the moment of data collection (November 2010–February 2011). We identified 745 definitive decisions, of which 448 related to Afghans and 297 to non-Afghans. Considering the heavy workload and anticipated homogeneity of the Afghan group, which will be explained further on, we decided to take a systematic sample (n = 61) of the Afghan files. The 297 non-Afghan and 61 Afghan files were

scored and analysed with the help of three research assistants. The remaining 753 files were dismissed from our analysis for various reasons. The majority concerned relatives of 1F-excluded persons (442 cases). In some instances a 1F decision by the IND had been overruled in court or revoked in anticipation of a court decision (139 cases). In 160 cases IND had not (or not yet) come to a decision to exclude, or files were inaccurately labelled as 'possible 1F files' since no 1F lead whatsoever could be found. Finally, a limited number of 12 files were – owing to the fact that we analysed digitalized copies – incomplete or (partially) inaccessible.

Files of 1F-excluded persons typically contain hundreds of pages with a wide range of documents, ranging from extensive reports of the different asylum hearings and letters from legal representatives, to country reports from the Ministry of Foreign Affairs and non-governmental organizations (NGOs) and court files. The fact that information most relevant to the study was not always clearly listed in IND's registration system often made scrolling through the large number of documents necessary. Coupled with the complexity of the files and the limitations of the registration system, this made determining the (then) current status of a decision both time consuming and at times difficult. Whenever information from the file analysis is used, reference will be made to the file codes used for internal communication such as '(J6)' or '(C5)'.[5]

5.3. The application of 1F in the Netherlands

In the Netherlands, the applicability of Article 1F is considered within the context of the usual refugee status determination procedure. The *Vreemdelingencirculaire* (Aliens Act implementation guidelines) 2000 determined that the organization responsible for status determination is the IND. Since 2001, if any indications arise during an initial asylum hearing that Article 1F might be applicable, officers of the IND refer the case to a specialized '1F unit'. Current Dutch policy with regard to the application of Article 1F originates from a letter to parliament from the State Secretary of Justice of 28 November 1997,[6] which mentions three guiding principles: Article 1F is to be interpreted restrictively; at the same time, the opportunities to apply it must be maximally utilized; and, finally, further consequences are to be connected to any exclusions made on the basis of 1F. In line with the first principle, Dutch administrative courts have ruled that the arguments for applying Article 1F must meet high standards.[7] Until 1998, 1F was indeed applied rarely: the State

5 These denominations have no value other than for the researchers' recording purposes.

6 *Kamerstukken* II 1997/98, 19637, no. 295, 28 November 1997.

7 District Court of The Hague, 11 April 1997, ECLI:NL:RBSGR:1997:ZA3312.

Secretary's letter mentions that roughly 30 exclusion decisions were issued. Of those, the decision was appealed in 11 cases, in 4 of which the court upheld the decision.[8] The State Secretary's letter marked a change in attitude from a prioritization of the first principle to the second. After 1997, the number of invocations increased rapidly: between 1997 and 2011, Article 1F was invoked against 810 persons, that is, an average of about 54 times a year.[9] This seems a lot compared with other countries, although few states publish or even record the number of 1F decisions they issue. During a conference regarding exclusion policies in June 2011[10] in which 13 states participated, it transpired that, between 2006 and 2011, their ranking order in terms of the number of exclusion decisions, from high to low, was the UK, Canada, the US, France, the Netherlands, Germany, Belgium, Sweden, Norway, Australia, Denmark, Ireland and New Zealand. Although this suggests that the number of 1F exclusions in the Netherlands is probably not more than average, this picture is biased because most of the exclusion decisions were issued before 2006 (93 percent of the analysed decisions concerning Afghan nationals were issued before 2006; 79 percent of the decisions regarding non-Afghans were issued before 2006). Regarding the country of origin of the excluded persons, Figure 5.1 shows that the majority of excluded persons in the Netherlands came from Afghanistan (448 individuals), followed by Iraq (62), Angola (26), Democratic Republic of the Congo (23), Sierra Leone (20), the former Yugoslavia (20), Turkey (18) and Iran (17). Because Dutch courts lack jurisdiction over the 'serious non-political crimes' listed under sub (b) of Article 1F since they are, by definition, committed outside the Netherlands and, in principle, are not subject to universal jurisdiction, ideally the cases in which Article 1F(b) was applied are excluded from the analysis. It turns out that in most cases, however, both sub (a) and (b) are deemed applicable because most of the crimes listed under sub (a) are understood to constitute 'serious non-political crimes' under sub (b) as well (see Article 6.2.8. of the Dutch Aliens Manual 2000 C(2)). Therefore, we distinguished between cases in which 1F(a) is deemed applicable as opposed to cases in which it is not.[11] Of the 297 definitive decisions concerning non-Afghans, 1F(a) was deemed not applicable by the IND in 48 cases (16 percent). In relation to Afghans this was true in only 1 out of the 61 decisions in the sample (1,6 percent). In 3 cases, it was

8 *Kamerstukken* II 1997/98, 19637, no. 295, 28 November 1997, 4 and 7.

9 *Aanhangsel Handelingen* no. 1607, Vergaderjaar 2012-2013, Ah-tk-20112012-1607.

10 The Intergovernmental Consultations on Migration, 'Asylum and Refugees' (IGC) Workshop on Exclusion Policies', 9–10 June 2011, in the Netherlands. See a video of a presentation in which reference is made to the conference and the ranking order at <https://www.youtube.com/watch?v=SUefl6S3m24> (last visited 3 October 2017).

11 Article 1F(c) is not considered to be sufficient in itself to serve as an independent ground for invoking Article 1F in the Netherlands, but can be when it is cited in combination with 1F(a) or 1F(b) (see the State Secretary's Letter of November 1997 to parliament, supra note 6).

not clear from the file whether they belonged to the first or second category. These 52 cases were not included in the analysis that follows.

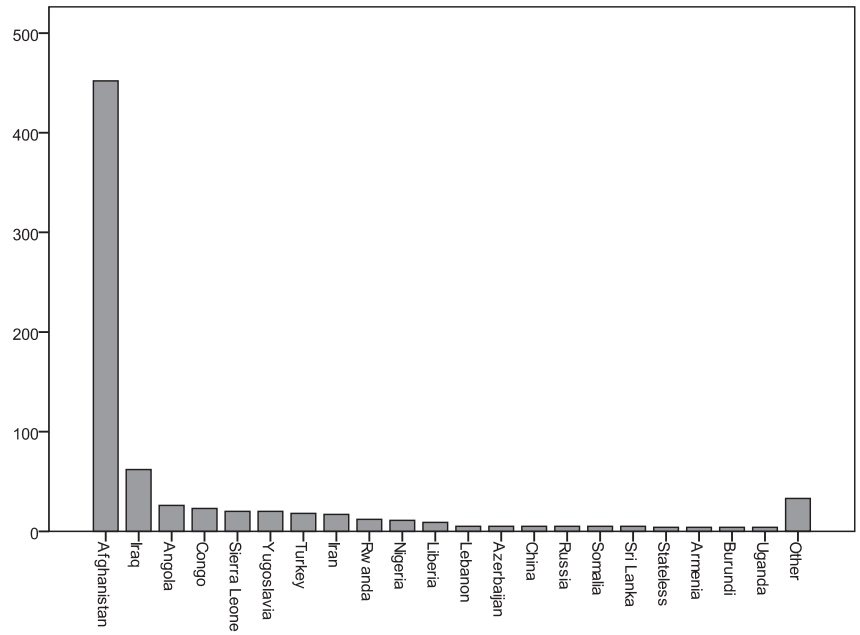

Figure 5.1.
Number of 1F exclusions in the Netherlands by country of origin (2000–2010)

5.4. The interpretation of Article 1F in Dutch policy

Although 1F is seen to stand at the crossroads of criminal law and refugee law, it is important to note that assessments considering the possible application of Article 1F by the IND are made within the framework of administrative law. Concepts familiar in criminal law that strengthen the position of a criminal suspect, such as the presumption of innocence and the availability of defences, are absent or interpreted differently in refugee law.[12] Discussing these differences in detail is outside the parameters of this study, but two elements stand out that need some elaboration in order to understand how 1F is interpreted in Dutch policy.

12 Although the availability of defences in (Dutch) refugee law and international criminal law may be similar, the results are different in that, whereas a successful appeal to a defence in criminal law will probably lead to mitigation of sentence, in refugee law (because it has a binary approach) it will lead to exclusion.

First, the 'serious reasons for considering' standard poses a lower threshold for assuming involvement in the crimes listed under 1F than the 'beyond reasonable doubt' threshold posed by criminal law in common law systems (UNHCR, 2003: 38). The serious reasons do not have to be substantiated with criminal evidence, but they have to be carefully motivated (UNHCR, 2003). Second, in order to establish whether there are 'serious reasons' to believe that someone has been involved in the crimes mentioned in Article 1F, the IND applies the *personal and knowing participation* test, developed in Canadian jurisprudence.[13] This test is used to assess whether an individual had, or should have had, knowledge of the crime that was committed, and whether he has personally participated in it. Knowledge of the crime is understood in such a way that membership of an organization that is, according to influential reporting, involved in the widespread or systematic commission of 1F crimes can be reason enough for establishing 'knowing participation', because it is deemed unlikely that members of the organization could remain unaware of such involvement.[14] Personal and knowing participation are also assumed if a person belongs to a category of persons that the Minister of Justice has determined falls within Article 1F, unless the applicant can show that his case represents a 'significant exception'; here, the burden of proof is reversed. A 'categorical exclusion' such as this, for instance, has been in place for persons who have worked in certain positions in several designated Afghan organizations. This explains, as noted previously, why the great majority of the subjects of this study are Afghan nationals. In the case of the KhAD/WAD security services, for instance, every non-commissioned officer and officer who has served in the organization who applied for asylum in the Netherlands was excluded on the assumption that he had, in order to be promoted to the rank of non-commissioned officer or higher, necessarily taken part in arrests, interrogations, torture and executions, to show his commitment to the regime.[15] The file analysis shows that 72 percent of the individuals in the sample of Afghan applicants had worked as a (non-commissioned) officer for the KhAD/WAD.[16]

13 Federal Court of Appeal of Canada, 7 February 1992 (Ramirez v. Canada), 2 F.C. 306 (C.A.).

14 For a translation of the exact criteria in the Aliens Manual, see Rikhof (2012: 233–4).

15 See *Kamerstukken* II 1999/2000, 19637, no. 520, 3 April 2000 and the Ministry of Foreign Affairs' country report (Ambtsbericht 'Veiligheidsdiensten in communistisch Afghanistan 1978–1992' [Security services in communist Afghanistan 1978–1992') of 29 February 2000, in particular pp. 15, 24–25).

16 Persons in certain positions within the Hezb-i-Wahdat (Islamic Unity Party of Afghanistan) and the Sarandoy (Afghan police) are also categorically excluded. See Kamerstukken II 2000/01, 19 673, no. 553, 19 December 2000 and Kamerstukken II 2002/03, 19637, number 695, 7 November 2002. A categorical exclusion has also been in place for high officials of the Iraqi security services and corporals and non-civilian leaders of the Sierra Leonean RUF (see Kamerstukken II 2003/04, 19637, no. 811, 8 April 2004, and Kamerstukken II 2003/04, 19637, no. 829, 23 June 2004. The data show that all of these groups are considerably smaller than the group of KhAD/WAD (non-commissioned) officers.

5.5. Extradition of excluded persons

On several occasions the Dutch government has stressed that the consequences connected to the invocation of 1F should *inter alia* consist of criminal prosecution on the basis of universal jurisdiction.[17] By explicitly referring to the *aut dedere aut judicare* principle of international law in her 1997 letter, the State Secretary of Justice suggested there is even an international obligation resting on the Dutch authorities under several international treaties to take action – in the form of extradition or adjudication – against individuals to whom 1F is applied. 1F crimes can indeed be seen to fall under this obligation, although it must be noted that not all manifestations of the crimes under 1F are subject to it, and that the obligation does not extend beyond submitting the case to the competent authorities for 'the purpose of prosecution' (Larsaeus, 2004: 71; Rikhof, 2012: 461–2). The obligation under international law to prosecute or extradite people to whom Article 1F is deemed applicable is therefore limited. Whether there is an obligation or not, the Dutch authorities have committed themselves to ensuring that the Netherlands is not a 'safe haven' for excluded persons.[18] Therefore, to be consistent with Recital 7 of EC Decision 2003/335/JHA, all files of asylum applicants against whom 1F is invoked are submitted to the public prosecutor, who initially reviews whether excluded persons can be extradited and prosecuted elsewhere.[19]

Extradition – understood here as either transfer to another state or surrender to an international criminal tribunal – is difficult for mainly two reasons. First, extradition to a state almost always requires a bilateral or multilateral instrument and can occur only at the request of the state in which the crime was committed (Rikhof, 2012). Second, the reasons that extradition requests are refused often revolve around expected human rights violations in the receiving state and, in particular, the right to a fair trial.[20] Only one excluded individual has been extradited (to Bosnia).[21] Surrender to international criminal courts does not occur on a vast scale either. As Rikhof (2012) points out, although human rights concerns are less likely to be an issue with surrender in this sense, the policy, mandate and practical limitations of

17 See, for instance, the State Secretary's letter of November 1997 (*supra* note 6) or *Kamerstukken* II 2007/08, 31200 VI, no. 160, 9 June 2008, 4.

18 *Kamerstukken* II 2007/08, 31200 VI, no. 160, 9 June 2008, 4.

19 *Kamerstukken* II 2008/09, 31200 VI, no. 193, 9 September 2008.

20 Looking at Rwanda, for instance, for years, extradition requests were refused because there was no bilateral extradition treaty and because of humanitarian (most notably fair trial) concerns (Van den Herik, 2009a: 1118; Rikhof, 2012: 470). Because the law was adapted, enabling extradition for crimes of genocide on the basis of the Genocide Convention, and because of investments made in the Rwandan justice system, extradition to Rwanda has become possible (see Chapter 4). It seems, however, that Rwanda is an exception in this respect.

21 District Court of The Hague, 5 June 2009, ECLI:NL:RBSGR:2009:BI7753.

these courts limit the scope of their activities and jurisdiction. In the Netherlands, for example, so far only two people against whom Article 1F was invoked have been surrendered to an international criminal tribunal (both Rwandan nationals, to the International Criminal Tribunal for Rwanda (ICTR)).[22]

In the following sections, we will discuss why the domestic prosecution of suspects of international crimes is already complicated in itself, while a number of additional factors make prosecuting (suspected) excluded persons even more challenging.

5.6. Prosecution of excluded persons

If extradition or transfer is not possible, the prosecutor will then assess which 1F files are to be sent to the specialized international crimes team of the police which carries out the investigations. In principle, all the files would qualify for (further) investigation, as the former Dutch Minister of Justice, Hirsch Ballin, in 2006 emphasized that the application of Article 1F is about 'more than merely a suspicion of 1F crimes'. The Minister also stated that the threshold for applying Article 1F is somewhat 'between' suspecting and proving.[23] Although many lawyers would most probably be very reluctant to compare thresholds of administrative law with criminal law, this suggests that the 'serious reasons for considering' threshold, according to the Minister, can be regarded as being at least equal to criminal suspicion, and maybe more (Van Wijk, 2011: 320). That they are de facto treated as criminal suspects is reflected in the practice of submitting every 1F file to the prosecutor.

So far in the Netherlands only four out of nine hundred and seventy excluded asylum applicants (0,4 percent) have been irrevocably convicted for committing international crimes.[24] Although this number may seem low, there are few indications that other European countries have been any more successful. In the UK, Germany or France for example, the total number of convictions on the basis of universal jurisdiction is even lower (Rikhof, 2012: 465).

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22 Simon B. (District Court of The Hague, 16 October 2001, CU 2001 RT.EX.01) and Ephrem S. (District Court of The Hague, 11 May 2004, UTL-I-2004.004.402).

23 "De bewijsmaatstaf is als het ware tussen verdenken en bewijzen in". *Kamerstukken* II 2006/07, 30800 VI, no. 31, 11 December 2006, 3.

24 At the time of publication of the original article, the total number of excluded individuals was lower. Two Afghans (Hesamuddin H. and Habibullah J. were sentenced to 12 and 9 years respectively on charges of war crimes and torture), one Rwandan (Joseph M., to life imprisonment on charges of war crimes) and one Congolese (Sébastien N., to 2 years and 6 months on charges of torture). One excluded Afghan, Abdullah F., was acquitted. Besides excluded individuals, seven persons have in recent years been convicted in the Netherlands for international crimes. See Van der Vlugt and Van Zadelhoff (2013: 186, note 66) for a listing of these cases.

In the following sections we will discuss why the domestic prosecution of suspects of international crimes is already complicated in itself, while a number of additional factors make prosecuting (suspected) excluded persons even more challenging.

5.6.1. Challenges to the domestic prosecution of international crimes suspects on the basis of universal jurisdiction

A number of factors make criminal investigations and the prosecution of international crimes a very complex and resource-intensive matter. That they are resource-intensive becomes clear, for instance, from a 2008 report from the Canadian Department of Justice which demonstrated that the total cost of domestically prosecuting an African perpetrator of international crimes amounted to approximately 4 million Canadian dollars (Department of Justice Canada, 2008: 92). Below we will identify the most relevant factors that, according to academic literature and our experts, have an impact on the successful domestic prosecution of suspects of international crimes and link these to the characteristics of the group of excluded persons in the Netherlands.

The passage of time

The basis for the extraterritorial prosecution of international crimes is universal jurisdiction. Although the *aut dedere aut judicare* obligation may extend to the crime of torture, genocide and war crimes, jurisdiction for such crimes is not self-evident. In line with the jurisprudence of the Dutch Supreme Court,[25] domestic courts in the Netherlands can claim jurisdiction when the perpetrator is present on Dutch territory. Until recently, however, this was true only with respect to war crimes committed after 1952 and crimes of torture committed after 1989, when the War Crimes Act and the Torture Convention Implementation Act respectively came into force (Van der Vlugt and Van Zadelhoff, 2013: 183). The International Crimes Act (Wet Internationale Misdrijven, WIM), which came into force on 1 October 2003, expanded the reach of Dutch jurisdiction to cover crimes of genocide and crimes against humanity outside the Netherlands by and against non-nationals that were committed after that date. On 1 April 2012, a law came into force that further expanded this reach with respect to genocide, by making the broad jurisdiction of Art. 2 WIM apply retroactively to the Genocide Convention Implementation Act, adopted in 1970.[26] Before this law came into force, Dutch courts had no jurisdiction to prosecute excluded individuals associated with genocide committed before 1

25 Criminal Division, 11 November 1997, No. 3717 AB; cited in the State Secretary's Letter of November 1997, see note 5.

26 Law of 8 December 2011, Staatsblad 2011, no. 605.

October 2003 unless they could be prosecuted on charges of war crimes or torture, as happened in the case against Joseph M. (Van den Herik, 2009a). Besides this legal challenge, the passage of time also restricts the prosecutor's ability to gather evidence in order to establish individual criminal liability for these crimes. International crimes prosecutions have so far shown that the main source of evidence in such cases is witness testimony, because documentary and forensic evidence are often unavailable (Combs, 2010: 12–14). Gathering reliable testimonies in relation to international crimes is already complicated by trauma, language barriers and cultural issues (Combs, 2010; Witteveen, 2010). With the passage of time the chance of finding reliable witnesses who may have died or moved away from the crime scene decreases, as does the reliability of witness testimony.

Our analysis of Dutch 1F cases demonstrates that this general problem of the domestic prosecution of international crimes restricts the prosecutor's opportunities in several ways. 1F cases submitted to the prosecutor are old cases. Of the excluded Afghans in the sample, the vast majority (83 percent) are associated with crimes committed before 1990. Of the excluded persons of other nationalities, the alleged crimes generally occurred more recently: three-quarters of the excluded persons are associated with crimes committed between 1990 and 2000, and one-fifth with crimes committed before 1990. The majority of the international crimes that excluded persons are associated with occurred before the WIM came into effect, so Dutch courts have jurisdiction over these crimes only if they constitute war crimes, torture or (since April 2012) genocide. Furthermore, as noted above, the passage of time, for obvious reasons, makes it difficult to get to witnesses and reduces the reliability of witness testimony.

Access to, cooperation of, and safety in the country of origin

Other practical barriers that typically hinder the domestic prosecution of international crimes on the basis of universal jurisdiction are access, cooperation and the safety restrictions that exist in the countries where the alleged crimes were committed. The crucial access to witnesses often depends on the willingness of a state to cooperate with criminal investigations on its territory and the degree to which the safety of witnesses and/or investigators can be guaranteed (REDRESS/FIDH, 2010: 23–6). Access to witnesses also depends on the availability of, and access to, (reliable) interpreters, who are indispensable in gathering testimony. According to a representative of the prosecution office, the prosecution of suspects from countries to which the prosecutor has no access or where the investigators cannot work in safety will therefore be shelved, unless there are other ways of

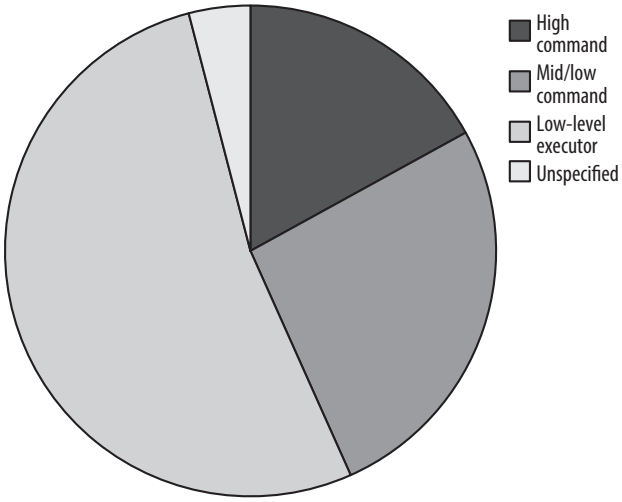

Figure 5.2.
Type of function that the excluded person is associated with, of non-Afghan nationality

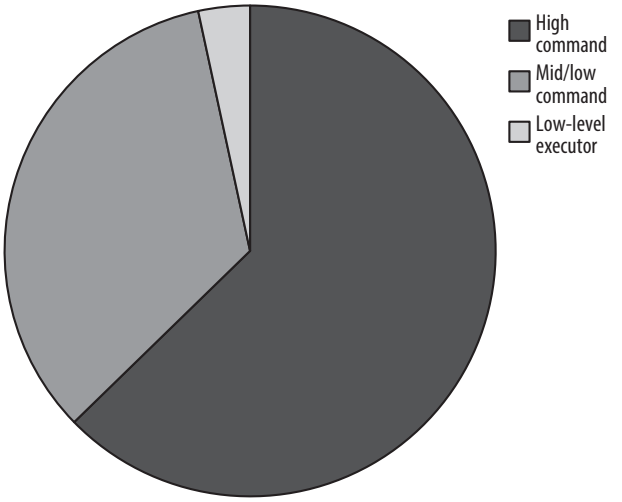

Figure 5.3.
Type of function that the excluded person is associated with, of Afghan nationality

building the case or until these circumstances change.[27] Our file analysis illustrates that most of the excluded persons typically come from countries where access and safety issues limit the possibility of conducting proper investigations. Countries such as Afghanistan, DRC and Iraq for example have in recent years been subject to wars and an overall situation of insecurity. In Karstedt's (2012: 505) Violent Societies Index 30 of extremely violent societies, Iraq, Afghanistan and DRC, for instance, were ranked numbers 1, 2 and 11 respectively in the period 2000 to 2009. Although other countries of origin have been relatively safer, their governments can often be considered uncooperative and not very reliable. Angola, for example, issued a general amnesty in 2002 and makes no effort at all to prosecute any alleged war criminals (Van Wijk, 2012); the likelihood that the authorities would assist Dutch investigators in doing so is very low indeed. The same argument goes for Afghanistan, which also has several amnesty laws in place. A country that, according to a representative of the prosecution office, has over the years proven to be accessible, safe and cooperative is Rwanda. In addition, there is extensive information on Rwanda available from ICTR prosecutions, which forms a good starting point for criminal investigations. These factors, in combination with the fact that Rwandan authorities and NGOs actively lobby and push for prosecutions, could partially explain why successful prosecutions on the basis of universal jurisdiction in Europe relatively often involve (former) Rwandan nationals.[28]

Position and reputation

Especially when time has passed, the higher a suspect's position or the bigger his reputation, the greater the chances that investigators can find witnesses who recognize or are able to remember the perpetrator of the crime. Rank and notoriety matter. It is easier to identify witnesses who can testify about the acts of a well-known (local) politician, a general or rebel leader than those of a regular foot soldier. The four convictions of excluded asylum applicants in the Netherlands confirm this to be relevant: the Afghans H. and J. were, respectively, the former director of the KhAD and the former director of the KhAD's interrogation department, and the Congolese Sébastien N., commander of the Garde Civile in Matadi, had an infamous reputation among the population and within the Garde Civile as the *Roi des Bêtes*

27 A letter of the Minister of Justice to parliament (*Kamerstukken* II 2008/09, 31200 VI, no. 193, 9 September 2008) describes the process of selecting 1F cases suitable for prosecution and mentions several other considerations, both legal and practical.

28 See Chapter 4.

(King of the Beasts).[29] Being part of an established family of traders and the son of a former mayor, Joseph M. was also well known locally.[30] Our analysis ranges from people in the lowest ranks, such as foot soldiers who have fought for the Uganda People's Defence Force or UNITA's rebel force in Angola, to high-level Afghan provincial governors and Rwandan politicians. If we make a distinction between high command, mid- to low-level command and low-level executors, however, we can see clear differences between non-Afghan and Afghan cases. Whereas the majority of non-Afghans were low-level executors (Figure 5.2), Afghans predominantly held the higher ranks (Figure 5.3).[31] Of the group of non-Afghan low-level executors, the file analysis shows that about one-third are believed to have played a facilitating role rather than having been directly involved in the commission of crimes. It would be extremely hard, from a prosecutor's perspective, to allocate individual criminal responsibility to members of this group.

5.6.2. Challenges specific to the domestic prosecution of excluded individuals

In addition to the challenges described above, there are specific issues that complicate the prosecution of excluded persons even further. It is important to realize that the framework in which the IND assesses the applicability of 1F is completely different from that in which a prosecutor and the police would normally start to conduct a criminal investigation. A criminal investigation typically starts with, or is based on, police information from ongoing investigations, a Europol or Interpol alert or a criminal complaint made by a victim, bystander or interest group who identified the suspect as a potential perpetrator. Our analysis demonstrates that the IND's decision to exclude an applicant was hardly ever started by, or based on, these conventional sources of information. In only a few of the analysed cases were police investigations, (international) arrest warrants or court records that made specific reference to the excluded individual referred to in 1F decisions. Instead, 1F exclusions typically start with, and are largely based on, information provided by the asylum applicants themselves during their interviews with the IND and might typically start, for example, when an applicant claims to have worked for a certain organization which

29 See this translation of the judgment in his case (District Court of Rotterdam, 7 April 2004, ECLI:NL:RBROT:2004:AO7178), available online at <http://www.asser.nl/upload/documents/2012041-3T095005-Nzapali%20Judgment%20District%20Court%20Rotterdam%20(English).pdf> (last visited 23 September 2014).

30 See the judgment in his case (ECLI:NL:RBSGR:2009:BK0520, 23 March 2009), Chapter 4, Chapter 5 under 83, and Chapter 7 under 6.

31 'Low-level executor' is defined here as the military ranks of sergeant, corporal or private, or comparable positions in semi-military organizations. Also included are people associated with non-military organizations who are not in management positions. Mid- to low-level command includes local governance or the military ranks of (or comparable to) lieutenant and captain. High command is defined as central or regional governance, or the military ranks of (or comparable to) major and higher. 'Unspecified' are cases in which the rank or position was not known or could not be inferred from the file.

is believed to be responsible for having committed serious crimes. A second type of source upon which the exclusion decisions are usually based is 'authoritative' reports that describe the activities of the organization that the applicant claimed to have worked for in general terms. If these two sources – the information stemming from the asylum interviews and the authoritative reports – do not contain many specifics about the alleged crimes, or their credibility or reliability is questionable, this could seriously hinder the successful prosecution of excluded persons.[32]

Accounts during asylum interviews

When officers of the IND have indications that Article 1F might apply to a certain applicant, they refer the case to the 1F Unit. This unit conducts additional interviews aimed at establishing whether there are serious reasons for considering that someone has personally *and* knowingly participated in the crimes included under 1F. Through these interviews, the IND tries to determine the level of the applicant's involvement in the alleged crimes. In particular, the statements made during the first interviews – when applicants may not have been aware of the existence of Article 1F – are very important in establishing whether 1F applies. This is especially true for those applicants who can be categorically excluded by merely stating that they worked, for instance, as a (non-commissioned) officer for the KhAD/WAD. For prosecution purposes, however, such statements offer little basis. Of the excluded Afghans associated with the KhAD/WAD, 95 percent actually denied having had any personal involvement in the crimes the security services – and therefore they themselves – were associated with. The majority (54 percent) of the excluded non-Afghans had (initially) admitted during the asylum interview that they had been personally and directly involved in 1F crimes, for example by having killed civilians in times of war or by facilitating acts of torture. Later on in the asylum procedure, 27 percent also maintained this position; in most of these instances, the applicants argued that they had acted under duress or out of self-preservation. Some Angolans, for example, claimed to have joined the UNITA rebel forces as teenagers after their families were killed (J15, J39). Other applicants from Angola (J1) and DRC (C7, C8) argued that they were forced to take drugs before they participated in 1F crimes. Almost 20 percent of the applicants denied their involvement in crimes later on, claiming, for instance, that their accounts had been mistranslated (J49), or that they had believed

32 A third source to which the IND refers in its decisions are personal reports (Individuele Ambtsberichten, IABs), which are composed in a similar way to the AABs. IABs are not referred to very often in the 1F decisions and, when they are, this is rarely done to substantiate conclusions regarding personal involvement in 1F crimes. In the non-Afghan cases, in only 8,0 percent is reference made to an IAB, of which 4,7 percent concern personal involvement in 1F crimes. Although reference is made to IABs more often in the assessed Afghan cases (23,0 percent), in only one case (1,6 percent) did the IAB referred to in a 1F decision concern the personal involvement of an individual in 1F crimes.

that confessing their crimes would help their application (M84) or that they had lied because they did not know what 1F was (J77, LE9, LE24); 7 percent admitted to the acts but denied criminal responsibility for them, claiming to have acted under superior orders (for instance an Iraqi who was given the order to fire SCUD rockets at random villages in Israel and Iran, LI26) or stating that the acts were legitimate in the context in which they occurred – a man from Congo Brazzaville who claimed to have killed one person out of self-defence and carried out the execution of another, which had resulted from a 'fair trial' (C5), a Russian army unit commander who ordered his units to make sure that no one left the village of Samashki while other forces committed acts of ethnic cleansing (C113) or a man from the former Yugoslavia who denied the illegality of his treatment of prisoners of war (J84). Dutch courts have accepted the use of asylum accounts in criminal procedures.[33] On the face of it, one might expect self-confessed accounts about involvement in serious crimes to be a very good starting point for prosecution; however, it should be taken into account that opportunity-seeking asylum seekers may have a vested interest in making things up (see, for example, Neumayer, 2005; Van Wijk, 2010). It cannot be ruled out that applicants who are unaware of the existence of Article 1F might embellish or fabricate stories about defection or rebellion, hoping that this will convince immigration officials that they risk persecution upon return and that it will thus increase their chances of obtaining refugee protection. Our file analysis contains several examples that suggest that applicants exaggerated or even fabricated their role in organizations and crimes. One Nepalese applicant (J129), for instance, alleged that he had been a member of the Maobadi, a Maoist rebel group, and claimed to have witnessed a great number of attacks in a certain region at a given time. The IND noted that the number and scale of the alleged attacks did not correspond with what was known of the region at that time. The man also claimed to have been involved in an attack in a particular region of the far east of Nepal, but this region was not known as an area where the Maobadi were active. In addition, he seemed to know little about the internal structure of the Maobadi. Despite the fact that he revoked his statements later on, the IND maintained that Article 1F should still apply. Consistent with established practice in case law, initial statements carry more weight than contradictory statements at a later stage.[34] This means, in practice, that, if an asylum applicant states in the initial hearing that he has committed crimes or belonged to an organization that is believed to have been

33 For instance, in the criminal cases against H. and J. from Afghanistan (Van Sliedregt, 2007). The use of asylum accounts in criminal cases has been criticized by some authors as compromising the right not to incriminate oneself (see, for instance, NJCM, 2002; Mettraux, 2006).

34 See Council of State, 23 June 2003, ECLI:NL:RVS:2003:AH9895 (Kesbir), District Court of The Hague AWB 0a/1813 (Rushdie) and District Court of Maastricht AWB 02/42704 = 03/18329 (Akbari).

involved in 1F crimes, there is hardly any way out. In this particular case, the IND argued that, although he may have confused times and places, he mentioned so many incidents in which he was involved that it is likely that his statements were accurate – even though not all of the incidents were known to have taken place. Another man (J111) claimed during his interview to have been involved in the execution of the well-known Guinea Bissauan rebel leader Ansumane Mané in 2000 and was able to provide details about the superior who gave the order. The IND argued that his account was credible because it largely matched the information in an online publication on a well-known French website. This website however, which also made reference to the name of the superior, is publicly available, which begs the question whether the applicant reproduced this information from personal experience or from the very same website consulted by the IND. The accounts given in the above cases may suffice for a 1F exclusion but, for a prosecutor, accounts such as these, from a credibility perspective, may not be a very appealing start for a criminal investigation. Apart from the possibly untruthful accounts, which are difficult to cross-check, there are also cases – as we have already mentioned above – in which applicants bluntly acknowledged they had told a white lie about being involved in crimes, hoping that this would increase their chances of being granted asylum. We encountered the case of a person (LE24), for example, who claimed to have been the bodyguard of five different warlords in the early 1990s. He said that his units were responsible for the killing of civilians, purely on the basis of ethnicity, and to have been involved in pillaging. He was excluded in 2002. Seven years later – he had remained in the Netherlands throughout this time – he re-applied for asylum, claiming to have fabricated a story during his first application, providing evidence that he had studied in Nigeria and Ghana for most of the 1990s and presenting a passport and references from universities and colleges that proved to be original. At the time of our analysis the procedure was still pending; in the meantime this file has become part of the prosecutor's caseload of 'suspected war criminals'. Again, one should take into account that the available information in cases such as these when an applicant has initially lied about his involvement in crimes is enough for him to be excluded on the basis of Article 1F, but not enough for a prosecutor with few leads to prosecute successfully. A reliable estimate of the percentage of applicants fabricating stories cannot be given.

Authoritative reports

In most cases, information from the interviews is complemented with the authoritative reports from (inter)governmental organizations and NGOs and reports in the media and on the internet. The most frequently used reports are the country reports (the Algemeen Ambtsbericht, AAB) issued by the Dutch Ministry of Foreign Affairs and reports from NGOs such as Human Rights Watch and Amnesty International. From a prosecutor's perspective, the first problem with these sources, be they NGO reports or AABs (which are partially based on NGO reports themselves, ACVZ, 2006: 18), is that they are not specific: they draw general conclusions about possible crimes committed but typically do not provide explicit leads about individuals involved, except perhaps the most notorious. They are, therefore, often not suitable as a basis for starting individual criminal prosecution. A second problem with these sources is that, even if they were more concrete in identifying possible perpetrators, recent history has illustrated that information in governmental and non-governmental reports can be unreliable. In the case against Guus Kouwenhoven, a Dutch national accused of delivering weapons to Charles Taylor, the Court of Appeal ruled that frequent references to the defendant as 'the usual suspect' in reports from governmental and non-governmental organizations were not enough to establish individual criminal liability.[35] More specifically, this case demonstrated that the information that Global Witness, an NGO, had published regarding the alleged complicity of Kouwenhoven was not reliable. As Van den Herik (2009b) concluded:

> In terms of using appropriate evidentiary standards, the acquittal of Kouwenhoven […] sends a serious message to NGOs, such as in this case Global Witness, to be cautious when pointing the accusatory finger to individuals in public reports. Like sanctions committees, NGOs should also be encouraged to explain the evidentiary basis on which they publicly denounce individuals.[36]

Although internationally operating NGOs such as Amnesty International, Human Rights Watch and Global Witness perform extensive and valuable research and are, in many cases, among the few parties actually 'on the ground' in conflict situations,

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35 The case against Guus K., Court of Appeal of The Hague, 10 March 2008, ECLI:NL:GHSGR:2008:BC6068, under 9.5 and 9.6.

36 Pre-Trial Chamber I in the case against Laurent Gbagbo before the ICC expressed its concerns about the heavy reliance of the prosecutor on NGO reports, which in their turn rely heavily upon anonymous hearsay evidence. The Chamber notes that such evidence is difficult to corroborate and puts the defence in a 'difficult position'. See Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, para. 28 and further via <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-01/11-432> (last visited 3 October 2017).

it must be borne in mind that their documentation of human rights violations serves their own specific purposes. Even the most well-established NGOs have an agenda, may be advocacy driven and – often for security reasons – do not always provide substantial or transparent methodological substantiation to support their conclusions. Referring to these reports may suffice to fulfil the conditions of a 1F exclusion, but relying on this information as a starting point for prosecution could very well frustrate a criminal case.

5.7. Conclusion

In this increasingly globalizing world, European governments constantly develop new strategies to react to external threats. A relatively new development is that they actively try to domestically prosecute immigrants who allegedly committed war crimes, crimes against humanity and genocide in their countries of origin. In the Netherlands, since 1992 five individuals excluded under Article 1F have been criminally prosecuted in the Netherlands. Four of them have been convicted (Hesamuddin H. and Habibullah J. from Afghanistan, Joseph M. from Rwanda and Sebastien N. from the Democratic Republic of Congo). Internationally, this is a relatively high number, but the number of domestically prosecuted 1F-excluded individuals represents only 0,5 percent of the total number of 1F-excluded individuals in the Netherlands. In this chapter, we have identified the most relevant legal and practical challenges the Netherlands faces in prosecuting individuals who were excluded on the basis of Article 1F(a) Refugee Convention that can explain why so few 1F-excluded individuals have been criminally prosecuted.

We argued that a first problem domestic prosecutors are faced with is that the threshold to exclude someone from refugee protection is much lower than the 'beyond reasonable doubt' criterion needed to hold someone individually liable in criminal law. Further investigations are therefore necessary. An additional problem has been that many of the alleged crimes took place before the coming into force of the Dutch International Crimes Act, meaning Dutch courts lack jurisdiction unless these crimes were covered by international treaties in force at the time, and the passage of time can create many practical problems hindering proper investigation. Furthermore, our data demonstrate that excluded persons typically come from countries that are unsafe and difficult to access and cooperate with. Whereas the excluded Afghans held relatively high positions in the KhAD/WAD, the majority of excluded non-Afghans were low-level executors, which makes finding leads and witnesses very problematic. In addition, 1F exclusions are largely based on information provided by the asylum applicants themselves in combination with authoritative reports. These sources often do not contain any specifics about the

alleged crimes, and the credibility and reliability of the asylum accounts and the NGO reports may also be questionable. Although the European Council in 2003 emphasized the need to investigate and, when justified, to prosecute excluded individuals, this chapter demonstrates why even the Netherlands, with its specialized prosecution and investigations teams, has such a low success rate compared with the total number of exclusions. Building criminal cases around 1F exclusions demands extremely resource-intensive trajectories that have little chance of success. This begs a number of questions which warrant further (criminological) research. For example, what happens to all the excluded individuals illegally residing in Europe who are not (successfully) prosecuted? Are they deported? If they are not, do they pose a threat to (inter)national security by committing (more) crimes? Or do they, following the line of thinking of Drumbl (2007) and Smeulers (2008) that most perpetrators of international crimes come to commit crimes only in the abnormal contexts of war and conflict, generally continue to live as law abiding citizens? The ongoing instability in the Middle East, combined with the continuous efforts of European governments to hold perpetrators of international crimes accountable, will in the near future only increase the debate among policy makers on how to deal with 1F-excluded individuals. We believe criminologists can – and should – add to this debate by critically evaluating existing and future laws and policy developments.

6. Those excluded under 1F(b)[1]

6.1. Introduction

On the basis of Article 1F(b) of the UN Convention Relating to the Status of Refugees 1951 (the Refugee Convention), refugee status should be denied to any person with respect to whom there are serious reasons for considering that […] he has committed a serious non-political crime outside the country of refuge prior to his admission. State practice with respect to the application of Article 1F(b) differs considerably from state to state. A 2007 exploratory study by the United Nations High Commissioner for Refugees (UNHCR) suggests that, as opposed to Article 1F(a) and (c), which concentrate on crimes against peace, war crimes and crimes against humanity, and acts contrary to the purposes and principles of the UN, respectively, Article 1F(b) is rarely applied in France, Germany, Greece, the Slovak Republic and Sweden (UNHCR, 2007: 98–100). In contrast, a study into the application of Article 1F(b) in Canada suggests that it is applied much more often there, in about one-third of the cases reviewed (Kaushal & Dauvergne, 2011: 64). In Norway, about two-thirds of all 1F cases are based on Article 1F(b) (Aas, 2013).

A complete and systematic empirical analysis of how often, and in particular for what crimes, Article 1F(b) in a given country is invoked is non-existent. We were granted the opportunity to analyse all 1F(b) exclusion decisions in the Netherlands – a country that is relatively active in applying Article 1F[2] – issued between 2000 and 2010. On the basis of this file analysis, a literature study and an analysis of policy documents, we will review the Dutch policy regarding Article 1F(b) in practice.

The results allow academics to engage in comparative research and help policy and decision makers both inside and outside the Netherlands to reflect on the application of Article 1F. First, we will discuss why and when 1F(b) should be applied according to international guidelines and legal instruments. Next, we will describe how many and what type of applicants the Netherlands excludes on the basis of Article 1F(b). This will be followed by a critical review of the Dutch interpretation of Article 1F(b) and its application in practice. Finally, we will address the increasingly more relevant question

1 This chapter was originally published as M.P. Bolhuis & J. van Wijk (2016). Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F(b) of the Refugee Convention in the Netherlands, *Journal of Refugee Studies, 29*(1), 19-38.

2 Article 1F was invoked against 920 persons between 1992 and 2014. See *Kamerstukken* II 2013/14, 19637, no. 1808, 14 April 2014, 14; *Kamerstukken* II 2014/15, 19637, no. 1952, 3 March 2015.

of what (can) happen(s) to the alleged perpetrators of serious non-political crimes after being excluded.

6.2. File analysis

After we requested and were granted permission to access immigration files of the cases in which Article 1F was invoked, we received a list of all decisions ('beschikkingen') in which Article 1F was invoked between January 2000 and November 2010. Only the 1F decisions that were definitive – in the sense that they were not revoked or not (yet) successfully appealed – at the moment of data collection were scored using an extensive list of criteria; 745 decisions met this definition. The majority (448 decisions) related to Afghan nationals. The overrepresentation of Afghans can be explained by the exclusion of certain designated categories of persons which the Minister of Justice has determined fall within Article 1F, also known as 'categorical exclusion'. This means that the assumption that someone held a certain position within a designated organization suffices as a basis for exclusion, if the applicant does not rebut this assumption. The largest group to which this categorical exclusion applies are people who held the military rank of non-commissioned officer or higher who served in the communist security services in Afghanistan. Considering the heavy workload and the size and expected homogeneity of this group, we took a systematic sample of the group of excluded Afghans (n=61). Whenever information from the file analysis is used, reference will be made to the file codes used for internal communication such as '(J1)' (these denominations have no value except for internal registration purposes).

6.3. The scope of Article 1F(b)

In its 2003 'Background Note on the Application of the Exclusion Clauses', the UNHCR contends that Article 1F has been included in the Refugee Convention because the drafters had two objectives in mind: firstly, to make sure that persons suspected of committing certain crimes cannot benefit from refugee protection because the gravity of the acts deems them 'undeserving' of such protection and, secondly, to ensure that such persons will not abuse the protection offered to refugees to avoid being held criminally accountable for their acts (UNHCR, 2003b). In this way, Article 1F serves to protect the 'integrity of the institution of asylum' (UNHCR, 2009: 6).[3] Since the interest in, and application of, this exclusion clause has revived in the last one-and-a-half decade, a third rationale has ever more prominently come to the fore, namely to protect the receiving society from the potential danger caused by criminal refugees. While concerns for the national public order or security are understandable in light

3 The Court of Justice of the European Union (CJEU) quotes maintaining the "credibility" of the refugee protection system as the underlying purpose of refugee exclusion; see CJEU Grand Chamber, *Bundesrepublik Deutschland v. B. and D.*, C-57/09 and C-101/09, 9 November 2010, ECR I-10979, at 115.

of the alleged nature of the conduct excluded asylum seekers are generally associated with, it is subject to debate whether applying Article 1F actually is the appropriate measure to address such concerns.[4]

The evidentiary threshold for applying Article 1F ('serious reasons for considering') is lower than a criminal standard of proof (UNHCR, 2003b). This is considered justifiable because of the gravity of the crimes (Rasulov, 2002: 816). However, while the egregious nature of the acts listed under Article 1F(a) and (c) is 'obvious' (UNHCR, 2009: 9), this is less so for the acts addressed by sub (b). This is also reflected in the phrasing of Article 1F(b): only crimes of a 'serious' and 'non-political' nature that have been committed 'outside the country of refuge prior to [the applicant's] admission' fall under its scope. The Refugee Convention itself does not define how the different criteria are to be understood, nor are there binding or universally accepted definitions of the notions 'serious' and 'non-political' (Kälin & Künzli, 2000). Goodwin-Gill and McAdam (2007: 177) argue that it is generally agreed upon that 'serious crimes' are crimes directed against physical integrity, life and liberty. The UNHCR proposes that the seriousness of a crime should be assessed on the basis of international standards and depends on factors like 'the actual harm inflicted', 'the nature of the penalty' and 'whether a crime is considered serious by most jurisdictions' (UNHCR, 2003b: 14). Serious crimes include murder, rape and armed robbery but not petty theft (*ibid.*). This approach contrasts with the 'mechanistic' approach adopted in some states, where the seriousness of a crime is determined on the basis of national standards with respect to what crime a given act would constitute under the national criminal code and what penalty could be imposed

4 In its 1992 Handbook, the UNHCR stated that "[t]he aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime". The view that Article 1F serves (solely or in part) to protect the receiving state's interests has been endorsed *inter alia* in Australia, New Zealand and in some Canadian cases (see Hathaway & Foster 2014: 538). On the contrary, in its 2009 'Statement on Article 1F', the UNHCR contends that "[w]hile Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country" (UNHCR, 2009: 8). This position was also adopted by the CJEU in *Deutschland v. B. and D.*, *supra* note 3, para. 101. The Supreme Court of Canada recently considered that the Refugee Convention "aims to strike a balance between helping victims of oppression by allowing them to start new lives in other countries, while also protecting the interests of receiving countries, which they did not renounce simply by negotiating specific provisions to aid victims of oppression. The Refugee Convention is not itself an abstract principle but an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests". Supreme Court of Canada, *Febles v. Canada (Citizenship and Immigration)*, 30 October 2014, 2014 SCC 68.

(Goodwin-Gill & McAdam, 2007: 183; Djordevic, 2014: 1067).[5] State practice shows that not only crimes directed against physical integrity, life and liberty are seen as 'serious' in the sense of Article 1F(b). The notion is also seen by some states to include drug offences (Gottwald, 2006: 91) and economic crimes.[6]

The concept of 'political crimes' is based on the principle from extradition law that 'political offenders', those who commit common crimes with a political character, are not to be extradited (Kälin & Künzli, 2000). Crimes are non-political when motives other than political ones, such as personal reasons or gain, are the 'predominant feature' of the committed crime or when they are not clearly linked or disproportionate to that objective (UNHCR, 2003b: 15). Determining the predominance of political or other features, however, can be difficult, as becomes clear from the application of the label of 'terrorism'. Article 1F(b) is increasingly seen as 'the appropriate doctrinal environment' for dealing with alleged terrorists seeking asylum (Djordevic, 2014: 1059). In absence of a universally accepted definition of terrorism in international law, deciding what does and does not constitute a terrorist act is, as Gilbert (2003: 440) has put it, a 'matter of political choice, rather than legal analysis'. The UNHCR asserts that terrorist acts are 'wholly disproportionate to any political objective' and are therefore almost by definition non-political (*ibid*.). This view, according to some academics, does however not account for situations of severe and systematic state repression where legitimate violent resistance may involve very violent conduct that under different circumstances would amount to a crime or a terrorist act (Kälin & Künzli, 2000: 76; Saul, 2004: 6; Kaushal & Dauvergne, 2011: 73–74). The UNHCR stresses that whether membership or support of an organization designated as 'terrorist' meets the seriousness threshold depends on individual involvement in an organization and individual responsibility for crimes. Mere affiliation or association with such an organization 'should not lead to an automatic application of the exclusion clauses' (UNHCR, 2009: 21). The Court of Justice of the European Union (CJEU) reached a similar conclusion in *Deutschland v. B. and D.* (Guild & Garlick, 2010: 80; Djordevic, 2014: 1071).[7]

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5 In the UK, for instance, crimes for which a minimum imprisonment of two years would be likely had the crime been prosecuted in the UK are considered 'serious' (Rikhof, 2012: 345). In Canada, in principle, a crime is seen as serious when a maximum sentence of 10 years or more could have been imposed (*ibid*.: 316; Rikhof, 2013: 219); this has led to exclusion under Article 1F(b) for crimes such as "using a false passport, taking bribes, possession of 0.9 grams of cocaine, falsifying business records, and operation of a motor vehicle while impaired" (see Canadian Association of Refugee Lawyers 2014: para. 12). However, as noted by some commentators (Rikhof, 2013: 231; Djordevic, 2014: 1069), in both the UK and Canada, there seems to be a move away from purely mechanistic approaches, as, for example, becomes clear from the judgments Court of Appeal of England and Wales, *AH (Algeria) v. Secretary of State for the Home Department*, 2 April 2012, [2012] EWCA Civ 395, para. 40; Federal Court of Appeal, *Jayakasera v. Canada (Citizenship and Immigration)*, 17 December 2008, 2008 FCA 404, para. 44; and *Febles v. Canada*, *supra* note 4, para. 62.

6 Canada, the Netherlands and the United States have, for instance, included economic crimes under this notion (Rikhof, 2012: 345).

7 CJEU, *Deutschland v. B. and D.*, supra note 3.

Article 1F(b) is furthermore limited to crimes committed 'outside the country of refuge and prior to admission to that country as a refugee'. Despite the seemingly straightforward formulation, there is disagreement on how 'admission to a country as a refugee' should be interpreted. In one view, serious crimes committed after having physically entered the territory of a country of refuge are covered by domestic criminal law and by the Convention's Articles 32 and 33(2) (UNHCR 2003: para. 44). In line with an opposing view, Article 12(2) of the 2004 European Council Qualification Directive Article (2004/83/EC) expands the scope of 1F(b) by interpreting admission as a refugee as the moment a residence permit is issued after refugee status has been granted, thereby including acts committed between entering the country of refuge and recognition as a refugee (Guild & Garlick, 2010: 72; Hathaway & Foster, 2014: 545).

In addition to these criteria included in the phrasing of the provision, there are two other factors that can, according to the UNHCR, be relevant in determining whether the commission of particular crimes should lead to someone's exclusion from refugee protection on the basis of 1F(b). First, the degree of the expected persecution after exclusion and removal should be in balance with the gravity of the alleged crime: 'If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant' (UNHCR, 2009: 11). While this 'proportionality test' has been adopted by some European states and also regionally by the European Union, some other European countries and common law countries have rejected it (Kälin & Künzli, 2000: 72–73; Bliss, 2000: 110–111; Rasulov, 2002: 824–833; Rikhof, 2012: 116–122). In concurrence with this rejection, the CJEU ruled in *Deutschland v. B. and D.* that the proportionality test does not need to be applied, as the determination of whether an act is 'serious' already incorporates an assessment of the circumstances surrounding the act and the situation of the individual. Besides, the question of whether the individual can be deported is a separate issue, according to the Court.[8]

Second, the UNHCR deems the consequences of expiation—having served a sentence or having been granted a pardon or amnesty for the crime but also the lapse of time or 'other rehabilitative measures' (UNHCR, 2003b: para. 72)—relevant in the application of Article 1F(b) (UNHCR, 1992: para. 157). In the case of pardons or amnesties, it notes that 'there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates' (UNHCR, 2003b: para 75). The UNHCR thus proposes

8 *Ibid*., paras. 109–111.

that, when a perpetrator of serious non-political crimes has been held accountable or has been pardoned for his crimes, his past involvement in crimes can, in principle, no longer be a reason to exclude him from refugee protection under 1F(b).[9]

6.4. Who are excluded in the Netherlands on the basis of 1F(b)?

In the Netherlands, Article 1F(b) is often applied in combination with 1F(a). To put it more accurately, in most 1F(a) cases, 1F(b) is deemed applicable as well, since most of the crimes that fall under Article 1F(a) are also listed as serious non-political crimes in Article C2/6.2.8 of the Dutch Aliens Manual. For the purposes of this study, we therefore selected those cases in which Article 1F(b) is invoked either as the sole ground or in combination with 1F(c).[10]

From 2000 to 2010, a total of 40 asylum applicants have been excluded on the basis of 1F(b) exclusively, while another nine persons were excluded on the basis of 1F(b) in combination with 1F(c). Of these 49 individuals, those of Nigerian and Turkish origin form the largest groups. Because of concerns with respect to traceability, due to the small numbers, we did not get permission to mention all the nationalities of excluded individuals from other countries. We can, however, give an indication of the regions the individuals excluded under 1F(b) originate from: Western Asia (12), Southern Asia (11), Eastern and Central Asia (<10), Western Africa (12), Central and Eastern Africa (<10) and South America (<10).[11] Four individuals were regarded as

9 The issue of whether serving a sentence negates the applicability of Article 1F is dealt with differently in different countries. In Belgium, Switzerland and France, for instance, serving a sentence can be a relevant factor (UNHCR 2014: para. 26). The French *Cour Nationale du Droit d'Asil* (National Asylum Court, CNDA) in one case even considered that completion of a sentence in itself resulted in the inapplicability of 1F(b); the Council of State argued that this is only true if the individual does not pose a danger to the state; see *Conseil d'Etat, Ofpra c/ M.A.*, judgment of 4 May 2011, 320910. In Canada, the Supreme Court in *Febles v. Canada* (*supra* note 4) recently saw completion of a sentence as a factor "extraneous" to the commission of the crime and therefore irrelevant. See also Rikhof (2013: 219–220). The same point of view was recently adopted by the High Court of England and Wales; see High Court of England and Wales, *AH (Algeria) v. Secretary of State for the Home Department v. UNHCR*, 14 October 2015, Case No: C1/2013/712, [2015] EWCA Civ 1003, paras. 19–33. Related is the issue of whether it should be taken into account whether the individual poses a present danger to the country of refuge. The CJEU in *Deutschland v. B. and D.* argued that making application of 1F(b) (or (c)) conditional on the individual posing a present danger would be inconsistent with the dual objective of 1F exclusion (excluding those undeserving of refugee status and preventing refugee status from enabling perpetrators of serious crimes to escape criminal liability); see *supra* note 3, paras. 100–105.

10 In theory, Article 1F(c) is only invoked in combination with sub (a), (b) or both, as it is considered not to suffice as an independent ground for exclusion in the Netherlands; see Letter of the State Secretary of Justice to Parliament, *Kamerstukken* II 1997/98, 19637, no. 295, 28 November 1997. Persons excluded on the basis of 1F(b) in combination with 1F(c) generally concern people who are believed to have held relatively high positions; the crimes they are associated with are not necessarily more 'serious', but the individuals concerned are considered to have carried greater responsibility. For an elaborate overview of the characteristics of individuals excluded under Article 1F(a), see Chapter 5.

11 These regions are in accordance with the United Nations Statistics Division (UNSD) M49 coding classification.

stateless or their nationality at the moment of asylum application was unknown. By analysing the motivations to commit the alleged crimes, we will characterize and categorize individuals who are excluded on the basis of Article 1F(b). This exercise is explorative in nature and meant to give more insight into the kind of cases in which the Netherlands applied 1F(b). We are aware that it may in some instances be debatable whether cases should be included in one category or another. The analysis should certainly not be seen as a typology of perpetrators of serious non-political crimes.

6.4.1. Motivated by personal reasons or gain

A first strand of cases are serious common crimes – crimes committed by an individual who seems to be motivated by personal reasons or gain. Ten out of the 49 1F(b)-excluded persons fit best into this first category (see Table 6.1). The alleged crimes found in this group include violent and sexual crimes such as assault, rape and murder, but also transnational crimes such as human smuggling and drug trafficking, and white-collar crime such as embezzlement. These cases, for example, include that of a man (J137) who claimed he had threatened wealthy people and abducted women and children to solve his personal financial problems. Another man (M23) claimed he raped his sister under the influence of alcohol, while another applicant (J6) claimed he was part of a criminal group of youngsters that provided for its livelihood by stealing. The group furthermore abducted, tortured and killed several young women and hid their bodies. The applicant stated that he used a sword to cut off a woman's breasts and nose while she was still living.

Table 6.1
Non-political crimes motivated by personal reasons or gain

Code	Crimes associated with
J6	Assault, murder
J117	Human smuggling
J133	Rape, attempted murder, sexual assault, attempted assault, theft, damaging property and assisting prisoners to escape
J137	Unlawful detention, abduction, hostage-taking
J201	Aggravated assault, theft with violence or threat of violence
LI4	Human smuggling
LI5	Human smuggling
LI149	Attempted homicide
LI154	Embezzlement, taking bribes as an official
M23	Rape

6.4.2. Acts of terrorism

A second category of crimes which Article 1F(b)-excluded individuals are associated with are crimes that have an alleged political objective but are deemed non-political because they were disproportionate or not clearly linked to that (political) objective. In these 16 cases, the acts and/or the organization the applicant was associated with were quoted as having a 'terrorist' nature by the Dutch immigration service (Immigratie en Naturalisatie Dienst, IND) in the 1F decision (see Table 6.2).

The cases concern alleged participation in activities such as hostage-taking, armed robbery, arson and murder. One individual (LE61) was allegedly responsible for the diversion that was supposed to keep the police away, while another man from within the militant group that both were part of was allegedly involved in an assassination. Another man (LI178) declared during the asylum interview to have reported a 'spy' within an opposition group. After he reported this, the spy was executed. One man (J138) was associated with acts of terrorism on the basis of an indictment by a prosecutor in his country of origin, accusing him of taking part in armed robberies on a jewellery store and a currency exchange office and throwing Molotov cocktails, and a conviction for extortion of a clothing workshop and participation in a criminal organization. Another man (J147) was excluded for allegedly having held someone in captivity for 10 days in his capacity as a board member of the national department of an opposition group somewhere in Europe.

6.4.3. Motivated by political, ideological, ethnic and/or religious beliefs

The common denominator of the remaining category, consisting of 23 cases, is negatively formulated that they do not concern cases which the IND identified as 'terrorist' cases and that the alleged perpetrators do not seem to have been primarily motivated by personal reasons or gain. Positively formulated, they first of all have in common that the alleged perpetrators were part of (in)formal groups (including groups associated with the formal government). Secondly, their motivation is associated with beliefs held by a group that they belonged to, as the applicants often claim that they committed crimes in the context of their membership of political, ideological, ethnic and/or religious groups (see Table 6.3).

It is striking that by far the majority of this group consists of individuals from Western Africa. These cases include, for instance, two men (C22 and M30) who claimed that they were members of a locally operating youth group/vigilante known for arresting, mistreating, torturing and killing people they believed were 'criminals'. According to IND information, the group also regularly turned against the police. Four other men (C25, C27, C28 and LE49) are associated with killing people with guns, sticks and machetes in riots

between different ethnic or religious groups. Two men (C24 and C30) alleged they were members of organizations associated with crimes such as extortion, sabotage, hijacking, abduction and killing. Another applicant (C26) allegedly collected children with an age of between one and two in a hospital, who were bought by the secret cult he was a member of. The children were killed and their blood was used in the cult's rituals. Yet another (C31) is associated with a university confraternity, which fought for the 'interests of students' by killing 'corrupt' teachers and fighting other confraternities. The organization allegedly did so very violently and with the use of weapons; the man claimed to have held the rank of 'butcher'. The organization was also employed for stealing ballots and manipulating election outcomes. A man (JM6) from a Western African country claimed to have transmitted errands to his uncle, who was a member of a militia group, and abducted a child who was sacrificed and killed a woman for his uncle. He also stabbed his fiancée to death after another man took her away. Another man (LE2) claimed he arrested 'opponents of the state' and handed them over to the secret service. He also planted antipersonnel and anti-tank mines. An applicant from a Southern Asian country (M45) claimed he worked for an investigative committee, and arrested and punished 'criminals' and opponents of the organization he was associated with.

Table 6.2
Acts of 'terrorism' or crimes committed for a 'terrorist' organisation

Code	Organisation	Crimes associated with
J113	Radical political opposition group	Participation in terrorist activities
J118	Radical political opposition group	Complicity in hostage-taking
J136	Radical political opposition group	Fire bomb attack, conspiracy to commit arson
J138	Radical political opposition group	Armed robbery, arson
J141	Radical political opposition group	Assault, murder, threat with violence against officials
J143	Radical political opposition group	Committing attacks qualified as terrorist acts
J147	Separatist opposition group	Hostage-taking
J148	Radical political opposition group	Assault, committing attacks against and murder of police officers
J153	Separatist opposition group	Murder of special police force officer
J155	Radical political opposition group	Armed robbery, homicide
LE61	Separatist opposition group	Terrorist activities, complicity in assassination
LE62	Radical religious opposition group	Facilitation of terrorist activities, complicity in homicide and murder
LI35	Radical religious opposition group	Leading a terrorist organisation, co-perpetration of terrorist acts (bomb attacks) and complicity in murder
LI36	Radical religious opposition group	Leading a terrorist organisation, complicity in terrorist acts (murder)
LI160	Radical religious opposition group	Complicity in terrorist activities
LI178	Separatist opposition group	Facilitation of extrajudicial execution

Table 6.3
Crimes motivated by political, ideological, ethnic and/or religious beliefs

Code	Organisation or group	Crimes associated with
C22	Vigilante group	Unlawful detention and interrogation, murder
C24	Vigilante group	Hostage taking, homicide, murder of police officers
C25	Political/religious group	Murder
C26	Political/religious group	Complicity in unlawful detention and murder
C27	Political/religious group	Aggravated assault and homicide
C28	Political/religious group	Homicide
C29	State security services	Unlawful detention and torture
C30	Vigilante group	Hostage-taking, homicide, murder
C31	Vigilante group	Abduction, armed robbery, assault, murder
C111	Political/religious group	Participation in violent action with civilian casualties
J54	Private army	Drug trafficking, torture, murder
J55	Private army	Murder
JM6	Ethnic group/militia	Murder, abduction
LE2	Military intelligence service	Hostage-taking, assault, torture
LE49	Ethnic group	Homicide
LI33	- (directed against members of opposition group)	(Attempted) arson, unlawful detention, (attempted) aggravated assault or homicide, (attempted) murder
M2	Political group	Facilitation of torture and extrajudicial execution, participation in attacks and ambushes
M16	Judicial police	Complicity in torture
M30	Vigilante group	Unlawful detention, complicity in aggravated assault and complicity in murder
M45	Separatist opposition group	Complicity in aggravated assault, unlawful detention
M53	Ethnic group	Murder
M71	Separatist opposition group	Facilitation of aggravated assault, murder
M90	Volunteer army	Facilitation of torture

The above analysis shows that the majority of 1F(b) exclusions in the Netherlands (80 percent) do not concern serious 'common' crimes motivated by personal reasons or gain. Whether or not labelled as terrorist cases, most cases have a connection with membership of politically, ideologically, ethnically and/or religiously motivated groups. Many crimes that apparently fall under the reach of 1F(b) occur in situations of conflict or civil war and thus, perhaps surprisingly, may have more resemblances to crimes that would be seen to fall under 1F(a) than one would expect. The study by Aas (2013) shows that this also seems to be the case for the majority of the 1F(b) cases in Norway. Rikhof's (2012: 310–344) extensive review of 1F(b) case law suggests that, in nine sampled countries, many of the cases referred to would fall in the same category, although it must be noted that his review is based on a selection

of case law. Interestingly, Aas (2013: 75) found that, in some cases where Article 1F(a) could have been applied, 1F(b) was used instead, as 'the legal test of Article 1F(b) was considered less complex and more straightforward to apply'. Similar pragmatic considerations may have also played a role in some of the Dutch cases. JM6, for example, committed crimes as a member of a relatively large armed faction at the time of a civil war and was excluded under 1F(b). It is generally accepted that the faction he was fighting for has been responsible for committing war crimes. The fact that cases such as these are excluded under 1F(b) instead of 1F(a) indicates that 1F(b) may, similarly to Norway, also in the Netherlands be used as a 'residual' exclusion ground in some cases. One important difference is, however, that the proportion of 1F(b) cases in the Netherlands compared to Norway is much smaller (6,6 percent against about two-thirds of the total number of 1F cases).

6.5. Article 1F(b) in Dutch policy and practice

The Dutch policy on Article 1F(b) is worked out in Article C2/6.2.8 of the *Vreemdelingencirculaire* (Aliens Act implementation guidelines). With respect to the notion of non-political crimes, it determines that a crime is only 'political' when there is a clear link with and proportionality of the crime relative to the political objective, when it is an effective means of reaching the political objective and when the individual has no peaceful alternative at his disposal. 'Purely' or 'absolute' political offences, which are directed at the state, in principle do not fall under 1F(b) (Rikhof, 2012: 329). Certain crimes are deemed serious and non-political by definition: murder, killing, rape, war crimes, crimes against humanity, genocide,[12] torture, slavery, slave trade and crimes of which a binding international instrument declares that it is non-political and/or cannot lead to refugee status.[13] This suggests that what Goodwin-Gill and McAdam (2007) have called a mechanistic approach is adopted. The Aliens Manual is silent on balancing (the proportionality test)[14] and rehabilitation or expiation.

If we analyse, on the basis of the file analysis, how this policy works out in practice and relates to the international guidelines discussed above, a few observations are striking. In the first place, many of the crimes the excluded are generally associated with (e.g.

12 These 'international crimes' also fall under the reach of 1F(a). Hathaway and Foster (2014: 547) argue that interpreting Article 1F(b) in a way to also include international crimes creates redundancy.

13 These binding instruments, for instance, include the 1977 European Convention on the Suppression of Terrorism and UN SC Resolutions 1269 and 1373 of 19 October 1999 and 28 September 2001, respectively. Earlier versions of the Aliens Manual made explicit reference to these instruments but this reference was omitted in the Manual that is currently in force.

14 A 'durability and proportionality' test has been developed in Dutch jurisprudence but it only assesses the proportionality of the consequences of exclusion in 'durable' situations of non-removal, namely situations that have lasted at least 10 years (Reijven & Van Wijk, 2012).

abduction, drug trafficking, arson, bombing, torture, rape, killing and murder) are violent crimes that inflict great harm, attract heavy penalties and are considered serious crimes by most jurisdictions.[15] For other crimes, such as embezzlement or human smuggling, it is less clear whether these criteria are met and therefore they do not automatically meet the 'seriousness' threshold. In an embezzlement case, the Council of State confirmed that, because of the amount of money involved (an estimated 253 million yuan, approximately 30 million Euros), the duration of the embezzlement scheme and because corruption is seen internationally as a serious crime, the case did fall under the reach of 1F(b).[16] Regarding human smuggling, there is international consensus that this is seen as a serious crime.[17] Not all forms of human smuggling are, however, equally harmful. In our file analysis, we, for example, encountered the case of J117, a man who was excluded for involvement in illegally transferring six persons by air from a country in Southern Asia to the Netherlands. He applied for asylum after being convicted in the Netherlands. Here, the harm is less apparent, as is reflected by the relatively low prison sentence of nine months that was handed down by a Dutch criminal court.[18] As the actual sentence that was handed down apparently is not part of the assessment as to whether a crime is serious, the approach taken in the Netherlands could also be qualified as mechanistic.[19]

15 The fact that a crime is not seen as a crime by some jurisdictions can also block the application of 1F, as becomes clear from a case concerning female genital mutilation. Council of State of the Netherlands, 10 February 2014, ECLI:NL:RVS:2014:550.

16 Council of State, 30 December 2009, ECLI:NL:RVS:2009:BK8653; see Rikhof (2012: 331, 345). In a case in which the IND applied 1F(b) to an Afghan judge for allegedly accepting bribes in her capacity as a judge, the court argued that the seriousness threshold was not met. See District Court The Hague, 2 October 2012, ECLI:NL:RBSGR:2012:BX9081.

17 Human smuggling is regarded to undermine the international system and can bring "great harm" to states and can "endanger the lives or security of the migrants involved" (preamble to the Protocol against the Smuggling of Migrants supplementing the UN Convention against Transnational Crime).

18 Interestingly, in an Australian human smuggling case, the Administrative Appeals Tribunal of Australia (AATA) took a different approach, arguing that "a distinction must be drawn between the offence in law, which is of a serious character, and the Applicant's conduct which, in the Tribunal's view, is not so serious. [The applicant's] criminal conduct comprised, on a number of occasions, his repairing an engine on the boat. He did not so do for profit but merely to facilitate the boat continuing on its voyage and reaching its destination. In the Tribunal's view, this is not the sort of 'serious non-political crime' which should give rise to Australia's protection obligations under the Refugees Convention not applying". AATA, 'SRBBBB' and Minister for Immigration and Multicultural and Indigenous Affairs, 24 October 2003, [2003] AATA 1066, para. 59. A similar conclusion was reached in AATA, 'SRCCCC' and Minister for Immigration and Multicultural and Indigenous Affairs, 26 March 2004, [2004] AATA 315.

19 In a recent case in which an individual convicted in Germany for importing 32 kilograms of raw opium had been excluded on the basis of 1F(b) by the Dutch State Secretary of Security and Justice, the Council of State, however, took an approach that seems to be less mechanistic. While the State Secretary confirmed that, in deciding whether 1F applies, he only takes into account whether the nature of the offence makes it can be qualified as a serious non-political crime (para. 1.4), the court considered that, since not every drug crime is a serious non-political crime, the State Secretary has to show on the basis of what criteria and under what circumstances a drug crime constitutes a serious non-political crime (para. 1.6). See Council of State of the Netherlands, 14 September 2015, ECLI:NL:RVS:2015:3008. Gottwald (2006) already argued that the fact that different degrees of seriousness exist, as reflected in the UN Trafficking Convention, should be taken into account in deciding on the applicability of 1F(b). Arguably, the same could be said about human smuggling.

A second observation in relation to the application of 1F(b) criteria is that many of the cases are deemed non-political, not because there is no political element, but because that element does not predominate the common element. In the case of J155, who claimed to have committed robberies to generate income for his organization, for instance, the IND notes in the preliminary decision that it is 'inconceivable why the political purpose could not have been reached by any other means than through robbery and similar criminal acts'. It is not impossible, however, that even a crime as serious as murder can be justified by a political objective. The District Court of The Hague annulled an exclusion decision by the IND concerning a man from Iraq who gathered information on members of the secret service and the Ba'ath party, which resulted in the killing of two men. The court considered that the organization aimed to overthrow the Saddam Hussein regime, that there was a direct connection between the acts and the political objective, that the acts were effective and proportional, and that the man had no peaceful alternatives at his disposal (Rikhof 2012: 330).[20] In the files in which the 'terrorist' label was used, the exclusion was based on the statements of the applicants in combination with what is known, from public sources or the applicant's statements, of the crimes the organization is believed to have been involved in. We did not encounter the use of listings of names of members of terrorist organizations as a basis for exclusion under 1F(b).

In most cases, the prerequisite that crimes have to be committed outside the country of asylum and before entering this country is met. This is, however, more disputable for 'transnational crimes' such as drug trafficking and human smuggling, as they may involve the trespassing of the Dutch border. The earlier discussed human smuggler J117, for example, partially committed the offence in the Netherlands.[21] As discussed above, crimes committed by refugees after entry to the country where the asylum application is filed are generally considered not to be subject to Article 1F but covered by Article 33(2) of the Convention. It makes one wonder why 1F was employed in this case, as it could have also been dealt with by applying Article 33(2). By now, policy may have changed. In a later case against an Iranian man convicted to an 18-month prison sentence on charges of human smuggling, the District Court of The Hague ruled that 1F(b) was not applicable, as the crime was committed from within the Netherlands.[22]

The Dutch authorities in some cases explicitly applied a proportionality test. This

20 District Court of The Hague, 19 July 2004, Awb 02/60920.

21 In an Australian case, the AATA also found that the crime in question fell under 1F(b), as it was committed both in and outside Australia. See 'WAT' and Minister for Immigration and Multicultural and Indigenous Affairs, 7 November 2002, [2002] AATA 1150, paras. 18–20.

22 District Court of The Hague, 28 June 2007, ECLI:NL:RBSGR:2007:BA8765.

was, for example, the case with the human smuggler (J117) mentioned above. As the IND deemed his crimes 'so serious' that they 'cannot weigh up against any fear for persecution' (quote from decision in J117), the test failed. If smuggling six persons to the Netherlands is in itself considered so serious that exclusion always precludes over the risk of persecution, there is the risk that the balancing test is in actual practice a dead letter.[23]

Finally, the file analysis suggests that expiation, for instance in the form of sentence completion, is not taken into consideration. In the five cases in which the applicant had already served a sentence for the crimes that were the basis for the 1F decision (J117, J133, J136, LI4 and LI5), this fact did not bar exclusion. LI5, for instance, claims he was convicted in Austria to two years in prison for human trafficking. He co-operated in the investigation and, because of his co-operation, several other members of the organization were convicted as well. In cases such as these, the fact that someone has been convicted of the crime is being used to support the conclusion that 1F applies but the fact that he served a sentence for the crime does not lead to the conclusion that 1F does not apply.[24]

6.6. What happens to those excluded under 1F(b)?

Once Article 1F(b) is invoked, there are several possibilities as to what happens to the excluded. A first option is prosecution in the Netherlands. As a follow-up to a 1F(b) exclusion, prosecution is, however, very unlikely, since courts in the Netherlands will almost always lack jurisdiction to prosecute 1F(b) crimes. Different from 1F(a) crimes, these crimes are typically not subject to universal jurisdiction.[25] In case someone has already been acquitted or convicted elsewhere (which is more likely with 1F(b) crimes than with 1F(a) and (c) crimes), prosecution will in most instances be blocked by the *ne bis in idem* principle. In our dataset, we have found no instances of 1F(b)- excluded individuals who were later prosecuted.

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23 As the Netherlands was one of four governments expressing to the CJEU that an assessment of proportionality is not necessary as all relevant circumstances are already considered in determining the seriousness of an act, and the CJEU adopted this view, it could be that the proportionality test is currently not used any more. See *Deutschland v. B. and D., supra* note 3, at para. 109. At the same time, the Council of State, in the above-mentioned recent decision, for example, stressed that 'the application of [Article 1F(b)] should be proportionate to the objective pursued, which involves weighing the seriousness of the crime against the consequences of exclusion' [translation by the authors]; Council of State, *supra* note 19, para. 1.5.

24 Remarkably, the above-mentioned recent decision by the Council of State seems to suggest that the passage of time and absence of recidivism are relevant in deciding on whether there are serious reasons for considering that someone has committed acts referred to in Article 1F(b). See Council of State, *supra* note 19, para. 1.3.

25 Exceptions are acts of torture that do not qualify as 1F(a) crimes. On the basis of the 1989 Torture Convention, Dutch courts have competence to adjudicate those crimes. We encountered at least three cases (M2, M16 and M90) in which the exclusion was based on alleged commission of acts of torture in the sense of the Torture Convention.

Second, there is the possibility of extradition to another state for the purpose of prosecution. This, however, also does not occur often (see Chapter 4). The first barrier is very practical in nature. If states would wish the extradition of someone who has been excluded in the Netherlands, they have to be aware of his presence in the Netherlands. This is difficult, as the Netherlands is often not in the position to proactively share such asylum related information with the country of origin or any third country interested in prosecuting the excluded individual because of confidentiality issues.[26] But, even if a country interested in prosecuting the excluded individual is aware of the presence of an individual in the Netherlands, a second barrier in many cases is the absence of a bilateral or multilateral extradition treaty. Of the states from which the 1F(b) applicants originate, only five have such agreements with the Netherlands. Even if there is an extradition agreement, extradition is only possible if the alleged crimes satisfy the double criminality requirement: the act has to be a crime in the country that requested the extradition as well as in the Netherlands. Past extradition requests of 1F(b)-excluded individuals from Turkey were refused, as they failed to meet this requirement (see Chapter 4).

If prosecution and extradition are not options, the individual will have to leave the Netherlands within 28 days or, under certain circumstances, immediately (Article 62 of the Aliens Act). In addition, the excluded person will be declared persona non grata (Article 67 of the Aliens Act) or receive an entry ban (Article 66a of the Aliens Act). Reijven and Van Wijk (2012) already discussed that persons excluded on the basis of 1F(a) are not likely to return voluntarily and that forced deportation may be barred by the non-refoulement principle laid down Article 3 of the European Convention on Human Rights (ECHR). The chances that those 1F(b)-excluded individuals who have allegedly been involved in crimes for personal gain or profit are protected by *non-refoulement* is relatively low. It is, however, much more likely that politically motivated alleged perpetrators are protected from deportation. If this is the case, the excluded find themselves in a situation of legal 'limbo'; there is no prospect for their departure, while remaining in the Netherlands is illegal. In the Netherlands, such individuals are not entitled to work, have no access to education and do not receive financial support.[27] Sooner or later, they may disappear from the government's radar, illegally roaming around in the Netherlands, or anywhere else

26 Another possibility is that the country of origin has issued an international arrest warrant; in the one case in which we encountered this (J136), it did not lead to the arrest and extradition of the person concerned.

27 Since a verdict by the European Committee for Social Rights, the Dutch government is obliged to offer them basic humanitarian aid, however (see European Committee for Social Rights, European Federation of National Organisations Working with the Homeless vs. the Netherlands, Complaint no. 86/2012, Decision on the merits, 2 July 2014. Available online at <http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC86Merits_en.pdf> (last visited 6 February 2015)).

in the 'Schengen' territory. In some cases, they pop up in another Schengen country and again apply for asylum or try to get subsidiary protection in another way. In such instances, these possibly dangerous persons are typically passed on from one country to the next like a 'hot potato'.

Let us illustrate this by zooming in on the post-exclusion phase of J136, who applied for asylum in England in 1993. In 1995 – probably while his case was still pending but this is unknown – he was convicted to a four-year sentence for firebombing a bank. After having served his sentence, he was expelled to his country of origin, where he was arrested and detained from 1998 to 2005 for being a member of a certain organization. In 2005, he entered the Netherlands and applied for asylum. The application was denied on the basis of 1F(b). In order to substantiate the exclusion, the IND had requested a copy of the conviction with the UK authorities, but to no avail. In 2010 – five years later – he emerged in France, where he again applied for asylum. On the basis of the 'Dublin Regulation',[28] the French authorities transferred him to the Netherlands, where he again filed an asylum application. In June 2010, he was released from aliens' detention because he could not be deported to his country of origin. In November that same year, he filed yet another asylum application in the UK. The UK authorities, on the basis of the Dublin Regulation, requested the Netherlands to take him back. The request was, however, turned down, as the applicant had claimed he had been to his country of origin after he was released in the Netherlands. And, indeed, on the basis of the Dublin Regulation, there is no obligation to arrange for a Dublin transfer if the alien has spent three months or more outside Schengen territory. Upon this request, the Netherlands reiterated that the UK authorities mentioned that the applicant's statements were credible. Since the applicant could indeed have left the territory of the member states for more than three months, the Netherlands informed the UK that it 'unfortunately' saw no other possibility than to reject the request for transfer. As we stopped analysing, the case was still pending, and it is unknown where J136 currently is. It is also unknown how many more of these 1F(b)-excluded 'hot potatoes' roam around in Europe.

6.7. Conclusion

From 2000 to 2010, the Netherlands excluded 49 individuals on the basis of Article 1F(b) of the Refugee Convention. Nigerian and Turkish nationals form the largest groups within this population. The crimes that individuals excluded on the basis of Article 1F(b) have allegedly committed can be categorized as serious common crimes committed by individuals, non-political crimes with an alleged political objective

28 Regulation 2003/343/EC.

and crimes motivated by political, ideological, ethnic and/or religious beliefs. Interestingly, most of the cases fall into the third category. In the Netherlands, a mechanistic approach is taken to determine the seriousness of the alleged crimes. We have seen cases in which a proportionality test was employed but recent case law suggests that this is now no longer always used. Factors such as expiation are deemed irrelevant to the applicability of Article 1F(b).

In absence of a universal meaning of the concept of serious non-political crimes, states have a significant amount of discretion to decide which crimes fall under 1F(b). Essentially, debates on the rationale behind and scope of Article 1F(b) can be summarized by these two questions recently posed by the Supreme Court of Canada:

- Does Article 1F(b) apply to 'anyone who has ever committed a serious non-political crime outside the country of refuge'?
- Does the seriousness of the crimes have to be 'balanced against factors extraneous to commission of the crime such as current dangerousness or post-crime rehabilitation or expiation'?[29]

This study suggests that the Netherlands tends to exclude anyone who has ever committed a serious non-political crime outside the Netherlands and that factors such as dangerousness, rehabilitation and expiation are irrelevant in determining whether the crime is serious. This contradicts the approach taken in some other European states and advocated by the UNHCR and human rights organizations. Finally, this study suggests that the post-exclusion phase of 1F(b) cases is full of hurdles. Domestic prosecution and extradition are often not possible, while voluntary or forced return may be barred because of non-refoulement obligations. Consequently, possibly dangerous unwanted but unreturnable individuals travel around in Europe, while immigration authorities of the respective countries where they set foot toss these 'hot potatoes' around in the hope that they themselves do not have to deal with the matter. With the increased attention on identifying possible terrorists amongst the asylum population, Europe is likely to be confronted with more 1F(b) exclusions in the future. However, as it stands, it does not have a coherent approach on how to deal with these individuals after exclusion.

29 *Febles v. Canada*, Supreme Court of Canada, 30 October 2014, 2014 SCC 68, paras. 44 and 60.

7. General discussion

7.1. Introduction

Article 1F is the 'exclusion clause' of the Refugee Convention. Individuals applying for asylum can be excluded from the protection offered by the Convention when there are serious reasons for considering that they have committed a serious crime. The exclusion clause is seen to fulfil different functions: excluding undeserving individuals from refugee protection, promoting criminal accountability for perpetrators of serious crimes, and protecting the community of the state of refuge.

The function of promoting criminal accountability is not served by the application of Article 1F in itself, but requires active follow-up by a capable and willing actor. The Refugee Convention does in this respect not assign responsibility to any actor in particular. As international criminal courts and tribunals have limited jurisdiction and focus, as domestic criminal justice systems in post-conflict states are often not willing or capable of prosecuting these cases, and as excluded individuals often remain in the states of refuge that have excluded them because they cannot return or be expelled, states of refuge arguably have a crucial role to play. Considering that one of the original aims of the exclusion clause was to prevent perpetrators of serious crimes from escaping criminal prosecution, and given the international dedication to close the 'impunity gap' for these crimes, it is important to know what states of refuge (can) contribute to these aims. To what extent are these states willing to bring people who allegedly have 'blood on their hands' residing on their territory to justice, and what can and do they actually do to promote accountability for these alleged perpetrators? What is realistically possible in this respect? These questions will likely remain topical for the time to come considering that people from conflict areas will continue to apply for asylum.

The purpose of this study was to empirically study the role that states of refuge can and do play in the administration of criminal justice to alleged perpetrators of serious crimes applying for asylum. The study focused on the case of the Netherlands, a country with a relatively high number of 1F exclusions, committed to the development and implementation of international criminal law, also on the domestic level. The central research question was: *How has the Netherlands as a state of refuge contributed to administering criminal justice to asylum seekers who have been excluded under Article 1F of the Refugee Convention?* In order to answer this question, different sub questions were formulated at the outset and have been addressed in the previous chapters:

- How does the application of Article 1F relate to other modes for exclusion of (allegedly) criminal immigrants, how is Article 1F being applied in the Netherlands, and what does the population of individuals excluded under Article 1F look like?
- To what extent and in what ways has the Netherlands facilitated and/or promoted criminal prosecution of individuals excluded under Article 1F *outside* the Netherlands?
- To what extent and in what ways has the Netherlands prosecuted individuals excluded under Article 1F *within* the Netherlands?
- What happens to those individuals excluded under Article 1F who are not criminally prosecuted but remain in the Netherlands?

This study has used a mixed-methods approach to answer these questions. An extensive dataset was used, consisting of all refugee status determination decisions taken between 2000 and 2010 by the Dutch immigration service where Article 1F has – at a certain point in the refugee status determination process – been *considered* or actually *invoked*. A sample of 358 case files, out of 745 files containing a definitive 1F decision, was analysed. Four categories of variables were scored: personal characteristics of the individual, legal characteristics of the case, characteristics relating to the alleged behaviour and sources used to substantiate the 1F decision. Besides this file analysis, a review of academic literature, case law and policy documents was conducted and interviews were held with experts. In addition, the second chapter drew from a study by Bolhuis and Van Wijk (2015b) into the information exchange between immigration, law enforcement and prosecution services in six European countries, commissioned by the Norwegian immigration service.

This chapter will summarise the results and answer the different research questions (section 7.2), reflect on strengths and limitations of the study (section 7.3), discuss the findings and their implications for policy and practice (sections 7.4 and 7.5) and, finally, reflect on directions for further research (section 7.6).

7.2. Summary of results

7.2.1. 1F exclusion in the Netherlands

As noted above, the first question was how the application of Article 1F relates to other modes of exclusion of (allegedly) criminal immigrants, how Article 1F is being applied in the Netherlands, and what the population of individuals excluded under Article 1F looks like. Besides exclusion from international protection on the basis of 1F, there are two other categories of immigrants who are 'undesirable' because of their past or possible future criminal conduct. Firstly, the commission of a crime by

someone in possession of a residence permit granted on the basis of international protection or another ground, can lead to the revocation of, or refusal to extend, a permit if there is reason to consider someone represents a *danger to the public order* or to the *community*. Whether such a danger is assumed depends on the nature of the crime or the penalty imposed: more serious crimes or penalties make denial of a residence permit more likely. Secondly, a *danger to national security* can also be a reason to end or revoke a legal status. Determination of whether someone poses a danger to national security is based on an individual report drafted by the national or a foreign intelligence service and is not dependent on a criminal conviction. In the context of international protection, an important difference between Article 1F on the one hand, and Articles 32 and 33(2) of the Refugee Convention on the other,[1] is that in the latter cases it has already been determined that someone is a refugee, while in the case of 1F, the individual is considered to fall *outside* the refugee definition because of his past conduct. The study focused on those individuals excluded under Article 1F.

At the outset of the study, the circumstances and developments that led to the introduction of the Dutch 1F policy in 1997 were described. Unlike in other states, the increased attention for Article 1F in the Netherlands was not triggered so much by the crises in the former Yugoslavia and Rwanda or the terrorist attacks in the United States on 11 September 2001, but in particular by societal unrest relating to asylum applications by alleged leaders of the former Afghan communist regime. A publication in a popular magazine led to a public outcry because it listed thirty-five senior leaders from the former Afghan communist regime who resided in the Netherlands, some in possession of an asylum status, while their involvement in war crimes had reportedly not been thoroughly investigated. This led to the formulation of an Article 1F policy, which was set out in a policy letter by the responsible State Secretary in November 1997.

Three guiding principles of this policy are that Article 1F is to be interpreted restrictively, that the opportunities to apply Article 1F must (nonetheless) be maximally utilized, and that further consequences are to be connected to any exclusion on the basis of 1F. The policy entails several measures. In order to maximally utilize the opportunities to apply 1F, the investigation and decision in relation to the applicability of Article 1F were made the exclusive responsibility of a designated unit within the immigration service. The further consequences connected to the application of Article 1F are that the individual is declared *persona non grata*, which

1 These two Articles respectively allow for expulsion on grounds of national security or public order (32) and declare the *refoulement* prohibition inapplicable in case of danger to the security or community (33(2)).

entails an obligation to leave the territory of the state, and a standard assessment by the public prosecutor of the possibilities for criminal prosecution. Other distinctive elements of the Dutch policy are that exclusion under 1F is assessed before inclusion under 1A Refugee Convention; that certain designated groups can be categorically excluded, in which case it is up to the individual concerned to show that his case forms an exception; that excluded individuals are by definition considered to pose a danger to public order; and that 1F invokes a blanket bar to all other residence permits. When this policy was communicated, the responsible State Secretary referred to moral and legal obligations to prevent international crimes and expressed the conviction that the Netherlands should not be a safe haven for persons excluded under 1F, because the position of their victims is at stake, and because it is important that these persons do not escape the penal consequences of their acts and that justice should have its course as much as possible, in the Netherlands or elsewhere. These policy measures are largely still in place. At the time of their introduction, they were unique internationally. Some of these measures, such as the designation of a special unit and the standard assessment of possibilities for criminal prosecution have also been introduced in other states. Other elements – most notably the practice of categorical exclusion and the standard assumption of a danger to public order – have not or only to a very limited extent been followed by other European states. Those are also the elements that continue to be the subject of criticism put forward by national and international observers.

This policy has driven up the number of 1F-exclusions in the Netherlands. Between 1992 and 2017, 1.000 asylum seekers have been excluded. Internationally, this is an exceptionally high number. This is partially due to the fact that – unlike in most other European states – exclusion is considered before inclusion in the Netherlands. This means Article 1F can also apply to persons that would not fall within the refugee definition of Article 1A. Nonetheless, the high number of 1F cases in the Netherlands is also evidence of the Netherlands' proactive, and relatively strict, 1F policy.

On the basis of the file analysis, several characteristics of the population of asylum seekers excluded in the Netherlands were discerned. The file analysis showed that in the period 2000-2010, individuals from Afghanistan are strongly overrepresented. This can be explained by the policy of categorical exclusion, which means that mere association with a certain position within a designated organization suffices as a basis for exclusion; such a categorical exclusion was *inter alia* in place for certain individuals who are believed to have served in the Afghan security services, police or the Islamic Unity Party. The other countries of origin in the top ten in this period are Iraq, Angola, Democratic Republic of the Congo, Sierra Leone, the former Yugoslavia, Turkey, Iran, Rwanda and Nigeria. The remaining individuals come from

28 other countries. More recently in 2015, the top five of countries of origin of people excluded were Syria, Eritrea, Nigeria, Sudan, and Georgia.

The vast majority of individuals in the sample are excluded on the basis of Article1F(a), which concerns genocide, crimes against humanity, war crimes and crimes against peace, or a combination of 1F(a) and the other limbs. Excluded individuals from Afghanistan and Iraq are typically believed to have committed war crimes or crimes against humanity as members of the organizations above. Excluded individuals from Angola, the Democratic Republic of the Congo (DRC), Sierra Leone, and the former Yugoslavia are typically believed to have committed war crimes in the 1990s while fighting for either government or rebel forces. Those individuals coming from Rwanda are mostly associated with the crime of genocide; individuals from Iran are often excluded because they allegedly contributed to crimes against humanity in their capacity as employees of secret services or prison security. The files show that for the crimes that fall under 1F(a), people in the lowest ranks are generally overrepresented, with the exception of the Afghan cases. Of the group of non-Afghan cases, the file analysis shows that about one-third are believed to have played a facilitating role rather than having been directly involved in the commission of crimes.

Only 49 out of the 358 cases in the sample are exclusively based on Article 1F(b); within this group, Nigerian and Turkish individuals are overrepresented. Three strands of 1F(b) cases can be distinguished. A first strand of cases are serious common crimes, committed by an individual who seems to be motivated by personal reasons or gain. The alleged crimes found in this group include violent and sexual crimes such as assault, rape and murder, but also transnational crimes such as human smuggling and drug trafficking, and white-collar crime such as embezzlement. A second category of cases concerns acts and/or organizations which were qualified as having a 'terrorist' nature by the Dutch immigration service. The cases concern alleged participation in activities such as hostage-taking, armed robbery, arson and murder. Cases in the third strand have in common that the alleged perpetrators were members of (in)formal political, ideological, ethnic and/or religious groups and often claimed that they committed crimes in the context of their membership of these groups.

The Netherlands as a state of refuge can play a role in bringing these alleged perpetrators to criminal justice by either facilitating their rendition to an international or national court *outside the Netherlands* (*aut dedere*), or prosecuting these individuals domestically *in the Netherlands* on the basis of universal

jurisdiction (*aut judicare*). Assessing the possibilities for criminal prosecution by the public prosecutor as a follow-up to exclusion is an integral part of the Dutch 1F policy. As was already mentioned, the analysis of the case files shows that most cases concern international crimes under 1F(a), which means that in most instances prosecution on the basis of universal jurisdiction is – in principle – possible. In those cases where exclusion was exclusively based on 1F(b), criminal prosecution would – in principle – only be possible after extradition to a country that does have jurisdiction.

7.2.2. Facilitation and promotion of criminal prosecution outside the Netherlands

In answer to the second sub question, the study has shown that the Netherlands has occasionally facilitated and promoted criminal prosecution of individuals excluded under Article 1F *outside the Netherlands*. This has resulted in the extradition of two 1F-excluded individuals from the Netherlands to Rwanda (Jean Baptiste M. and Jean-Claude I.) and the transfer of two excluded individuals from the Netherlands to an international court, the ICTR (Simon B. and Ephrem S.). Notwithstanding this relative success, the number of 1F-excluded individuals that have been extradited or transferred still represents only about 0,4 percent of the total number of 1F-excluded individuals in the Netherlands.

Extradition or transfer of individuals who are excluded on the basis of Article 1F of the Refugee Convention has several advantages compared to prosecution on the basis of universal jurisdiction. Prosecuting crimes close to the crime scene is likely to be less demanding in terms of energy, time and resources than prosecuting them from a place far away. A conviction by a court in closer vicinity to the crime scene is arguably also more effective for retributive or reconciliatory purposes. For these reasons, the Dutch government has put significant effort in (facilitating) the extradition of excluded asylum seekers. It has done so not only by (passively) cooperating with extradition requests, but in the case of Rwanda also by actively creating favourable circumstances that would make extradition possible, by strengthening the criminal justice sector in Rwanda by means of capacity building, training and financial input.

The case of Rwanda shows that despite several legal and practical complications and obstacles, it is possible to facilitate and promote extradition of 1F-excluded individuals in this way. In order to address legal obstacles, reforms in Dutch and Rwandan legislation have been made to meet extradition law requirements. Further reforms and other measures have been undertaken by the Rwandan government, supported by the Dutch government among others, in order to take away human rights concerns. These concerns related to the possible imposition of the death

penalty or life imprisonment in isolation; general conditions in detention and prison facilities; the inability of the defence to have witnesses from abroad testify in court; witness protection; the independence of the judiciary and the availability of legal aid. The Dutch government also took practical measures to overcome legal obstacles, for instance by financing the construction of a prison that meets international standards, training members of the judiciary and arranging trial monitoring. Based on *inter alia* these efforts, extraditions to Rwanda have been and continue to be accorded.[2]

However, as discussed in Chapter 4, the case of Rwanda is arguably exceptional. Besides legal requirements posed by extradition and human rights law, essential preconditions for successful extradition include – on the part of the requesting state – willingness to prosecute Article 1F-related crimes, capacity and expertise to prosecute the alleged crimes domestically, and ability to trace alleged perpetrators living abroad. In Rwanda, the circumstances were such that these conditions could be fulfilled: the Rwandan government has always been willing to prosecute alleged perpetrators of the genocide, but also developed the capacity and expertise to prosecute international crimes in addition to investing in the ability to trace alleged perpetrators abroad, and has also been prepared to make modifications to its domestic laws and criminal justice system in order to take away concerns that extradited individuals would not receive a fair trial or would be detained under circumstances unacceptable to the extraditing state. Particular about the case of Rwanda is that prosecuting perpetrators of international crimes was intrinsically motivated; soon after the 1994 genocide, the Rwandan government itself strongly pushed for domestic prosecution of its Hutu *génocidaires*. States hosting suspects of international crimes can only influence the conditions for successful extradition to a limited extent.

Because of the exceptionality of the Rwandan case, it is not likely that many other (post-conflict) countries will, in the near future, successfully request the extradition of excluded persons residing in the Netherlands. Most states where the alleged crimes

2 Extradition of individuals to Rwanda has continued after the publication of the article on which Chapter 4 is based (Bolhuis, Middelkoop & Van Wijk, 2014). Besides the two extraditions from the Netherlands in November 2016, the US e.g. extradited Leopold Munyakazi in September of that year (see 'US deports Rwanda genocide suspect Leopold Munyakazi', BBC, 28 September 2016, available online at <http://www.bbc.com/news/world-africa-37493505>; last visited 22 September 2017), while Germany extradited Jean Twagiramungu in August 2017 (see 'Official: Rwanda genocide suspect extradited from Germany', Fox News, 18 August 2017, <http://www.foxnews.com/world/2017/08/18/official-rwanda-genocide-suspect-extradited-from-germany.html>; last visited 22 September 2017). However, the UK High Court of Justice in July 2017 blocked the extradition of five individuals to Rwanda because extradition would breach Article 6 ECHR; see High Court of Justice, Rwanda v. Nteziryayo and others, 28 July 2017, [2017] EWHC 1912 (Admin).

occurred, seem to lack the political willingness or the necessary capacity and ability to locate and domestically prosecute the type of alleged perpetrators residing in the Netherlands. For those willing, such as Turkey, serious challenges exist in relation to extradition law and human rights law requirements. Together with Rwanda, the states which emerged from the former Yugoslavia seem to be the exception, because several individuals have been extradited to these states.[3] It is not coincidental that Rwanda and countries in the former Yugoslavia are the most likely to successfully request for extradition of excluded individuals, as the international community invested substantially in the infrastructure which enables domestic prosecution in these countries, simultaneous to the establishment of the ICTR and ICTY. The extradition to countries such as Rwanda also is not without risks. While the trials of some of the extradited individuals are subject to international monitoring, there still is a possibility that the trials are unfair, which could negatively impact future willingness of the Dutch or other extradition judges to approve extradition requests.[4]

7.2.3. Criminal prosecution of excluded individuals in the Netherlands

In answer to the question to what extent and in what ways the Netherlands has criminally prosecuted individuals excluded under Article 1F domestically, this study has shown that since 1992 only five individuals excluded under Article 1F have been criminally prosecuted in the country. Four of them have been convicted (Hesamuddin H. and Habibullah J. from Afghanistan, Joseph M. from Rwanda and Sebastien N. from the Democratic Republic of the Congo); hence, the number of domestically prosecuted 1F-excluded individuals represents about 0,5 percent of the total number of 1F-excluded individuals in the Netherlands. Despite a strong commitment to advancing the criminal prosecution of excluded individuals domestically and a standard assessment of the opportunities for prosecution in exclusion cases by the prosecutor, this low number illustrates the legal and practical challenges and complexities of domestic prosecution of excluded asylum seekers by states of refuge.

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3 This is confirmed by the extraditions from the Netherlands of Senad A. and Damir L. to Bosnia and Herzegovina in 2010 and 2016 respectively, and Veljko S. to Croatia in 2016 (the first two of them are known to have held the Dutch nationality or a permanent residence permit, which means they have not been excluded on the basis of Article 1F). See <https://www.om.nl/onderwerpen/kopie-international/rechtszaken-per-land/bosnie/> (last visited 22 September 2017) and Kamerstukken II 2016/17, 34550 VI, no. 105, 8 March 2017. By April 2017, an estimated 28 individuals from different states had been extradited to Bosnia and Herzegovina alone, and 9 more extradition requests were pending; see 'Bosnia awaits extradition of nine war crimes suspects', Balkan Insight, 5 April 2017, available online at <https://www.balkaninsight.com/en/article/bosnia-awaits-extradition-of-nine-war-crimes-suspects-04-05-2017/> (last visited 22 September 2017).

4 In this context, the July 2017 decision by the UK High Court in *Rwanda v. Nteziryayo and others* (*supra* note 2) could become influential in other countries, thereby making the extradition option more difficult even for Rwanda.

As elaborated in Chapter 5, the criminal prosecution of excluded individuals is hindered by a number of complications and challenges that are inherent to universal jurisdiction prosecutions in general. A first legal obstacle is that many of the alleged crimes took place before the coming into force of the Dutch International Crimes Act, meaning Dutch courts lack jurisdiction unless these crimes were covered by international treaties in force at the time. Practical complications hindering proper investigation are first of all caused by the passage of time between the alleged occurrence of the crimes and the assessment whether or not to prosecute, that characterises these cases. The more time has passed, the more complicated it is to collect evidence and find witnesses, and the more likely the reliability of witness statements decreases due to memory effects.[5] The empirical analysis of the population of excluded asylum seekers in the Netherlands based on the 1F case files confirms that typically at least several years have passed between the moment of arrival and the commission of the alleged crime. A second practical challenge is access to and cooperation with the country where the crimes were committed. The empirical analysis of the population of excluded asylum seekers demonstrates that these individuals typically come from countries that are unsafe and difficult to access and cooperate with. A third practical challenge is that many of the excluded individuals are 'insignificant' individuals, which further complicates finding evidence and reliable witnesses. The empirical analysis shows that the population of excluded asylum seekers ranges from people in the lowest ranks, such as foot soldiers who have fought for the Uganda People's Defence Force or UNITA's rebel force in Angola, to high-level Afghan provincial governors and Rwandan politicians. Typically, however, the excluded asylum seekers are believed to be low-level perpetrators, a number of whom are also believed to have played a facilitating role, rather than being directly involved, in the commission of crimes. It is easier to identify witnesses who can testify about the acts of a well-known (local) politician, a general or rebel leader than those of a regular foot soldier. The four successful prosecutions all concern individuals who were relatively well-known or notorious at the time when, and in the area where, their crimes occurred; the majority of the excluded asylum seekers in the Netherlands are, however, 'insignificant' individuals. A final practical issue is the resource-intensiveness of these prosecutions and the large burden that this type of investigations places on the available capacity within the law enforcement and prosecution services.

5 These challenges are illustrated by the case of Joseph M., one of the four convicted 1F-excluded individuals. Although he was convicted, some have questioned the reliability of the witness statements that have been used in this case. In the context of the Project Gerede Twijfel ['Beyond reasonable doubt' project] at VU University Amsterdam, a team of researchers concluded that the witness statements are unreliable and an insufficient basis for a conviction (De Bruïne, De Boer, Dehaene, Vredeveldt, & Van Koppen (2017).

Many of the above-referred to challenges are problems related to (domestic) prosecution of international crimes in general. The domestic prosecution of 1F-excluded individuals by states of refuge, however, presents some additional challenges and complications that are inherent to the nature of exclusion cases. Arguably, the most important reason why most exclusion cases will not be followed up by criminal prosecution is the large gap between the threshold to exclude someone from refugee protection ('serious reasons for considering') and the threshold required to hold someone individually accountable in criminal law ('beyond reasonable doubt'). Because of this large gap, firstly the type of information that suffices to substantiate a 1F decision does not reach the level of detail or precision that is required to support a conclusion that someone beyond reasonable doubt is individually guilty of, and responsible for, the crimes in question. The sources that are used in the context of exclusion, are not specific: they draw general conclusions about possible crimes committed but typically do not provide explicit leads about individuals involved, except perhaps the most notorious. A second complication relates to the reliability of the information that is used to substantiate 1F decisions. As the analysed cases show, 1F decisions are for an important part based on personal statements of the excluded individuals themselves. While such statements in principle would seem to be very suitable as evidence in a criminal case, it cannot be ruled out that applicants who are unaware of the existence of Article 1F might embellish or fabricate stories, hoping that this will convince immigration officials that they risk persecution upon return and that it will thus increase their chances of obtaining refugee protection. The case files contain several examples that suggest that applicants exaggerated or even fabricated their role in organizations and crimes. In addition, these decisions rely heavily on 'authoritative' reports from (inter)governmental organizations and NGOs, but such reports are written for other purposes than allocating individual criminal responsibility.

Because of these different challenges and complications, only in a very limited number of cases, a 1F file forwarded by the immigration service will offer prosecution agencies a good perspective for a conviction for crimes that the individual is believed to be guilty of.

7.2.4. Those who are not prosecuted

If less than 1 percent of the excluded individuals is either extradited or domestically prosecuted, what happens to the others? In the Netherlands, besides the standard assessment of the possibilities for criminal prosecution by the public prosecutor, these individuals receive an entry ban or are declared *persona non grata*. This means that they have no legal right to stay and, in principle, have to leave the country immediately.

A substantial part of the 1F-excluded individuals are, however, 'unremovable' for various legal or practical reasons. Legal reasons in particular stem from the principle of *non-refoulement* which does not allow forced removal to the country of origin or any other country where there is a real risk of serious harm to the individual, e.g. under the European Convention on Human Rights (ECHR) or the Convention Against Torture (as was noted in Chapter 3, such an impediment to *refoulement* was in place for about a third of the excluded individuals between 2007 and 2014). Practical reasons that may lead to unremovability include in particular lack of travel documents or non-cooperation by the excluded individual or the state of origin.

Being unremovable does not lift the obligation to leave the Netherlands. Once a decision invoking Article 1F has been issued, the alien in question not only loses the right to stay on Dutch territory because of the entry ban, but any access to other forms of residence permits is also explicitly blocked. 1F-excluded individuals thus do not receive any form of temporary leave to stay. For as long as they are unreturnable, these individuals are destined to live a life in "legal limbo" and are faced with serious economic, social, and psychological challenges, as becomes clear from a study by Reijven and Van Wijk (2014a: 12-16). The individuals are not entitled to social allowances, employment, or education, and can only rely on a minimal level of legal aid and urgent primary healthcare. They constantly risk being arrested and avoid casual work or engaging in 'survival criminality', in order not to attract attention or lose support from individuals or organisations concerned with their fate. They depend heavily on such assistance, which is often offered by their family members. Allowances of those family members can be cut if the authorities believe that an undocumented migrant is benefiting. The dependence on the family can also lead to tensions within the family. Finally, excluded individuals experience different kinds of mental and physical health problems due to the great uncertainty and the experienced hopelessness of their situation (*ibid*.). At the end of 2016, at least 110[6] 1F-excluded individuals remained in the Netherlands despite an obligation to leave. In reality, this number is likely to be higher, as the authorities do not have everyone on the radar.[7] While the obstacles to removal are of a temporary nature

6 *Kamerstukken* II 2016/17, 34550 VI, no. 105, 8 March 2017, 7.

7 Out of the 358 cases analysed, 169 cases were marked as 'MOB, *met onbekende bestemming vertrokken*' [left with unknown destination] in the administrative system of the IND. While the assumption is that an individual marked as MOB has left the Netherlands, in reality this status means that his whereabouts are unknown, which means he may have also 'disappeared' into illegally or found (legal) residence in another European country.

and the Netherlands periodically assesses whether deportation is feasible,[8] by the year 2017, some of these individuals have been in legal limbo in the Netherlands for twenty years.

In response to this situation, an unknown number of 1F-excluded individuals have, rather than making use of institutionally arranged relocation schemes, engaged in self-arranged modalities of relocation by means of taking the 'Europe route'. In these cases, 1F-excluded individuals who have a (family) relationship with a Union citizen, have moved to surrounding countries such as Belgium in order to invoke entitlements pursuant to the EU Citizenship Directive. The analysis of 1F cases also shows that individuals who have been excluded in the Netherlands have tried – and sometimes succeeded – to obtain legal residence in other European states, as have individuals excluded elsewhere tried – and perhaps succeeded – to obtain legal residence in the Netherlands. As a consequence of an inconsistent or lacking post-exclusion policy in Europe, possibly dangerous unwanted but unreturnable individuals travel around in Europe, while immigration authorities of the respective countries where they set foot toss these 'hot potatoes' around in the hope that they themselves do not have to deal with the matter. With the ever-increasing attention for Article 1F also outside the Netherlands, European states are likely to be confronted with more 1F exclusions in the future. However, as it stands, they do not have a coherent approach on how to deal with these individuals after exclusion.

In sum, the policies of the Dutch government with respect to 1F exclusion and the criminal prosecution of international crimes have resulted in a relatively large number of excluded asylum seekers, and different efforts to promote their criminal prosecution. The Dutch government has put significant effort in (facilitating) the extradition of excluded asylum seekers. It has done so not only by (passively) cooperating with extradition

8 If the situation in the country of origin is deemed safe enough, a previously unremovable excluded individual could be deported. As the figures presented in §3.2.2 show, the number of unreturnable excluded individuals was much higher when the government started publishing this information in 2008 (280 individuals), than it was at the end of 2016 (110 individuals). More than half of the 280 individuals in 2008 reportedly originated from Afghanistan, a country which in general has been deemed safe to return to from 2014 onwards. The size of the group of unremovable Afghans in the caseload of the Departure and Repatriation Service DT&V has indeed decreased substantially in the period 2014-2016. This does not necessarily mean that the number of deportations of Afghans has also increased, however. Both in 2015 and 2016, for instance, about 60 percent of individuals in the caseload were reportedly Afghans, while the caseload decreased from 150 in 2015 to 110 in 2016 (see *Kamerstukken* II 2015/16, 34300 VI, no. 89, 23 May 2016 and *Kamerstukken* II 2016/17, 34550 VI, no. 105, 8 March 2017). This implies that of the 40 cases no longer in the caseload in 2016, also about 60 percent (about 24 individuals) originate from Afghanistan. The number of independent and forced departures, however, totals 10. If the 10 'known' departures would all concern Afghans, then still 14 others 'left with an unknown destination', which means they may also have disappeared into illegality or have found legal residence in another European country, possibly because they were aware that deportation to Afghanistan had become possible. Furthermore, while the DT&V caseload is decreasing, there are also new groups of unremovable excluded individuals that are protected against refoulement, such as Syrians.

requests, but in the case of Rwanda also by actively creating favourable circumstances that would make extradition possible, by strengthening the criminal justice sector in Rwanda by means of capacity building, training and financial input. Furthermore, the Dutch government has equipped its own criminal justice system to domestically prosecute excluded asylum seekers, by changing laws and investing in the capacity of its law enforcement and prosecution services. However, despite the strong commitment to the objective of administering criminal justice to excluded asylum seekers, because of different legal and practical complications, less than 1 percent of the excluded asylum seekers have been criminally prosecuted in the Netherlands or elsewhere, let alone convicted,[9] for crimes that previously led to their exclusion. Finally, the Dutch 1F policy has also resulted in a considerable number of excluded asylum seekers who have not been prosecuted but cannot be removed and have ended up in a 'legal limbo'.

7.3. Strengths and limitations of the study

Like every study, this study too has its methodological strengths and limitations. A first strength is its in-depth focus on one very suitable state of refuge, the Netherlands, which has excluded a relatively large number of asylum seekers on the basis of Article 1F. The Dutch government has gone to great lengths to promote the criminal prosecution of these individuals and equip its criminal justice system to process international crimes cases.

Another strength is the wealth of information available in the Netherlands on the application of Article 1F and subsequent criminal prosecutions. A lot of information on the application of Article 1F in the Netherlands is publicly available. In addition, access was obtained to the immigration files of all cases in which a decision to invoke Article 1F was taken between 2000 and 2010 in the Netherlands. This has made it possible, for the first time, to give an overview of a complete population of 1F-excluded individuals in a given country, over a longer period. This makes the Netherlands an ideal case for studying the role states of refuge (can) play in the administration of criminal justice to 1F-excluded individuals.

A final strength is the use of the multi-method approach, which makes it possible to combine insights from the case files, interviews, academic literature, case law and policy documents. Whereas the analysis of regulations, policy documents and case law has produced insight into the Dutch government's position on the criminal prosecution

9 Four out of five excluded asylum seekers prosecuted in the Netherlands have been convicted (see §7.2.3). Of the four excluded asyum seekers extradited and transferred (see §7.2.2), the two individuals transferred to the ICTR have been convicted (see <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/rwanda/>; last visited 27 September 2017), while the cases of the two excluded individuals extradited to Rwanda are still ongoing.

of excluded individuals, the interviews have given new insights into how policy considerations work out in practice. Whereas the academic literature has allowed a structured analysis of the legal and practical challenges that the criminal prosecution of excluded individuals entails, the knowledge about the composition of the population of excluded individuals and the substantiation of exclusion decisions from the case files, and the interviews with experts and practitioners in the field, have given insight into how these challenges work out in practice.

The fact that the study mainly focuses on a single country, which could make it difficult to generalize the findings to other states of refuge, could be seen as a limitation of the study. On the one hand, the Netherlands does indeed present an atypical case: it has been a 'frontrunner' with respect to 1F exclusion and unlike many other states it uses the policy of 'categorical exclusion', which results in a larger number of excluded individuals. Furthermore, in relation to the criminal prosecution of excluded individuals, the Netherlands has arguably 'pioneered' and other states may now and in the future be relatively more successful because they can build on the early experiences of states such as the Netherlands. On the other hand, however, the case of the Netherlands is not so different that these findings are irrelevant with respect to other states of refuge. Although the number of excluded individuals is expected to be lower in other states, the nature of exclusion cases is unlikely to be very different. It can be expected that also in other states, excluded individuals will mainly be rather 'insignificant' individuals who held low or mid-level ranks. Most other states of refuge – in any case within Europe – are subject to the same refugee law and human rights law regimes, which means *inter alia* that the expected legal challenges with respect to extraditing and prosecuting the individuals are similar. Practical challenges in this respect are also unlikely to be different. The available empirical work shows that since the 1990s there have been a considerable number of domestic prosecutions in the Netherlands and other countries, especially in Europe, of international or other serious crimes committed elsewhere (Rikhof, 2012; 2017).[10] However, many of those cases do not concern 1F-excluded individuals, but individuals who had legal residence or even held the nationality of the state where the prosecution took place.[11] Previous research has demonstrated challenges in relation to

10 Rikhof (2017) presents an overview of international crimes prosecutions undertaken by countries including the Netherlands, Germany, Sweden, France, Belgium, Finland, Norway, Switzerland, Austria, Denmark, Spain, the UK, Canada and the US.

11 This is true for instance for Yvonne B. (or N.), convicted in the Netherlands for incitement to genocide to 6 years and 8 months (see District Court of The Hague, 1 March 2013, ECLI:NL:RBDHA:2013:8710, translation available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:8710> ; last visited 6 March 2018) and for Eshetu A., convicted to life imprisonment for war crimes committed in the 1970s in Ethiopia (see District Court of The Hague, 15 December 2017, ECLI:NL:RBDHA:2017:16383, translation available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2017:16383>; last visited 6 March 2018).

'unremovability' of excluded individuals are also similar in other countries (see Bolhuis & Van Wijk, 2015b; RLI/CICJ, 2016). In fact, considering the wealth of information, the large 1F population and the efforts of the Dutch government aimed at promoting criminal accountability of this group, the Netherlands arguably offers the most suitable case available for answering the research questions posed in this study.

The fact that the case files have only been analysed until the year 2010 could also be seen as a limitation of this study. The study has looked retrospectively, which means the current status of the cases cannot be assessed. Since the start of data collection (end of 2010) at least 140 additional 1F decisions have been taken, often with regard to different nationalities and different contextual settings compared to the cases analysed here:[12] the number of exclusion decisions relating to asylum seekers from Afghanistan has decreased since 2010, while the number of exclusion decision relating to individuals from Syria, for instance, has increased. However, the structural problems, such as the lack of possibilities for extradition, the gap between the different standards of proof, or the challenges in relation to evidence collection have remained the same. Furthermore – assuming that those cases in which 1F exclusion is followed up by criminal prosecution are usually publicized – publicly available information does not suggest that the number of criminal prosecutions of excluded asylum seekers has increased. This suggests that the conclusions of this study will hold for other time periods.

7.4. Discussion

At the time when the Refugee Convention was drafted, the world was recovering from two consecutive World Wars that had displaced great numbers of individuals. The exclusion clause was included in the Convention to ensure that 'undeserving' individuals who were guilty of serious crimes would not abuse the protection offered to refugees, thereby avoiding being held criminally accountable. Much has changed since the signing of the Refugee Convention in 1951. The scope of the Convention has been broadened,[13] and the Convention has since been supplemented by regional instruments establishing refugee and subsidiary protection such as the EU 'Qualification Directive'.[14] Conflicts

12 This is based on the information provided in the Ministry of Security and Justice's annual reporting letters on international crimes since 2011. Figures for 2012 are missing.

13 The 1967 Protocol Relating to the Status of Refugees removed limitations of the temporal and geographical scope of the 1951 Convention (situations occurring before 1 January 1951 within Europe) giving the Convention "universal coverage". UNHCR (2010: 2), Convention and Protocol Relating to the Status of Refugees, December. Available online at <http://www.unhcr.org/3b66c2aa10.html>.

14 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12 and the recast Council Directive 2011/95/EU of 13 December 2011 [2011] OJ L 337/9.

that have occurred since the Second World War have forcibly displaced an ever-larger number of people. The system of international protection is arguably more relevant than ever.

At the same time, the dynamics of migration have changed. Increased overall mobility and opportunities to travel to Western – in particular European – states, as well as increased awareness of these possibilities and of the procedures and rights in connection to asylum among migrants, *inter alia* due to the rise of the internet and social media, have not only resulted in an increased number of migrants in general, but also in diffusion of refugees and economically motivated migrants. 'Who comes in' and 'who is worthy of protection' is increasingly subject of political debates. Indeed, in tandem with the growing scale of migratory movements, calls to scrutinize the background of immigrants, and asylum seekers in particular, have increased. This scrutiny first of all relates to the entitlement of immigrants to international protection. On the basis of the Refugee Convention, but also based on concerns within the receiving society, governments in states of refuge are expected to separate individuals genuinely in need of international protection from other groups of migrants (including economically motivated migrants). They are in addition expected to identify and exclude 'undeserving' individuals who are believed to be guilty of serious crimes. Secondly, the increasing scrutiny is reinforced by increased emphasis on the security 'risks' of migration, partly given in by concerns in relation to the threat of terrorism, but also by increasing anti-immigration sentiments in receiving societies caused by the growing volume of immigration and the presumed resulting changes in these societies. This emphasis is evidenced by processes that have been described by scholars as the 'securitisation of migration' (the presentation of migration as a security problem; Huysmans, 2000: 756-7) and 'crimmigration' (the merger of criminal law and immigration law; Stumpf, 2006: 376). Finally, the growing scrutiny can be explained from the growing commitment to the aspiration of closing the 'impunity gap' for international crimes. This growing commitment is evidenced by the establishment of international courts and increasing possibilities for prosecuting perpetrators of international crimes, as well as the call upon states of refuge to prosecute them.

Hence, while the importance of the system of refugee protection still stands, upholding the integrity of the international protection system has arguably never been more relevant.[15] More and better-informed migrants, driven by more diverse motives, are coming in, and the expectations from the governments within the receiving societies to prevent unentitled, undeserving and/or dangerous individuals from obtaining

15 See also Dauvergne (2013: 82).

asylum, are high. It is within this area of tension that policy and decision makers in the immigration domain have to operate.

With these developments, the use and function of the exclusion clause have also changed. The increasing relevance of Article 1F from the 1990s onwards can be explained from the different developments described above. The increased scrutiny of immigrants has resulted in maximizing the opportunities to use 1F exclusion by some states, or even the stretching of the possibilities of 1F exclusion. Consequently, some observers conclude, to their discontent, governments increasingly consider the exclusion clause to be a tool to protect the community in the state of refuge, rather than to protect the integrity of the protection regime.

This study focused on the exclusion clause's function of preventing perpetrators from escaping criminal prosecution. As the exact scope and nature of the obligation to extradite or prosecute excluded individuals are unclear, what role states of refuge see for themselves in administering criminal justice to excluded asylum seekers arguably depends on what role they see for themselves in fighting impunity of international crimes.[16] As discussed in this thesis, the Netherlands has in this regard taken a proactive stance, probably even reaching beyond its legal obligations. The Dutch Minister of Justice once remarked that "The Netherlands has chosen to lead the way internationally in the criminal investigation and prosecution of international crimes"[17] and, on another occasion, underlined the government's aspiration to "let justice take its course as much as possible with respect to persons to whom Article 1F Refugee Convention applies".[18] A key element of the policy is the standard assessment of the feasibility of criminal prosecution based on the 1F casefiles by the criminal prosecutor. The designation of specialised units within the immigration, law enforcement and prosecution services and the accompanying allocation of budget, is telling in itself of the degree of importance afforded to criminal prosecution of international crimes in the Netherlands. Such a proactive attitude can be applauded from the perspective of 'closing the impunity gap.'[19]

16 As Larsaeus (2004: 70-71) notes, "the efforts invested in the criminal prosecution of a crime committed abroad will correlate with the perceived importance of bringing the perpetrators to justice. This in turn will be affected by what the state sees as its obligations". Although states may be under a duty to prosecute some of the crimes that fall within the scope of article 1F, Gilbert and Rüsch (2014: 1109) have argued that "[the] wide variation in competences that has developed over time and the reliance in all cases on states having implemented their treaty obligations to the fullest extent in domestic law means that impunity is still possible despite any international duty to prosecute or extradite."

17 *Kamerstukken* II 2008/09, 31200 VI, no. 193, 9 September 2008.

18 *Kamerstukken* II 2007/08, 31200 VI, no. 160, 13 June 2008.

19 Human Rights Watch (2014: 32) has described the Dutch specialised units within the immigration, law enforcement and prosecution services as "the most robust and well-resourced units in the world dedicated to pursuing grave international crimes on the basis of universal jurisdiction".

However, despite strong commitment to bringing 1F-excluded individuals to justice, less than 1 percent of them have actually been criminally prosecuted in the Netherlands or elsewhere, let alone convicted. Taking into account that the successful criminal prosecution of an individual excluded under Article 1F will remain a sporadic occurrence, one that only occurs when different favourable circumstances that are largely outside the sphere of influence of a state of refuge happen to coincide, the prospects for states of refuge committed to closing the impunity gap by criminally prosecuting 1F-excluded asylum seekers is not promising. As far as the function of promoting criminal accountability is concerned, a strict 1F policy and subsequent efforts to prosecute 1F-excluded individuals do not seem to have had the desired effect.

This, however, does not necessarily mean that the application of the exclusion clause and investing in subsequent prosecutions serves no purpose at all. 1F exclusions combined with even a limited number of extraterritorial international crimes prosecutions may already impact the decision making of perpetrators as to whether or not they should seek asylum in certain countries.[20] No matter how many 1F-excluded individuals are *de facto* prosecuted, a strict 1F policy and focus on subsequent prosecutions may already suffice to discourage perpetrators to search for a 'safe haven' in a given country. Whether or not such an effect really exists, however, is difficult to assess, and would require empirical research on the decision-making process of perpetrators trying to find a safe haven.

Where the 'Dutch approach' of applying a strict 1F policy and subsequently trying to promote the criminal prosecution of 1F-excluded individuals is not promising as a tool to close the impunity gap and may only theoretically discourage perpetrators from finding a safe haven, it should be noted that such a policy also has considerable side-effects for the state of refuge. As this study demonstrates, it results in a considerable number of excluded individuals whose guilt or responsibility will never be properly determined in a criminal trial, who cannot be removed and end up in a 'legal limbo'. If this legal limbo lasts for many years, this makes the exclusion policy vulnerable to criticism and resistance. On the one hand, the durable presence of a group of unwanted but unremovable individuals leads to criticism and close scrutiny from politicians, who demand regular updates on the size of this group and the efforts to remove them. On the other hand, human rights advocates and other interest groups may criticise the hopeless situation of the unremovable 1F-excluded individuals and the lack of 'closure'

20 In this regard, also see Rikhof (2017: 112) who argues: "[…] it is to be expected that even a modest level of prosecutions could very well have a deterrent effect, perhaps not on the commission of international crimes, but at least on the choice of perpetrators fleeing their crimes to enter, remain or seek asylum in a country that prosecutes such international crimes."

in these cases. Illustrative in this regard, as discussed in chapter 3, is the longstanding debate in the Netherlands on how to deal with excluded individuals from Afghanistan, some of whom have been unremovable for up to twenty years.[21]

In the Netherlands, such criticism is arguably even more vocal than in other countries, as the applicability of Article 1F is extended to all other forms of legal residence, which strips the 1F-excluded individuals of any right to a residence permit. This expansion is understandable from the 'no safe haven'-perspective, but does raise the question how such an expansion relates to the original intentions of the drafters of the Refugee Convention, who (merely) wanted to prevent abuse of the system of *refugee protection*. Moreover, a strong emphasis on removal and barring access to any other form of legal residence – a broad conception of the 'no safe haven' mantra – arguably undermines the function of promoting criminal accountability.[22] As was noted before, the difficult circumstances and the inconsistencies in exclusion and post-exclusion policies in Europe have the effect of tossing around excluded individuals like 'hot potatoes'. They also have the effect of excluded asylum seekers using creative strategies to 'relocate' themselves in other European states that are unaware of the previous exclusion and/or take less of a strict approach to Article 1F.[23] The fact that these individuals still manage to find ways to legally reside in Europe can be seen as problematic. Unwanted and possibly dangerous individuals continue to live in Europe and are likely to escape criminal accountability, because their background is likely to remain unknown to the authorities as long as they do not apply for asylum but obtain residence on other grounds (Bolhuis & Van Wijk, 2015b). Furthermore, by making staying in one state of refuge so unattractive that excluded asylum seekers feel forced to move on, that state in fact counts on other states to 'solve' the limbo situation it has created. At the same time, from a national perspective it can be argued that the use of this 'Europe route' offers a pragmatic solution for a 'deadlocked' situation: an alleged war criminal, who cannot be deported, has left the country, without complex legal procedures and without violating any international obligations. This option could however enable actual perpetrators of international crimes to find a safe haven *and* escape prosecution, which from a more universal perspective is undesirable.

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21 In this context, also see Yakut-Bahtiyar (2015).

22 As Gilbert and Rüsch (2014: 1093) note: "Governments are drafting policies in isolation that focus only on their specific needs – usually involving a simple removal of the individual from that state – such that protection offered through international human rights law and non-impunity are both ignored and remain unaddressed."

23 In Germany, Sweden and Norway, for instance, excluded individuals can obtain temporary or permanent residence statuses, e.g. on the basis of family reunification; see RLI/CICJ (2016).

This study shows how strong prioritisation of promoting criminal accountability of excluded individuals does not result in the conviction of a substantial number of excluded individuals. At the same time, it is questionable whether a strong insistence on the 'no safe haven' rationale increases domestic security if it results in the durable presence of a group of unwanted but unremovable undocumented individuals without proper means of subsistence whose guilt remains undetermined. The findings of this study do not tell to what extent the application of Article 1F serves the function of protecting the integrity and credibility of the international protection regime. Arguably, however, the integrity and credibility of the asylum system can also be undermined by a too strict application of the exclusion clause.

Different perspectives that may coincide but may also be incompatible underlie the application of the exclusion clause: the national and the universal perspective, the migration, the human rights and the prosecution perspective. The functions and objectives that the exclusion clause can serve are not clearly defined or universally agreed upon, nor are they made explicit by states of refuge that apply the exclusion clause. This leads to fundamental questions. For example, is a 1F policy a success if many individuals are excluded, subsequently deported, but never prosecuted? From a narrow, national perspective of providing 'no safe haven' to alleged perpetrators of serious crimes, one might argue it is. Yet, from the universal perspective of preventing perpetrators from escaping prosecution it arguably is not as countries of origin are often not able or willing to engage in prosecution. Or is the policy a success if it results in a considerable number of excluded individuals who cannot be removed and can neither be prosecuted? From a narrow, national policy makers' perspective it arguably is not, in particular if it leads to heavy resistance, social unrest and criticism within the state of refuge. Yet, from the universal perspective of protecting the integrity of refugee protection it arguably is not necessarily problematic.

The lack of explicit goals, makes 1F policies susceptible to criticism. The purposes of exclusion and the expectations from states of refuge post-exclusion therefore require further clarification.

7.5. Implications for policy and practice

The findings of this study highlight the challenges in relation to the function of promoting criminal accountability for perpetrators of serious crimes that the exclusion clause is assumed to have, and the ability of states of refuge – which are crucial actors in this respect – to support his function. In this section, it will be assessed what this means 1) for the contribution states of refuge can make to the aspiration of closing the 'impunity gap' for the most serious crimes and the role of the exclusion clause in that context, and 2) for the application of the exclusion clause.

Implications for the criminal prosecution of excluded individuals and the 'fight against impunity'

In the European context, the European Commission has stressed that "despite the serious obstacles [...], criminal prosecution by the international community, both at global level as well as Member States level, of those persons having committed crimes against humanity, war crimes or terrorist attacks, and excluded from protection regimes, is an appropriate response".[24] If states do see a role for themselves to contribute to the fight against impunity for international crimes, it is important that those tasked with criminal prosecution acknowledge the limited value of 1F files and do not dismiss other sources. Universal jurisdiction prosecutions present tremendous challenges and warrant strong evidence and well-resourced and well-equipped criminal justice actors. They also require lasting investment in the capacity of these actors, also in times when other priorities such as the threat of terrorism demand attention. Still, only very occasionally will the case of an excluded individual offer a good prospect for criminal prosecution.

As this study demonstrates, any suggestion that exclusion of asylum seekers will naturally be followed by criminal prosecution in many cases is illusive. Efforts to prosecute 1F-excluded individuals may at best narrow the 'impunity gap' that exists for perpetrators of international crimes, but it is an illusion that these efforts can close this gap. However, there are several opportunities to improve the chances of success in the future. The lack of harmonization of 1F policies, and the insufficient information exchange and lack of cooperation on 1F exclusion between national law enforcement and prosecution agencies, and between national immigration authorities, means opportunities for prosecution are possibly missed (Bolhuis & Van Wijk, 2015b). As elaborated in Chapter 2, several initiatives have been taken to increase the cooperation

24 See Commission Working Document, 'The relationship between safeguarding internal security and complying with international protection obligations and instruments', Brussels, 5 December 2001, COM(2001) 743 final, 14.

on the governmental level, between national law enforcement and prosecution agencies on the international level (the EU Genocide Network, the extension of the Europol mandate to include genocide, crimes against humanity and war crimes, and the negotiation of an international mutual legal assistance treaty) and also between national immigration services (the establishment of an exclusion network). Successful criminal prosecution of international crimes is often dependent on close cooperation between states of refuge and states where the crimes occurred, but also other states of refuge. Furthermore, information from exclusion cases and more generally from immigration cases in one state, may be relevant to criminal cases in other states, because they may for instance hint to witnesses. In addition, cooperation is not limited to the governmental level, as different promising initiatives that have been taken to promote universal jurisdiction prosecutions in relation to Syria show. One of these is the collection of evidence against members of the Syrian regime by the Commission for International Justice and Accountability (CIJA). Spokesperson Bill Wiley told the New Yorker that "the commission has also identified a number of 'quite serious perpetrators, drawn from the security-intelligence services,' who have entered Europe. 'The CIJA is very much committed to assisting domestic authorities with prosecutions.'"[25] States of refuge can financially support initiatives like this.[26] Finally, it has been suggested that Western states can support criminal prosecution in areas where perpetrators have fled, including the refugee camps in Lebanon, Jordan and Turkey[27] – similar to how the Dutch government has supported criminal prosecutions in Rwanda. These initiatives may be beneficial to the criminal prosecution of excluded individuals and therefore states of refuge can support those to contribute to closing the impunity gap.

Implications for the application of the exclusion clause

The UNHCR (2003b: 3) has stressed that "as with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and should be used with great caution." The developments that have been described above suggest a tendency in an opposite direction, where states lean towards an expansion of the use and function of Article 1F. In addition, as discussed above, the objectives that

25 Ben Taub, 'The Assad Files. Capturing the top-secret documents that tie the Syrian regime to mass torture and killings', the New Yorker, 28 April 2016, available online at <http://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed> (last visited 23 August 2017).

26 In addition, they can possibly benefit from a collection of fifty-five thousand photographs of bodies of detainees, that have been smuggled out of Syria by a former military-police photographer – the 'Caesar-files' (*supra* note 25) – or the work done by the International, Impartial and Independent Mechanism (IIIM) on international crimes committed in the Syrian Arab Republic, established in December 2016 (see Kamerstukken II 2017/18, 34775 VI, no. 7, 10 October 2017).

27 See Mark Kersten, 'Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?' Justice in Conflict blogpost, 17 October 2016, available online at <https://justiceinconflict.org/2016/10/17/calls-to-prosecute-war-crimes-in-syria-are-growing-is-international-justice-possible/>.

the exclusion clause should serve are not clearly defined or universally agreed upon, which makes it difficult to assess whether an exclusion policy is 'successful'. In any case, in order for any of the supposed purposes to be reached in a meaningful way, any narrow national focus needs to be abandoned and a harmonized, consistent European approach is needed.[28]

Nonetheless, some of the abovementioned challenges could be overcome by changing or modifying national policies. An obvious first option is to increase the number of removals or returns. This will, however, be far from easy. States such as the Netherlands (see Chapter 3) and the UK (see Singer, 2017) already have a strong focus on removal and in actual practice deportation of excluded asylum seekers simply proves to be very challenging. Another option would be to provide unremovable excluded individuals with incentives to return voluntarily to their country of origin or elsewhere, for instance by making IOM reintegration packages also available to excluded individuals. Although it is unlikely that large numbers of 'unremovable' 1F-excluded individuals will suddenly return, it might be an effective incentive in some cases. Furthermore, states of refuge could more actively search for third states willing to consider relocation or more actively engage in setting up 'diplomatic assurances' with third states. Again, it is unrealistic to expect this will lead to the departure of large numbers of excluded asylum seekers. A disadvantage of increasing removals or returns is that it probably reduces the likeliness that excluded individuals will be criminally prosecuted.[29]

Apart from trying to increase the number of removals, a second option is to bring down the number of excluded individuals by increasing the threshold for exclusion. Assessing inclusion before exclusion would be one way to reduce the number of exclusions. Another way would be to restrict exclusion to the most serious cases or cases in which there are clear indications of direct personal involvement, or to take into account the seriousness of the case or the degree of personal involvement. The UNHCR (2003b: 7) urges in its guidelines on the application of Article 1F that the

28 See also Holvoet (2014: 1048), who argues that "the existence of divergent interpretations of the same law or different conclusions in similar factual situations creates uncertainty and unpredictability", and could result in "forum shopping", which "could encourage courts to adapt their decisions to certain policy goals, to the detriment of an objective approach to justice", and Li (2017) who advocates a harmonizing interpretation of the exclusion clauses. It is questionable, however, whether European states are prepared to accept a harmonized approach. As RLI/CICJ (2016: 5) concludes, "Arguably [EU member states] prefer retaining full discretionary powers in dealing with [irregular migrants], rather than being subjected to a harmonized approach".

29 Lafontaine (2014: 98) notes "[…] deportations and removals are quite unsatisfactory as they offer a mild version of justice: there is no proper accountability of the alleged perpetrator, no satisfaction or reparation to the victims and very little truth telling associated with the processes". With respect to deportation, a Canadian war crimes official remarked to Stover, Peskin and Koenig (2016: 224) that "the big dilemma […] is what to do with people found to be war criminals in [national] refugee systems [when] you can't guarantee trial if you deport them".

exclusion clauses must be applied "in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion". With respect the 'categorical exclusion' of designated groups, *inter alia* the UNHCR has stressed that exclusion should be based on *individual* assessments.[30]

A third option is to more closely monitor the group of unremovable individuals. This could be done by imposing strict conditions, such as forcing the individuals to reside at a designated location or imposing a reporting duty (as is done in Denmark and the UK; Bolhuis & Van Wijk, 2015b). However, such measures have far-reaching consequences for the individuals concerned and heavily infringe their human rights. It is questionable whether this is justified by the basis for their exclusion from asylum: an assessment that there are *serious reasons* for considering that they are guilty of serious crimes, but not a proper, definitive determination of their guilt. Another option would be to give them a provisional legal status, a temporary leave to stay, to which conditions can be connected in order to keep excluded individuals in sight, but which would allow the individuals to continue their lives to some extent by making it possible to work or enjoy education, without granting the full array of rights connected to refugee status.

While through these measures the number of unremovable and unprosecuted excluded asylum seekers may be brought down, or side-effects may be limited, the number of successful criminal prosecutions of 1F-excluded individuals is unlikely to increase substantially. This study demonstrated that precisely because of this reason, Article 1F should first and foremost be considered to be an immigration tool that serves to warrant the integrity and credibility of the international protection regime. For the discussion on the interrelationship between exclusion and prosecution, it would be helpful if state authorities and commentators came to acknowledge that 1F-excluded individuals on the one hand, and convicted (war) criminals on the other, are just different categories.[31] Excluding an asylum seeker follows from an assessment, made in the context of an immigration procedure, that there are 'serious reasons for considering' that someone has committed serious crimes. For someone to be convicted for international crimes, guilt has to be established 'beyond reasonable doubt' by a criminal court. The two should not be mixed up. Even if the number of excluded individuals goes down, and even if the number that is prosecuted will double, triple or quadruple, as long as the threshold to exclude is set considerably lower than

30 See e.g. UNHCR (2009: 7); Letter of the UNHCR Deputy Regional Representative dated 9 July 2009, available online at <https://zoek.officielebekendmakingen.nl/blg-34204.pdf> (last visited 28 September 2017).

31 The fact that many of those convicted for international crimes on the basis of universal jurisdiction had obtained legal residence or even the nationality of the state where the prosecution took place, as noted earlier, indeed confirms that the immigration process and criminal prosecutions need to be seen as separate.

the threshold for holding someone criminally accountable, the majority of excluded individuals will simply never be convicted.

7.6. Directions for future research

The findings of this study point to different directions for future research. Firstly, this study is limited to the Netherlands. While it was already noted that it can be expected that other states of refuge encounter similar problems with the prosecution of 1F-excluded individuals, it would still be valuable to study the cases that have emerged in recent years in other states of refuge. The population is likely to differ in different states of refuge, at least in respect of their state of origin. As of yet, little is publicly known about the composition of the population of 1F-excluded individuals in other states of refuge. Secondly, future research could look into the effects stronger international cooperation between national law enforcement and prosecution services, and between national immigration services, has on the number of successful criminal prosecutions of 1F-excluded individuals.

Thirdly, future research could focus on gaining insight into the movement of excluded individuals within Europe. This study presented some figures on the number of unremovable excluded individuals. These figures make clear that the decrease of the caseload of the Dutch Departure and Repatriation Service is larger than the number of forced and independent departures. This means that a considerable part of the unremovable excluded individuals leaves with an 'unknown destination'. The fact that they have disappeared from the radar makes it difficult to track them down, especially as the individuals have no interest in drawing attention to themselves. Furthermore, it was already mentioned that their 'relocation' offers a pragmatic solution to a deadlock situation, so it is also questionable what the interest of the concerned governments would be in drawing attention to these cases. On the other hand, this 'relocation' to other European countries undermines the functions that Article 1F is supposed to have. In any case, without enhanced information exchange between European immigration services, such a research would be difficult to carry out.

Finally, further research is needed into durable solutions to address the problem of durably unremovable excluded individuals. In the Netherlands, a "durability and proportionality" assessment is available, but so far only in ten cases this has led to the granting of a residence permit to an excluded asylum seeker who was unremovable. The Dutch section of the International Commission of Jurists suggested already in 2008 that the government should examine the possibilities for a temporary residence permit for unremovable excluded individuals (NJCM, 2008). In the context of the research project by the Refugee Law Initiative/Center

for International Criminal Justice on 'undesirable and unreturnable' migrants (RLI/CICJ, 2016), the option of creating a balancing test has been discussed: in case an unremovable but undesirable migrant has demonstrably not been in the position to return for a number years, a judge could weigh the interests of the state to prolong the status of undesirability (level of acute security threat, seriousness of the alleged crimes, mode of complicity, level of responsibility) against the individual's interests of having the status of undesirability lifted (social, psychological, physical impact of a protracted limbo situation). The feasibility of, and preparedness of states of refuge to implement, such a 'balancing test' for durably unremovable excluded individuals could be further explored. Considering the undesirable long term effects in those cases, there is a clear need for evidence-based solutions for this pernicious issue.

References

Journal articles, books, book chapters and research papers

Aas, K. F. (ed.) (2013). *Globalization and Crime*. London: Sage.

Ambos, K. & Stegmiller, I. (2013). Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy? *Crime Law & Social Change*, *59*(4), 415–437.

Aptel, C. (2012). Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap. *Journal of International Criminal Justice*, *10*(5), 1357–1375.

Baines, E. K. (2009). Complex Political Perpetrators; Reflections on Dominique Ongwen. *Journal of Modern African Studies*, *47*(2) 163–191.

Beversluis, A., Fischbacher Lobianco, D., Von Schack, K., Bonneau, L., Notarbartolo di Sciara, M. & Lage, M-M. (2016). *Once a criminal, always a threat? Investigating whether the Dutch practice of applying Article 1F Refugee Convention criteria to Article 27 Citizenship Directive conforms with EU law.* Expert opinion. Migration Law Clinic and Migration Law Expertise Centre, VU University Amsterdam.

Beyani, C., Fitzpatrick, J., Kälin, W. & Zard, M. (2000). Introduction. *International Journal of Refugee Law Special Supplementary Issue*, *12*(1), 1–8.

Bliss, M. (2000). Serious Reasons for Considering: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses. *International Journal of Refugee Law Special Supplementary Issue, 12*(1), 91-132

Bolhuis, M. P., Battjes, H. & Van Wijk, J. (2017). Undesirable but Unreturnable Migrants in the Netherlands, *Refugee Survey Quarterly*, *36*(1), 61–84.

Bolhuis, M. P., Middelkoop, L. P. & Van Wijk, J. (2014). Refugee Exclusion and Extradition in the Netherlands: Rwanda as Precedent? *Journal of International Criminal Justice*, *12*(5), 1115–1139.

Bolhuis, M. P. & Van Wijk, J. (2015a). Alleged War Criminals in the Netherlands: Excluded from Refugee Protection, Wanted by the Prosecutor. *European Journal of Criminology*, *12*(2), 151–168.

Bolhuis, M. P. & Van Wijk, J. (2016). Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F(b) of the Refugee Convention in the Netherlands, *Journal of Refugee Studies*, *29*(1), 19–38.

Bond, J. (2012). Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and 'Guilty' Asylum Seekers. *International Journal of Refugee Law*, *24*(1), 37–59.

Broomhall, B. (2001). Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law. *New England Law Review*, *35*(2), 399–420.

Bruin, R. (2015). Kroniek toelatingsgronden asiel. *Asiel & Migrantenrecht*, 7, 275–287.

Christova, A. (2013). Seven Years of EUJUST LEX: The Challenge of Rule of Law in Iraq. *Journal of Contemporary Research*, *9*(3) 424–439.

Combs, N.A. (2010). *Fact-Finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions*. Cambridge: Cambridge University Press.

Dauvergne, C. (2007). Security and Migration Law in the Less Brave New World. *Social & Legal Studies*, *16*(4), 533–549.

Dauvergne, C. (2013). The Troublesome Intersections of Refugee Law and Criminal Law. In: Aas, K.F., & Bosworth, M., (eds.), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford: OUP, pp. 76–90.

De Bruïne, G., De Boer, A., Dehaene, T., Vredeveldt, A. & Van Koppen, P. (2017). *Een Rwandees Kaartenhuis. Een Wirwar van Wankelende Verklaringen* ("A Rwandan House of Cards. A Ravel of Wavering Statements"). Den Haag: Boomcriminologie.

De Vries, H. (2014). Uitzetting van criminele illegalen; procedures en ontwikkelingen. *Tijdschrift voor de Politie*, *76*(3), 6–9.
Djordevic, N. (2014). Exclusion under Article 1F(b) of the Refugee Convention: The Uncertain Concept of Internationally Serious Common Crimes. *Journal of International Criminal Justice*, *12*(5), 1057–1074.
Drumbl, M. A. (2007). *Atrocity, Punishment and International Law*. Cambridge: Cambridge University Press.
Fitzpatrick, J. (2000). The Post-Exclusion Phase: Extradition, Prosecution and Expulsion. *International Journal of Refugee Law Special Supplementary Issue*, *12*(1), 272–294.
Gilbert, G. (2003). Current Issues in the Application of the Exclusion Clauses. In: Feller, E., Türk, V. & Nicholson, F. (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, pp. 425–478.
Gilbert, G. (2017). Undesirable but Unreturnable. Extradition and Other Forms of Rendition. *Journal of International Criminal Justice*, *15*(1), 55–74.
Gilbert, G. & Rüsch, A. M. (2014). Jurisdictional Competence Through Protection. To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge? *Journal of International Criminal Justice*, *12*(5), 1093–1114.
Giuffre, M. (2017). Deportation with Assurances and Human Rights: The Case of Persons Suspected or Convicted of Serious Crimes. *Journal of International Criminal Justice*, *15*(1), 75–95.
Gottwald, M. (2006). Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(b) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions. *International Journal of Refugee Law*, *18*(1), 81–117.
Guild, E. & Garlick, M. (2010). Refugee Protection, Counter-Terrorism, and Exclusion in the European Union. *Refugee Survey Quarterly*, *29*(4), 63–82.
Hailbronner, K. (2000). *Immigration and Asylum Law and Policy of the European Union*. The Hague: Kluwer.
Handmaker, J. (2003). Seeking Justice, Guaranteeing Protection and Ensuring Due Process: Addressing the Tensions Between Exclusion from Refugee Protection and the Principle of Universal Jurisdiction. *Netherlands Quarterly of Human Rights*, *21*(4), 677–695.
Harris, D. J. et al. (2009). Law of the European Convention on Human Rights (2nd edn.), Oxford: Oxford University Press.
Hathaway, J. C. & Foster, M. (2014). *The Law of Refugee Status*. Cambridge: Cambridge University Press.
Hathaway, J. C. & Harvey, C. J. (2001). Framing Refugee Protection in the New World Disorder. *Cornell International Law Journal*, *34*(2), 257–320.
Hatton, T.J. (2004). Seeking Asylum in Europe. *Economic Policy*, *19*(38), 6–62.
Holvoet, M. (2014). Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law. *Journal of International Criminal Justice*, *12*(5), 1039–1056.
Huysmans, J. (2000). The European Union and the Securitization of Migration. *Journal of Common Market Studies*, *38*(5), 751–77.
Jaishankar, K. and Ronel, N. (eds) (2013). *Global Criminology: Crime and Victimization in a Globalized Era*. Boca Raton, Fl: CRC Press.
Jones, J. R. W. D. & Davidson, R. (2008). *Extradition and Mutual Legal Assistance Handbook*. Oxford: Oxford University Press.
Kälin, W. & Künzli, J. (2000). Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes. *International Journal of Refugee Law Special Supplementary Issue*, *12*(1), 46–78.
Kapferer, S. (2000). Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom. *International Journal of Refugee Law Special Supplementary Issue*, *12*(1), 195–221.

Karstedt, S. (2012). Contextualizing mass atrocity crimes: The dynamics of 'extremely violent societies'. *European Journal of Criminology*, 9(5), 499–513.
Kaushal, A. & Dauvergne, C. (2011). The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions. *International Journal of Refugee Law*, *23*(1), 54–92.
Kosar, D. (2013). Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say. *International Journal of Refugee Law*, *25*(1), 87–119.
Kouvo, S. & Mazoori, D. (2011). Reconciliation, Justice and Mobilization of War Victims in Afghanistan. *International Journal of Transitional Justice*, *5*(3), 492–503.
Lafontaine, F. (2014). The prosecute or expel dilemma in far-away lands. Alternative universal justice for victims of international crimes. In: J-A.M. Wemmers (ed.). *Reparation for victims of crimes against humanity. The healing role of reparation*. New York: Routledge, 92–110.
Larsaeus, N. (2004). The relationship between safeguarding internal security and complying with international obligations of protection. The unresolved issue of excluded asylum seekers. *Nordic Journal of International Law*, 73(1), 69–97.
Li, Y. (2017). *Exclusion from Protection as a Refugee. An Approach to a Harmonizing Interpretation in International Law*. Leiden, Boston: Brill Nijhoff.
Martin, D. A. (1988). The New Asylum Seekers. In: D.A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s. The Ninth Sokol Colloquium on International Law.* Dordrecht: Kluwer Academic Publishers, pp. 1–20.
Mettraux, G. (2006). Dutch courts' universal jurisdiction over violations of common Article 3 qua war crimes. *Journal of International Criminal Justice*, 4(2), 362–371.
Moffett, L. (2015). Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague. *Journal of International Criminal Justice*, *13*(2), 281–311.
Mullard, M. and Bankole, A.C. (eds) (2007). *Globalisation, Citizenship and the War on Terror*. Cheltenham: Edward Elgar Publishing.
Neumayer, E. (2005). Bogus refugees? The determinants of asylum migration to Western Europe. *International Studies Quarterly*, 49(3), 389–410.
Pakes, F. (ed.) (2012). *Globalisation and the Challenge to Criminology*. New York: Routledge.
Peyronnet, C. (2017). Undesirable and Unreturnable Migrants under French Law: Between Legal Uncertainty and Legal Limbo. *Refugee Survey Quarterly*, *36*(1), 35–60.
Rasulov, A. (2002). Criminals as Refugees: The "Balancing Exercise" and Article 1F(b) of the Refugee Convention'. *Georgetown Immigration Law Journal*, *16*(4), 815–834.
Reijven, J. & Van Wijk, J. (2012). Dealing with the Consequences of Article 1F of the Refugee Convention in the Netherlands: A Crisis for Migration Policymakers and Excluded Asylum Claimants. *Migration Policy Practice*, October–November issue, 26–30.
Reijven, J. & Van Wijk, J. (2014a). Caught in Limbo. How Alleged Perpetrators of International Crimes Who Applied for Asylum in the Netherlands Are Affected by a Fundamental System Error in International Law, *International Journal of Refugee Law*, *26*(2), 248–271.
Reijven, J. & Van Wijk, J. (2014b). Probleem opgelost? Hoe van asiel uitgesloten vermeende oorlogsmisdadigers toch rechtmatig in de EU kunnen verblijven. *Asiel en Migrantenrecht*, *7*, 256–261.
Rikhof, J. (2001). Access, Asylum and Atrocities: An Unholy Alliance? *Refuge*, *19*(4), 100–115.
Rikhof, J. (2004). Canada and War Criminals: the Policy, the Program and the Results. Paper presented to the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, August.
Rikhof, J. (2009). Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity. *Criminal Law Forum*, *20*(1), 1–51.
Rikhof, J. (2012). *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*. Dordrecht: Republic of Letters Publishing.
Rikhof, J. (2013). Exclusion Law and International Law: Sui Generis or Overlap? *International Journal on Minority and Group Rights*, *20*(2), 199–232.

Rikhof, J. (2017). Prosecuting Asylum Seekers Who cannot be Removed. A Feasible Solution? *Journal of International Criminal Justice*, *15*(1), 97–113.
Saul, B. (2004). *Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law*, IIIS Discussion Paper No. 26, July 2004.
Saul, B. (2008). *Protecting Refugees in the Global "War on Terror"*. University of Sydney, Sydney Law School Research Paper No. 08/130.
Schabas, W. (2005). Genocide Trials and Gacaca Courts. *Journal of International Criminal Justice*, *3*(4), 879–895.
Schabas, W. A. (2008). 'Complementarity in Practice': Some Uncomplimentary Thoughts. *Criminal Law Forum*, *19*(1), 5–33.
Scharf, M. (2007). The Iraqi High Tribunal. A Viable Experiment in International Justice? *Journal of International Criminal Justice*, *5*(2), 258–263.
Singer, S. (2015). *Terrorism and Exclusion from Refugee Status in the UK. Asylum Seekers Suspected of Serious Criminality*. Queen Mary Studies in International Law, vol. 18. Leiden: Koninklijke Brill.
Singer, S. (2017). "Undesirable and Unreturnable" in the United Kingdom. *Refugee Survey Quarterly*, *36*(1), 9–34.
Smeulers, A. L. (2008). Perpetrators of international crimes: Towards a typology. In: Smeulers A and Haveman R (eds) *Supranational Criminology. Towards a Criminology of International Crimes*. Antwerp: Intersentia, 233–265.
Smeulers, A. L., Hola, B., & van den Berg, T. (2013). 65 Years of International Criminal Justice: Facts and Figures. *International Criminal Law Review*, *13*(1), 7–41.
Speckmann, D. (2011). Balancing Exclusion, Prosecution and Non-refoulement: The Application of Article 1F of the Refugees Convention in The Netherlands. ANU Centre for European Studies Briefing Paper Series, vol. 2 no.1 (January).
Spijkerboer, T.P. & Vermeulen, B.P. (2005). Vluchtelingenrecht. Nijmegen: Ars Aequi Libri.
Stover, E., Peskin, V. & Koenig, A. (2016). *Hiding in Plain Sight. The Pursuit of War Criminals from Nuremberg to the War on Terror*. Oakland, CA: University of California Press.
Stumpf, J. (2006). The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power. *American University Law Review*, *56*(2), 367–419.
Van den Herik, L. (2009a). A quest for jurisdiction and appropriate definition of crime. Mpambara before the Dutch courts. *Journal of International Criminal Justice*, *7*(5), 1117–1132.
Van den Herik, L. (2009b). The difficulties of exercising extraterritorial jurisdiction: The acquittal of a Dutch businessman for crimes committed in Liberia. *International Criminal Law Review*, *9*(1), 211–226.
Van der Vlugt, M. A. & Van Zadelhoff, G. W. F. (2013). Artikel 1F Vluchtelingenverdrag en de Vervolging van Internationale Misdrijven in Nederland. Over Verschillen tussen de Toepassing van Artikel 1F VV en Strafvervolging. *Strafblad*, *11*(3), 179–187.
Van Sliedregt, E. (2007). International crimes before Dutch courts: Recent developments. *Leiden Journal of International Law*, *20*(4), 895–908.
Van Sliedregt, E., Sjöcrona, J. M. & Orie, A. M. M. (2008). *Handboek Internationaal Strafrecht*. Den Haag: Kluwer.
Van Wijk, J. (2010). Luanda-Holanda: Irregular (asylum) migration from Angola to the Netherlands. *International Migration*, *48*(2), 1–30.
Van Wijk, J. (2011). Als vluchtelingen mogelijk daders zijn. *Tijdschrift voor Criminologie*, *53*(4), 310–327.
Van Wijk, J. (2012). Amnesty for war crimes in Angola: Principled for a day? *International Criminal Law Review*, *12*(4), 743–761.
Wijngaarden, M. (2008). Balanceren onder nul. Het bewijs in asielzaken waar artikel 1F Vluchtelingenverdrag wordt tegengeworpen. *Nieuwsbrief asiel- en vluchtelingenrecht*, *24*(6), 407–417.

Witteveen, M. (2010). Closing the gap in truth finding: From the facts of the field to the judge's chambers. In: A. Smeulers (ed.) *Collective Violence and International Criminal Justice*. Antwerp: Intersentia, pp. 383–413.

Yakut-Bahtiyar, Z. (2015). *Exclusion clauses of the Refugee Convention in relation to national immigration legislations, European policy and human rights instruments. Article 1F versus the non-refoulement principle*. Oisterwijk: Wolf Legal Publishers.

Research and advisory reports and other documentation

Aas, M. B. (2013). *Exclusion from Refugee Status: Rules and Practices in Norway, Canada, Great Britain, The Netherlands and Denmark.* Study commissioned by the Norwegian Directorate of Immigration (Utlendingsdirektoratet, UDI), available online at <http://www.udi.no/globalassets/global/forskning-fou_i/beskyttelse/exclusion-from-refugee-status.pdf> (last visited 2 March 2015).

ACVZ [*Adviescommissie Vreemdelingenzaken*] (2001). *Advies mbt artikel 1(F) van het Vluchtelingenverdrag* ("Advice regarding article 1(F) of the Refugee Convention"). Den Haag: ACVZ, January.

ACVZ (2006). *Transparant en toetsbaar. Een advies over landeninformatie in het vreemdelingenbeleid* ("Transparent and verifiable. An advice on country information in the aliens policy"). Den Haag: ACVZ, July.

ACVZ (2008). *Artikel 1F Vluchtelingenverdrag in het Nederlands vreemdelingenbeleid* ("Article 1F of the Refugee Convention in the Dutch aliens policy"), The Hague, ACVZ, May.

ACVZ (2011). *Om het maatschappelijk belang* ("For reasons of societal interest"). *Advies over het betrekken van het lokale bestuur en de lokale gemeenschap bij de uitoefening van de discretionaire bevoegdheid*, The Hague, ACVZ, December.

Amnesty International (2017). *Forced back to danger. Asylum-seekers returned from Europe to Afghanistan*, available online at <https://www.amnesty.org/download/Documents/ASA1168662017ENGLISH.pdf> (last visited 5 October 2017).

Bolhuis, M. P. & Van Wijk, J. (2015b). *Study on the Exchange of Information between European Countries Regarding Persons Excluded from Refugee Status in Accordance with Article 1F Refugee Convention*, Amsterdam, UDI/VU University, December 2015, available online at <https://cicj.org/wp-content/uploads/2012/11/Bolhuis-Van-Wijk-2015-Study-on-the-exchange-of-information-on-1F-exclusion-between-European-countries.pdf>.

Canadian Association of Refugee Lawyers (2014). Factum of the Intervener, Febles v. Minister of Citizenship and Immigration, *Supreme Court of Canada*, Court File No. 35215.

Department of Justice Canada (2008). *Crimes Against Humanity and War Crimes Program; Summative Evaluation, Final Report*. Evaluation Division, Office of Strategic Planning and Performance Management, October.

Hayner, P. (2007). *Negotiating Peace in Sierra Leone; Confronting the Justice Challenge*. Centre for Humanitarian Dialogue, December. Available online at <http://www.swisspeace.ch/fileadmin/user_upload/Media/Topics/Dealing_with_the_Past/Resources/Hayner_Priscilla_Negotiating_Peace_in_Liberia.pdf> (last visited 25 May 2014).

Human Rights Watch (2014). *The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*. Human Rights Watch, September. Available online at <https://www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf>.

Leerkes, A., Boersema E. & Chotkowski, M. (2014). *Het lot van het inreisverbod; Een onderzoek naar de uitvoeringspraktijk en gepercipieerde effecten van de Terugkeerrichtlijn in Nederland*. Den Haag: WODC.

NJCM [*Nederlands Juristen Comité voor de Mensenrechten*] (2002). *Commentaar betreffende de toepassing van artikel 1F Vluchtelingenverdrag en de bestrijding van terrorisme*. 11 June 2002.

NJCM (2008). *Commentaar: De positie van mensen met een 1F-status en hun gezinsleden. Enige knelpunten en aanbevelingen*, 24 January.

REDRESS/FIDH [International Federation for Human Rights] (2010). *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised International War Crimes Units*. Report of a conference organized in November 2008 in Brussels, Belgium.

RLI/CICJ [Refugee Law Initiative/Center for International Criminal Justice] (2016). *Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality who cannot be Removed*, policy brief, undated, available online at <https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf> (last visited 30 November 2016).

UNHCR [United Nations High Commissioner for Refugees] (1992). *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*. HCR/IP/4/Eng/REV.1 Re-edited, Geneva, January 1992, UNHCR 1979.

UNHCR (2001). *Asylum Applications in Industrialized Countries: 1980–1999. Trends in Asylum Applications Lodged in 37, Mostly Industrialized, Countries*. Population Data Unit (November).

UNHCR (2003a). *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003.

UNHCR (2003b). *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*. Protection Policy and Legal Advice Section, Department of International Protection, Geneva, 4 September 2003.

UNHCR (2007). *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*. Brussels, November.

UNHCR (2009). *Statement on Article 1F of the 1951 Convention. Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive*, July 2009.

UNHCR (2014). *Factum of the Intervener,* Febles v. Minister of Citizenship and Immigration, Supreme Court of Canada, Court file no. 35215, <http://www.unhcr.ca/beta/wp-content/uploads/2014/10/35215-Factum.pdf>. Last visited 30 April 2015.

UNHCR (2016). *Global Trends Forced Displacement in 2015* (June). Available online at <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>.

Van Schijndel, C. & Van Gemmert, N. (2014). *Vreemdelingenbewaring in Getal; 2009–2013*. Dienst Justitiële Inrichtingen, Ministerie van Veiligheid en Justitie, July.

Case law

International courts

Court of Justice of the European Union (CJEU)

Bundesrepublik Deutschland v. B and D, joined cases C-57/109 & C-101/09, 9 November 2010

CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, case C-283/81, 6 October 1982

H.T. v. Land Baden-Württemberg, case C-373/13, 24 June 2015

Jose Maria Sison v. Council of the European Union, case T-47/03, 30 September 2009

K. v. Staatssecretaris van Justitie and *H.F. v. Belgische staat*, joined cases C-331/16 & 366/16

P.I. v. Oberbürgermeisterin der Stadt Remscheid, case C-348/09, 22 May 2012

Regina v. Bouchereau, case C-30/77, 27 October 1977

Rutili v. Ministre de l'intérieur, case C-36/75, 28 October 1975

S. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. G., case C-457/12, 12 March 2014

Z. Zh. v. Staatssecretaris van Veiligheid en Justitie and Staatssecretaris van Veiligheid en Justitie v. I.O., case C-554/13, 11 June 2015

European Court of Human Rights (ECtHR)

Ahorugeze v. Sweden, ECtHR, Application No. 37075/09, 2 June 2012

Chahal v. the United Kingdom, Reports of Judgments and Decisions 1996-V, 15 November 1996

CruzVaras and Others v. Sweden, Series A No. 201, 20 March 1991

Mamatkulov and Askarov v. Turkey [GC], Application Nos 46827/99 and 46951/99, ECHR 2005-I, 4 February 2005

M.M. and Others v. the Netherlands, Application No. 15993/09, 8 June 2017

S.D.M. and Others v. the Netherlands, Application No. 8161/07, 12 January 2016

Soering v. United Kingdom, ECtHR (1989) Series A, No. 14038/88, 7 July 1989

International Criminal Tribunal for Rwanda (ICTR)

Referral Chamber

Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, Munyakazi (ICTR-97-36-R11bis), Trial Chamber, 28 May 2008

Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, Kanyarukiga (ICTR-2002-78-R11bis), 6 June 2008

Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda, Hategekimana (ICTR-00-55B-Rule 11bis), 19 June 2008

Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, Kanyarukiga (ICTR-2002-78-R11bis), Trial Chamber, 30 October 2008

Decision on Prosecutor's Request For Referral To The Republic Of Rwanda, Uwinkindi (ICTR-2001-75-R11bis), Referral Chamber, 28 June 2011

Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions, Uwinkindi (ICTR-2001-75-R11bis), Appeals Chamber, 16 December 2011

Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, Munyagishari (ICTR-2005-89-R11bis), 6 June 2012

International Criminal Court (ICC)

Pre-trial Chamber I

Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 3 June 2013

National courts

Australia

Administrative Appeals Tribunal of Australia

'SRBBBB' and Minister for Immigration and Multicultural and Indigenous Affairs, 24 October 2003, [2003] AATA 1066

'SRCCCC' and Minister for Immigration and Multicultural and Indigenous Affairs, 26 March 2004, [2004] AATA 315

Belgium

Council for Alien Law Litigation

Case No. 99.921, 27 March 2013

Canada

Federal Court of Appeal

Jayakasera v. Canada (Citizenship and Immigration), 17 December 2008, 2008 FCA 404

Ramirez v. Canada, 7 February 1992, 2 F.C. 306 (C.A.)

Supreme Court

Febles v. Canada (Citizenship and Immigration), 30 October 2014, 2014 SCC 68

Denmark

Supreme Court

Højesterets Kendelse (Order of the Supreme Court of Denmark), 6 November 2013, *Director of Public Prosecutions vs. T.*, Case No. 105/2013

France

Court of Cassation

ECLI:FR:CCASS:2014:CR00810, 26 February 2014

Council of State

Ofpra c/ M.A., 4 May 2011, no. 320910

Netherlands

Council of State

ECLI:NL:RVS:2003:AH9895, 23 June 2003

ECLI:NL:RVS:2007:BB1436, 18 July 2007

ECLI:NL:RVS:2008:BF1415 of 12 September 2008

ECLI:NL:RVS:2009:BK8653, 30 December 2009

ECLI:NL:RVS:2013:BZ8702, 27 March 2013

ECLI:NL:RVS:2014:550, 10 February 2014

ECLI:NL:RVS:2015:2008, 16 June 2015

ECLI:NL:RVS:2015:3008, 14 September 2015

Supreme Court

ECLI:NL:HR:2003:AF1909, 20 May 2003

ECLI:NL:HR:2004:AF6988, 7 May 2004

ECLI:NL:PHR:2006:AV7387, 15 September 2006

ECLI:NL:HR:2007:BA1764, 17 April 2007

ECLI:NL:PHR:2012:BX6945, 9 October 2012

ECLI:NL:HR:2014:1441, 17 June 2014

ECLI:NL:HR:2015:1760, 30 June 2015

Appeals Court of The Hague
ECLI:NL:GHSGR:2008:BC6068, 10 March 2008
ECLI:NL:GHDHA:2016:1924, 5 July 2016
ECLI:NL:GHDHA:2016:1925, 5 July 2016

District Court of Leeuwarden
ECLI:NL:RBLEE:2008:BG2721, 3 September 2008

District Court of The Hague
CU 2001.RT.EX.01, 16 October 2001
ECLI:NL:RBSGR:1997:ZA3312, 11 April 1997
ECLI:NL:RBSGR:2006:AY9726, 4 July 2006
ECLI:NL:RBSGR:2007:BA8765, 28 June 2007
ECLI:NL:RBSGR:2009:BK0520, 23 March 2009
ECLI:NL:RBSGR:2009:BI7753, 5 June 2009
ECLI:NL:RBSGR:2010:BM2047, 22 April 2010
ECLI:NL:RBSGR:2010:BM8018, 16 June 2010
ECLI:NL:RBSGR:2012:BX9081, 2 October 2012
ECLI:NL:RBDHA:2013:8710, 1 March 2013
ECLI:NL:RBSGR:2014:8484, 11 July 2014
ECLI:NL:RBDHA:2014:17274, 5 November 2014
ECLI:NL:RBSGR:2015:13904, 27 November 2015
ECLI:NL:RBDHA:2017:16383, 15 December 2017

District Court of Roermond
ECLI:NL:RBROE:2010:BL9029, 26 March 2010

District Court of Rotterdam
ECLI:NL:RBROT:2004:AO7178, 7 April 2004

Norway
District Court Oslo
11-050224ENE-OTIR/01, 11 July 2011

UK
Court of Appeal of England and Wales
AH (Algeria) v. Secretary of State for the Home Department, 2 April 2012, [2012] EWCA Civ 395

High Court of England and Wales
AH (Algeria) v. Secretary of State for the Home Department v. UNHCR, 14 October 2015, Case No: C1/2013/712, [2015] EWCA Civ 1003
Rwanda v. Nteziryayo and others, 28 July 2017, [2017] EWHC 1912 (Admin)

Parliamentary documents

Aanhangsel Handelingen no. 534, Vergaderjaar 1994–1995
Aanhangsel Handelingen no. 1607, Vergaderjaar 2012-2013
Aanhangsel Handelingen no. 1774, Vergaderjaar 2012-2013
Kamerstukken II 1997/98, 19637, no. 295, 28 November 1997
Kamerstukken II 1999/2000, 26732, no. 3, 22 September 1999
Kamerstukken II 1999/2000, 19637, no. 520, 3 April 2000
Kamerstukken II 2000/01,19673, no. 553, 19 December 2000
Kamerstukken II 2002/03,19637, no. 695, 7 November 2002
Kamerstukken II 2003/04, 19637, no. 811, 8 April 2004
Kamerstukken II 2003/04, 19637, no. 829, 23 June 2004
Kamerstukken II 2006/07, 30800 VI, no. 31, 11 December 2006
Kamerstukken II 2007/08, 31200 VI, no. 160, 9 June 2008
Kamerstukken II 2008/09, 31200 VI, no. 193, 9 September 2008
Kamerstukken II 2009/10, 27925, no. 363, 2 October 2009
Kamerstukken II 2009/10, 27925, no. 377, 7 January 2010
Kamerstukken II 2009/10, 32475, no. 3, published on 14 September 2010
Kamerstukken II 2011/12, 29237, nr. 142, 17 November 2017
Kamerstukken II 2011/12, 19637, no. 1547, 1 June 2012
Kamerstukken II 2013/14, 19637, no. 1808, 14 April 2014
Kamerstukken II 2014/15, 34000 VI, no. 2, 16 september 2014
Kamerstukken II 2014/15, 34000 VI, no. 4, 25 September 2014
Kamerstukken II 2014/15, 19637, no. 1952, 3 March 2015
Kamerstukken II 2015/16, 19637, no. 2152, 29 February 2016
Kamerstukken II 2015/16, 34000 VI, no. 89, 23 May 2016
Kamerstukken II 2016/17, 34550 VI, no. 91, 21 December 2016
Kamerstukken II 2016/17, 34550 VI, no. 105, 8 March 2017
Kamerstukken II 2017/18, 34775 VI, no. 7, 10 October 2017
Kamerstukken II 2017/18, 34775 VI, no. 94, 5 March 2018
Notitie betreffende de toepassing van artikel 1F, 6 June 2008
Rapportagebrief opsporing en vervolging internationale misdrijven 2008, no. 5589509/09, 19 May 2009
Rapportagebrief Internationale Misdrijven 2009, 31 May 2010
Rapportagebrief Internationale Misdrijven 2010, no. 5702638/11, 5 July 2011
Rapportagebrief Internationale Misdrijven 2011, no. 220338, 21 June 2012
Rapportagebrief Internationale Misdrijven 2012, no. 435234, 13 November 2013

Figures and tables

Appendix 1. Scoring list

This is a translation by the author of the original scoring list in Dutch that has been used in the file analysis that was conducted by a team consisting of the author, a senior researcher and three research assistants from November 2010 to February 2011.

Personal details

1. Research code:[1]
2. V-number:[2]
3. File number:
4. Relation 1F:
   a. 1F has been invoked in a formal decision[3] by the IND
   b. Year invocation: ….
   c. Procedure is ongoing (recent case, no decision yet)
   d. 1F was never invoked[4] –**STOP HERE**
   e. Partner of 1F-er – **STOP HERE**
   f. Child of 1F-er – **STOP HERE**
   g. File not accessible via INDIS – **STOP HERE**
   h. Person turns out not to be a 1F-er **– STOP HERE**
   i. Other, namely …
5. Current nationality:
6. Former nationality:
7. Country of birth:
8. Year of birth:
9. Sex:
10. Year of asylum application:
11. Last known legal representative (**if something happened after 2008**)
    a. Name:
    b. Place:

1 Name researcher + reference number

2 The number assigned to the alien by the immigration authorities.

3 See in file – often mentioned under heading: "Aanvraag verg. bepaalde tijd – afwijzen"

4 For example, the 1F unit has done research but it has had no consequences; a voornemen [intended decision has been issued but not followed up; no decision on the basis of 1F (or art. 31 lid 1, jo. Art. 32 (2) k) has been issued.

Asylum

12. Status 2010 :
    a. 1F-procedure ongoing[5] – *same as question 4b*
    b. 1F final after decision or acknowledged in court. Effect is the following:
        - Forced removal
        - Removal under supervision
        - Voluntary return
        - Return – unknown how
        - MOB[6]/unknown/not clear from file where person is
        - Residence in 2009 or 2010 is known– clear from file (e.g. BMA [Bureau Medical Advice])
        - Emerges abroad, namely in …
        - In detention
        - In appeal at court (only if about grounds for 1F)
        - Other, namely …
    c. 1F turned down in appeal at court **– STOP HERE**
        - Lack of evidence[7]
        - Other, namely …
    d. Withdrawal 1F objections by IND on basis of … **– STOP HERE**
    e. Other, namely …
13. 3 ECHR (danger inhuman/degrading treatment) or 8 ECHR (family life) acknowledged?
    a. Yes, namely 3 and/or 8 (durable or not?)
    b. No

Travel route

14. Entry into Europe according to applicant (see first asylum hearing):
    a. Assistance paid for by applicant him/herself
    b. Assistance by person who assisted applicant for free
    c. Independently/without assistance[8]
    d. Other, namely…

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5 This means that it is not clear yet whether 1F will be invoked in a formal decision. A procedure concerning a persona non grata declaration or medical reasons is ongoing, for instance, is NOT covered here. The same goes for an ongoing procedure concerning 3 ECHR (is NOT covered here)

6 "Met Onbekende Bestemming" [left with unknown destination] – you can assume MOB if at VS – under 'status' – it says "onrechtmatig" [unlawful]

7 IND has not been able to demonstrate that … – insufficient clues that… – insufficiently motivated that…

8 E.g. a stowaway who claims to have received no assistance

Serious reasons

15. Country where alleged crime(s) occurred:
16. Period in which alleged crime(s) (primarily) occurred
    a. 1960–1970
    b. 1970–1980
    c. 1980–1990
    d. 1990–2000
    e. 2000–2010
17. Situation in country at time of alleged crime(s):
    a. Dictatorship
    b. Civil war
    c. International war
    d. Instable democracy
    e. Democracy
    f. Other, namely …
18. Invocation 1F on basis of: [**MULTIPLE ANSWERS POSSIBLE**]
    a. International crime
        - Crime against peace
        - War crime
        - Crime against humanity
        - Genocide
    b. Serious non-political crime
    c. Acts contrary to the purposes and principles of the United Nations
    d. Unclear/not mentioned, namely…

"Er zijn ernstige redenen …"[there are serious reasons…] – (from first 'voornemen'[intended decision] or 'beschikking' [decision on residence permit application]) [QUOTE IN DOCUMENT]

19. Active in what type of organisation:
    a. No organisation (e.g. in case of 1F(b)) → <u>continue to 27 (personal involvement)</u>
    b. Government; name section: …
    Secret service/anti-terror
        - Army regular
        - Prison staff
        - Police
        - Ministry
        - Political party
        - Judiciary

- Public prosecution office
- Other, namely …

c. Informal organisation; name: …
- Religious orientation
- Separatist orientation
- Political orientation
- Unknown
- Other, namely …

d. Other, namely …

20. Manner in which joined organisation <u>according to applicant</u>:

a. Forced recruitment
- Conscription
- By force/violence

b. Voluntary

c. Other: …

21. Highest achieved position within organisation at time of occurrence crime <u>according to IND</u> (**see personal participation in voornemen**):

a. Rank/title: …
- Command/management, as becomes clear from the following tasks/ responsibilities: …
- Executive
- Other, namely …

b. Involvement 1F acts <u>according to IND</u> (see beschikking):
- Direct perpetrator/direct perpetration[9]
- Command responsibility/gave order[10]
- Joint criminal enterprise/facilitator/accomplice[11]
- EXCEPTION AFGHANISTAN

22. Failed attempts to flee/desert <u>according to applicant</u> (see second asylum hearing)?

a. No/unknown

b. Yes, … times

9 Applicant has DIRECTLY perpetrated crimes HIM/HERSELF

10 Applicant had a HIGH POSITION because of which he was able to order others to directly perpetrate crimes

11 Applicant may not have committed crimes him/herself but FACILITATED acts that fall within 1F – was present, created conditions

23. Reason departure from organisation according to applicant (second asylum hearing):
    a. Ethical/moral objections actions organisation
    b. Organisation or unit absolved/conquered
    c. Applicant fired/removed from organisation
    d. Peace signed/demobilisation
    e. Organisation still existed, but personal security issues
    f. Other, namely …
24. Manner of departure from organisation according to applicant:
    a. Escaped/deserted against will direct supervisor in organisation[12]
    b. In consultation with/not against will of command[13]
    c. Organisation or unit absolved/conquered[14]
    d. Other, namely …

Substantiation serious reasons [MULTIPLE ANSWERS POSSIBLE]

25. If **1F(a) or (c)**: Evidence membership/involvement applicant[15] in organisation:
    a. Own statements applicant: …
    b. Other evidence
        - No
        - Documents presented by applicant, namely *(see first asylum hearing; documents*) …
        - Witness statements:
            - Anonymous, namely …
            - Traceable, namely …
        - Individueel ambtsbericht [Official Individual Report by Ministry of Foreign Affairs], namely …
        - Reports/media, namely …
        - Other, namely …
26. If **1F(a) or (c)**: Evidence presumption 1F actions organisation:
    a. No
    b. Own statements applicant: …
    c. Other evidence:
        - No

12 E.g. rebel escapes from RUF where he was against his own will

13 E.g. government searches rebel and rebel flees in consultation with rebel movement – or peace signed and person is free to go

14 E.g. KhAD/WAD employees had to flee because of regime change

15 Be aware: here it is really about sources that connect the name of the applicant to the organisation; the evidence must relate to THAT. So NOT driver license or school diploma, but e.g. membership card police or military

- Documents presented by applicant, namely …
- Algemeen ambtsbericht [Official Country Report by Ministry of Foreign Affairs]
- Witness statements:
  - Anonymous, namely …
  - Traceable, namely …
- Individueel ambtsbericht [Official Individual Report by Ministry of Foreign Affairs], namely …
- Reports/media, namely …
- Other, namely …

27. **1F(a), (b) and (c)**: Evidence involvement of applicant in *any* 1F crime:[16]

a. Position applicant:
- Denies to be direct perpetrator/have given order of *any* 1F crime
- States in all asylum hearings to have never personally executed any form of 1F crime, or to have given orders to that effect[17]
- States to have used violence or given orders to that effect, but that violence was justified,[18] namely …
- Confirms (in one or more asylum hearings) to be direct perpetrator/have given order of *any* 1F crime:
- Without further explanation
- Confirms, but:
  - Denies or downplays role in second instance (in 'zienswijze' [view applicant] or second asylum hearing)
  - Invokes force majeure
    - Self-preservation-argument[19]
    - Drugs-argument[20]
  - Other, namely …

b. Other evidence:[21]
- No

16 Evidence that applicant has personally perpetrated or given an order for a 1F crime. HERE, MULTIPLE ANSWERS ARE POSSIBLE, especially if applicant is associated with multiple types of crimes.

17 E.g. 'I have never fired a shot'; I have never recruited child soldiers'; 'I have never tortured'; 'I was there, but only fired shots into the skies'; 'I occasionally delivered prisoners to their cell, but was not aware that they were tortured'. N.B. IND could still invoke 1F for facilitation in such cases.

18 E.g. 'Legally no 1F crime'; 'victims were not civilians'; 'abode by Geneva conventions'; 'violence was proportional'; 'child soldiers were not children'.

19 E.g. 'I have fired shots, tortured, BUT I followed an order'; 'if I did not participate, I risked being killed/tortured myself'.

20 'I did it, but I did not know what I was doing anymore'; taken or administered drugs

21 Be aware: here it is really about sources that connect the name of the applicant to 1F crimes

- Documents presented by applicant, namely …
- Witness statements:
  - Anonymous, namely …
  - Traceable, namely …
- Individueel ambtsbericht [Official Individual Report by Ministry of Foreign Affairs], namely …
- Reports/media, namely …
- Other, namely …

Other particularities – anything striking:

…

Summary

Conflict and violent political repression cause forced displacement. Those who are displaced by such situations can seek asylum elsewhere, if they manage to escape the situation. However, among people seeking asylum are also individuals who are responsible for the very crimes that cause or contribute to forced displacement.

Article 1F is the 'exclusion clause' of the Refugee Convention: individuals applying for asylum can be excluded from refugee protection when there are serious reasons for considering they have committed certain serious crimes, such as war crimes, crimes against humanity and other serious crimes. This exclusion clause is seen to fulfil different functions: excluding undeserving individuals from refugee protection, promoting criminal prosecution for perpetrators of serious crimes, and protecting the community of the host state.

While host states may have obligations under international law to protect displaced persons in need, they do not want to be a safe haven for war criminals.

Moreover, in recent years many states have shown themselves dedicated to ending impunity for the serious crimes that occur in situations of conflict and violent political repression, often referred to as international crimes. A large 'impunity gap' remains for these crimes: the number of individuals prosecuted for international crimes by international or national courts is very small, which means that most perpetrators of international crimes remain unpunished.

As the exclusion clause is applied to people who are believed to be guilty of international and other serious crimes, proactively applying this clause possibly is a key element in narrowing this impunity gap.

However, criminal prosecution of excluded asylum seekers does not follow automatically from the application of Article 1F itself. It requires active follow-up by a capable and willing actor. International courts have limited jurisdiction and focus. Domestic criminal justice systems in post-conflict states are often not capable of prosecuting these cases. In addition, excluded individuals often cannot return or be expelled and thus remain in the states that have excluded them. For these reasons, these host states arguably have a crucial role to play in the prosecution of excluded asylum seekers. In fact, if it were not for host states, the 'impunity gap' could not be narrowed.

It is therefore important to know how states hosting excluded asylum seekers (can) contribute to this aim. To what extent are these states willing to bring people residing on their territory who allegedly have 'blood on their hands' to justice, and what *can* and *do* they actually do to promote accountability for these alleged perpetrators? What is realistically possible in this respect?

This is an empirical study of the role that host states in practice play in criminally prosecuting alleged perpetrators of serious crimes applying for asylum. It is a case study of the Netherlands, a country with a relatively high number of 1F exclusions and strongly committed to ending impunity for international crimes. The central research question is: *How has the Netherlands as a state of refuge contributed to administering criminal justice to asylum seekers who have been excluded under Article 1F of the Refugee Convention?*

The study relies on a mixed-methods approach to answer this question. These methods include an analysis of asylum files in Dutch exclusion cases, a review of academic literature, case law and policy documents, and interviews with experts.

Results

The study concludes that the policies of the Dutch government with respect to 1F exclusion and the criminal prosecution of international crimes have resulted in a large number of excluded asylum seekers compared to other countries of refuge, and different efforts to promote their criminal prosecution.

Societal unrest relating to asylum applications by alleged leaders of the former Afghan communist regime led to the early adoption, in 1997, of a 1F-policy with three guiding principles: Article 1F is to be interpreted restrictively, the opportunities to apply Article 1F must be maximally utilized, and further consequences are to be connected to any exclusion on the basis of 1F. The 'further consequences' are that the individual is declared *persona non grata*, which entails an obligation to leave the territory of the state, and a standard assessment by the public prosecutor of the possibilities for criminal prosecution.

Other distinctive elements of the Dutch policy are that exclusion under 1F is assessed *before* inclusion under 1A Refugee Convention; that certain designated groups can be categorically excluded, in which case it is up to the individual concerned to show that his case forms an exception; that excluded individuals are by definition considered to pose a danger to public order; and that 1F invokes a blanket bar to all other residence permits.

Taken together, these different, oftentimes unique aspects of the Dutch (post) exclusion policy reflect the government's insistence on the conviction that the Netherlands should not be a 'safe haven' for asylum seekers who are believed to be guilty of serious crimes. This 'no safe haven' policy has driven up the number of 1F-exclusions in the Netherlands. From 1992 to 2017, a thousand asylum seekers have been excluded. Internationally, this is an exceptionally high number and this high number is evidence of the Netherlands' active, and relatively strict, 1F policy.

The Netherlands as a state of refuge can play a role in bringing these alleged perpetrators to justice by either facilitating their rendition to an international or national court *outside the Netherlands* (*aut dedere*), or prosecuting these individuals domestically *in the Netherlands* on the basis of universal jurisdiction (*aut judicare*). The principle of universal jurisdiction provides that any state can exercise criminal jurisdiction regardless of whether there was a territorial or nationality link between that state, and the crime, perpetrator or victim. The analysis of the case files shows that the vast majority of cases concern international crimes under 1F(a). For these crimes, universal jurisdiction often exists, which means that prosecution in the Netherlands is – in principle – possible.

The Dutch government has put significant effort in (facilitating) the extradition of excluded asylum seekers. It has done so not only by (passively) cooperating with extradition requests, but also by actively creating favourable circumstances that would make extradition possible. Especially in Rwanda, the Netherlands has strengthened the criminal justice sector by means of capacity building, training and financial input. The case of Rwanda shows that despite several legal and practical complications and obstacles, it is possible to facilitate and promote extradition of 1F-excluded individuals in this way. However, states hosting possibly extraditable suspects can only influence the conditions for successful extradition to a limited extent. Moreover, the case of Rwanda is arguably exceptional. In Rwanda, there was a strong, intrinsically motivated, dedication to prosecute perpetrators of international crimes. In many other post-conflict states, such dedication – which is crucial – is lacking. This makes it even more challenging to meet extradition law requirements and take away human rights concerns, for instance concerning the possible imposition of the death penalty, general conditions in detention and prison facilities and the right to a fair trial. Although the Dutch efforts with respect to (facilitating) extradition have been relatively successful, only four 1F-excluded individuals have been extradited or transferred, representing about 0,4 percent of the total number of a thousand 1F-excluded individuals in the Netherlands.

The Dutch government has also equipped its own criminal justice system to domestically prosecute excluded asylum seekers, by changing laws and investing in the capacity of its law enforcement and prosecution services. The Dutch 1F policy furthermore entails a standard assessment of the opportunities for prosecution in exclusion cases by the public prosecutor. However, domestic prosecution of excluded asylum seekers by states of refuge is complicated by many legal and practical challenges. They include lack of jurisdiction; difficulties of conducting investigations at the crime scene and finding witnesses, due to passage of time and lack of access to or cooperation with the country where crimes were committed; the fact that many of the individuals are rather 'insignificant', low-level and thus unknown individuals; and the high demand in terms of resources and capacity that this type of investigations and prosecutions entail. In addition, challenges specific to the context of 1F exclusion are the large gap between the threshold for 1F exclusion and the threshold for criminal convictions, and the reliability of the information underlying 1F decisions. Despite a strong commitment to advancing the criminal prosecution of excluded individuals domestically, since 1992, these efforts have resulted in the criminal prosecution of only five excluded individuals, representing about 0,5 percent of the total number of 1F-excluded individuals in the Netherlands, four of whom have been convicted.

If less than 1 percent of the excluded asylum seekers is either extradited or domestically prosecuted, what happens to the others? In the Netherlands – unlike in many other European countries – excluded asylum seekers receive an entry ban or are declared *persona non grata* which means that they have no legal right to stay and have to leave the country immediately. Because of the entry ban, they are considered by definition to pose a permanent threat to public order and any access to other forms of residence permits is explicitly blocked. A substantial part of the excluded asylum seekers, however, cannot be removed, for various legal or practical reasons, for instance because they are at risk of inhuman or degrading treatment after return or do not have identity documents. Being 'unremovable' does not take away the obligation to leave the Netherlands. For as long as they are unremovable, these individuals are destined to live a life in 'legal limbo' and are faced with serious economic, social, and psychological challenges. The number of individuals in this situation in the Netherlands is considerable, and by the year 2017, some of them have been in legal limbo for twenty years.

Strengths and limitations

Like every study, this study too has its methodological strengths and limitations. Strengths are its in-depth focus on a state which has excluded a relatively large

number of asylum seekers and has gone to great lengths to promote their criminal prosecution; the wealth of information available on the case of the Netherlands; and the use of the multi-method approach.

The fact that the study mainly focuses on a single country, which could make it difficult to generalize the findings to other states of refuge, could be seen as a limitation of the study. However, other states are likely to be confronted with the same legal and practical challenges and complications. In fact, considering the wealth of information and the large 1F population and the efforts of the Dutch government aimed at promoting criminal accountability of this group, the Netherlands arguably offers the best available case for answering the research questions posed in this study.

The fact that the data collection only covered exclusion cases until the year 2010 could also be seen as a limitation of this study; since then, new 1F cases concerning different nationalities have occurred. Indeed, the effects of the Arab Spring and the ensuing 'refugee crisis' in Europe have considerably changed the composition of the asylum influx. However, the structural problems, such as the lack of possibilities for extradition, the gap between the different standards of proof, or the challenges in relation to evidence collection have remained the same. Furthermore, publicly available information does not suggest that the number of criminal prosecutions of excluded asylum seekers has increased.

Discussion

In dealing with asylum seekers, states have an obligation to exclude those immigrants who are believed to have committed serious crimes. This obligation is based on the idea that international protection should not be available for these 'undeserving' individuals and should not be abused to escape criminal prosecution. States have also committed to ambitious aspirations, such as 'ending impunity for the most serious crimes of concern to the international community as a whole' and 'letting justice take its course as much as possible'. These states are faced with high expectations to prevent unentitled, undeserving and dangerous individuals from obtaining asylum. As a result, the attention for and use of the exclusion clause has increased.

This study concludes that despite strong commitment from the Dutch government to bringing 1F-excluded individuals to justice, less than 1 percent of them have actually been criminally prosecuted in the Netherlands or elsewhere, let alone convicted. Taking into account that the successful criminal prosecution of an excluded asylum seeker will remain a sporadic occurrence, one that only occurs

when different favourable circumstances that are largely outside the sphere of influence of a state of refuge happen to coincide, the prospects for states of refuge committed to closing the impunity gap by criminally prosecuting excluded asylum seekers is not promising.

In practice, the ambitious aspirations are thus far from achieved. Moreover, the 'no safe haven' policy has considerable side-effects for the host state itself, for other states, and for the individuals concerned. It results in a considerable number of excluded individuals whose guilt or responsibility will never be properly determined in a criminal trial, who cannot be removed and end up in a 'legal limbo'. If this legal limbo lasts for many years, this makes the exclusion policy vulnerable to criticism and resistance from politics and society. These individuals will most likely either remain in the state of refuge, or disappear from the radar and relocate elsewhere in Europe. The durable presence of those who stay – a group of unwanted but unremovable undocumented individuals without proper means of subsistence – may have questionable effects on domestic security. The 'relocation' of others to other European states may offer a pragmatic solution to a deadlock situation for the individual and the country of refuge, but undermines the functions that Article 1F is believed to have. European states have no coherent way of dealing with these cases and seem to do what they can in order to get these cases off their plates, which may in fact contribute to perpetrators of international crimes finding a safe haven and escaping prosecution.

Implications for policy and practice

The findings of this study highlight the challenges in relation to the function of promoting criminal accountability for perpetrators of serious crimes that the exclusion clause is presumed to have, and the ability of states of refuge – which are crucial actors in this respect – to support his function.

What does this mean for the contribution states of refuge can make to the aspiration of closing the 'impunity gap' for the most serious crimes and the role of the exclusion clause in that context?

If states do see a role for themselves to contribute to the fight against impunity for international crimes, it is important that those tasked with criminal prosecution acknowledge the limited value of 1F files and do not dismiss other sources. Universal jurisdiction prosecutions present tremendous challenges and warrant strong evidence and well-resourced and well-equipped criminal justice actors. They also require lasting investment in the capacity of these actors. In addition, the study outlines several

opportunities to improve the chances of success in the future, most importantly by strengthening cooperation and information exchange between willing states.

What does it mean for the application of the exclusion clause? The objectives that the exclusion clause should serve are not clearly defined or universally agreed upon, which makes it difficult to assess whether an exclusion policy is 'successful'. In any case, in order for any of the supposed purposes to be reached in a meaningful way, any narrow national focus needs to be abandoned and a harmonized, consistent European approach is needed. Nonetheless, some of the challenges identified in this study could be overcome by changing or modifying national policies, which will possibly bring down the number of unremovable and unprosecuted excluded asylum seekers, or limit side-effects.

However, even if the number of excluded individuals goes down, and even if the number that is prosecuted will double, triple or quadruple, as long as the threshold to exclude is set considerably lower than the threshold for holding someone criminally accountable, the majority of excluded individuals will simply never be convicted. Precisely because of this reason, Article 1F should first and foremost be considered to be an immigration tool that serves to warrant the integrity and credibility of the international protection regime.

Directions for future research

The findings of this study point to different directions for future research. Firstly, it would be valuable to study the cases that have emerged in recent years in other states than the Netherlands. As of yet, little is publicly known about the composition of the population of 1F-excluded individuals in other states of refuge. Secondly, future research could look into the effects that stronger international cooperation between national law enforcement and prosecution services, and between national immigration services, may have on the number of successful criminal prosecutions of 1F-excluded individuals. Thirdly, future research could focus on gaining insight into the movement of excluded individuals within Europe. Finally, further research is needed into durable solutions to address the problem of durably unremovable excluded individuals. Considering the undesirable long term effects in those cases, there is a clear need for evidence-based solutions for this pernicious issue.

Samenvatting

Conflict en gewelddadige politieke onderdrukking veroorzaken ontheemding. Degenen die door dergelijke situaties ontheemd raken kunnen elders asiel zoeken, als zij erin slagen de situatie te ontvluchten. Onder hen die asiel zoeken, bevinden zich echter ook personen die verantwoordelijk zijn voor precies die misdrijven die maken dat mensen ontheemd raken.

Artikel 1F is de 'uitsluitingsclausule' van het Vluchtelingenverdrag: individuen die asiel aanvragen kunnen worden uitgesloten van vluchtelingenbescherming als er ernstige redenen zijn om aan te nemen dat zij bepaalde ernstige misdrijven hebben begaan, zoals oorlogsmisdrijven, misdrijven tegen de menselijkheid en andere ernstige misdrijven. Deze uitsluitingsclausule zou verschillende functies vervullen: het uitsluiten van individuen die geen vluchtelingenbescherming verdienen, het bevorderen van strafrechtelijke vervolging van daders van ernstige misdrijven, en het beschermen van de gemeenschap in het land van toevlucht.

Hoewel landen van toevlucht onder het internationaal recht verplichtingen kunnen hebben om bescherming te bieden aan ontheemden die dat nodig hebben, willen zij geen veilige haven zijn voor oorlogsmisdadigers.

Bovendien hebben veel landen zich in de afgelopen jaren toegewijd getoond om een eind te maken aan straffeloosheid voor de ernstige misdrijven die zich voordoen in situaties van conflict en gewelddadige politieke onderdrukking, ook wel internationale misdrijven. Een grote 'straffeloosheidskloof' blijft bestaan voor deze misdrijven: het aantal personen dat wordt vervolgd voor internationale misdrijven door internationale of nationale rechtbanken is zeer klein, wat betekent dat de meeste daders van internationale misdrijven ongestraft blijven.

Aangezien de uitsluitingsclausule wordt toegepast bij personen waarvan het vermoeden bestaat dat ze schuldig zijn aan internationale en andere ernstige misdrijven, is het actief toepassen van deze clausule mogelijk de sleutel in het verkleinen van de straffeloosheidskloof.

Echter, strafrechtelijke vervolging van uitgesloten asielzoekers volgt niet vanzelf uit de toepassing van Artikel 1F. Dit vereist een actieve opvolging door een bekwame en welwillende actor. Internationale rechtbanken hebben een beperkte rechtsmacht en focus. Nationale strafrechtssystemen in post-conflictlanden zijn vaak niet in staat deze zaken te vervolgen. Bovendien kunnen uitgesloten asielzoekers vaak niet

terugkeren of worden uitgezet en blijven zij dus in het land dat hen heeft uitgesloten. Om deze redenen kan worden gesteld dat landen van toevlucht een cruciale rol spelen in het berechten van uitgesloten asielzoekers. Zonder inmenging van landen van toevlucht kan de straffeloosheidskloof niet worden verkleind.

Het is daarom van belang te weten hoe landen waar uitgesloten asielzoekers verblijven (kunnen) bijdragen aan dit doel. In welke mate zijn deze landen *bereid* personen die op hun grondgebied verblijven die vermoedelijk 'bloed aan hun handen' hebben te (laten) berechten, wat *kunnen* ze doen, en wat *doen* ze daadwerkelijk om deze vermoedelijke daders verantwoordelijk te houden? Wat is realistisch om te verwachten in dit opzicht?

Dit proefschrift is het resultaat van een empirisch onderzoek naar de rol die landen van toevlucht in de praktijk spelen in de strafrechtelijke vervolging van vermoedelijke daders van ernstige misdrijven die asiel aanvragen. Het betreft een casestudie van Nederland, een land met een relatief groot aantal 1F-uitsluitingen, dat sterk is toegewijd aan het beëindigen van straffeloosheid voor internationale misdrijven. De centrale onderzoeksvraag is: *Hoe heeft Nederland als land van toevlucht bijgedragen aan de strafrechtelijke vervolging van asielzoekers die zijn uitgesloten van asiel op basis van Artikel 1F Vluchtelingenverdrag?*

Het onderzoek beantwoordt deze vraag met behulp van een gemixte-methodenbenadering. Deze methoden bestaan uit een analyse van asieldossiers in Nederlandse uitsluitingszaken, een studie van wetenschappelijke literatuur, jurisprudentie en beleidsdocumenten, en interviews met experts.

Resultaten

Het onderzoek concludeert dat het beleid van de Nederlandse overheid met betrekking tot 1F-uitsluiting en de strafrechtelijke vervolging van internationale misdrijven heeft geresulteerd in een groot aantal uitgesloten asielzoekers in vergelijking met andere landen van toevlucht, en verschillende inspanningen om hun strafrechtelijke vervolging te bevorderen.

Maatschappelijke onrust in verband met asielverzoeken van vermoedelijke leiders van het voormalige Afghaanse communistische regime leidde in 1997 tot de formulering van een 1F-beleid met drie leidende principes: Artikel 1F wordt op terughoudende wijze geïnterpreteerd, de mogelijkheden om Artikel 1F toe te passen worden maximaal benut, en er worden nadere consequenties verbonden aan iedere uitsluiting op basis van 1F. De 'nadere consequenties' bestaan eruit dat

het individu ongewenst wordt verklaard, hetgeen een verplichting tot het verlaten van het Nederlands grondgebied inhoudt, en dat het Openbaar Ministerie (OM) in iedere 1F-zaak de mogelijkheden om over te gaan tot strafrechtelijke vervolging onderzoekt.

Andere onderscheidende elementen van het Nederlandse beleid zijn dat aan uitsluiting wordt getoetst vóórdat wordt bekeken of iemand onder de vluchtelingendefinitie van Artikel 1A Vluchtelingenverdrag; dat bepaalde daartoe aangewezen groepen categorisch kunnen worden uitgesloten, in welk geval het aan het individu is om aan te tonen dat zijn geval een uitzondering vormt; dat uitgesloten asielzoekers per definitie als een gevaar voor de openbare orde worden aangemerkt; en dat 1F alle andere soorten verblijfsvergunningen blokkeert.

Samengenomen weerspiegelen deze verschillende, vaak unieke, aspecten van het Nederlandse (post-)uitsluitingsbeleid de nadruk die de overheid legt op de overtuiging dat Nederland geen 'veilige vluchthaven' (*safe haven*) moet bieden aan asielzoekers die vermoedelijk schuldig zijn aan ernstige misdrijven. Dit '*no safe haven*'-beleid heeft het aantal 1F-uitsluitingen in Nederland opgedreven. Van 1992 tot 2017 zijn duizend asielzoekers uitgesloten. Internationaal is dit een uitzonderlijk hoog aantal en dit hoge aantal is bewijs van het actieve, en relatief strenge, Nederlandse 1F-beleid.

Nederland als land van toevlucht kan een rol spelen bij het berechten van deze vermoedelijke daders door ofwel te bevorderen dat zij worden overgedragen aan een internationale of nationale rechtbank *buiten Nederland* (*aut dedere*), ofwel zelf over te gaan tot strafrechtelijke vervolging *in Nederland* op basis van universele rechtsmacht (*aut judicare*). Het beginsel van universele rechtsmacht bepaalt dat iedere staat strafrechtelijke rechtsmacht kan uitoefenen ongeacht of er ten tijde van het misdrijf sprake was van een link met het grondgebied van die staat, of met de nationaliteit van dader of slachtoffer. De dossieranalyse laat zien dat het overgrote deel van de zaken internationale misdrijven betreft. Voor deze misdrijven bestaat vaak universele rechtsmacht, wat betekent dat strafrechtelijke vervolging in Nederland – in principe – mogelijk is.

De Nederlandse overheid heeft aanmerkelijke inspanningen verricht om uitlevering van uitgesloten asielzoekers mogelijk te maken. Dat heeft zij niet alleen gedaan door (passief) mee te werken aan uitleveringsverzoeken, maar ook door actief gunstige omstandigheden te creëren die uitlevering mogelijk zouden maken. Met name in Rwanda heeft Nederland de strafrechtsector versterkt door middel van het

opbouwen van capaciteit, training en financiële steun. De casus van Rwanda laat zien dat ondanks verscheidene juridische en praktische complicaties en obstakels, het mogelijk is om op deze wijze uitlevering van uitgesloten asielzoekers te faciliteren en bevorderen. Echter, landen waar mogelijk uitleverbare verdachten zich bevinden kunnen de omstandigheden voor succesvolle uitlevering maar in beperkte mate beïnvloeden. Bovendien kan worden gesteld dat de casus van Rwanda uitzonderlijk is. In Rwanda was er een sterke, intrinsiek gemotiveerde toewijding om daders van internationale misdrijven te vervolgen. In veel andere post-conflictlanden ontbreekt het aan zulke toewijding, terwijl deze cruciaal is. Dat maakt het nog uitdagender om te voldoen aan de voorwaarden die worden gesteld in het uitleveringsrecht en zorgen in verband met mensenrechten weg te nemen. Deze voorwaarden en zorgen hebben bijvoorbeeld betrekking op de mogelijke oplegging van de doodstraf, algehele omstandigheden in detentie en gevangenissen en het recht op een eerlijk proces. Hoewel de Nederlandse inspanningen met betrekking tot (het faciliteren van) uitlevering relatief succesvol zijn geweest, zijn slechts vier 1F'ers overgedragen of uitgeleverd, wat gelijkstaat aan 0,4 procent van het totaalaantal van duizend 1F'ers in Nederland.

De Nederlandse overheid heeft ook het eigen strafrechtssysteem toegerust om uitgesloten asielzoekers te kunnen vervolgen, door wetten aan te passen en te investeren in de capaciteit van politie en OM. Het Nederlandse 1F-beleid omvat bovendien standaard een beoordeling door het OM van de mogelijkheden voor strafvervolging in uitsluitingszaken. Echter, strafrechtelijke vervolging in het land van toevlucht wordt bemoeilijkt door vele juridische en praktische uitdagingen. Deze omvatten gebrek aan rechtsmacht; complicaties met betrekking tot het doen van opsporingsonderzoek op de plaats delict en het vinden van getuigen, door het verstrijken van tijd en gebrek aan toegang tot of samenwerking met het land waar de misdrijven plaatsvonden; het feit dat veel van de uitgesloten asielzoekers relatief 'onbelangrijke', laaggeplaatste en dus onbekende individuen zijn; en de zware wissel die dit type opsporingsonderzoeken en strafzaken trekt op de capaciteit en middelen van politie en OM. De context van 1F-uitsluiting brengt bovendien nog extra uitdagingen met zich mee, zoals de grote kloof tussen de drempel voor 1F-uitsluiting en de drempel voor een strafrechtelijke veroordeling en de betrouwbaarheid van de informatie die aan 1F-beslissingen ten grondslag ligt. Ondanks een sterke toewijding aan het bevorderen van strafrechtelijke vervolging van uitgesloten asielzoekers in Nederland, zijn sinds 1992 slechts vijf 1F'ers strafrechtelijk vervolgd, wat gelijkstaat aan 0,5 procent van het totaalaantal 1F'ers in Nederland, van wie vier zijn veroordeeld.

Als minder dan 1 procent van de uitgesloten asielzoekers ofwel overgedragen ofwel in Nederland wordt berecht, wat gebeurt er dan met de anderen? In Nederland – in tegenstelling tot veel andere Europese landen – krijgen uitgesloten asielzoekers een inreisverbod opgelegd of worden zij ongewenst verklaard, wat betekent dat zij in juridische zin geen recht hebben om te blijven en het grondgebied onmiddellijk moeten verlaten. Vanwege het inreisverbod worden zij per definitie aangemerkt als een gevaar voor de openbare orde en wordt iedere toegang tot andersoortige verblijfsvergunningen uitdrukkelijk geblokkeerd. Een aanmerkelijk deel van de uitgesloten asielzoekers kan echter niet terugkeren of worden uitgezet, om uiteenlopende juridische of praktische redenen, bijvoorbeeld omdat zij gevaar lopen na terugkeer of niet over identiteitspapieren beschikken. 'Onuitzetbaar' zijn heft de verplichting om Nederland te verlaten niet op. Voor zolang als zij onuitzetbaar zijn, zijn deze personen veroordeeld tot een leven in 'juridisch limbo' en zien zij zich geconfronteerd met ernstige economische, sociale en psychologische uitdagingen. Het aantal personen in deze situatie in Nederland is aanmerkelijk, en aan het eind van 2017 bevonden sommigen van hen zich al twintig jaar in een juridisch limbo.

Sterktes en beperkingen

Zoals ieder onderzoek, heeft ook dit onderzoek zijn methodologische sterktes en beperkingen. Sterktes zijn de focus op een land van toevlucht dat een relatief groot aantal asielzoekers heeft uitgesloten én zich sterk heeft ingespannen om hun strafrechtelijke vervolging te bevorderen; de rijke informatie die beschikbaar is over de Nederlandse casus; en het gebruik van de gemixte-methodenbenadering.

Het feit dat het onderzoek zich hoofdzakelijk richt op één enkel land, wat het moeilijk zou kunnen maken de bevindingen te generaliseren naar andere landen van toevlucht, kan als een beperking van dit onderzoek worden gezien. Tegelijkertijd is het waarschijnlijk dat andere landen te maken krijgen met dezelfde juridische en praktische uitdagingen en complicaties. Gezien de rijke informatie en de grote 1F-populatie en de inspanningen van de Nederlandse overheid gericht op het bevorderen van de berechting van deze groep, kan gesteld worden dat Nederland de best beschikbare casus biedt om de onderzoeksvragen die centraal staan in dit onderzoek te beantwoorden.

Het feit dat alleen uitsluitingsdossiers tot 2010 zijn geanalyseerd zou ook als een beperking van dit onderzoek gezien kunnen worden; sindsdien zijn er nieuwe 1F-zaken bijgekomen, met betrekking tot andere nationaliteiten. De effecten van de Arabische Lente en de daaropvolgende 'vluchtelingencrisis' in Europa hebben de samenstelling van de asielinstroom aanzienlijk veranderd. Echter, de structurele

problemen, zoals een gebrek aan mogelijkheden voor uitlevering, de kloof tussen de verschillende bewijsdrempels of de uitdagingen met betrekking tot het verzamelen van bewijs zijn blijven bestaan. Bovendien lijkt het er op basis van openbare informatie niet op dat het aantal strafzaken tegen uitgesloten asielzoekers is toegenomen.

Discussie

In het omgaan met asielzoekers hebben staten een verplichting om die immigranten uit te sluiten waarbij het vermoeden bestaat dat ze ernstige misdrijven hebben begaan. Deze verplichting is gebaseerd op het idee dat internationale bescherming niet beschikbaar zou moeten zijn voor hen die dit 'niet verdienen' en niet misbruikt zou moeten worden om strafvervolging te ontlopen. Staten hebben zich ook toegewijd aan vergaande ambities, zoals het 'beëindigen van straffeloosheid voor de ernstigste misdrijven die de internationale gemeenschap in het geheel aangaan' en te bewerkstelligen dat 'het recht zoveel mogelijk zijn loop krijgt'. Deze staten zien zich geconfronteerd met hoge verwachtingen om te voorkomen dat personen asiel krijgen die geen recht hebben op bescherming, geen bescherming verdienen, of gevaarlijk zijn. Als gevolg hiervan is de aandacht voor en het gebruik van de uitsluitingsclausule toegenomen.

Dit onderzoek concludeert dat ondanks sterke toewijding van de Nederlandse overheid om 1F'ers te (laten) berechten, minder dan 1 procent van hen daadwerkelijk strafrechtelijk vervolgd is, laat staan veroordeeld, in Nederland of elders. Rekening houdend met het feit dat de succesvolle strafvervolging van een uitgesloten asielzoeker een sporadische gebeurtenis zal blijven, die zich enkel voordoet wanneer verschillende gunstige omstandigheden die grotendeels buiten de invloedssfeer van het land van toevlucht liggen samenkomen, zijn de vooruitzichten voor landen van toevlucht die de straffeloosheidskloof willen sluiten door uitgesloten asielzoekers strafrechtelijk te vervolgen niet veelbelovend.

In de praktijk worden de vergaande ambities dus verre van bereikt. Bovendien heeft het 'no safe haven'-beleid aanzienlijke neveneffecten voor het land van toevlucht zelf, voor andere landen en voor de betreffende personen. Het resulteert in een aanzienlijk aantal uitgesloten personen wiens schuld of verantwoordelijkheid nooit deugdelijk zal worden vastgesteld in een strafproces, die onuitzetbaar zijn en in een 'juridisch limbo' terechtkomen. Als deze limbosituatie vele jaren voortduurt, maakt dit het uitsluitingsbeleid kwetsbaar voor kritiek en verzet vanuit de politiek en vanuit de samenleving. Deze personen zullen hoogstwaarschijnlijk ofwel in het land van toevlucht blijven, ofwel van de radar verdwijnen en zich elders in Europa hervestigen. De duurzame aanwezigheid van hen die blijven – een groep ongewenste

maar onuitzetbare ongedocumenteerden zonder deugdelijke middelen om in hun levensonderhoud te voorzien – zou twijfelachtige gevolgen kunnen hebben voor de veiligheid in het land van toevlucht. De 'hervestiging' van anderen in andere Europese staten biedt voor het individu en voor het land van toevlucht wellicht een pragmatische oplossing voor deze impasse, maar ondermijnt de veronderstelde functies van de uitsluitingsclausule. Het ontbreekt Europese staten aan een samenhangende aanpak en deze staten lijken te doen wat ze kunnen om deze zaken van hun bord te krijgen, wat er in feite aan zou kunnen bijdragen dat daders van internationale misdrijven een veilige vluchthaven vinden en strafvervolging ontlopen.

Implicaties voor beleid en praktijk

De bevindingen van dit onderzoek onderstrepen de uitdagingen in verband met de veronderstelde functie van het bevorderen van het strafrechtelijk ter verantwoording roepen van daders van ernstige misdrijven, en de mate waarin landen van toevlucht – die cruciale actoren zijn in dit verband – in staat zijn om deze functie te ondersteunen.

Wat betekent dit voor de bijdrage die landen van toevlucht kunnen leveren aan de ambitie om de straffeloosheidskloof voor de ernstigste misdrijven te sluiten en de rol van de uitsluitingsclausule in dat verband? Als staten een rol voor zichzelf zien om bij te dragen aan de strijd tegen straffeloosheid voor internationale misdrijven, dan is het van belang dat zij die strafvervolging tot taak hebben de beperkte waarde van 1F-dossiers inzien en andere bronnen niet links laten liggen. Strafzaken op basis van universele rechtsmacht impliceren bijzonder grote uitdagingen en vereisen sterk bewijs en toegeruste actoren in de strafrechtspleging. Dergelijke zaken vragen ook om blijvende investeringen in de capaciteit van deze actoren. Daarnaast benoemt het onderzoek een aantal mogelijkheden om de kans op succes in de toekomst te vergroten, waarvan een versterking van de samenwerking en informatie-uitwisseling tussen welwillende landen de belangrijkste is.

Wat betekent dit voor de toepassing van de uitsluitingsclausule? De doelen die de uitsluitingsclause zou moeten dienen zijn niet helder gedefinieerd of universeel geaccepteerd, wat het moeilijk maakt om vast te stellen of een uitsluitingsbeleid 'succesvol' is. In ieder geval moet om elk van deze doelen te bereiken een smalle nationale focus worden losgelaten en is een geharmoniseerde, Europese aanpak nodig. Desondanks kunnen sommige van de in dit onderzoek geïdentificeerde uitdagingen te boven worden gekomen door het veranderen of aanpassen van nationaal beleid, wat mogelijkerwijs zal leiden tot een daling van het aantal onuitzetbare en niet-vervolgde uitgesloten asielzoekers of neveneffecten zal beperken.

Echter, zelfs als het aantal uitgesloten asielzoekers daalt, en zelfs als het aantal dat strafrechtelijk wordt vervolgd zal verdubbelen, verdrievoudigen of verviervoudigen, zolang de drempel om uit te sluiten aanzienlijk lager ligt dan de drempel voor strafvervolging, zal de meerderheid van uitgesloten personen simpelweg nooit worden veroordeeld. Precies om die reden, zou Artikel 1F hoofdzakelijk moeten worden gezien als een tool voor beslismedewerkers van immigratiediensten die ertoe dient de integriteit en geloofwaardigheid van het regime van internationale bescherming te garanderen.

Richtingen voor vervolgonderzoek

De bevindingen van dit onderzoek wijzen op verschillende richtingen voor vervolgonderzoek. Allereerst zou het waardevol zijn om 1F-uitsluitingen die de afgelopen jaren hebben plaatsgevonden in andere landen dan Nederland te analyseren. Momenteel is weinig openbaar bekend over de samenstelling van de populatie 1F'ers in andere landen van toevlucht. In de tweede plaats zou toekomstig onderzoek zich kunnen richten op de effecten die een sterkere internationale samenwerking tussen nationale opsporings- en vervolgingsinstanties, en tussen nationale immigratiediensten, zouden hebben op het aantal succesvolle strafrechtelijke vervolgingen van 1F'ers. In de derde plaats zou toekomstig onderzoek zich kunnen richten op het verkrijgen van inzicht in de beweging van uitgesloten asielzoekers binnen Europa. Tenslotte is nader onderzoek nodig naar structurele oplossingen voor het probleem van duurzaam onuitzetbare 1F'ers. Gezien de ongewenste effecten op de lange termijn in deze gevallen is er een duidelijke behoefte aan op feiten gebaseerde oplossingen voor dit heikele vraagstuk.

Curriculum vitae

After completing his bachelor in Criminology at VU University, Maarten Bolhuis (1986) obtained a master degree in International Crimes and Criminology (cum laude) at VU University and a master degree in Conflict Resolution and Governance at the University of Amsterdam.

During and after his studies he worked at a Dutch Human Rights NGO, Lawyers for Lawyers. He also worked as a research intern at VU University and the Dutch Immigration Service IND on the application of Article 1F in the Netherlands, which later became the subject of his doctoral thesis.

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Publications

Underlying this thesis

Bolhuis, M.P., Battjes, H. & Van Wijk, J. (2017). Undesirable but Unreturnable Migrants in the Netherlands, *Refugee Survey Quarterly*, *36*(1), 61–84.

Bolhuis, M.P. & Wijk, J. van (2016). Alleged terrorists and other perpetrators of serious non-political crimes; the application of Article 1F(b) in the Netherlands, *Journal of Refugee Studies*, *29*(1): 19–38.

Bolhuis, M.P. & Wijk, J. van (2015). Alleged war criminals in the Netherlands; excluded from refugee protection, wanted by the prosecutor, *European Journal of Criminology*, *12*(2), 151–168.

Bolhuis, M.P., Middelkoop, L., Wijk, J. van (2014). Refugee Exclusion and Extradition in the Netherlands; Rwanda as Precedent? *Journal of International Criminal Justice*, *12*(5), 1115–1139.

Bolhuis, M.P. & Wijk, J. van (2015). *Study on the exchange of information between European countries regarding persons excluded from refugee status in accordance with Article 1F Refugee Convention*. Final report of a study commissioned by the Norwegian Directorate of Immigration, UDI. Available at <https://cicj.org/wp-content/uploads/2012/11/Bolhuis-Van-Wijk-2015-Study-on-the-exchange-of-information-on-1F-exclusion-between-European-countries.pdf>.

Other publications

Wijk, J. van & Bolhuis, M.P. (2017). Awareness trainings and detecting jihadists amongst asylum seekers; a case study of the Netherlands, *Perspectives on Terrorism*, *11*(4), 39–49.

Wijk, J. van & Bolhuis, M.P. (2017). Asielzoekers als (vermeende) daders [*Asylum seekers as (alleged) perpetrators*], *Tijdschrift voor Veiligheid*, *16*(2-3), 11–25.

Wijk, J. van & Bolhuis M.P. (2017). The asylum-jihadism nexus: non-government actors and detection of jihadism among asylum seekers. A case study of the Dutch Refugee Council and the guardianship organization for unaccompanied minors (Nidos), *SSRN Working paper*.

Cantor, D.J., Wijk, J. van, Singer, S. & Bolhuis, M.P. (2017) (eds.) Special Issue: "Undesirable and Unreturnable" Aliens in Asylum and Immigration Law, *Refugee Survey Quarterly*, *36*(1).

Bolhuis, M.P. & Wijk, J. van (2016). *Ongewenste maar onuitzetbare migranten in Nederland* [Undesirable but unreturnable migrants in the Netherlands], *Asiel- en Migrantenrecht 9*: 412–418.

Wijk, J. van & Bolhuis, M.P. (2016). *'Jihadisme en de vreemdelingenketen – De signalering van vermoedelijke jihadisten onder asielzoekers en jihadistische activiteiten in en rond asielzoekerscentra nader onderzocht'* ,[Jihadism in the immigration process – a closer look at identification]. Final report of a study commissioned by the WODC (Research and Documentation Centre of the Dutch Ministry of Security and Justice).

Refugee Law Initiative/Center for International Criminal Justice (2016). *Undesirable and Unreturnable Migrants. Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed.* Conference report and policy brief, September 2016.

Bolhuis, M.P., Schoenmakers, Y.M.M. & Beijers, W.M.E.H. (2016). *Actoren in de strafrechtspleging* (derde druk). Den Haag: Boom Criminologie.

Bolhuis, M.P. & Wijk, J. van (2015). De Arabische Lente en artikel 1F Vluchtelingenverdrag [*The Arab Spring and Article 1F Refugee Convention*], *Justitiële Verkenningen 41*(3), 90–100.