



# Alleged war criminals in the Netherlands: Excluded from refugee protection, wanted by the prosecutor

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## Abstract

On the basis of Article 1F of the Refugee Convention, alleged perpetrators of international crimes can be excluded from refugee protection. This paper explains why the Netherlands – which is among the countries that apply Article 1F most actively – has, despite administrative commitment, so far successfully prosecuted only 4 out of approximately 800 excluded individuals. On the basis of an analysis of 1F files and interviews with policy makers, representatives from the National Prosecution Office and investigators, we identify the most relevant legal and practical challenges. Although domestic prosecution of suspects of international crimes is already complicated in itself, this article presents a number of additional factors that make prosecuting excluded persons even more challenging.

## Keywords

1F exclusion clause, prosecution, universal jurisdiction, war crimes

## Introduction

An important field of criminological studies emerging these days deals with the complexities of crime and crime control in a globalized world. In this body of literature authors typically discuss, and critically reflect on, (inter)national policy developments in the war on terror, immigration control, the fight against transnational (organized) crime and cybercrime (Aas, 2013; Jaishankar and Ronel, 2013; Mullard and Bankole, 2007; Pakes, 2012; Stumpf, 2006). Surprisingly little attention, however, has been given to

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how law enforcement agencies and other institutional bodies in this increasingly globalized world deal with (the threat of) possible war criminals, *genocidaires* and other perpetrators of international crimes entering their territory. This lacuna is particularly striking because, over the last decade, major legal and policy developments have taken place in this regard and an increasing number of European and North American countries, in particular, in the context of so-called 'no safe haven policies' have been trying to identify alleged perpetrators of these crimes and exclude them from refugee protection.<sup>1</sup> Additionally, with the creation of the International Criminal Court in 2002, many countries have decided to prosecute the alleged perpetrators of war crimes, crimes against humanity and genocide residing in their territory.<sup>2</sup>

If a person enters the European Union and 'serious reasons for considering' that he has been involved in the commission of war crimes and crimes against humanity arise, Article 1F of the Refugee Convention can be invoked to exclude him from refugee protection.<sup>3</sup> The European Council recited, in its Decision 2003/335/JHA of 8 May 2003, that:

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

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

## File analysis

At our request, the IND provided a list of 1498 file numbers of asylum seekers who, according to its administrative system, were associated with Article 1F and had had their asylum requests processed between January 2000 and November 2010. This list contained a total of 67 nationalities; with 720 files, Afghan nationals constituted the biggest

group by far. With the file numbers in hand we gained access to the corresponding digitalized copies of the files in IND's administrative system and identified files of individuals who had received a 1F decision ('beschikking') that was definite in the sense that it was not revoked or had not (yet) been successfully appealed at the moment of data collection (November 2010–February 2011). We identified 745 definite decisions, of which 448 related to Afghans and 297 to non-Afghans. Considering the heavy workload and anticipated homogeneity of the Afghan group, which will be explained further on, we decided to take a systematic sample ( $n = 61$ ) of the Afghan files. The 297 non-Afghan and 61 Afghan files were scored and analysed with the help of three research assistants.

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

Files of 1F-excluded persons typically contain hundreds of pages with a wide range of documents, ranging from extensive reports of the different asylum hearings and letters from legal representatives, to country reports from the Ministry of Foreign Affairs and non-governmental organizations (NGOs) and court files. The fact that information most relevant to the study was not always clearly listed in IND's registration system often made scrolling through the large number of documents necessary. Coupled with the complexity of the files and the limitations of the registration system, this made determining the (then) current status of a decision both time consuming and at times difficult. Whenever information from the file analysis is used, reference will be made to the file codes used for internal communication such as '(J6)' or '(C5)'.<sup>4</sup>

## The application of 1F in the Netherlands

In the Netherlands, the applicability of Article 1F is considered within the context of the usual refugee status determination procedure. The *Vreemdelingencirculaire* (Aliens Manual) 2000 determined that the organization responsible for status determination is the IND. Since 2001, if any indications arise during an initial asylum hearing that Article 1F might be applicable, officers of the IND refer the case to a specialized '1F unit'. Current Dutch policy with regard to the application of Article 1F originates from a letter to parliament from the State Secretary of Justice of 28 November 1997,<sup>5</sup> which mentions three guiding principles: Article 1F is to be interpreted restrictively; at the same time, the opportunities to apply it must be exploited to the utmost; and, finally, further consequences are to be connected to any exclusions made on the basis of 1F.

In line with the first principle, Dutch administrative courts have ruled that the arguments for applying Article 1F must meet high standards.<sup>6</sup> Until 1998, 1F was indeed applied rarely: the State Secretary's letter mentions that roughly 30 exclusion decisions were issued. Of those, the decision was appealed in 11 cases, in 4 of which the court upheld the decision.<sup>7</sup> The State Secretary's letter marked a change in attitude from a prioritization of the first principle to the second. After 1997, the number of invocations

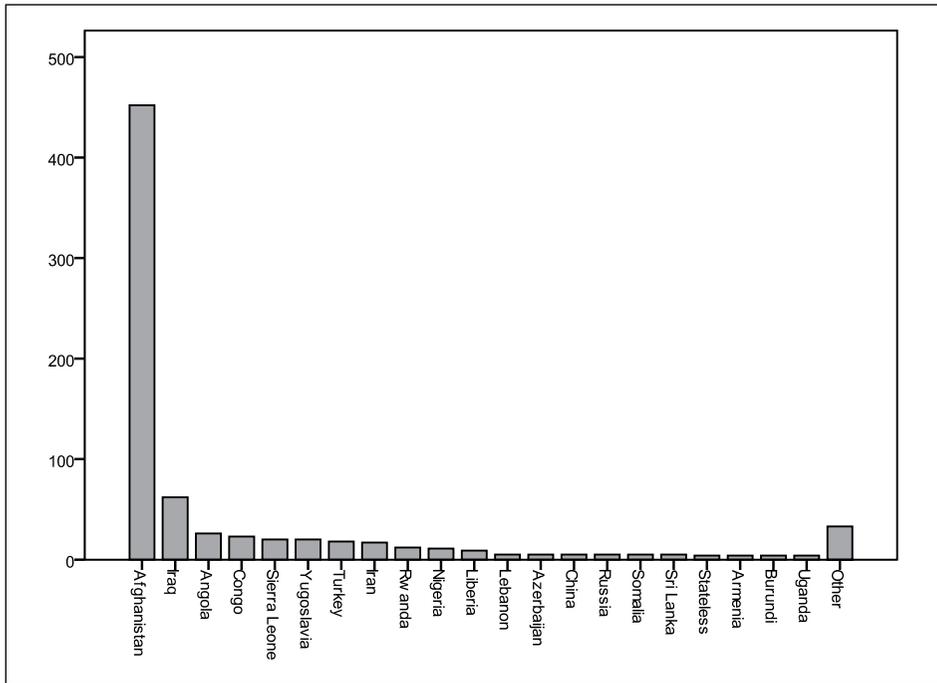
increased rapidly: between 1997 and 2011, Article 1F was invoked against 810 persons, that is, an average of about 54 times a year.<sup>8</sup> This seems a lot compared with other countries, although few states publish or even record the number of 1F decisions they issue. During a conference regarding exclusion policies in June 2011<sup>9</sup> in which 13 states participated, it transpired that, between 2006 and 2011, their ranking order in terms of the number of exclusion decisions, from high to low, was the UK, Canada, the US, France, the Netherlands, Germany, Belgium, Sweden, Norway, Australia, Denmark, Ireland and New Zealand. Although this suggests that the number of 1F exclusions in the Netherlands is probably not more than average, this picture is biased because most of the exclusion decisions were issued before 2006 (93 percent of the analysed decisions concerning Afghan nationals were issued before 2006; 79 percent of the decisions regarding non-Afghans were issued before 2006). Regarding the country of origin of the excluded persons, Figure 1 shows that the majority of excluded persons in the Netherlands came from Afghanistan (448 individuals), followed by Iraq (62), Angola (26), Congo (23), Sierra Leone (20), the former Yugoslavia (20), Turkey (18) and Iran (17).

Because Dutch courts lack competence over the 'serious non-political crimes' listed under sub (b) of Article 1F since they are, by definition, committed outside the Netherlands and, in principle, are not subject to universal jurisdiction, ideally the cases in which Article 1F(b) was applied are excluded from the analysis. It turns out that in most cases, however, both sub (a) and (b) are deemed applicable because most of the crimes listed under sub (a) are understood to constitute 'serious non-political crimes' under sub (b) as well (see Article 6.2.8. of the Dutch Aliens Manual 2000 C(2)). Therefore, we distinguished between cases in which 1F(a) is deemed applicable as opposed to cases in which it is not.<sup>10</sup> Of the 297 definite decisions concerning non-Afghans, 1F(a) was deemed not applicable by the IND in 48 cases (16 percent). In relation to Afghans this was true in only 1 out of the 61 decisions in the sample (1.6 percent). In 3 cases, it was not clear from the file whether they belonged to the first or second category. These 52 cases were not included in the analysis that follows.

### *The interpretation of Article 1F in Dutch policy*

Although 1F is seen to stand at the crossroads of criminal law and refugee law, it is important to note that assessments considering the possible application of Article 1F by the IND are made within the framework of administrative law. Concepts familiar in criminal law that strengthen the position of a criminal suspect, such as the presumption of innocence and the availability of defences, are absent or interpreted differently in refugee law.<sup>11</sup> Discussing these differences in detail is outside the parameters of this article, but two elements stand out that need some elaboration in order to understand how 1F is interpreted in Dutch policy.

First, the 'serious reasons for considering' standard poses a lower threshold for assuming involvement in the crimes listed under 1F than the 'beyond reasonable doubt' threshold posed by criminal law in common law systems (UNHCR, 2003: 38). The serious reasons do not have to be substantiated with criminal evidence, but they have to be carefully motivated (UNHCR, 2003). Second, in order to establish whether there are 'serious reasons' to believe that someone has been involved in the crimes mentioned



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

in Article 1F, the IND applies the *personal and knowing participation* test, developed in Canadian jurisprudence.<sup>12</sup> This test is used to assess whether an individual had, or should have had, knowledge of the crime that was committed, and whether he has personally participated in it. Knowledge of the crime is understood in such a way that membership of an organization that is, according to influential reporting, involved in the widespread or systematic commission of 1F crimes can be reason enough for establishing ‘knowing participation’, because it is deemed unlikely that members of the organization could remain unaware of such involvement.<sup>13</sup>

Personal and knowing participation are also assumed if a person belongs to a category of persons that the Minister of Justice has determined falls within Article 1F, unless the applicant can show that his case represents a ‘significant exception’; here, the burden of proof is reversed. A ‘categorical exclusion’ such as this, for instance, has been in place for persons who have worked in certain positions in several designated Afghan organizations. This explains, as noted previously, why the great majority of the subjects of this study are Afghan nationals. In the case of the KhAD/WAD security services, for instance, every non-commissioned officer and officer who has served in the organization who applied for asylum in the Netherlands was excluded on the assumption that he had, in order to be promoted to the rank of non-commissioned officer or higher, necessarily taken part in arrests, interrogations, torture and executions, to show his commitment to the regime.<sup>14</sup> The file analysis shows that 72 percent of the individuals in the sample of Afghan applicants had worked as a (non-commissioned) officer for the KhAD/WAD.<sup>15</sup>

## Extradition of excluded persons

On several occasions the Dutch government has stressed that the consequences connected to the invocation of 1F should *inter alia* consist of criminal prosecution on the basis of universal jurisdiction.<sup>16</sup> By explicitly referring to the *aut dedere aut judicare* principle of international law in his 1997 letter, the State Secretary of Justice suggested there is even an international obligation resting on the Dutch authorities under several international treaties to take action – in the form of extradition or adjudication – against individuals to whom 1F is applied. 1F crimes can indeed be seen to fall under this obligation, although it must be noted that not all manifestations of the crimes under 1F are subject to it, and that the obligation does not extend beyond submitting the case to the competent authorities for ‘the purpose of prosecution’ (Larsaeus, 2004: 71; Rikhof, 2012: 461–2). The obligation under international law to prosecute or extradite people to whom Article 1F is deemed applicable is therefore limited.

Whether there is an obligation or not, the Dutch authorities have committed themselves to ensuring that the Netherlands is not a ‘safe haven’ for excluded persons.<sup>17</sup> Therefore, to be consistent with Recital 7 of EC Decision 2003/335/JHA, all files of asylum applicants against whom 1F is invoked are submitted to the public prosecutor, who initially reviews whether excluded persons can be extradited and prosecuted elsewhere. Extradition – understood here as either transfer to another state or surrender to an international criminal tribunal – is difficult for mainly two reasons. First, extradition to a state almost always requires a bilateral or multilateral instrument and can occur only at the request of the state in which the crime was committed (Rikhof, 2012). Second, the reasons that extradition requests are refused often revolve around expected human rights violations in the receiving state and, in particular, the right to a fair trial.<sup>18</sup> So far, only one excluded individual has been extradited (to Bosnia).<sup>19</sup> Surrender to international criminal courts does not occur on a vast scale either. As Rikhof (2012) points out, although human rights concerns are less likely to be an issue with surrender in this sense, the policy, mandate and practical limitations of these courts limit the scope of their activities and jurisdiction. In the Netherlands, for example, so far only two people against whom Article 1F was invoked have been surrendered to an international criminal tribunal (both Rwandan nationals, to the International Criminal Tribunal for Rwanda (ICTR)).<sup>20</sup>

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

## Prosecution of excluded persons

If extradition or transfer is not possible, the prosecutor will then assess which 1F files are to be sent to the specialized international crimes team of the police which carries out the investigations. In principle all the files would qualify for (further) investigation, as the former Dutch Minister of Justice, Hirsch Ballin, in 2006 emphasized that the application of Article 1F is about ‘more than merely a suspicion of 1F crimes’. The Minister also stated that the threshold for applying Article 1F is somewhat ‘between’ suspecting and

proving.<sup>21</sup> Although many lawyers would most probably be very reluctant to compare thresholds of administrative law with criminal law, this suggests that the ‘serious reasons for considering’ threshold, according to the Minister, can be regarded as being at least equal to criminal suspicion, and maybe more (Van Wijk, 2011: 320). That they are de facto treated as criminal suspects is reflected in the practice of submitting every 1F file to the prosecutor.

So far in the Netherlands only four excluded asylum applicants (0.5 percent) have been irrevocably convicted for committing international crimes.<sup>22</sup> Although this number may seem low, there are few indications that other European countries have been any more successful. In the UK, Germany or France for example, the total number of convictions on the basis of universal jurisdiction is even lower (Rikhof, 2012: 465). In this section we will discuss why the domestic prosecution of excluded persons is such a challenge.

### *Challenges to the domestic prosecution of suspects of international crimes*

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

*The passage of time.* The basis for the extraterritorial prosecution of international crimes is universal jurisdiction. Although the *aut dedere aut judicare* obligation may extend to the crime of torture, genocide and war crimes, jurisdiction for such crimes is not self-evident. In line with the jurisprudence of the Dutch Supreme Court,<sup>23</sup> domestic courts in the Netherlands can claim jurisdiction when the perpetrator is present on Dutch territory. Until recently, however, this was true only with respect to war crimes committed after 1952 and crimes of torture committed after 1989, when the War Crimes Act and the Torture Convention Implementation Act respectively came into force (Van der Vlugt and Van Zadelhoff, 2013: 183). The International Crimes Act (Wet Internationale Misdrijven, WIM), which came into force on 1 October 2003, expanded the reach of Dutch jurisdiction to cover crimes of genocide and crimes against humanity outside the Netherlands by and against non-nationals that were committed after that date. On 1 April 2012, a law came into force that further expanded this reach with respect to genocide, by making the broad jurisdiction of Art. 2 WIM apply retroactively to the Genocide Convention Implementation Act, adopted in 1970.<sup>24</sup> Before this law came into force, Dutch courts had no competence to prosecute excluded individuals associated with genocide committed before 1 October 2003 unless they could be prosecuted on charges of war crimes or torture, as happened in the case against Joseph Mpambara (Van den Herik, 2009a). Besides this legal challenge, the passage of time also restricts the prosecutor’s ability to gather

evidence in order to establish individual criminal liability for these crimes. International crimes prosecutions have so far shown that the main source of evidence in such cases is witness testimony, because documentary and forensic evidence are often unavailable (Combs, 2010: 12–14). Gathering reliable testimonies in relation to international crimes is already complicated by trauma, language barriers and cultural issues (Combs, 2010; Witteveen, 2010). With the passage of time the chance of finding reliable witnesses who may have died or moved away from the crime scene decreases, as does the reliability of witness testimony.

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

*Access to, cooperation of, and safety in the country of origin.* Other practical barriers that typically hinder the domestic prosecution of international crimes on the basis of universal jurisdiction are access, cooperation and the safety restrictions that exist in the countries where the alleged crimes were committed. The crucial access to witnesses often depends on the willingness of a state to cooperate with criminal investigations on its territory and the degree to which the safety of witnesses and/or investigators can be guaranteed (REDRESS/FIDH, 2010: 23–6). Access to witnesses also depends on the availability of, and access to, (reliable) interpreters, who are indispensable in gathering testimony. According to a representative of the prosecution office, the prosecution of suspects from countries to which the prosecutor has no access or where the investigators cannot work in safety will therefore be put aside, unless there are other ways of building the case or until these circumstances change.<sup>25</sup>

Our file analysis illustrates that most of the excluded persons typically come from countries where access and safety issues limit the possibility of conducting proper investigations. Countries such as Afghanistan, Congo and Iraq for example have in recent years been subject to wars and an overall situation of insecurity. In Karstedt's (2012: 505) Violent Societies Index 30 of extremely violent societies, Iraq, Afghanistan and Congo, for instance, were ranked numbers 1, 2 and 11 respectively in the period 2000 to 2009. Although other countries of origin have been relatively safer, their governments can often be considered uncooperative and not very reliable. Angola, for example, issued a general amnesty in 2002 and makes no effort at all to prosecute any alleged war criminals (Van Wijk, 2012); the likelihood that the authorities would assist Dutch investigators in doing so is very low indeed. The same argument goes for Afghanistan, which also has several amnesty laws in place. A country that, according to a representative of the

prosecution office, has over the years proven to be accessible, safe and cooperative in Rwanda. In addition there is extensive information on Rwanda available from ICTR prosecutions, which forms a good starting point for criminal investigations. These factors, in combination with the fact that Rwandan authorities and NGOs actively lobby and push for prosecutions, could partially explain why successful prosecutions on the basis of universal jurisdiction in Europe relatively often involve (former) Rwandan nationals.

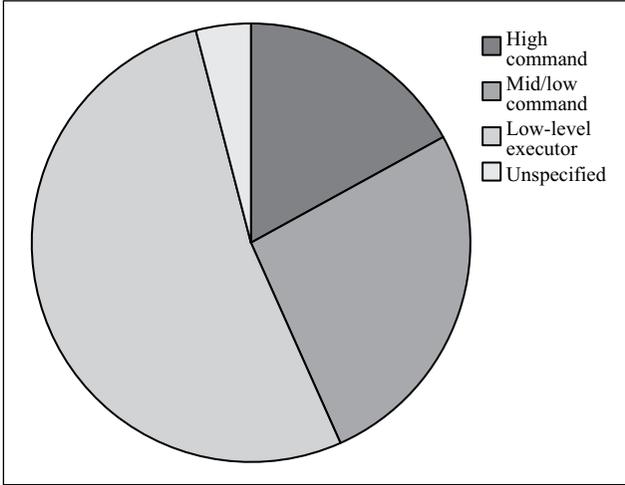
*Position and reputation.* Especially when time has passed, the higher a suspect's position or the bigger his reputation, the greater the chances that investigators can find witnesses who recognize or are able to remember the perpetrator of the crime. Rank and notoriety matter. It is easier to identify witnesses who can testify about the acts of a well-known (local) politician, a general or rebel leader than those of a regular foot soldier. The four convictions of excluded asylum applicants in the Netherlands confirm this to be relevant: the Afghans Hesam and Jalalzoy were, respectively, the former director of the KhAD and the former director of the KhAD's interrogation department, and the Congolese Sébastien Nzapali, commander of the Garde Civile in Matadi, had an infamous reputation among the population and within the Garde Civile as the Roi des Bêtes (King of the Beasts).<sup>26</sup> Being part of an established family of traders and the son of a former mayor, Joseph Mpambara was also well known locally.<sup>27</sup>

Our analysis ranges from people in the lowest ranks, such as foot soldiers who have fought for the Uganda People's Defence Force or UNITA's rebel force in Angola, to high-level Afghan provincial governors and Rwandan politicians. If we make a distinction between high command, mid- to low-level command and low-level executors, however, we can see clear differences between non-Afghan and Afghan cases. Whereas the majority of non-Afghans were low-level executors (Figure 2), Afghans predominantly held the higher ranks (Figure 3).<sup>28</sup>

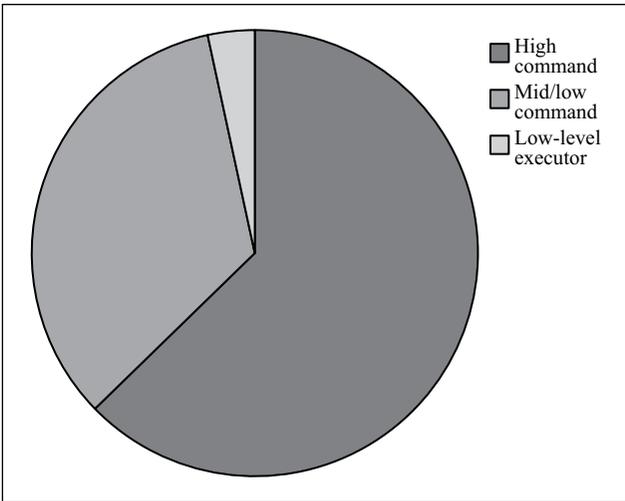
Of the group of non-Afghan low-level executors, the file analysis shows that about one-third are believed to have played a facilitating role rather than having been directly involved in the commission of crimes. It would be extremely hard, from a prosecutor's perspective, to allocate individual criminal responsibility to members of this group.

### *Problems specific to the domestic prosecution of excluded persons*

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



**Figure 2.** Type of function that the excluded person is associated with, of non-Afghan nationality.



**Figure 3.** Type of function that the excluded person is associated with, of Afghan nationality.

Instead, 1F exclusions typically start with, and are largely based on, information provided by the asylum applicants themselves during their interviews with the IND and might typically start, for example, when an applicant claims to have worked for a certain organization which is believed to be responsible for having committed serious crimes. A second type of source upon which the exclusion decisions are usually based is ‘authoritative’ reports that describe the activities of the organization that the applicant claimed to have worked for in general terms. If these two sources – the information stemming from

the asylum interviews and the authoritative reports – do not contain many specifics about the alleged crimes, or their credibility or reliability is questionable, this could seriously hinder the successful prosecution of excluded persons.<sup>29</sup>

*Accounts during asylum interviews.* When officers of the IND have indications that Article 1F might apply to a certain applicant, they refer the case to the 1F Unit. This unit conducts additional interviews aimed at establishing whether there are serious reasons for considering that someone has personally *and* knowingly participated in the crimes included under 1F. Through these interviews, the IND tries to determine the level of the applicant's involvement in the alleged crimes. In particular, the statements made during the first interviews – when applicants may not have been aware of the existence of Article 1F – are very important in establishing whether 1F applies. This is especially true for those applicants who can be categorically excluded by merely stating that they worked, for instance, as a (non-commissioned) officer for the KhAD/WAD. For prosecution purposes, however, such statements offer little basis. Of the excluded Afghans associated with the KhAD/WAD, 95 percent actually denied having had any personal involvement in the crimes the security services – and therefore they themselves – were associated with.

The majority (54 percent) of the excluded non-Afghans had (initially) admitted during the asylum interview that they had been personally and directly involved in 1F crimes, for example by having killed civilians in times of war or by facilitating acts of torture. Later on in the asylum procedure, 27 percent also maintained this position; in most of these instances, the applicants argued that they had acted under duress or out of self-preservation. Some Angolans, for example, claimed to have joined the UNITA rebel forces as teenagers after their families were killed (J15, J39). Other applicants from Angola (J1) and Congo (C7, C8) argued that they were forced to take drugs before they participated in 1F crimes. Almost 20 percent of the applicants denied their involvement in crimes later on, claiming, for instance, that their accounts had been mistranslated (J49), or that they had believed that confessing their crimes would help their application (M84) or that they had lied because they did not know what 1F was (J77, LE9, LE24); 7 percent admitted to the acts but denied criminal responsibility for them, claiming to have acted under superior orders (for instance an Iraqi who was given the order to fire SCUD rockets at random villages in Israel and Iran, LI26) or stating that the acts were legitimate in the context in which they occurred – a man from Congo Brazzaville who claimed to have killed one person out of self-defence and carried out the execution of another, which had resulted from a 'fair trial' (C5), a Russian army unit commander who ordered his units to make sure that no one left the village of Samashki while other forces committed acts of ethnic cleansing (C113) or a man from the former Yugoslavia who denied the illegality of his treatment of prisoners of war (J84).

Dutch courts have accepted the use of asylum accounts in criminal procedures.<sup>30</sup> On the face of it, one might expect self-confessed accounts about involvement in serious crimes to be a very good starting point for prosecution; however, it should be taken into account that opportunity-seeking asylum seekers may have a vested interest in making things up (see, for example, Neumayer, 2005; Van Wijk, 2010). It cannot be ruled out that applicants who are unaware of the existence of Article 1F might embellish or fabricate stories about defection or rebellion, hoping that this will convince immigration

officials that they risk persecution upon return and that it will thus increase their chances of obtaining refugee protection. Our file analysis contains several examples that suggest that applicants exaggerated or even fabricated their role in organizations and crimes. One Nepalese applicant (J129), for instance, alleged that he had been a member of the Maobadi, a Maoist rebel group, and claimed to have witnessed a great number of attacks in a certain region at a given time. The IND noted that the number and scale of the alleged attacks did not correspond with what was known of the region at that time. The man also claimed to have been involved in an attack in a particular region of the far east of Nepal, but this region was not known as an area where the Maobadi were active. In addition, he seemed to know little about the internal structure of the Maobadi. Despite the fact that he revoked his statements later on, the IND maintained that Article 1F should still apply. Consistent with established practice in case law, initial statements carry more weight than contradictory statements at a later stage.<sup>31</sup> This means, in practice, that, if an asylum applicant states in the initial hearing that he has committed crimes or belonged to an organization that is believed to have been involved in 1F crimes, there is hardly any way out. In this particular case, the IND argued that, although he may have confused times and places, he mentioned so many incidents in which he was involved that it is likely that his statements were accurate – even though not all of the incidents were known to have taken place. Another man (J111) claimed during his interview to have been involved in the execution of the well-known Guinea Bissauan rebel leader Ansumane Mané in 2000 and was able to provide details about the superior who gave the order. The IND argued that his account was credible because it largely matched the information in an online publication on a well-known French website. This website however, which also made reference to the name of the superior, is publicly available, which begs the question whether the applicant reproduced this information from personal experience or from the very same website consulted by the IND. The accounts given in the above cases may suffice for a 1F exclusion but, for a prosecutor, accounts such as these, from a credibility perspective, may not be a very appealing start for a criminal investigation.

Apart from the possibly untruthful accounts, which are difficult to cross-check, there are also cases – as we have already mentioned above – in which applicants bluntly acknowledged they had told a white lie about being involved in crimes, hoping that this would increase their chances of being granted asylum. We encountered the case of a person (LE24), for example, who claimed to have been the bodyguard of five different warlords in the early 1990s. He said that his units were responsible for the killing of civilians, purely on the basis of ethnicity, and to have been involved in pillaging. He was excluded in 2002. Seven years later – he had remained in the Netherlands throughout this time – he re-applied for asylum, claiming to have fabricated a story during his first application, providing evidence that he had studied in Nigeria and Ghana for most of the 1990s and presenting a passport and references from universities and colleges that proved to be original. At the time of our analysis the procedure was still pending; in the meantime this file has become part of the prosecutor's caseload of 'suspected war criminals'. Again, one should take into account that the available information in cases such as these when an applicant has initially lied about his involvement in crimes is enough for him to be excluded on the basis of Article 1F, but not enough for a prosecutor with few leads to

prosecute successfully. A reliable estimate of the percentage of applicants fabricating stories cannot be given.

*Authoritative reports.* In most cases, information from the interviews is complemented with the authoritative reports from (inter)governmental organizations and NGOs and reports in the media and on the internet. The most frequently used reports are the country reports (the Algemeen Ambtsbericht, AAB) issued by the Dutch Ministry of Foreign Affairs and reports from NGOs such as Human Rights Watch and Amnesty International. From a prosecutor's perspective, the first problem with these sources, be they NGO reports or AABs (which are partially based on NGO reports themselves, ACVZ, 2006: 18), is that they are not specific: they draw general conclusions about possible crimes committed but typically do not provide explicit leads about individuals involved, except perhaps the most notorious. They are, therefore, often not suitable as a basis for starting individual criminal prosecution. A second problem with these sources is that, even if they were more concrete in identifying possible perpetrators, recent history has illustrated that information in governmental and non-governmental reports can be unreliable. In the case against Guus Kouwenhoven, a Dutch national accused of delivering weapons to Charles Taylor, the Court of Appeal ruled that frequent references to the defendant as 'the usual suspect' in reports from governmental and non-governmental organizations were not enough to establish individual criminal liability.<sup>32</sup> More specifically, this case demonstrated that the information that Global Witness, an NGO, had published regarding the alleged complicity of Kouwenhoven was not reliable. As Van den Herik (2009b) concluded:

In terms of using appropriate evidentiary standards, the acquittal of Kouwenhoven . . . sends a serious message to NGOs, such as in this case Global Witness, to be cautious when pointing the accusatory finger to individuals in public reports. Like sanctions committees, NGOs should also be encouraged to explain the evidentiary basis on which they publicly denounce individuals.<sup>33</sup>

Although internationally operating NGOs such as Amnesty International, Human Rights Watch and Global Witness perform extensive and valuable research and are, in many cases, among the few parties actually 'on the ground' in conflict situations, it must be borne in mind that their documentation of human rights violations serves their own specific purposes. Even the most well-established NGOs have an agenda, may be advocacy driven and – often for security reasons – do not always provide substantial or transparent methodological substantiation to support their conclusions. Referring to these reports may suffice to fulfil the conditions of a 1F exclusion, but relying on this information as a starting point for prosecution could very well frustrate a criminal case.

## Conclusion

In this increasingly globalizing world, European governments constantly develop new strategies to react to external threats. A relatively new development is that they actively try to domestically prosecute immigrants who allegedly committed war

crimes, crimes against humanity and genocide in their countries of origin. In this article we have identified the most relevant legal and practical challenges the Netherlands faces in prosecuting individuals who were excluded on the basis of Article 1F(a) Refugee Convention.

We argued that a first problem domestic prosecutors are faced with is that the threshold to exclude someone from refugee protection is much lower than the 'beyond reasonable doubt' criterion needed to hold someone individually liable in criminal law. Further investigations are therefore necessary. An additional problem is that many of the individuals who were excluded between 2000 and 2010 are suspected of having committed crimes in a period with respect to which Dutch courts lack competence, and the passage of time can create many practical problems hindering proper investigation. Furthermore, our data demonstrate that excluded persons typically come from countries that are unsafe and difficult to access and cooperate with. Whereas the excluded Afghans held relatively high positions in the KhAD/WAD, the majority of excluded non-Afghans were low-level executors, which makes finding leads and witnesses very problematic. In addition, 1F exclusions are largely based on information provided by the asylum applicants themselves in combination with authoritative reports. These sources often do not contain any specifics about the alleged crimes, and the credibility and reliability of the asylum accounts and the NGO reports may also be questionable.

Although the European Council in 2003 emphasized the need to investigate and, when justified, to prosecute excluded individuals, this article demonstrates why even the Netherlands, with its specialized prosecution and investigations teams, has such a low success rate compared with the total number of exclusions. Building criminal cases around 1F exclusions demands extremely resource-intensive trajectories that have little chance of success. This begs a number of questions which warrant further (criminological) research. For example, what happens to all the excluded individuals illegally residing in Europe who are not (successfully) prosecuted? Are they deported? If they are not, do they pose a threat to (inter)national security by committing (more) crimes? Or do they, following the line of thinking of Drumbl (2007) and Smeulers (2008) that most perpetrators of international crimes come to commit crimes only in the abnormal contexts of war and conflict, generally continue to live as law-abiding citizens?

The ongoing instability in the **Middle East**, combined with the continuous efforts of European governments to hold perpetrators of international crimes accountable, will in the near future only increase the debate among policy makers on how to deal with 1F-excluded individuals. We believe criminologists can – and should – add to this debate by critically evaluating existing and future laws and policy developments.

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## Notes

1. Refugee protection is understood here as the protection offered by the United Nations Convention relating to the Status of Refugees (hereinafter the Refugee Convention), adopted in 1951.
2. The preamble to the Rome Statute of the International Criminal Court of 17 July 1998 ‘recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.
3. Article 1F reads: ‘The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’ In this paper, the term ‘exclusion’ refers solely to Article 1F; the other exclusion clauses (Articles 1D and E) are not addressed. Whenever mention is made of ‘excluded persons’, that is, applicants who have been denied refugee protection due to Article 1F, for practical reasons the masculine pronoun is used.
4. These denominations have no value other than for the researchers’ recording purposes.
5. *[Kamerstukken]* II 1997/98, 19 637, no. 295, 28 November 1997.
6. District Court of The Hague, 11 April 1997, Awb 97/944, 96/7843.
7. See Parliamentary documents *[Kamerstukken]* II 1997/98, 19 637, no. 295, 28 November 1997, pp. 4 and 7.
8. *[Kamerstukken]* AH-TK-20112012-1607, 20 February 2012.
9. The Intergovernmental Consultations on Migration, Asylum and Refugees’ (IGC) Workshop on Exclusion Policies, 9–10 June 2011, in the Netherlands. See a video of a presentation in which reference is made to the conference and the ranking order at <http://www.you-tube.com/watch?v=SUef16S3m24> (accessed 19 November 2012).
10. Article 1F(c) is not considered to be sufficient in itself to serve as an independent ground for invoking Article 1F in the Netherlands, but can be when it is cited in combination with 1F(a) or 1F(b) (see the State Secretary’s Letter of November 1997 to parliament, note 5).
11. Although the availability of defences in (Dutch) refugee law and international criminal law may be similar, the results are different in that, whereas a successful appeal to a defence in criminal law will probably lead to mitigation of sentence, in refugee law (because it has a binary approach) it will lead to exclusion.
12. Federal Court of Appeal of Canada, 7 February 1992 (*Ramirez v. Canada*), 2 F.C. 306 (C.A.).
13. For a translation of the exact criteria in the Aliens Manual, see Rikhof (2012: 233–4).
14. See the Letter of the Minister of Justice to parliament of 3 April 2000 (TK 1999–2000, 19 637, number 520) and the Ministry of Foreign Affairs’ country report (Ambtsbericht ‘Veiligheidsdiensten in communistisch Afghanistan 1978–1992’ [Security services in communist Afghanistan 1978–1992]) of 29 February 2000, in particular pp. 15, 24–25).
15. Persons in certain positions within the Hezb-i-Wahdat (Islamic Unity Party of Afghanistan) and the Sarandoy (Afghan police) are also categorically excluded. See the letters of the State Secretary of Justice to parliament of 19 December 2000 (TK 2000–2001, 19 673, number 553) and 7 November 2002 (TK 2002–2003, 19 637, number 695). A categorical exclusion has also been in place for high officials of the Iraqi security services and corporals and non-civilian leaders of the Sierra Leonean RUF (see letters of the Minister of Immigration and Integration to parliament of 8 April 2004, TK 2003–2004, 19 637, number 811, and 23 June 2004, TK 2003–2004, 19 637, number 829). The data show that all of these groups are considerably smaller than the group of KhAD/WAD (non-commissioned) officers.

16. See, for instance, the State Secretary's letter of November 1997 (note 5) or [*Kamerstukken*] TK 2007–2008, 31 200 VI, no. 160, p. 4.
17. [*Kamerstukken*] TK 2007–2008, 31 200 VI, no. 160, p. 4.
18. Looking at Rwanda, for instance, for years extradition requests were refused because there was no bilateral extradition treaty and because of humanitarian (most notably fair trial) concerns (Van den Herik, 2009a: 1118; Rikhof, 2012: 470). Because the law was adapted, enabling extradition for crimes of genocide on the basis of the Genocide Convention, and because of investments made in the Rwandan justice system, extradition to Rwanda has recently become much more likely. In fact, on 20 December 2013, the Dutch extradition chamber approved the request for the extradition of Jean Claude I (The Hague District Court, ECLI 2013:18505). This decision, which is being currently appealed, fits in with a trend that began with the first expulsions and transfers from the US, Canada and the ICTR in 2011. It seems, however, that Rwanda is an exception in this respect.
19. The Hague District Court, 5 June 2009, ECLI BI7753.
20. Simon Bikindi (District Court of The Hague, 16 October 2001, 2001 RT.EX.01) and Ephrem Setako (District Court of The Hague, 11 May 2004, UTL-I-2004.004.402).
21. 'De bewijsmaatstaf is als het ware tussen verdenken en bewijzen in'. [*Kamerstukken*] II TK 2006–2007, 30 800 VI, no. 31, p. 3.
22. Two Afghans (Hesamuddin Hesam and Habibullah Jalalzoy were sentenced to 12 and 9 years respectively on charges of war crimes and torture), one Rwandan (Joseph Mpambara, to life imprisonment on charges of war crimes) and one Congolese (Sébastien Nzapali, to 2 years and 6 months on charges of torture). One excluded Afghan, Abdullah F., was acquitted. Besides excluded people, seven people have in recent years been convicted in the Netherlands for international crimes. See Van der Vlugt and Van Zadelhoff (2013: 186, note 66) for a listing of these cases.
23. Criminal Division, 11 November 1997, No. 3717 AB; cited in the State Secretary's Letter of November 1997, see note 5.
24. Law of 8 December 2011, Staatsblad 2011, no. 605.
25. The letter of the Minister of Justice to parliament (TK 2007–2008, 31 200-VI no. 193) of 9 September 2008 describes the process of selecting 1F cases suitable for prosecution and mentions several other considerations, both legal and practical.
26. See this translation of the judgment in his case (LJN: A07178, District Court of Rotterdam, 7 April 2004), URL (accessed 23 September 2014): [http://www.asser.nl/upload/documents/2012041-3T095005-Nzapali%20Judgment%20District%20Court%20Rotterdam%20\(English\).pdf](http://www.asser.nl/upload/documents/2012041-3T095005-Nzapali%20Judgment%20District%20Court%20Rotterdam%20(English).pdf).
27. See the judgment in his case (LJN: BK0520), Chapter 4, Chapter 5 under 83, and Chapter 7 under 6, URL (accessed 23 September 2014): <http://uitspraken.rechtspraak.nl/inziendocu-ment?-id=ECLI:NL:RBSGR:2009:BK0520>.
28. 'Low-level executor' is defined here as the military ranks of sergeant, corporal or private, or comparable positions in semi-military organizations. Also included are people associated with non-military organizations who are not in management positions. Mid- to low-level command includes local governance or the military ranks of (or comparable to) lieutenant and captain. High command is defined as central or regional governance, or the military ranks of (or comparable to) major and higher. 'Unspecified' are cases in which the rank or position was not known or could not be inferred from the file.
29. A third source to which the IND refers in its decisions are personal reports (Individuele Ambtsberichten, IABs), which are composed in a similar way to the AABs. IABs are not referred to very often in the 1F decisions and, if they are, this is rarely done to substantiate conclusions regarding personal involvement in 1F crimes. In the non-Afghan cases, in only

- 8.0 percent is reference made to an IAB, of which 4.7 percent concern personal involvement in 1F crimes. Although reference is made to IABs more often in the assessed Afghan cases (23.0 percent), in only one case (1.6 percent) did the IAB referred to in a 1F decision concern the personal involvement of an individual in 1F crimes.
30. For instance, in the criminal cases against Hesam and Jalalzoy from Afghanistan (Van Sliedregt, 2007). The use of asylum accounts in criminal cases has been criticized by some authors as compromising the right not to incriminate oneself (see, for instance, NJCM, 2002, or Mettraux, 2006).
  31. See Council of State, 23 June 2003, no. 200300240/1 (Kesbir), District Court of The Hague AWB 0a/1813 (Rushdie) and District Court of Maastricht AWB 02/42704 = 03/18329 (Akbari).
  32. The case against Guus Kouwenhoven, Court of Appeal of The Hague, 10 March 2008, LJN: BC6068, 220043306, under 9.5 and 9.6.
  33. Recently, Pre-Trial Chamber I in the case against Laurent Gbagbo before the ICC expressed its concerns about the heavy reliance of the prosecutor on NGO reports, which in their turn rely heavily upon anonymous hearsay evidence. The Chamber notes that such evidence is difficult to corroborate and puts the defence in a 'difficult position'. See ICC-02/11-01/11-432, para. 28 and further via [http://icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc0-2110111/court%20records/chambers/pretrial%20chamber%20i/Pages/432.aspx](http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc0-2110111/court%20records/chambers/pretrial%20chamber%20i/Pages/432.aspx) (accessed 26 January 2014).

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