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Balancing exclusion, prosecution and non-refoulement: the application of article 1F of the Refugees Convention in The Netherlands

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BALANCING EXCLUSION, PROSECUTION AND *NON-REFOULEMENT:* THE APPLICATION OF ARTICLE 1F OF THE REFUGEES CONVENTION IN THE NETHERLANDS AS A MODEL OF CONTEMPORARY PRACTICE

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"[States] must not resort to methods

which undermine the very values they seek to protect"[1]

1 INTRODUCTION

As the "legal capital of the world" and host of the International Criminal Court (ICC), the Dutch government has consistently advocated that crimes under international law should not go unpunished.[2] Hence, it is not surprising that the Netherlands has become a frequent invoker of Article 1F of the 1951 Convention Relating to the Status of Refugees (Refugees Convention), which denies refugee status to perpetrators of particularly serious international crimes.[3] In an attempt to go beyond excluding such individuals from refugee protection, the Dutch government has made serious efforts towards prosecuting them. By rigorously applying Article 1F and by making criminal prosecution an inherent component of the post-exclusion phase, the Netherlands considers itself a progressive frontrunner in this field.[4] Indeed, as this essay will show, the Dutch approach to exclusion is ahead of its time.

In application, the Dutch action mirrors growing state practice and *opinio juris* that Article 1F should be rigorously applied. Moreover, in the post-exclusion phase, Dutch attempts to prosecute and extradite Article 1F-excluded people capitalises on developments in international law since 1951 and consensus among scholars that this approach is needed to address the current state of impunity that surrounds Article 1F crimes. European laws that prohibit sending anyone to places where they risk torture means that Dutch policies operate in a contemporary context, where developments in human rights law have expanded the notion of *non-refoulement*; itself the central purpose of the Refugees Convention.

This paper will examine the Dutch approach to Article 1F and consider to what extent it has been successful in balancing the three imperatives of exclusion, prosecution and *non-refoulement*. After an overview of the global context and the Dutch model, its application will be analysed in two parts.

The first part focuses on issues of interpretation and application in the exclusion phase; the second considers the success of prosecution and application of the principle of *non-refoulement* in the post-exclusion phase. Throughout this analysis the Dutch model is viewed as a case study of contemporary practice, allowing for conclusions and recommendations to be extended to the role of Article 1F in today's refugee framework.

2 GLOBAL CONTEXT

2.1 Legal Framework

The Refugees Convention provides protection to those who meet the criteria for "refugee" as detailed in Article 1A(2) of the Convention.[5] According to Article 1F, the Convention does not apply to:

> Any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against the 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.[6]

A dual purpose underlies the exclusion clauses.[7] From a moral and humanitarian standpoint, the drafters considered that perpetrators of the acts described above are inherently undeserving of international protection. This idea of 'non-deservingness' is based on the intrinsic link between concepts of humanity, equality and refuge.[8] Affording protection to perpetrators of grave offences would be contrary to human rights and humanitarian law standards. By excluding them, the integrity of the convention would be preserved.[9] On the other hand, the drafters believed that these perpetrators should not be able to use the Convention to escape prosecution.[10]

The intention to prevent impunity and maintain the integrity of the asylum institution was accompanied by practical considerations of the drafters who recognised that States would not agree to be bound by a system that required them to protect undesirable refugees.[11] Similar sovereignty considerations left it up to each state to determine when a case falls within the scope of the exclusion clauses.[12] Although the drafters advocated a scrupulous application of Article 1F,[13] they believed that it should be applied sparingly and restrictively in light of its potentially grave consequences.[14] Indeed, the consequences of exclusion are substantial. Because they are not recognised as refugees, excluded persons are not entitled to the same rights and protections. These include the right to work, education, housing and social support[15] and assistance from the United Nations High Commissioner for Refugees (UNHCR).[16] Potentially the most controversial

consequence of exclusion is that the *non-refoulement* protection codified in Article 33[17] does not apply, enabling States to send excluded persons back to places of persecution.

A second area of contention is that the Convention is silent on the need to commence criminal proceedings or extradite the individual concerned. This goes against the rationale of the exclusion clauses that those who are excluded should be held legally accountable for their actions.[18] Although obligations under international law may now require such action,[19] State practice has not followed suit, thereby creating a gap between exclusion and prosecution.[20] The next section discusses these two gaps in protection and impunity, and outlines the contrasting developments in international law and State practice.

2.2 Contemporary trends

2.2.1 Extension of the principle of *non-refoulement*

Although the prohibition on *refoulement* is not absolute under the Refugees Convention, developments in human rights law since 1951 have expanded the principle to the extent that eminent scholars have ascribed it customary status.[21] Guy Goodwin-Gill, for instance, argues that States now have an obligation under customary international law to provide at least temporary refuge in the face of imminent danger when governmental protection is lacking.[22] Sir Elihu Lauterpacht and Daniel Bethlehem conclude that the scope of the customary principle of *non-refoulement* now also includes a prohibition on torture and other cruel, inhuman or degrading treatment of punishment.[23] They base their position on the incorporation of the *non-refoulement* principle into many binding and widely ratified international human rights instruments.[24] These instruments have widened the scope of the principle to apply not only to 'refugees' within the meaning of article 1A of the Convention, but also to other persons at risk of harm.[25] In contrast to the Convention, these human rights instruments contain no exclusion clauses.

Particularly in Europe, Article 3 of The European Convention on Human and Fundamental Freedoms ("ECHR") has created a safety net for excluded persons. Although the clause does not cover all forms of persecution,[26] it does provide protection from *refoulement* to all those who are at risk of "torture or inhuman or degrading treatment or punishment".[27] The European Court of Human Rights recently confirmed that Article 3 ECHR has become an absolute prohibition that allows for no exceptions.[28]

2.2.2 Increased opportunities for prosecution

Developments in international criminal law have increased opportunities to prosecute excluded individuals. An obligation to prosecute or extradite serious international war crimes offenders (*aut*

dedere aut judicare) was already in place before the Refugees Convention was drafted, most clearly embodied in the 1949 Geneva Conventions.[29] Moreover, an undertaking to prevent and punish genocide is contained in article 1 of the 1948 Genocide Convention.[30] Since then, the exercise of universal jurisdiction by States has become increasingly mandated by international Treaties to include crimes of torture, hijacking, terrorism, hostage-taking and drug-trafficking.[31] This has led to claims that the general principle of *aut dedere aut judicare* has become customary international law,[32] although it is questionable whether there is sufficient State practice to support this view.[33] Whether or not such an extensive obligation exists, the principle is at least recognised as a Treaty duty, not just a power.[34] Furthermore, most authors agree that a permissive principle of universal jurisdiction has been extended beyond grave breaches of the Geneva Convention to crimes in non-international armed conflicts.[35] There is also widespread agreement that universal jurisdiction applies to crimes against humanity as a matter of customary international law.[36]

Prosecution opportunities have further increased with the establishment of international criminal tribunals and the entry-into-force of the Statute of the International Criminal Court ("Rome Statute").[37] The complementarity principle contained within it emphasises that States have a duty to prosecute international crimes when other States that have jurisdiction are unable or unwilling to do so;[38] a development that has been interpreted as reflecting customary international law.[39] Although the complementarity principle and the principle of *aut dedere aut judicare* are distinct, the burgeoning use of universal jurisdiction by States shows an increased interest to apply these principles.[40]

2.2.3 Is Article 1F becoming obsolete?

In theory, the developments mentioned above should prompt a re-evaluation of the role of exclusion and help fill the gaps in protection and impunity that have plagued the exclusion clauses from their inception.[41] It has even been suggested that Article 1F has become redundant. According to Kees Wouters,[42] the prohibition on *refoulement* has reduced the legitimacy of Article 1F. For him, the fundamental prohibition on torture and inhuman treatment under article 3 EHRM is not compatible with the lack of protection afforded to excluded persons. The same goes for the practical consequences of the prohibition, which leave excluded persons in legal limbo in asylum countries. He ultimately contends that refugee law is not a suitable instrument to punish people for their actions.

From a criminal law perspective, Wouters states that Article 1F crimes are sufficiently serious to warrant either prosecution or extradition under international law.[43] At the same time, he acknowledges that prosecution of Article 1F-crimes is complicated by practical obstacles, such as limited jurisdiction and the exclusion threshold, which is much lower than what would normally

trigger prosecution. The fact that Article 1F also applies to previously convicted persons is another complicating factor. Wouters disagrees with this practice, claiming that punishing someone twice for an offence - once through a conviction and then again through exclusion - conflicts with basic principles of criminal law and human rights.[44] He contends that exclusion is not appropriate in these circumstances, particularly when the individual involved has a well-founded fear of persecution.

2.2.4 Towards an expansive, rigorous application

Despite international legal trends moving away from exclusion, geo-political developments have pushed states in the opposite direction. Issues such as terrorism, internal conflicts and political violence have increasingly caused victims and perpetrators of gross human rights abuses to seek asylum and have placed pressure on politicians to punish offenders.[45] Exclusion is the easier way to achieve this. Contributing to this trend, the global asylum climate has become increasingly restrictive, particularly in Western Europe and North America, at the expense of standards in refugee protection.[46] The harmonisation of European asylum policy to the lowest common denominator, so-called 'safe third country' policies and various restrictive interpretations of the refugee definition are just a few examples. Even Africa's traditionally hospitable stance to refugees is on the wane.[47] Together, these developments have fed the desire among States to invoke Article 1F and to apply it expansively and rigorously.[48] In some cases, it has led States to disregard due process and other rights of applicants and threaten deserving refugees with exclusion.[49] Examples of State practice and *opinio juris* to this effect will be discussed and juxtaposed against Dutch application of the exclusion clauses in section 4. First, however, it is necessary to outline the Dutch approach.

3 THE DUTCH MODEL

3.1 Contextual framework

Legal and socio-political developments in the Netherlands over the past decade have complemented the above mentioned global developments and informed the Dutch approach to exclusion and prosecution.

First, as party to the ECHR, the Netherlands is bound by the extended principle of *non-refoulement* under Article 3. Second, growing public discontent about increased and uncontrolled asylum flows into the Netherlands that started in the mid-1980's have resulted in tougher asylum policies. In 1994, for example, new asylum legislation entered into force, which excluded asylum cases from appeal and introduced provisional residence permits.[50] At the EU level, moves to harmonise asylum and migration policies led to amendments in 1995 that introduced the concepts of "safe countries or

origin" and "safe third countries" into Dutch legislation.[51] In 1998, when asylum applications reached a high of 45,217,[52] the Dutch Government announced it would continue the initiated "strict and just" entry requirements and speed up procedures towards a "fast and sober" asylum policy.[53] This culminated in the *Vreemdelingenwet 2000* and the introduction of the widely criticised 48-hour procedure, which greatly reduced opportunities for asylum seekers to substantiate their claims.[54] Partly as a result of these policies, a mere five percent of asylum seekers are recognised as refugees[55] and asylum applications dropped to under 10,000 in 2007.[56]

Complementing this trend is an increased willingness to prosecute criminals under universal jurisdiction.[57] As host of the ICC and two criminal tribunals, the willingness to prosecute largely stems from a desire and perceived obligation to set an example for other States and promote itself as the "legal capital of the world".[58] More opportunities for prosecution also exist following the *Knesevic* case, which ruled that existing legislation provides Dutch courts with universal jurisdiction for war crimes.[59] These socio-political developments culminated in 1997 in the formulation of a tough, invigorated Article 1F-policy that would bring the Netherlands in line with its perceived obligations to prosecute Article 1F crimes under international law.

3.2 Legal and policy framework

On 28 November 1997, the then State Secretary for Justice in the Netherlands introduced a new policy on the application of Article 1F of the Refugees Convention.[60] He announced that the exclusion clauses would be interpreted restrictively, but that all avenues to apply them would be optimally utilised. From then on, exclusion would also have serious consequences: excluded individuals would be classified "unwanted" and efforts to prosecute excluded persons would be stepped up. This policy still applies today.

The Netherlands ratified the Refugees Convention on 3 May 1956. Under its domestic legislation, the *Vreemdelingenwet* ("Vw")[61] and the *Vreemdelingenbesluit* ("Vb")[62] apply. The *Vreemdelingencirculaire* ("Vc")[63] outlines the policies derived from these instruments. Under Vw2000 articles 16(1)(d) and 31(2)(k), no residence permit is granted to an asylum seeker who is classified a danger to the public order. On this ground, an asylum request can be denied to people to whom Article 1F of the Refugees Convention applies.[64] The laws explicitly state that excluded persons are neither entitled to refugee status nor a residence permit.[65] Living provisions and benefits are also suspended as soon as the asylum request is denied.[66] This is in line with the EU Qualification Directive which denies excluded persons both refugee status and subsidiary protection.[67] The so-called "unwanted" declaration, codified in Article 67.1 Vw2000, is automatically applied. Besides a legal obligation to leave the Netherlands independently, simple

presence in the Netherlands becomes punishable by up to 6 months imprisonment,[68] with forceful eviction also possible.[69]

To promote the prosecution of excluded persons, the Netherlands swiftly ratified the Rome Statute and introduced the *Wet internationale misdrijven* in 2003 (Wim2003)[70], which codifies the Statute's complementarity principle. Major policy changes include the automatic forwarding of all Article 1F cases to the public prosecutor[71] and the establishment of a special investigation team[72] in July 2003.[73]

3.3 A model of best practice?

In the decade between 1998 and 2008, the Netherlands successfully excluded 700 persons under Article 1F.[74] At least 40 of them could not leave or be evicted from the Netherlands due to the application of Article 3 ECHR.[75] A questionnaire by the Strategic Committee on Frontiers, Immigration and Asylum (SCIFA) confirmed that the Netherlands has a more pro-active Article 1F policy that other EU member states.[76] Together with Denmark, Germany and Belgium, The Netherlands is one of the leading member states to prosecute 1-F excluded individuals.[77]

The fact that the Netherlands is seen at the forefront of global trends in criminal law, human rights law and state practice makes it an interesting case study. In addition to contributing to the current debate surrounding the role of Article 1F in today's refugee framework, it also raises the question as to the extent to which the Netherlands has successfully balanced the three imperatives of exclusion, prosecution and *non-refoulement*. Theoretically, the application of *non-refoulement* obligations and an increased focus on prosecution should go a long way to filling the fundamental gaps in protection and prosecution within the refugee framework. On the other hand, the tough and rigorous application of Article 1F could very well have the opposite effect.

To date, the Dutch approach has generated mixed responses. The government considers itself a frontrunner in the field,[78] however, a range of human rights and interest groups disagree.[79] This has led to much political and scholarly debate in recent years, in which UNHCR has also been involved.[80] On 9 June 2008, the government responded with a "Note regarding the application of Article 1F",[81] followed by an extensive response to questions from Parliament three months later.[82] The wealth of information generated by this debate forms the basis for the following analysis of the Dutch application of Article 1F and the concepts of prosecution and *non-refoulement* in the post-exclusion phase.

4 EXCLUSION: ISSUES IN THE APPLICATION OF ARTICLE 1F

4.1 Following trends in State practice

Closer observation of the Dutch application of Article 1F confirms that the Netherlands follows global trends in State practice that extend the scope of the exclusion clauses and their practical application.

4.1.1 Expansive interpretation of Article 1F

Ambiguous wording in the exclusion clauses has enabled States to extend their application.[83] Article 1F(a), for instance, is open to abuse as it refers to international instruments to define excludable crimes. The 'crimes against humanity' subcategory, for instance, incorporates a wide range of offences, with the ILC's 1991 Draft Code including drug trafficking and international terrorism. Existing definitions for the latter are often so broad and imprecise that they include a wide range of activities.

Excludable offences under Article 1F(b) have also expanded. UNHCR's three-tier definition for a 'political' crime - which requires genuine political motivation, a causal link between the crime committed and its political purpose and a political element to the crime that is stronger than its common-law character - has been replaced in many jurisdictions by the 'political offences' exclusion test applied in extradition law, which focuses almost exclusively on the third criterion.[84] As a result, a genuine political motive can be disregarded if the crime is sufficiently serious.[85] Another trend in extradition law that has been applied to Article 1F(b) is to exclude 'terrorist acts' from the 'political offence' exception.[86] With the lack of a generally accepted definition of the term 'terrorism', this greatly extends the breadth of potential coverage of Article 1F(b).[87] Due to the flexible scope of Article 1F, its application has been increasingly extended.[88] A survey of State practice in France, Belgium and the United Kingdom, countries that apply Article 1F more often than most other European States, demonstrates the expansive application of Article 1F.[89]

While a substantive analysis of the Dutch interpretation of the exclusion clauses is outside the scope of this paper, it is clear that global developments have also influenced Dutch practice; a trend confirmed by the high number of exclusions.[90] Terrorist activities as defined in specified international legal instruments, for instance, are automatically classed as "serious, non-political crimes" for the purposes of Article 1F(b).[91] This includes membership of specified terrorist organisations.[92] In those cases, the predominance test normally required under Article 1F(b) is not applied.[93] Various persons have been excluded under this policy.[94] Although commentators have lamented this practice and warned about the danger of politicising the determination system,[95] UNHCR approved the process by concluding that terrorist activities are always "wholly disproportionate to any political objective".[96]

Another indicator that the Netherlands interprets Article 1F(b) expansively is the fact that the clause may be invoked even when the applicant has served a sentence for the crimes committed.[97] According to the UNHCR Handbook, there should be a presumption that the exclusion clause is no longer applicable in those cases, unless the applicant's criminal character still predominates.[98]

Article 1F(a) has also been interpreted more broadly over time. In 2005, for instance, a Dutch court held that crimes classed as war crimes under the ICC Statute allow for exclusion under Article 1F even if those crimes were committed before the Statute entered into force.[99] Although it could be argued that the adjusted definition merely reflects pre-existing definitions in the Geneva Conventions and Customary International Law, this example illustrates a willingness to make full use of the dynamic nature of Article 1F and its potential to incorporate a growing number of offences.

4.1.2 Exclusion before inclusion

Much debated is whether the application of Article 1F may precede the refugee status determination under Article 1A(2). To ensure procedural fairness, UNHCR warns against 'admissibility or accelerated procedures' and advocates for the consideration of inclusion before exclusion, barring the occasional exception.[100] Although many commentators agree,[101] the Netherlands nonetheless favours exclusion before inclusion, thereby following the example of a significant number of States.[102] Reversing its initial policy of a 'two-part investigation', the State Secretary of Justice concluded that 'nothing in the text of the Convention indicates that Article 1F must be applied first'.[103] Since then, specialised 1F-units have been established and exclusion procedures embedded in the very early stages of the refugee determination process before the qualification for protection is considered.[104] The "exclusion before inclusion"-policy has become part of the set jurisprudence of the Dutch Department of Administrative Law of the Council of State.[105] Although this early focus on exclusion by experts may increase the speed and quality of decision making,[106] it also creates a bias towards exclusion over a determination as to whether subjects are in need of protection.[107]

4.1.3 Limited balancing

To take into account the (potentially serious) consequences of exclusion, UNHCR has traditionally advocated for a proportionality test that weighs the gravity of the crime committed against the persecution feared in the country of origin.[108] If the applicant is likely to face severe persecution, the crime committed must be particularly serious for the applicant to be excluded.[109] Many writers and human rights groups support this approach.[110] However, State practice on this issue is not

uniform, with superior courts in five common law jurisdictions rejecting the balancing test.[111] Consistent with Europe-wide trends,[112] the Netherlands rejects the balancing test in most cases.[113] A proportionality test is applied in a very limited number of cases, but only in the post-exclusion phase when return to the country of origin has not been possible for a great many years.[114] In these cases, humanitarian concerns are not necessarily weighed against the nature of the crime committed, but against the "interest of Dutch public order".[115]

4.1.4 Low burden of proof

For the exclusion clauses to apply, there must be "serious reasons for considering" that one of the described acts have been committed. Although "formal proof of previous penal prosecution is not required,"[116] some commentators have claimed that this standard of proof should be equal to or, at least, approach the level of proof required for a criminal conviction in light of the exceptional nature of exclusion and the protection imperative of the 1951 Convention.[117] UNHCR also advocates that "clear and credible evidence is required", but the criminal standard of proof need not be met.[118]

An overall lowering of this minimum threshold is evident from state practice,[119] with the proof required by national courts ranging from "clear and convincing evidence"[120] to "probable cause" in the United States.[121] In Canada, Australia, the UK and New Zealand, the standard has even been placed below the civil standard of 'balance of probabilities'.[122] This is exacerbated by the powerful role of administrative decision-makers, who have discretionary powers to make semi-judicial decisions.[123] Judicial scrutiny of the administrative process is essential to ensure due process.

Dutch policy makers have followed this trend by maintaining that the criminal standard of "convincing evidence" need not be met and, as a result, the outcomes of criminal proceedings cannot influence exclusion decisions.[124] Dutch courts have translated the "serious reasons" standard into a requirement for "plausible" evidence that requires detailed motivation, and thus follow a stricter line of interpretation.[125] To establish liability, the Canadian "personal and knowing participation test" is applied.[126] The next section shows that the implementation of the Canadian test in the Netherlands leads to high exclusion rates and raises questions of procedural fairness.

Asylum rejections can be appealed, first to the Court of The Hague (Aliens Chamber) and ultimately to the Judicial Division of the Council of State. The latter, however, has been criticised for its failure to adequately scrutinise asylum policies.[127] This can be explained by the limited discretionary powers it has been granted under Vw2000.[128] As an administrative court, it does not overturn decisions unless new facts or changed circumstances have emerged.[129] An appeal with the Council of State also does not suspend decision of the Aliens Chamber, thus forcing excluded persons to leave the Netherlands before their final appeal is concluded, unless new evidence has

been submitted.[130] Between 1998 and 2008, 150 of 850 exclusion determinations were successfully appealed.[131]

4.2 Issues of procedural fairness

The previous section illustrated that the Netherlands followed State practice and *opinio juris* towards a broad interpretation and wide application of the exclusion clauses. In its eagerness to apply Article 1F, however, some practices fail to meet procedural standards[132] and raise questions of due process. Two of these issues are now explored.

4.2.1 Categorical exclusions

A contentious issue that links in closely with low standards of proof is the Dutch implementation of the "personal and knowing participation" test. Under this test, both "knowing" *and* "personal" participation is assumed for asylum seekers who have worked in organisations "of which the Minister has concluded that to persons belonging to this category …Article 1F applies".[133] This rule has led to the exclusion of large numbers of asylum seekers from Afghanistan and, to a lesser extent, Iraq based on their positions in listed criminal organisations.

In the now infamous case of the Afghan military intelligence service KhaD/WAD, the Dutch government assumed responsibility in Article 1F crimes for all Officers of that organisation.[134] Its conclusions were based on a policy brief from the Department of Foreign Affairs which stated that "all NCOs and officers … were personally involved in the arrest, interrogation, torture and even execution of suspects". [135] The lack of an individual assessment of "personal participation" in these cases resulted in courts upholding exclusions under Article 1F in cases where people reported as members of an inspection committee to KhaD[136] Moreover, executing purely administrative duties, such as forwarding information from unopened letters, was not accepted as a defence and "knowing and personal participation" was assumed.[137]

This approach has drawn much criticism, first from Dutch courts,[138] but then also from commentators.[139] They argue that individual assessment of each case is required[140] and that the Dutch practice amounts to an unfair reversal of the burden of proof on the refugee.[141] It is also claimed that such practices do not meet the "serious reasons for considering" underlying the exclusion clauses.[142] Rather than complicity in Article 1F crimes, this practice arguably amounts to guilt by association. At best, it constitutes a denial of procedural fairness and goes against the requirement to make an individual determination.[143]

The Netherlands government has always maintained that its policies are in line with UNHCR guidelines.[144] Indeed, whilst UNHCR asserts that mere membership of an organisation is not

sufficient to establish liability for Article 1F crimes,[145] a "presumption of responsibility" may arise in the case of voluntary membership of certain groups.[146] In such cases, reversing the burden of proof on the refugee, creating a "rebuttable presumption of excludability," is acceptable.[147]

Before membership justifies exclusion, however, a range of factors must be taken into account. These include the activities of the group, its organisational structure, the individual's position in the group and his or her ability to influence its activities.[148] A recent judgement by the British Supreme Court emphasised the need to consider a wide range of such determining factors.[149] It labelled as "unhelpful" and overly simplistic a previous ruling (*Gurung*) that allowed exclusion of members of organisations "whose aims, methods and activities are predominantly terrorist in character".[150] It went on to criticise *Gurung*'s contention that organisations can be placed on a continuum for war crime cases: 'War crimes are war crimes... [a]nd actions which would not otherwise constitute war crimes do not become so merely because they are taken pursuant to policies abhorrent to western liberal democracies.'[151]

The assumption of responsibility based on one policy document does not meet the required consideration of a "range of factors" and "direct sources".[152] Also controversial is the sensitive nature of the evidence underlying the policy brief. Whilst various courts have confirmed the government's claim that the brief has the status of "expert advice" and is based on "reliable" sources,[153] the sources themselves remain confidential to the public. This goes against the requirements that applicants "should be given the benefit of the doubt" and that exclusions should not be based on "sensitive evidence that cannot be challenged".[154] It also places an unfair burden on the excluded individual to challenge its substance[155] and may even be inconsistent with fair trial obligations under the ECHR.[156]

The Dutch government retorted that each case is individually tested and that excluded persons are given ample opportunities to rebut assumptions of guilt.[157] They can challenge the assumption in multiple hearings by proving a "significant exception" regarding their personal involvement, which applies if he or she is a lateral entrant of KhAD/WAD, has not rotated within the organisation or has not been promoted within the organisation.[158] Proving a significant exception requires evidence which is often hard to come by. Considering the difficulty the Dutch government encounters in gathering evidence for public prosecutions,[159] placing such a burden on the asylum seeker is hardly fair. Indicative of this imbalance is the fact that only one rebuttal has so far been successful.[160]

4.2.2 Exclusion of family members

Another policy that has received persistent criticism is the treatment of family members of individuals who have been excluded retroactively. Under the principle of family unity, these family

members initially received derivative status.[161] This status was revoked once the head of the family was excluded, unless the family member in question could prove a right of stay on independent grounds.[162] This often occurred after many years of legal stay in the Netherlands. This policy was considered to be in the interest of public order and security and was intended to deprive excluded persons of an added incentive and support network to remain in the Netherlands.[163] The fact that 250 excluded persons and 210 of their family members still remain in the Netherlands illegally shows the fallacy of this argument.[164]

Such a practice of exclusion after many years of legal residence has also been interpreted as disproportionate and a violation of Article 3 and 10 of the International Convention of the Rights of the Child,[165] which maintain that the best interest of the child should take precedence in all actions concerning children and that family reunification shall be dealt with in a positive, humane and expeditious manner.[166] The Dutch government held that public security interests can weigh heavier than the interests of the child.[167] When Dutch jurisprudence disagreed,[168] the government announced in June 2008 that it would adjust its policy. Exclusion decisions would be reversed for those family members that had remained in the Netherlands without interruption for at least ten years, had been unable to leave and had not obstructed their own departure.[169] However, this still falls short of discontinuing the policy of retroactively excluding family members of excluded individuals.

4.3 Is it legal?

As discussed, categorical exclusion and retroactive exclusion of family members raise issues of procedural fairness and may even breach Treaty obligations.[170] This is less obvious with regard to the widening interpretation of Article 1F, the establishment of specialised exclusion units, the prioritisation of exclusion in Dutch asylum determination procedures and the requirement of a low burden of proof.

According to some commentators, these practices ignore the principle of restrictive interpretation and violate standards of procedural fairness and natural justice.[171] Arguably, they also breach standards of Treaty interpretation, which require that Treaty provisions must be interpreted "in good faith in accordance with [their] ordinary meaning" and "in light of [their] object and purpose".[172] By ignoring the original purpose of the Convention and Article 1F, which respectively call for protecting those in need[173] and a restrictive interpretation of the exclusion clauses,[174] this requirement is not met. However, Treaty interpretation should also take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties

regarding its interpretation".[175] If a rigorous application of Article 1F has indeed become State practice, it may be considered a legal, albeit worrying, trend.[176]

5 POST EXCLUSION: PROSECUTION AND NON-REFOULEMENT

Immigration figures in appendix 1 show that the Dutch approach to exclusion has had limited success in the post-exclusion phase. Of the 700 excluded individuals, only five persons have been prosecuted for their crimes in the Netherlands, and only three of these cases resulted in actual convictions. There have been two extraditions to the Rwanda tribunal and at least one to Kosovo.[177] Besides limited legal consequences for Article 1F crimes committed, the application of Article 3 ECHR has resulted in a small but significant group of non-returnable, excluded persons. At least 40 of these individuals and ten of their family members remain in the Netherlands illegally without any form of protection.[178] This section delves into the causes and consequences of this situation.

5.1 Failure of prosecution

To explain the low levels of successful prosecutions and extraditions, the Netherlands government emphasises practical obstacles. The high reliance on witness accounts has proved particularly problematic since most Article 1F crimes are committed many years ago and witnesses are often traumatised and not readily available in the Netherlands.[179] Other practical issues include the limited availability of interpreters, the different cultural settings of the parties involved and the high dependency on third parties.[180] Extradition is complicated by the lack of extradition relations with most countries of origin, both through bilateral Treaties and multilateral Conventions, such as the Torture Convention.[181] Concerns of due process and human rights abuses in the receiving countries also complicate prosecution under extradition treaties.[182]

Despite developments in international criminal law, legal barriers also remain. Claiming universal jurisdiction, for instance, remains difficult. Because most Article 1F crimes were committed before the entry-into-force of the *Wim* on 1 October 2003, most Article 1F cases need to be prosecuted under pre-existing laws that provide limited jurisdiction.[183] Under the complementarity principle, there are also limited options for extraditing persons to international courts and tribunals whose mandates are already restricted.[184]

Besides legal and practical obstacles, the fact that *obligations* to prosecute under international law still remain largely permissive also have a serious impact on prosecution figures.[185] Despite the extension of the principles of universal jurisdiction and *aut dedere aut judicare* mentioned earlier in this paper, gaps remain. Not all Article 1F crimes fall within the ambit of the conventions codified by the principle of *aut dedere aut judicare*.[186] For crimes against the peace, for example, there is

not even a permissive rule of universal jurisdiction.[187] Moreover, there is no explicit requirement in refugee law that excluded persons should be prosecuted or extradited for their crimes.[188] As a result, not all states surrender or prosecute indicted suspects.

The Dutch government, although a staunch and proven advocate of international prosecution, admits that it does not go beyond its obligations under international law to prosecute Article 1F crimes. Investigators do not actively seek out witnesses in countries of origin and investigation is suspended if witnesses cannot be sourced in the Netherlands. Many excluded persons are expelled without being prosecuted.[189] Although understandable given the legal and practical difficulties mentioned above, it is likely that this has contributed to the low prosecution numbers in the Netherlands.

Ultimately, however, these explanations fail to address the structural issue underlying the extremely low prosecution rate: the inherent tension between the "serious reasons for considering" standard versus the higher criminal standard required for prosecution.[190] Further lowering the exclusion standard has made it even harder to prosecute Article 1F cases. Here, the Dutch case study – viewed as an example of growing state practice – demonstrates that contemporary application of the exclusion clauses compromises the ability to prosecute.[191]

5.2 *Non-refoulement* and the protection gap

The three imperatives of exclusion, prosecution and *non-refoulement* intersect on the issue of excluded persons who cannot be expelled because of Article 3 ECHR. The broader application of the principle of *non-refoulement*[192] and the strict approach to exclusion have created this problem. Prosecution has been forwarded by the EU and others as a possible solution.[193] However, the low success rate and previous discussion on legal and administrative impediments to Article 1F-prosecutions demonstrate the fallacy of this position.

There is a clear imbalance between exclusion, prosecution and non-refoulement that results in a significant class of persons stuck in legal limbo. Compounding this situation, the global and European refugee frameworks do not confer an adequate level of protection.[194] Human rights law also only provides limited relief. Although the ECHR protects persons from *refoulement*, it does not confer a regulated status.[195] Such protection is provided under the subsidiary protection clauses in the EU Qualifications Directive. However, these also exclude persons who fall within the scope of Article 1F of the Convention.[196] Without national policies to fill this gap, a situation of humanitarian concern arises, where excluded persons are merely tolerated. They have no rights to shelter, financial support or work and become completely dependent on donations and illegal

support mechanisms.[197] Because the vast majority is never prosecuted, there is little prospect of change in their situation. Instead, they indefinitely carry the label of (war) criminal. This effectively turns the Convention into a punishment tool; a function it was never intended to perform.[198]

Because no special provisions exist to address this protection gap, this is exactly what happens in the Netherlands.[199] Although a proportionality test was created, it is restrictively applied to those excluded individuals who have lived in the Netherlands for a 'great number of years',[200] who cannot be evicted and for whom there is no prospect that their situation will change. They must also prove that departure to a third country, despite sufficient attempts, is not possible. Only then, is their humanitarian situation considered and weighed against the interest of public order. If the minister is convinced that all these criteria have been met, a temporary residence permit is issued.[201] So far, this test has resulted in only three revoked exclusions, mostly in cases of terminal illnesses.[202] Unless the bar for this test is lowered and additional protection mechanisms established, the protection gap will remain.

An additional problem is that excluded, non-returnable people are declared "unwanted" in the same way as other excluded persons.[203] This means they are also held legally liable for remaining in the Netherlands.[204] The rationale is that they should move to a country other than their country of origin.[205] Even the Dutch government admits that it is virtually impossible to find countries willing to take them.[206] Moreover, the individual incentive to leave is minimised given that other EU countries will simply send excluded individuals back under the Dublin Regulations. When traveling beyond the EU, indivduals effectively nullify their protection from *refoulement* under the ECHR.[207] It is unsurprising that laws to prosecute in these circumstances are barely enforced.[208]

A general amnesty that entered into force on 15 June 2007 and granted residence status to long-term illegal immigrants explicitly did not apply to excluded persons.[209] Despite instructions to the contrary, many councils have continued to provide emergency shelter for these and other persons excluded from the amnesty, because in most cases no alternative form of protection exists.[210]

6 RECOMMENDATIONS

It is clear from this discussion that balancing exclusion, prosecution and *non-refoulement* ultimately requires a restrictive interpretation of Article 1F. Improving standards of fairness and due process would enhance the integrity of the Convention. Moreover, a higher burden of proof to justify exclusion would make prosecution more achievable and reduce the likelihood that a large class of non-returnable and excluded people is created under the prohibition on *non-refoulement*. The

practices of categorical exclusion should be terminated and exclusion by association of family members should be replaced by a gender sensitive approach to status determination.[211]

Unfortunately, this paper has made clear that State practice is moving in the opposite direction and that a return to a restrictive application is unlikely. Viewed from the sovereign dividend represented by the provision, it is also unlikely that the relatively low standard of proof will ever be raised. But if States continue the status quo of strict exclusion practices, they need to appreciate that prosecution will be compromised and that protection gaps will continue to exist unless additional policies are created. They should also not justify their hard-lined application of the exclusion clauses on the basis that international human rights and criminal law instruments will ensure prosecution and protection.[212]

Rather, a more integrated approach is needed that de-emphasises exclusion and makes full use of trends in international criminal and human rights law to strengthen prosecution and protection mechanisms. On the issue of prosecution, the Dutch government has made a series of proposals with the announcement of a programme to strengthen the prosecution of international crimes in May 2009.[213] These range from the retroactive extension of universal jurisdiction for genocide in Dutch legislation[214] to improving collaboration between relevant international institutions such as EUROJUST, government departments and the public prosecutor.[215] Although these policies go some way towards addressing the legal and practical barriers to prosecution, they do not increase the legal *obligation* of countries to prosecute Article 1F crimes. Unless states commit to prosecuting Article 1F crimes beyond their current legal obligations,[216] expanding those obligations will require a global effort to strengthen the conceptual linkages between exclusion and prosecution.[217] This could start with soft law provisions, but should ultimately bring about Treaty obligations.[218]

In terms of addressing protection gaps, the Dutch government has been less willing to take action. It considers the proportionality test sufficient[219] and believes that offering anything beyond it would be contrary to its own policies and those of the EU Directive.[220] This view must be opposed. Although limited protection is *owed* to excluded persons under international and domestic instruments, there are sufficient legal grounds *permitting* such action.

According to UNHCR, for instance, States can choose to grant individual stay on grounds other than the Convention.[221] The drafters of the Refugees Convention also discussed that *protection* can be granted under alternative agreements.[222] UNHCR furthermore proposes that an applicant may be able to claim refugee status when Article 1F crimes are "sufficiently distant in the past" and his or her life conditions have changed.[223] The central question should then be whether the applicant's criminal character still predominates.[224]

The EU Directive also provides leeway. Firstly, its prohibition on granting refugee status and providing subsidiary protection is a minimum standard that member States are encouraged to expand upon.[225] Under the EU Directive, a permit can also be granted for other reasons than subsidiary protection, such as work, family reunification or on humanitarian grounds.[226]

Finally, excluded persons are entitled to a basic level of protection under international and human rights law.[227] Simply tolerating them for extended periods of time without according them a status may even be considered inhumane or degrading treatment or punishment in contravention of Article 3 ECHR and the CAT.[228] According to Hathaway, excluded persons should at least be entitled to all non-derogable rights as listed in the ICCPR.[229] Under the ECHR all persons are entitled to generic civil and political rights.[230] Extra-Convention regimes, such as the ExCom Conclusion No 22 and the EU Reception Conditions Directive, also contain rights, which – albeit more limited – are applicable.[231] They include rights to employment (waiting periods may apply), health care, social welfare, education, housing, limited recognition to family reunion and non-discrimination.

Ultimately, when humanitarian concerns are paramount, some form of legal status should be accorded, particularly in drawn out cases.[232] Some States, notably France and the UK, already do this.[233] In addition, the proportionality test should be extended and the "unwanted" declaration should only apply to persons with a residence alternative.[234] Simultaneously, prosecution of excluded persons should be prioritised. Only then can the situation be avoided where States undermine the core values of the Refugees Convention they seek to protect.

7 CONCLUSION

The Dutch case study showed that a contemporary application of Article 1F was unable to strike an effective balance between exclusion, prosecution and *non-refoulement*. Exclusion methods were interpreted expansively and applied rigorously to such an extent that they could no longer be considered restrictive as envisaged by the drafters of the Convention. In addition, they could easily lead to issues of due process and procedural fairness or even breach Treaty obligations.

The rigorous application of Article 1F, demonstrated by the Dutch model but a growing feature of State practice, had the additional effect of exacerbating the challenges in the post-exclusion phase. By lowering the already low standard of proof required for Article 1F-determination, exclusions not only increased, but prosecution of excluded individuals became even harder. Together with the extended application of the principle of *non-refoulement*, increased exclusions also exacerbated the numbers of excluded, non-returnable people who were not entitled to any form of protection.

As demonstrated, developments in criminal law, human rights law and humanitarian law since 1951 were so far unable to fill these gaps in protection and punishment that existed from day one. This was exacerbated by State refusal to implement policies that address them, especially on the protection front. Consequently, the rationales of the exclusion clauses - to promote an international morality, protect the integrity of the Convention and prevent impunity - were still not met. The same goes for the central objective of the Refugee framework as a whole, which was to protect persons victimised or threatened by persecution. Instead, the Convention itself was used as a punitive tool, a function it was neither intended to perform, nor should.[235] Thus, besides worrying trends in state practice, the Dutch model exposed fundamental flaws associated with Article 1F and the Refugee framework's ability as a whole to meet their objectives and provide an effective solution to people in need of protection. Unless a more integrated approach is taken, which de-emphasises exclusion and takes into account developments in international criminal law and human rights law, there is no immediate prospect that this situation will improve.

APPENDIX 1: FACTS AND FIGURES OF PERSONS EXCLUDED UNDER ARTICLE 1F

Excluded persons and family members

Figure 1: Distribution of 1-F excluded persons in the Netherlands at April 2008 [236]

<table>
<tr><td rowspan="6">700 Article 1F excluded persons</td><td rowspan="4">350 residing in the Netherlands</td><td rowspan="3">250 residing illegally

(210 of 550 family members unwanted)</td><td>40 Art. 3 ECHR prohibition to refoulement</td><td>10 of 80 family members unwanted</td></tr>
<tr><td>180 no prohibition to refoulement</td><td>160 of 390 family members unwanted</td></tr>
<tr><td>30 no Art. 3 ECHR decision made</td><td>40 of 80 family members unwanted</td></tr>
<tr><td colspan="3">100 residing legally (in asylum procedure)</td></tr>
<tr><td rowspan="2">350 assumed left</td><td colspan="3">120 left supervised</td></tr>
<tr><td colspan="3">230 no registered address</td></tr>
</table>

The 250 persons residing in the Netherlands illegally had 550 family members. 260 were naturalised or received a residence permit; 80 were still undergoing an asylum procedure; 210 were declared unwanted. By far, the majority of excluded individuals had Afghan nationality (170). The remainder came from Iraq, Angola, Iran, Bosnia and Azerbaijan.

Prosecutions in the Netherlands

1. 7/3/2004: Congolese Army Colonel S.N. is convicted to 2.5 years in prison for committing torture in his home country under the Uitvoeringswet Folteringsverdrag.[237]
2. 14/10/2005: Former general and head of KhaD/WAD is convicted to 12 years in prison for committing torture as a war crime under the Uitvoeringswet Folteringsverdrag.[238]
3. 14/10/2005: Former head of the department of interrogation of the KhaD/WAD is convicted to 9 years in prison for committing torture as a war crime under the Wetboek van Strafrecht and the Wet Oorslogsstrafrecht.[239]
4. 25/6/2007: One of the replacements of the head of the KhaD is discharged from committing human rights violations (torture), because 'effective command and control' could not be proven.[240]
5. 24/07/2007: The suspect was not convicted for crimes of genocide committed in Rwanda in 1994, because the Court determined it had no jurisdiction. A ruling on the responsibility for war crimes is still expected.[241]

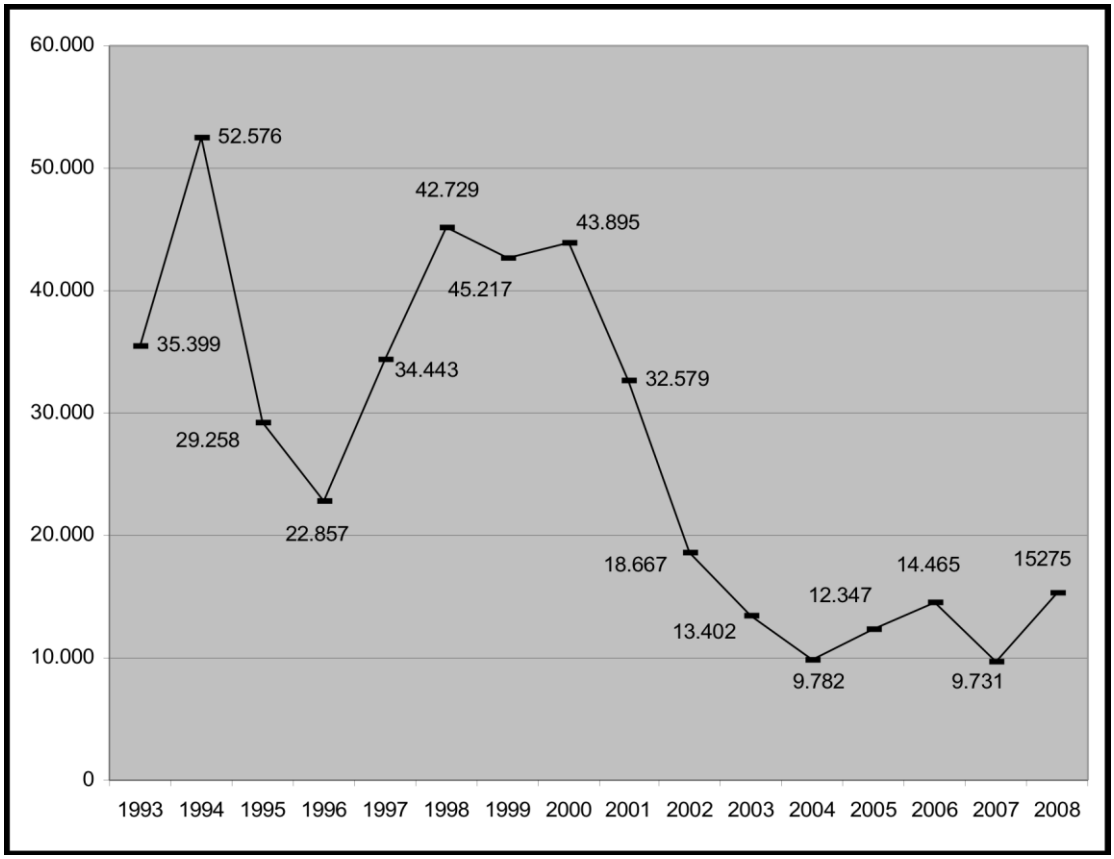
Extraditions from the Netherlands[242]

1. 16/10/2001: Extradition of Simon Bikindi to the Tribunal for Rwanda.[243] The Tribunal convicted him to 15 years in prison for the Direct and Public Incitement to Commit Genocide. He was acquitted on the remaining five counts of genocide, complicity in genocide, conspiracy to commit genocide, murder and persecution as crimes against humanity.[244] His case is under appeal.[245]
2. 11/5/2004: Extradition of Ephrem Setakoto to the Tribunal for Rwanda. He was sentenced to 25 years in imprisonment on 25 February 2010.[246] His case is currently under appeal.[247]
3. 5/6/2009: Person suspected of war crimes committed in 1993 is extradited to Bosnia.[248]

APPENDIX 2 –GENERAL STATISTICS

Asylum

Figure 2: Asylum applications in the Netherlands [249]



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Landelijk Parket, 'Suspect of war crimes may be extradited to Bosnia' (Press Release, 5 [1] *The Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-T, Judgement and Sentence – 2 December 2008, available: http://www.ictr.org/default.htm, p16 http://www.om.nl/onderwerpen/oorlogsmisdaden_0/rechtszaken_per_land/@151055/verdachte_van_0/ at 12 January 2009.

Letter from Judith Kumin, Regional Representative UNHCR to Minister Hirsch Ballin, 14 November 2007 http://www.tekenvoorrechtvaardigheidinnederland.nl/uploads/14_nov_2007_unhcr.pdf at 17 January 2010.

Ministry of Justice, Asiel: Pardonregeling en huisvestingstaakstellingen http://www.justitie.nl/onderwerpen/migratie/asiel/pardonregeling/ at 29 May 2010.

Teken voor rechtvaardigheid in Nederland.nl <http://www.tekenvoorrechtvaardigheidinnederland.nl/> at 20 Januray 2010.

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[1] Judge Myjer in his concurrent opinion in 1F-case Saadi vs Italy: *Saadi v Italy* (2008) Eur Court HR nr. 37201/06.

[2] Ministry of Justice, 'Nederland geen vluchthaven voor oorlogsmisdadigers' (Press Release, 9 June 2008) http://www.justitie.nl/actueel/nieuwsberichten/archief-2008/80609nederland-geen-vluchthaven-voor-oorlogsmisdadigers.aspx at 20 January 2009.

[3] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 1F (entered into force 22 April 1954), as amended by the Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). Hereafter: *Refugees Convention*.

[4] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, Ministry of Justice, 6 June 2008 http://www.justitie.nl/images/Notitie%20betreffende%20de%20toepassing%20van%20artikel%201F%20Vluchtelingenverdrag_tcm34-113750.pdf at 17 January 2010.

[5] *Refugees Convention,* above n3, art 1A(2).

[6] *Refugees Convention,* above n3, art 1F.

[7] See statements of Herment (Belgium) and Hoare (UK): *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record*, UN doc. A/CONF.2/SR.24, 24th Meeting (1951): in Geoff Gilbert, 'Current issues in the application of the exclusion clauses' (2003) in E. Feller, V. Turk, and F. Nicholson (eds.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) CUP 428. See also Nina Larsaeus, 'The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluding Asylum Seekers' (2004) 73 Nordic Journal of International Law 70.

[8] See *Note on the Exclusion Clauses*, Standing Committee of the Executive Committee of the High Commissioner's Programme, UN doc. EC/47/SC/CRP.29, 47th Session (1997) para. 3: in Geoff Gilbert, above n7, 428. The three exclusion categories draw directly on the Universal Declaration of Human Rights.

[9] See also statement of Mr Rochefort of France, who argued that the object of the exclusion clauses was not to impose a particular standard of treatment on a state, but only to state whether it was *entitled* to grant refugee status: *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons,* UN doc. E/AC.7/SR.166 at 4 (1950): in James C. Hathaway, *The Law of Refugee Status* (1991) 214.

[10] The drafters feared that the Convention might clash with extradition treaties. Herment (Belgium) noted: 'A clause referring to extradition treaties ought to be included in the Convention, but it would have to be made clear that such

treaties must be observed and that they should remain outside the framework of framework of article 28.': *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record,* above n7.

[11] James C. Hathaway, above n9, 214-15.

[12] Ibid.

[13] While the United States argued for State discretion to admit or refuse serious criminals, Israel and France argued that exclusion should be mandatory: James C. Hathaway, above n9, 214, n156.

[14] See *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, UN Doc HCR/GIP/03/05 (2003), para 2. Hereafter *UNHCR Guidelines; Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 196 Protocol Relating to the Status of Refugees*, UNHCR, UN Doc HCR/IP/4/Rev.1 (1979), para 149. Hereafter *UNHCR Handbook*.

[15] *Refugees Convention,* above n3, arts 17-19, 21-24.

[16] *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428, UN Doc A/RES/428(V), art 7d.

[17] Article 33(1) provides that "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion": *Convention Relating to the Status of Refugees,* above n3.

[18] *UNHCR Guidelines* above n14, para 2.

[19] See section 2.2.2 ahead.

[20] See eg, E.S. Vargas, 'Ensuring Protection and Prosecution of Alleged Torturers: Looking for Compatibility of *Non-Refoulement* Protection and Prosecution of International Crimes' (2006) 8 *European Journal of Migration and Law* 42.

[21] The Executive Committee has gone so far to claim that it is progressively acquiring the status of a peremptory norm: Executive Committee Conclusion No. 17 (XXXI) 1980: in Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' (2003) in E. Feller, V. Turk, and F. Nicholson (eds.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) CUP 469, 144. Other scholars disagree and point to the lack of extensive and uniform State Practice and opinion juris to justify these conclusions. See e.g. K. Hailbronner, "Non-refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Thinking?" (1986) 26(4) Virginia Journal of International Law 857, 887: in James C. Hathaway, above n9, 25; James C. Hathaway, *The Rights of Refugees under International Law* (2005) 24-39.

[22] G. Goodwin-Gill, "Non-refoulement and the New Asylum Seeker" (1986), 26(4) Virginia Journal of International Law 897, 901: in James C Hathaway, above n9. See also G.S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed. 2007), 248;

[23] Sir Elihu Lauterpacht and Daniel Bethlehem, above n21, 155.

[24] See eg, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention")*, opened for signature 10 December 1984, 1465 UNTS 85, art 3 (entered into force 26 June 1987); *International Covenant on Civil and Political Rights ("ICCPR")*, opened for signature 16 December 1966, 99 UNTS 171, art 7 (entered into force 23 March 1976) and *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 April 1950, art 3 (entered into force 9 March 1953). Around 90 percent of the UN

membership are now party to one or more conventions of which the principle of *non-refoulement* is an essential component: Sir Elihu Lauterpacht and Daniel Bethlehem, above n21, 147. For a long time, extradition law has also prohibited surrender when human rights and fundamental freedoms would be violated as a result: See Geoff Gilbert, above n7, 469.

[25] Jane McAdam, *Complementary protection in international refugee law* (2007), 4.

[26] See eg, J.C. Hathaway, 'Framing refugee protection in the new world disorder' (2001) 34 *Cornell International Law Journal* 257, 25.

[27] *The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 1 January 1990).

[28] *Saadi v Italy* (2008), above n1, para 127.

[29] See Articles 49, 50, 129 and 146 of the four Geneva Conventions: *Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field* (Convention I); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Convention 11); *Geneva Convention Relative to the Treatment of Prisoners of War* (Convention 111); and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Convention IV), opened for signature 12 August 1949, 75 UNTS (entered into force 21 October 1950). Supplemented by *Additional Protocol 1 relating to the Protection of Victims of International Armed Conflicts* and *Additional Protocol I1 relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 12 December 1977, 16 ILM 1391.

[30] See e.g. the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

[31] See, e.g. *Torture Convention*, above n25, arts 6, 7 and 12 and the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105, art 7 (entered into force 14 October 1971). The meaning of universal jurisdiction in the *Torture Convention* and custom is currently being considered by the International Court of Justice (ICJ) in *Belgium v Senegal* (2009). Bassiouni has found over 20 conventions that establish a duty to extradite or prosecute: M. C. Bassiouni and E. M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law (1995) 4-5: in Nina Larseaus, above n7, 82.

[32] L. N. Sadat, 'Redefining Universal Jurisdiction' (2002) 35 *New England Law Review* 244; C. Enache-Brown and A. Fried, 'The Obligation of Aut Dedere Aut Judicare in International Law' (1998) 43 *McGill Law Journal* 613: in Nina Larseaus, above n7, 78.

[33] Nina Larseaus points to a lack of opinio juris evidenced by 'the relatively small number of cases where states have actually initiated prosecutions in regards to war crimes or widespread human rights violations.' The obligation is even weaker with regards to terrorism and other less well established obligations. For the same reasons, Larseaus holds that 'it is not possible today to speak of an international positive obligation erga omnes of prosecuting or extraditing those responsible for violations of jus cogens norms.' She does acknowledge that the almost universal ratification of the Torture and Genocide Conventions means that the doctrine of aut dedere aut judicare might meet customary standards with respect to the torture and genocide prohibitions: Nina Larsaeus, above n7, 85-91. See also Joan Fitzpatrick, 'The Post-Exclusion Phase: Extradition, Prosecution and Expulsion' (2000) 12 *International Journal of Refugee Law*, 280-281.

[34] See Geoff Gilbert, above n7, 477-478.

[35] T. Meron, 'International Criminalization of Internal Atrocities' 89 *American Law Journal of International Law* (1995) 569: in Nina Larseaus, above n7, 80.

[36] E.g. C. Tomuschat, 'The Duty to Prosecute Crimes Committed by Individuals', in H.J. Cemer at al. (eds.), Tradition under Weltoffenheit des Rechts. Festschrift fur Helmut Steinberger (2002) 339-340; B. Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law' (2001/2002) 35 New England Law Review 2, 404: in Nina Larseaus, above n7.

[37] *Rome Statute of the International Criminal Court*, concluded at 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002). Hereafter: *Rome Statute*. The jurisdiction supra-national authorities should be distinguished from universal jurisdiction, which refers to the jurisdiction of national courts: Jeff Handmaker, 'Seeking justice, guaranteeing protection and ensuring due process: Addressing the tension between exclusion from refugee protection and the principle of universal jurisdiction' (2003) 21 *Netherlands Quarterly of Human Rights* 4, 682.

[38] Rome Statute, above n38, art 17.3 and 17.2.

[39] See E.S. Vargas, above n20, 46.

[40] Geoff Gilbert, above n7, 429-430.

[41] Geoff Gilbert poses that if *non-refoulement* has indeed become a peremptory norm, it flows from Articles 64 and 44(2) of the Vienna Convention on the Law of Treaties that Article 1F, which allows for *refoulement*, would be void: Geoff Gilbert, above n7, 454. UNHCR holds that prosecution could replace article 1F's punitive function: *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, UN Doc HCR/GIP/03/05 (2003), para 4. Hereafter: *UNHCR Background Note.*

[42] K. Wouters, '1F: noodzakelijk of achterhaald? Een inleiding in de complexiteit van artikel 1F Vluchtelingenverdag' (2008) 24 *Nieuwsbrief Asiel- en Vluchtelingenrecht (NAV)* 6, 387-391. At the time of writing, Kees Wouters was researcher at the Insitute for Immigration law of Leiden University. He is currently senior refugee law advisor at UNHCR.

[43] He references James C. Hathaway and Colin J. Harvey, above n26, 259.

[44] See e.g. *ICCPR*, above n24, art 14(7) and the *ne bis idem* principle.

[45] See eg, Michael Kingsley Nyinah, 'Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice' (2000) 12 *International Journal of Refugee Law* 301-302.

[46] Ibid, 303. See also Jane McAdam, above n26, 110.

[47] Ibid.

[48] See eg, Michael Kingsley Nyinah, above n45, 301.

[49] Ibid, 304.

[50] Termed "*Voorwaardelijke Vergunning tot Verblijf* (VVTV)": *Evaluatie Vreemdelingenwet 2000: De asielprocedure – deel 1*, Commissie Evaluatie Vreemdelingenwet 2000, 2006, 33 http://www.wodc.nl/onderzoeksdatabase/ov-200404-evaluatie-vreemdelingenwet-2000.aspx at 9 May 2010.

[51] Ibid, 2, 34.

[52] IND in bedrijf: nieuws, organisatie en cijfers <http://www.ind.nl/NL/inbedrijf/overdeind/cijfersenfeiten/> at 21 January 2010.

[53] *Evaluatie Vreemdelingenwet 2000*, above n51 3.

[54] Vluchtelingenwerk Nederland, *Vluchtelingen in Getallen nader beschouwd* (2009) http://www.vluchtelingenwerk.nl/pdf-bibliotheek/VLUCHTELINGEN_IN_GETALLEN_NADER_BESCHOUWDDEF_RW.pdf at 9 May 2010.

[55] Ibid 2.

[56] IND in bedrijf: nieuws, organisatie en cijfers <http://www.ind.nl/NL/inbedrijf/overdeind/cijfersenfeiten/> at 21 January 2010. The end of the Balkans war and increased security measures at airports contributed to this trend: 'Daling van aantal asielzoekers is Europese trend', *Trouw*, (Amsterdam), 20 February 2008 http://www.trouw.nl/onderwijs/nieuws/europajournaal/article2083221.ece/Daling_van_aantal_asielzoekers_is_Europese_trend.html at 9 May 2010.

[57] Erwin van der Borght, 'Prosecution of International Crimes in the Netherlands: An analysis of recent case law (2007) 18 *Criminal Law Forum* 87.

[58] Explanatory Memorandum, *Voorstel van wet ter verruiming van de mogelijkheden tot opsporing en vervolging van internationale misdrijven* (2009) http://www.justitie.nl/images/MvT%20bij%20voorstel%20van%20wet%20(def)_tcm34-220985.doc at 17 January 2010, 1.

[59] *Prosecutor v. Knesevic* (1997) Hoge Raad der Nederlanden, Strafkamer No 3717: in Erwin van der Borght, above n57, 134.

[60] *Vluchtelingenbeleid; Brief staatssecretaris met beleidsnotitie inzake toepassing van artikel 1F van het Vluchtelingenverdrag van 1951*, Doc 19637, nr.295, 17 December 1997 http://parlando.sdu.nl/ at 16 January 2009.

[61] *Vreemdelingenwet 2000.* Hereafter Vw2000.

[62] *Vreemdelingenbesluit 2000.* Hereafter Vb2000.

[63] *Vreemdelingencirculaire 2000.* Hereafter Vc2000.

[64] Vb2000, art 3.77(1)(a) and Vc2000, ibid, art C1/5.13.3.

[65] Vb2000, arts 3.107 and 3.77.

[66] Vw2000, arts 45(1)(c) and 7(1)(b).

[67] *EU Qualification Directive* 2004/83/EC, 29 April 2004, Official Journal L304, arts 12(2) and 17(1).

[68] *Wetboek van Strafrecht*, art 197.

[69] Vw2000, art 63(1).

[70] *Wet internationale misdrijven* 2003, Hereafter: *Wim*.

[71] Letter to Parliament (Tweede Kamer), *Vaststelling van de begrotingsstaten van het Ministerie van Justitie*, Ministry of Justice, Doc 31200VI, nr.160, 9 June 2008 http://www.justitie.nl/images/toepassing%20van%20artikel%201F%20van%20het%20Vluchtelingenverdrag_10524_tcm34-114093.pdf at 17 January 2010.

[72] *Team Internationale Misdrijven* ("TIM").

[73] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 18.

[74] See appendix 1: 350 are assumed to have returned to their home countries voluntarily. Of the remaining 350, 250 resided in the Netherlands illegally.

[75] See appendix 1.

[76] Adviescommissie voor Vreemdelingenzaken (ACVZ), *Artikel 1F Vluchtelingenverdrag in het Nederlandse vreemdelingenbeleid* (2008), 19 http://www.acvz.org/publicaties/Advies-ACVZ-NR26-2008.pdf at 17 January 2010.

[77] Ibid, 19.

[78] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 32.

[79] See eg, ACVZ, above n77; Nederlands Juristen Comité voor de Mensenrechten (NJCM) *De toepassing van artikel 1F van het Vluchtelingenverdrag*, position paper, 27 August 2008 http://www.njcm.nl/site/uploads/download/277 at 17 January 2010; Amnesty International, *1F Standpunt Amnesty International* (2008)

http://www.amnesty.nl/documenten/themas/vluchtelingen/positionpaper%201F.pdf at 17 January 2010; Teken voor rechtvaardigheid in Nederland.nl <http://www.tekenvoorrechtvaardigheidinnederland.nl/> at 20 Januray 2010.

[80] See eg, Letter from Judith Kumin, Regional Representative UNHCR to Minister Hirsch Ballin, 14 November 2007 http://www.tekenvoorrechtvaardigheidinnederland.nl/uploads/14_nov_2007_unhcr.pdf at 17 January 2010.

[81] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 32.

[82] Report to Parliament (Tweede Kamer) 2008, *Schriftelijk overleg brief en notitie inzake de toepassing van artikel 1F Vluchtelingenverdrag*, Ministry of Justice, 8 September 2008 http://www.justitie.nl/images/schriftelijk%20overleg%20toepassing%20van%20artikel%201f%20vluchtelingenverdrag_11419_tcm34-129027.pdf at 17 January 2010.

[83] G.S. Goodwin-Gill and Jane McAdam, above n22, 175.

[84] Matthew Zagor, 'Persecutor or Persecuted: Exclusion Under Article 1F(A) and (B) of the Refugees Convention' (2000) 23 *UNSW Law Journal* 3, 177-178.

[85] Ibid, 178.

[86] Ibid, 178.

[87] Ibid, 178.

[88] See above n48.

[89] Sibylle Kapferer, 'Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom' (2000) 12 *International Journal of Refugee Law* 220.

[90] See appendix 1 for statistics.

[91] *Tussentijdse aankondiging Vreemdelingencirculaire, Article 1F Refugee Convention,* Ministry of Justice TBV 2001/37 (2001), 12 http://cmr.jur.ru.nl/CMR/TBV/TBV94/01/2001-37.pdf at 19 January 2010. See e.g., the E*uropean Convention on the Suppression of Terrorism*, opened for signature 27 January 1977, ETS 90 (entered into force 4 August 1978), as amended by its Protocol of 15 May 2003; the UN Security Council Resolution *on the responsibility of the Security Council in the Maintenance of international peace and security*, SC Res 1269, 4053th meeting, UN Doc R/RES/1269 (1999) and the Resolution *Treats to international peace and security caused by terrorist threats*, SC Res 1373, 4385th meeting, UN Doc R/RES/1373 (2001).

[92] M. Wijngaarden, 'Balanceren onder nul: Het bewijs in asielzaken waar artikel 1F Vluchtelingenverdrag wordt tegengeworpen' (2008) 24 *Nieuwsbrief Asiel- en Vluchtelingenrecht (NAV)* 6, 412. Other crimes that lead to automatic exclusion are rape, torture (including female circumcision), slavery and any other crime that falls within the scope of international instruments that term it non-political: Vc2000, art C4/3.11.3.2.

[93] The predominance test applied by the Netherlands is similar to the UNHCR tests for determining whether an offence is political (see *UNHCR Handbook*, above n14, para 152). It's aim is to determine whether a crime is mainly political in nature by weighing the the political element of the crime against the communal element, taking into account considerations of subsidiarity and proportionality. A crime is considered to be political (and hence not excludable) when there is a direct link between the crime committed and its purpose, when the crime was an effective means to the political end, when no peaceful means were available and when the crime was proportionate to its purpose: Vc2000, art C4/3.11.3.2.

[94] See e.g. M. Wijngaarden, above n92, 407.

[95] See e.g. Matthew Zagor, above n84, 179 and Michael Kingsley Nyinah, above n45, 311.

[96] See *UNHCR Handbook*, above n14, para 15.

[97] Email from Bert Meulblok, Advisor, Immigration and Naturalisation Service (IND) to Deciana Speckmann, 19 January 2010.

[98] *UNHCR Handbook,* above n14, para 157.

[99] ABRVS nr 200408765/1, JV, 18 April 2005: in M. Wijngaarden, above n92, 407.

[100] See *UNHCR Handbook*, above n14, paras 141, 176-177.

[101] See e.g. Michael Bliss, ''Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses (2000) 12 *International Journal of Refugee Law* 106-108; Michael Kingsley Nyinah, above n46, 304-306; Geoff Gilbert, above n7, 466; European Council on Refugees and Exiles (ECRE), 'Position on Exclusion from Refugee Status' (2004) 16 *International Journal of Refugee Law* 2 (2004) 259.

[102] See, e.g. Sibylle Kapferer, above n89, 215-217; Department of Immigration & Multicultural & Indigenous Affairs, *Persons deemed unworthy of international protection (article 1F): An Australian perspective* (2002), 26; Michael Bliss, above n101, 106-108; Geoff Gilbert, above n7, 464; Michael Kingsley Nyinah, above n45, 305-306.

[103] Translated from: *Vluchtelingenbeleid*, above n60, 4.

[104] *Procedurele aspecten van artikel 1F Vluchtelingenverdag*, IND-werkinstructie, nr.2005/22 (AUB) (2005), 1-2.

[105] ACVZ, above n79, 14.

[106] *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, UNHCR Position Paper, 29 November 2001, para 7 http://www.unhcr.org/refworld/docid/3c0b880e0.html at 20 January 2010.

[107] Jeff Handmaker, above n37, 684-685.

[108] *UNHCR Handbook*, above n14, para 156.

[109] *UNHCR background note*, above n41, para 77.

[110] See e.g. Michael Bliss, above n101, 108-110; Akbar Rasulov, 'Criminals as Refugees: The "Balancing excercise" and Article 1F(B) of the Refugee Convention" (2001-2002) 16 *Georgetown Immigration Law Journal* 815; Lawyers Committee for Human Rights (LCHR), 'International law safeguarding the rights of refugees under the exclusion clauses: summary findings of the project and a Lawyers Committee for Human Rights perspective' (2000) 12 Supp IJRL, 335-336; ECRE, above n101, 259.

[111] I.e. the United Kingdom, Australia, Canada, the US and New Zealand: Michael Kingsley Nyinah, above n45, 307.

[112] Sibylle Kapferer, above n89, 217.

[113] In his letter to Parliament, the State Secretary for Justice announced that he sees no reason to issue a temporary permit for stay based on the overall situation in the country of origin: Letter to Parliament (Tweede Kamer), above n71, 8.

[114] See section 5.2 ahead.

[115] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 26-27.

[116] *UNHCR Handbook*, above n14, para 149.

[117] See eg, NJCM, above n79, 2; ECRE, above n101, 274; Geoff Gilbert, above n7, 470.

[118] *UNHCR Guidelines*, above n14, para 35.

[119] Michael Bliss, above n101, 115-116.

[120] See *Cardenas v. Canada* (1994) 23 IMM LR 92d, 244.

[121] See *Ofosu v. McElroy* (1995) 933 SDNY F. Supp. 237, 239.

[122] See Ramirez v Canada (Minister of Employment and Immigration) (1992) 89 DLR 173; Refugee Appeal No 1248/93 Re TP (31/7/95), affirmed in S v Refugee Status Appeals Authority [1998] 2 NZLR 291; Re Hapugoda and Minister for Immigration and Multicultural Affairs (1997) 25 AAR 1: in Matthew Zagor, above n84, 168.

[123] Ibid.

[124] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 15, 38.

[125] ABRVS, 5 April 2007, nr 200609054/1, JV 2007/256 in M. Wijngaarden, above n92, 409.

[126] See *Ramirez* v. *Canada (Minister of Employment and Immigration)* (1992) 2 FC 306 (CA); Vc2000, above n63, C14/3.11.3.3 refers to articles 25 to 27 and 3 of the Rome Statute. The test consists of a three-part test for complicity, which includes (1) membership of an organisation which committed international offences as a continuous and regular part of its operation; (2) personal and knowing participation; and (3) failure to disassociate from the organisation at the earliest safe opportunity: Guy S. Goodwin Gill and Jane McAdam, above n22, 170.

[127] Ibid.

[128] P. Boelens, "Normconform handelen in het immigratierecht: welke norm voor wie?" (2003) in: T. Barkhuysen et al (eds), *Recht Realiseren: bijdragen rond het thema adequate naleving van rechtsregels* (2005) 323-345.

[129] See Vw2000, above n62, art 69 and *Algemene wet bestuursrecht ("Awb")* 2000, art 8:1.

[130] Vc2000, above n63, art 22/5.5.2.

[131] ACVZ, above n79, 34.

[132] The Netherlands nonetheless meets basic procedural UNHCR safeguards, including the provision of legal assistance, a competent interpreter and a right to appeal and its practice not to remove applicants until all legal remedies are exhausted: *Procedurele aspecten van artikel 1F Vluchtelingenverdag*, above n102; *UNHCR Background Note*, above n41, para 98.

[133] Vc2000, above n62, C13/4.3.11.3.3.

[134] This policy also applies to superiors of the police Saadoy and members of specific organs of the Hezb-iWahdat. For Iraqi applicants, it applies to the heads of specific Iraqi security services and officers of the Special Security Service at the time of the Saddam-regime: Report to Parliament (Tweede Kamer) 2008. above n82, 12.

[135] *Veiligheidsdiensten in Communistisch Afghanistan (1978-1992): AGSA, KAM, KhAD en WAD*, Ministry of Foreign Affairs (2000), 24-25 http://www.comite1fbeleid.nl/files/2000-02-29-aab-veiligheidsdiensten-afghanistan.pdf at 22 January 2010.

[136] See eg, MK, 25 Sept 2006, AWB 05/27010 JV 2006/461; and ABRVS, 2 Aug 2004, nr. 200401637/1: in M. Wijngaarden, above n99, 408. On the other hand, courts have overruled exclusions on the basis that insufficient evidence was provided to prove facilitation. See e.g. LJN: AO9654, AWB 02/64488, 02/64485: in M. Wijngaarden, above n101, 408.

[137] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 13.

[138] See eg, ABRVS, 30 Nov 2004, nr. 200402260/1, RV 2004/16 in: M. Wijngaarden, above n99, 411.

[139] See above n79.

[140] See *UNHCR Guidelines*, above n14, para 18-20; Michael Bliss, above n101, 99. This is also required by the criminal and humanitarian law principle of individual liability: see Michael Kingsley Nyinah, above n45, 300.

[141] This goes against article 34 of the *UNHCR Guidelines* and it is contrary to basic principles of procedural fairness: Michael Bliss, above n101, 112. The UNHCR Handbook places the burden of proof on the claimant; the duty to ascertain all relevant facts, however, is shared: *UNHCR Handbook,* above n14, para 196.

[142] See e.g. Geoff Gilbert, above n7, 470.

[143] Michael Bliss, above n101, 125.

[144] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 38; 11-15.

[145] UNHCR Executive Committee *Note on the Exclusion Clauses, UN Doc EC/47/WSC/CRP.29*, para 12-15: in Matthew Zagor, above n84, 175.

[146] *UNHCR Guidelines*, above n14, para 19.

[147] Ibid, para 34.

[148] Ibid, para 19.

[149] It included the need to consider the individual's personal contribution towards the commission of war crimes: *R (Sri Lanka) v Secretary of State for the Home Department* (2010) UKSC 15, para 29.

[150] Ibid, para 32.

[151] Ibid. See Gurung v Secretary of State for the Home Department (2002) UKIAT 4870.

[152] See eg, Michael Bliss, above n101, 117-8.

[153] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 13.

[154] *UNHCR Handbook*, above n14, paras 34 & 36.

[155] Letter from Judith Kumin, Regional Representative UNHCR, above n80, 4.

[156] The 'confrontation clause' of ECHR, above n27, art 6 is violated when national laws allow the use of testimonies of absent, anonymous and vulnerable witnesses as evidence. Unfortunately, however, the European Court of Human Rights has consistently held that immigration proceedings do not fall within the scope of Article 6: Helene Lambert, *The position of aliens in relation to the European Convention on Human Rights* (2006), 48.

[157] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 11-12.

[158] Ibid, 13.

[159] See section 5.1 ahead.

[160] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 14.

[161] *Vluchtelingenbeleid*, above n60, 8.

[162] Vw 2000, above n61, art 29(1) sub d; Vb 2000, above n62, arts 3.77(1)(b) and 3.107(3); ACVZ, above n76, 17.

[163] *Vluchtelingenbeleid*, above n60, 8.

[164] Ibid. Following criticism from UNHCR against some of the conclusions of the policy brief, the Court of Amsterdam called for a review. The government rejected this request on the basis that its original brief is still reliable. Because the Dutch 1F policies are now internationally renowned, it also doubts the reliability and objectivity of the sources it would need to consult: Wijngaarden, above n101.

[165] See eg, Geoff Gilbert, above n7, 474; ACVZ, above n76.

[166] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 3 and 10 (entered into force 2 September 1990). See eg, Geoff Gilbert, above n7, 474; ACVZ, above n76.

[167] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, p29.

[168] Ibid.

[169] Ibid, 30.

[170] See also Michael Bliss, above n101, 100.

[171] Ibid. See also Michael Kingsley Nyinah, above n45.

[172] *The Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31(1) (entered into force 27 January 1980). Hereafter: VCLT.

[173] *Refugees Convention,* above n3, preamble.

[174] *UNHCR Handbook*, above n14, para 149.

[175] VCLT, above n172, art 31(3)(a).

[176] Michael Kingsley Nyinah (above n45, 306) does not agree that the good faith requirement can be met when subsequent practices clearly go against the grain of earlier practice.

[177] See appendix 1.

[178] Another 180 excluded persons to whom article 3 ECHR does *not* apply also reside in the Netherlands illegally. This issue, however, is outside the scope of this paper.

[179] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 18-19.

[180] Report to Parliament (Tweede Kamer) 2008, above n82, 22.

[181] Ibid, 23. No legal basis exists, for instance, for the extradition for crimes of genocide, crimes against humanity and war crimes committed in non-international armed conflict: Explanatory Memorandum, above n58, 8-9.

[182] Report to Parliament (Tweede Kamer) 2008, above n82, 23.

[183] Under the Genocide Convention, for instance, only the passive and active nationality principles apply: Explanatory Memorandum, above n58, 2.

[184] See e.g. *Rome Statute,* arts 24.1 and 17.1.d.

[185] See eg, Werhard Werle et al, *Principles of International Criminal Law* (2005), 63.

[186] For example, crimes against the peace and crimes against humanity (Article 1F(a)) and many potentially 'serious non-political crimes' (Article 1F(b)) are not covered: Nina Larsaeus, above n7, 82.

[187] Ibid.

[188] See eg, J.C. Hathaway, above n9, 21.

[189] See eg, Report to Parliament (Tweede Kamer) 2008, above n82, 15-16.

[190] See, e.g. Joan Fitzpatrick, above n33, 280.

[191] See e.g. B. Swart, 'Vluchtelingenrecht en internationaal strafrecht: Strafrechtelijke vervolging van verdachten van ernstige mensenrechtenschendingen in Nederland' (2008) 24 *Nieuwsbrief Asiel- en Vluchtelingenrecht (NAV)* 6, 428-429.

[192] Other factors precluding removal are the political offence exception to extradition and other limitations in extradition law: Jane McAdam, above n25, 235.

[193] See European Commission Working Document, 'The relationship between safeguarding internal security and complying with international protection obligations and instruments', 05.12.2001, COM (20010), 13: in Nina Larsaeus, above n7, 75-76. See also Geoff Gilbert, above n7, 469.

[194] See section 3.2.

[195] See eg, Jane McAdam, above n25; Nina Larsaeus, above n7, 75.

[196] See *EU Qualifications Directive*, above n67, art 17(1).

[197] ACVZ, above n76, 21.

[198] Nina Larsaeus, above n7.

[199] Report to Parliament (Tweede Kamer) 2008, above n, 82.

[200] The Government defines "a great number of years" as a period of at least ten years from the day of the asylum application: *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 26.

[201] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 26.

[202] Report to Parliament (Tweede Kamer) 2008, above n82, 25.

[203] *Vluchtelingenbeleid*, above n60, 9.

[204] Sr, art 197.

[205] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 3.

[206] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 24.

[207] See also Amnesty International, above n79, 3.

[208] ACVZ, above n76, 21. However, in a case criticised by the ECHR, an asylum seeker from the Democratic Republic of Congo to whom Article 3 ECHR applied was prosecuted for remaining in the Netherlands while knowing that he was declared unwanted: See Report to Parliament (Tweede Kamer) 2008, above n82, 24.

[209] Ministry of Justice, Asiel: Pardonregeling en huisvestingstaakstellingen http://www.justitie.nl/onderwerpen/migratie/asiel/pardonregeling/ at 29 May 2010.

[210] Elsevier, 'Gemeente blijft uitgeprocedeerde asielzoekers opvangen', 11 December 2009, available: http://www.elsevier.nl/web/Nieuws/Nederland/253050/Gemeente-blijft-uitgeprocedeerde-asielzoekers-opvangen.htm?rss=true at 29 May 2010.

[211] See Geoff Gilbert, above n7, 474.

[212] Ibid, 475.

[213] Report to Parliament (Tweede Kamer) 2009, *Rapportagebrief opsporing en vervolging internationale misdrijven 2008*, Ministry of Justice, 19 May 2009, 4-9 http://www.justitie.nl/images/Rapportagebrief%20opsporing%20en%20vervolging% UNTS 20internationale%20misdrijven%202008_14578_tcm34-192595.pdf at 17 January 2010; Explanatory Memorandum, above n58, 2.

[214] Ibid.

[215] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 32-35.

[216] Ellies van Sliedrecht, 'International Crimes before Dutch Courts: Recent Developments' (2007) 20 *Leiden Journal of International Law* 13, 895-908.

[217] Joan Fitzpatrick, above n33, 292.

[218] E.S. Vargas, above n20, 58.

[219] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4, 5.

[220] Ibid, 39.

[221] *UNHCR Guidelines*, above n14, 3-4.

[222] K. Wouters, above n42, 388.

[223] See UNHCR, 'Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practise Violence', above n. 63, paras. 18 and 19: in Gilbert, above n7, 472-3.

[224] *UNHCR Handbook,* above n14, para 157.

[225] *EU Qualification Directive*, above n67, preamble, para 8.

[226] ACVZ, above n76, 38.

[227] *UNHCR background note*, above n41, para 22.

[228] Jane McAdam, above n25, 234.

[229] J.C. Hathaway, above n26.

[230] ECHR, above n27, art 1.

[231] Jane McAdam, above n25, 246-250.

[232] See also ACVZ, above n76, 39; ECRE, above n101, 284.

[233] See, e.g. the United Kingdom's 'exceptional leave to remain' and France's humanitarian status: in Sibylle Kapferer, above n86, 219.

[234] See also ACVZ, above n76, 3.

[235] K. Wouters, above n42, 391.

[236] *Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag*, above n4.

[237] Rechtbank Rotterdam (7 March 2004) LJN AO7287, Parket#: 10/000050-03.

[238] Rechtbank Den Haag (14 October 2005) LJN AV1163, Parket#: 09/751004-04.

[239] Rechtbank Den Haag (14 October 2005) LJN AU4373, Parket#: 09/751005-04.

[240] Rechtbank Den Haag (25 June 2007) LJN BA7877, Parket#: 09/750001-06.

[241] Rechtbank Den Haag (24 July 2007) LJN BB0494, Parket#: 09/750009-06 + 09/750007-07.

[242] This list may not be exhaustive.

[243] Rechtbank 's-Gravenhage (16 October 2001) Parketnummer RT. EX.01.

[244] *The Prosecutor v. Simon Bikindi* (2008) ICTR-01-72-T, 16.

[245] Rechtbank 's-Gravenhage (11 May 2004) Parketnummer UTL-1-2004.004.402.

[246] *The Prosecutor v. Ephrem Setako,* Case No. ICTR-04-81-T, summary judgement, para22.

[247] For an up-to-date account, see www.ictr.org.

[248] Landelijk Parket, 'Suspect of war crimes may be extradited to Bosnia' (Press Release, 5 June 2009) Landelijk Parket http://www.om.nl/onderwerpen/oorlogsmisdaden_0/rechtszaken_per_land/@151055/verdachte_van_0/ at 12 January 2009.

[249] Immigratie en Naturalisatiedienst (IND): in Vluchtelingenwerk Nederland, *Vluchtelingen in Getallen* (2009) http://www.vluchtelingenwerk.nl/pdf-bibliotheek/VLUCHTELINGEN_IN_GETALLEN_2_copy.pdf at 9 May 2010.