The issue of non-removable migrants suspected or convicted of serious crimes in the Netherlands

Maarten Bolhuis[1]

March 2015

Draft – Not for publication

Introduction

One of the purposes of the seminar is to come to a comparison on the extent to which selected countries are affected by the issue of non-removable migrants suspected or convicted of serious crimes, and what policy measures exist to deal with this issue. In this paper I will concentrate on the Netherlands and start by defining the problem and mapping its scale and the key characteristics of the 'undesirable and unreturnable' migrants. I will also illustrate some of the dilemma's that come up because of the problem. Subsequently, I will turn to the question what policy measures exist to deal with undesirable and non-removable migrants and how and how often these are applied.

1. To what extent is the Netherlands affected by the issue of non-removable migrants suspected or convicted of serious crimes?

1.1. Key characteristics of undesirable and non-removable migrants in the Netherlands

Legal qualification of undesirability and non-removability

An important and very visible group of undesirable and non-removable migrants in the Netherlands are those who are excluded on the basis of Article 1F of the Refugee Convention and who may not be *refouled* because of human rights obligations the Dutch government is bound by, most importantly, the *refoulement* prohibition of Article 3 of the European Convention on Human Rights (ECHR). Since 2002, the Dutch government has applied a policy of declaring individuals excluded under Article 1F of the Refugee Convention *persona non grata* on the basis of Article 67 *Vreemdelingenwet* (Aliens Act), on the grounds that the excluded individuals posed a threat to public order or to national security (Art. 67(1)(c)) and/or in the interest of international relations (Art. 67(1)(e)).[2] In this way the incentive to leave the Netherlands was maximized, because the individual is ordered to leave the

[1] PhD candidate and lecturer, fellow at the Center for International Criminal Justice (www.cicj.org), Vrije Universiteit Amsterdam, junior researcher in the Escaping Justice Project. Email: m.p.bolhuis@vu.nl.

[2] Minister of Justice, Kamerstukken 30800-VI-78, 21 March 2007, page 9.

Netherlands within 24 hours after the declaration. Remaining in the Netherlands while having been declared *persona non grata* is a criminal offence (Art. 197 of the Dutch Criminal Code), punishable by up to six months detention (Reijven and Van Wijk, 2014: 9). In principle, this is true whether someone may be *refouled* or not (ibid.).[3] Since 31 December 2011, when the EU Return Directive 2008/115/ EG was implemented in Dutch legislation, 1F-excluded individuals are no longer declared *persona non grata* as a standard policy. Instead, 1F-excluded individuals currently receive an immediate EU entry ban for a maximum of twenty years on the basis of Art. 66A Aliens Act (ibid.). In accordance with Article 66A(4), entry bans are in principle imposed for a maximum of 5 years, "unless the alien, in the opinion of Our Minister, forms a serious threat for public order, public security or national security." For the same reasons, the Minister may determine that the subject of the entry ban must leave the Netherlands "immediately", on the basis of Art. 62(2) Aliens Act.

A significant number of the individuals excluded under 1F cannot be deported because of the *non-refoulement* principle of international law, which prohibits removing someone to a place where he might face persecution. This is worked out inter alia in Article 3 ECHR and Article 3 of the Convention Against Torture, which prohibit subjecting someone to torture or other inhuman or degrading treatment or punishment.[4] Because of this prohibition, the Dutch government cannot deport (or extradite) someone to his country of origin if he risks to be subjected to torture or other inhuman or degrading treatment or punishment there, nor to other non-member states of the European Union that are not bound by or do otherwise not respect the *refoulement*-prohibition of Article 3 ECHR (Reijven and Van Wijk, 2014: 11). However, an Article 3 ECHR impediment does not lift the duty someone who has received an entry ban has to leave the Netherlands (ibid.).

Next to those cases in which an Article 3 ECHR impediment is acknowledged, there are several other possible reasons for non-removability of undesirable individuals. During an on-going procedure, someone has lawful temporary residence and he is not (yet) undesirable. Deportation can be blocked on medical grounds (Article 64 Aliens Act). Furthermore, there are individuals who cannot be removed because the European Court for Human Rights (ECtHR) imposed an 'interim measure' (Reijven and Van Wijk, 2014: 11). There may also be

[3] However, the Advisory Committee on Migration Affairs, ACVZ (2008: 46) notes that a *persona non grata*-declaration can only serve as a basis for a criminal conviction if the alien realistically has an alternative to stay somewhere outside the Netherlands; see Council of State, judgment of 7 August 2006, 200602402/1.
[4] This prohibition is furthermore laid down in Art. 3 of the European Convention on Extradition 1957, Art. 37A of the Convention on the Rights of the Child 1989, Art. 22(8) of the American Convention on Human Rights 1969, and Art. 7 of the International Covenant on Civil and Political Rights 1966. See *Kindler v Canada*, 1993, UN Human Rights Committee, Communication No 470/1991.

cases in which the applicability of 3 ECHR was not assessed as the individual is believed to have left the country 'with an unknown destination' (*met onbekende bestemming*, MOB) immediately after 1F was applied, but he could still apply for 3 ECHR protection once faced with deportation (ibid.).

Apart from 1F-excluded individuals, the Netherlands is also confronted with other non-removable migrants suspected or convicted of serious crimes. For instance, all migrants convicted of serious crimes (punishable by a three-year prison sentence or more), committed in the Netherlands after their entry may be declared undesirable on the basis of Article 67(1)(b) and receive an entry ban. If they too come from a country to which they cannot be deported, they too can be considered 'undesirable and unreturnable'. I could not find any statistics on this group.

Nationalities and types of crimes

In the Netherlands, Article 1F has been invoked against 920 persons between 1992 and 2014.[5] According to the latest figures, the top five of countries of origin of these 920 individuals are Afghanistan, Iraq, Turkey, Angola and Iran.[6] An analysis of all 1F-decisions between 2000 and 2010 showed that the most prevalent countries of origin among 1F-excluded individuals were Afghanistan (448 individuals), Iraq (62), Angola (26), Congo (23), Sierra Leone (20), former Yugoslavia (20), Turkey (18) and Iran (17) (Bolhuis and Van Wijk, 2015).

The ranking order of countries of origin for 1F-excluded individuals who are non-removable is likely to be slightly different. Here, it is important to note that the Netherlands excludes before it includes. At this moment, Article 3 ECHR protection is for instance not very likely for an excluded individual from Angola or the former Yugoslavia. It is known that the biggest group of undesirable and non-removable migrants are Afghans, as about half of all exclusion decisions taken in the Netherlands concern Afghan nationals and Afghanistan is generally deemed unsafe (for figures, see paragraph 1.2).[7] The overrepresentation of Afghan nationals can – apart from a relatively large influx of Afghans to the Netherlands – be explained by the policy of categorical exclusion, which means that for some nationalities

[5] State Secretary of Security and Justice, Kamerstukken 19637-1808, 14 April 2014, page 14; State Secretary of Security and Justice, Kamerstukken 19637-1952, 3 March 2015.
[6] Ibid..
[7] One of the first deportations of an excluded Afghan to Afghanistan recently sparked a controversy, as nothing was heard from the man after he arrived in Afghanistan. Because of this, members of parliament requested the State Secretary of Justice and Security to suspend all deportations to Afghanistan. The question whether Afghanistan is safe enough to return to differs from case to case, but if more deportations to Afghanistan are on the way, the number of non-removable migrants is likely to decrease significantly.

mere association with a certain position within a designated organization suffices as a basis for exclusion. The largest group to which this categorical exclusion applies are people who held military ranks of non-commissioned officer and officer who has served in the KhAD/WAD security service.[8] Persons in certain positions within the Hezb-i-Wahdat (Islamic Unity Party of Afghanistan) and the Sarandoy (Afghan police) are also categorically excluded.[9] 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.[10] As the 1F-excluded with the Iraqi nationality form the second biggest group among the 1F-excluded, partially also because of the categorical exclusion policy, and Iraq is also deemed unsafe, it is likely that a considerable number of non-removable individuals originates from Iraq. With respect to Turkey, especially 1F-excluded individuals who are believed to be members of the PKK are often non-removable. A new group of 1F-excluded individuals who are generally likely to qualify for Article 3 ECHR protection are Syrians. As the influx from Syria is high at the moment, the number of 1F-excluded individuals is likely to grow. In fact, this group may become one of the bigger groups in the future.[11]

Excluded persons from Angola, the Democratic Republic of the Congo (DRC), Sierra Leone and the former Yugoslavia are typically believed to have committed war crimes in the 1990s while fighting for either government or rebel forces. In most of these cases, Article 1F(a) is applied.[12] Turks and Nigerians form an exception, as they are often solely excluded on the basis of Article 1F(b):[13] Turks because of suspected links with organizations designated as 'terrorist' by the Turkish government, such as Dev Sol or the Kurdistan Workers' Party (PKK); Nigerians, because they are believed to have committed serious crimes as members of radical occult or religious groups, such as the 'Egbesu Boys' and Ijaw youth groups. Excluded individuals from Iran are typically excluded because they allegedly contributed to crimes against humanity in their capacity as employees of secret services or prison security (Bolhuis, Middelkoop and Van Wijk, 2014).

[8] It must be noted that many of them were initially granted asylum.
[9] Letters of the State Secretary of Justice to parliament of 19 December 2000 (TK 2000–2001, 19 673, no. 553) and 7 November 2002 (TK 2002–2003, 19 637-695).
[10] Letters of the Minister of Immigration and Integration to parliament of 8 April 2004, TK 2003–2004, 19 637, no. 811, and 23 June 2004, TK 2003–2004, 19 637, no. 829.
[11] Until 2013, only a handful Syrians have been excluded. In 2014, 10 1F-exclusions concerned Syrians; see State Secretary of Security and Justice, above note 5, 2014, page 19; and above note 5, 2015, page 2.
[12] Thus, there are "serious reasons for considering that [the applicant] 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" (Article 1F(a) of the Refugee Convention).
[13] Here, there are "serious reasons for considering that [the applicant] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee" (Article 1F(b)).

1.2. Scale of the problem

As was noted above, the Netherlands has invoked Article 1(F) against 920 persons between 1992 and 2014. In order to get an idea of the number of 1F-excluded individuals who are non-removable, it is useful to start with mapping the number of excluded individuals who have left the country. Here a distinction needs to be made between individuals who have 'demonstrably' left the country (forced deportation or independent departure), and individuals who are believed to have left the country 'with an unknown destination' (MOB) or have 'not demonstrably' left the country. The overview in Figure 1 shows the number of forced deportations and independent departures from 2008 to 2013. According to figures from the Repatriation and Departure Service (DT&V)[14] a total of 100 1F-excluded individuals has 'demonstrably' left the country between 2007 and 2013.[15]

Figure 1. Forced deportations and independent departures 1F-excluded, 2008-2014[16]

Year	*Number of 1F-invocations*	*1F-cases in caseload DT&V (end of year)*	*Number of forced deportations*	*Number of independent departures*
2008	30	270	5	Unknown
2009	30	210	6	10[17]
2010	20	160	<5	10
2011	30	145	5	<5
2012	40	160	5	5
2013	30	180	5	5
2014	50	170	10	10

Article 3 ECHR blocked deportation in about 180 of 630 cases in the total caseload of the DT&V since 2007, when it started registering this type of information.[18] Thus, about 30% of

[14] See http://english.dienstterugkeerenvertrek.nl/.
[15] State Secretary of Security and Justice, above note 5, page 19.
[16] These figures originate from the Ministry of Justice and Security's annual Reporting Letters on International Crimes. Minister of Justice, *Rapportagebrief opsporing en vervolging internationale misdrijven 2008*, 19 May 2009, no. 5589509/09, page 3; Minister of Justice, *Rapportagebrief Internationale Misdrijven 2009*, 31 May 2010, page 4; State Secretary of Security and Justice and Minister of Immigration and Asylum, *Rapportagebrief Internationale Misdrijven 2010*, 5 July 2011, no. 5702638/11, page 5; State Secretary of Security and Justice, *Rapportagebrief Internationale Misdrijven 2011*, 21 June 2012, no. 220338, page 6; State Secretary of Security and Justice, *Rapportagebrief Internationale Misdrijven 2012*, 13 November 2013, no. 435234, page 5; State Secretary of Security and Justice (2014), *Vaststelling van de begrotingsstaten van het Ministerie van Veiligheid en Justitie (VI) voor het jaar 2015*, 25 September 2014, kst-34000-VI-4, page 9; State Secretary of Security and Justice (2015), *Brief van de Staatssecretaris van Veiligheid en Justitie*, 3 March 2014, kst 19637-1952, page 3.
[17] This figure is not included in the Reporting Letter, but as a total of 60 persons 'demonstrably' left the country between January 2009 and March 2014, about 10 individuals should have left the country independently in 2009.
[18] State Secretary of Security and Justice, above note 5, page 19.

the individuals excluded under Article 1F are non-removable because of an Article 3 ECHR impediment. As Reijven and Van Wijk (2014: 12) note, protection against deportation under Article 3 ECHR is subject to change and can be reassessed at any time. However, individuals that are MOB and not part of the DT&V's caseload may still reside in the Netherlands without the authorities being aware of their whereabouts (Reijven and Van Wijk, 2014: 11). If they reappear on the authorities' radar, they may (still) be non-removable, because of an Article 3 ECHR impediment or for other reasons. In April 2008, about 230 out of the by then 700 1F excluded individuals were labelled MOB (ACVZ, 2008: 22). Between January 2009 and March 2014, 250 individuals are believed to have left the country (60 had demonstrably done so, 190 individuals were labelled MOB). 70 of these 250 individuals were non-removable because of an Article 3 ECHR impediment.[19]

Of the 170 1F-cases in the caseload of the DT&V at the end of 2014, about 56% had the Afghan nationality. In June 2012, the responsible Minister reported that there were about 190 1F-excluded with the Afghan nationality in the Netherlands, of whom 40 were in an on-going procedure, 20 had lawful residence and about 45 were protected from deportation by Article 3 ECHR. In less than 5 cases, deportation was not possible for medical reasons. In another 30 cases, the ECtHR imposed an interim measure.[20]

1.3. Illustration of dilemmas

Because of the combination of an active application of Article 1F in the Netherlands and the human rights obligations the government is bound by, a relatively large number of 1F-excluded individuals – mainly from Afghanistan and Iraq – are undesirable and non-removable, while having been in the Netherlands for up to almost twenty years. Their fate has attracted a lot of media attention and the dossier is a headache for the politically responsible members of successive cabinets. Many of the undesirable and non-removable individuals who have been in the Netherlands for a longer period are supported by their families, different interest groups or by local or national politicians.[21] While the government in many cases has to acquiesce in the presence of 1F-excluded individuals and cannot do much more than regularly reassessing whether an Article 3 ECHR impediment still blocks expulsion,[22] it has also tried to influence the circumstances in countries of origin in order to take away human

[19] Ibid., page 18.
[20] Minister of Immigration and Asylum and State Secretary of Security and Justice, *Letter to parliament*, 1 June 2012, kst-19637-1547, page 2.
[21] Joris van Wijk describes these dynamics in his paper.
[22] State Secretary of Security and Justice, above note 5, page 22.

rights concerns. This happened in particular with respect to Rwanda. The Netherlands has invested significant funds and energy in rebuilding Rwanda's justice system. Although this may have started out as a form of development cooperation, later on these investments have been presented as part of a policy specifically directed at facilitating extradition of 1F-excluded individuals for the purpose of criminal prosecution (Bolhuis, Middelkoop and Van Wijk, 2014). Article 3 ECHR and extradition law requirements blocked extradition to Rwanda for many years. After many of the human rights concerns were taken away, partially because of foreign investments in the justice system, extradition was accorded by inter alia the ECtHR and different states started to extradite suspects to Rwanda. In the slipstream of this process, Dutch immigration services in 2008 started to reconsider all Rwandan cases in which a residence permit was initially granted, which led to the exclusion of a considerable number of migrants from Rwanda who had been in the Netherlands for a number of years, and has also started to expel 1F-excluded individuals (ibid.). However, the case of Rwanda shows that in order for a government to influence circumstances that block *refoulement* in a given country of origin, both governments need to have strong, shared interests.

One of the most notorious undesirable and non-removable migrants in the Netherlands is José Maria Sison, founder of the Communist Party of the Philippines (CPP) in the 1960s, who is also said to have been involved in founding the military wing of the CPP, the New People's Army, which is regarded to be a terrorist organisation inter alia by the US and the EU.[23] He has been living in the Netherlands since 1987 and his repeated requests for asylum and a permanent residence permit have always been turned down. Courts have established that the suspicions of his involvement in criminal activities are well-founded, but cannot lead to the conclusion that there are serious reasons for considering that he is guilty of the crimes listed in Article 1F, and so he is not excluded from refugee protection under 1F. The State Secretary of Justice has decided that, although he qualifies for a residence permit, residence should be refused because there is a "significant interest of the state of the Netherlands", namely the integrity and the credibility of the state in relation to its responsibilities towards other states.[24] Article 3 ECHR blocks removal to the Philippines. In August 2002, the United States and the EU placed Sison on a list of terror suspects, as a consequence of which his assets were frozen and he could no longer get insurances and travel documents. This decision

[23] See http://www.state.gov/j/ct/rls/other/des/123085.htm# and http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=T1yHJ3GBct0lD7G8KCnwRpTQzlqXcNyyHNRH1JjL2vn168xhG771!-1328704561?uri=CELEX:32009R1285.

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

was overruled in 2007; on 30 September 2009 the European Court of Justice ruled that Sison should be removed from the list.

2. Which policy measures to deal with the issue exist in the Netherlands?

The starting point for the Dutch government is that undesirable and non-removable migrants are encouraged to leave. As noted above, 1F-excluded individuals were declared *persona non grata* until 2011, and nowadays are imposed an entry ban. 1F-excluded individuals are not entitled to social allowances and only have access to a minimal level of services, such as legal aid and urgent primary healthcare (Reijven and Van Wijk, 2014: 12).[25] In the previous paragraph, it became clear that a considerable number of undesirable and non-removable migrants stay in the Netherlands, with or without the authorities being aware of their exact whereabouts. There are two ad hoc policy measures that could either lift the applicability of Article 1F on humanitarian grounds if someone is undesirable and non-removable for a considerable number of years, or otherwise end the unlawfulness of his residence in the Netherlands if he finds himself in an exceptional situation. First, there is the durability and proportionality test ('*duurzaamheids- en proportionaliteitstest*'), which was developed in the case law of the administrative branch of the Council of State.[26] If an excluded individual is non-removable for a considerable number of years, this test can be applied to revoke the application of Article 1F, upon request by the excluded individual. As the seriousness of the alleged offence is weighed against actual humanitarian concerns in the Netherlands or the country of origin, it is a kind of 'post-exclusion balancing test' (Reijven and Van Wijk, 2014). According to the State Secretary of Security and Justice, a durable bar to expulsion is assumed when the alien a) has been in the Netherlands for ten years without a residence permit, in a situation where he cannot be expelled to the country of origin because of Article 3 ECHR, b) there is no prospect for change in this situation and c) the alien has made plausible that departure to a third country is not possible. Only when these requirements are met, there is a durable bar to expulsion and only then the proportionality will be assessed. Proportionality will be determined by reviewing whether the alien has made plausible that there are highly exceptional circumstances on the basis of which permanently refraining from granting him a residence permit is disproportional.[27] The 'exceptional circumstances' refer to

[25] For more on deportation, voluntary return and relocation of excluded individuals, I refer to the paper by Joris van Wijk.
[26] Council of State, judgment of 18 July 2007, ECLI:NL:RVS:2007:BB1436; and Minister and State Secretary of Justice (2008), *Notitie betreffende de toepassing van artikel 1F*, 6 June 2008, page 26.
[27] State Secretary of Security and Justice, above note 5, page 21.

a medical or other humanitarian emergency affecting the individual's family life, something that is well established in the Netherlands (Reijven and Van Wijk, 2014: 17).

Second, the Minister of Security and Justice has a discretionary competence to grant a temporary residence permit to an individual who has been refused residence, on the basis of Art. 3(4)(3) *Vreemdelingenbesluit* (Aliens Decree). This competence is not limited to 1F-excluded individuals but can extend to all aliens who have applied for asylum or a residence permit. In those cases that are not regulated by the policy laid down in article 3(4)(1) Aliens Decree, there have to be unique circumstances that relate specifically to the individual and that make that refusal of residence results in an "unintended extraordinary hardness", usually referred to as a 'harrowing' ('*schrijnende*') situation (ACVZ, 2011: 18). The Minister has determined that a high level of integration and a long stay in itself are insufficient to lead to acceptance of residence, and that in addition there have to be compelling humanitarian circumstances (a harrowing situation).

3. How often are these measures applied?

Application of the durability and proportionality test only leads to a residence permit in a limited number of cases. The first requirement – that the person could demonstrably not be expelled due to human rights concerns during at least ten years of uninterrupted stay in the Netherlands – is rarely satisfied because a human rights impediment to expulsion, such as Article 3 ECHR protection, is non-permanent (Reijven and Van Wijk, 2014: 17). To meet the third requirement, the applicant has to show that he has done what he can to depart to a third country. In a case that came to my attention, the IND requested the applicant to ask as many countries as possible to accept him as a resident. The applicant wrote letters to sixteen countries, who all refused him. As soon as the country is aware that someone has been denied asylum, it can be expected that such a request will be turned down.

If durability is accepted, the proportionality part of the test subsequently requires the applicant to show that his case is exceptional. Case law shows that the standard for this requirement is rather high. Circumstances such as having "almost finished a university education", having "no right to housing or income during the waiting period" or a combination of several factors such as suffering from the accusation of being a war criminal, having been a victim of torture and having achieved a high level of integration, among other things, have been found not to be disproportional (Rikhof, 2012: 480). If the number of 1F-exclusions is high, as is the case in the Netherlands, more people will be in a comparable situation where they are undesirable and non-removable at the same time, and it will be more

difficult for the individual to claim that he is in an exceptional situation. However, as the test was specifically developed for non-removable 1F-excluded individuals, determining the proportionality of the consequences of applying 1F for an individual relative to the consequences for other 1F-excluded individuals, has been accepted in case law (Reijven and Van Wijk, 2014: 17).

Until April 2014, in about 10 cases the durability and proportionality test has led to the granting of a residence permit to 1F-excluded individuals with an Article 3 ECHR impediment.[28] Shortly after it was introduced, the ACVZ (2008: 16) warned that the requirements of the test should not be so high that it would in practice be a dead letter. According to the State Secretary, however, the fact that the durability and proportionality test can and does lead to residence permits in some very exceptional cases shows that it is a purposeful policy measure, while the fact that the policy is applied very strictly is justified by the nature and gravity of the applicability of Article 1F.[29]

It is unknown in how many cases the Minister has used his discretionary competence to grant a residence permit to 1F-excluded individuals. Reijven and Van Wijk (2014: 18) report that it happened in at least one case, where the children of a 1F-excluded individual would have been left in the Netherlands without parents would the individual have been expelled. One remark by the State Secretary of Security and Justice at best suggests that the discretionary competence was used in more than one case. In a letter to parliament on the policy on 1F-excluded Afghans, the responsible Minister states that (at that time) "20 individuals (still) have lawful residence on the basis of a residence permit; they were granted a permit on the basis of the discretionary competence or a procedure to revoke their permit is currently pending."[30] Considering the reticence in granting residence permits on the basis of the durability and proportionality test, it however seems safe to assume that the discretionary competence is not used in a great number of cases in which 1F has been applied.

Conclusion

The largest group of undesirable and non-removable migrants in the Netherlands are those who are excluded on the basis of Article 1F of the Refugee Convention and who may not be *refouled* because of human rights obligations the Dutch government is bound by, most importantly those posed by Article 3 ECHR. Next to those cases in which a 3 ECHR

[28] State Secretary of Security and Justice, above note 5, page 18.
[29] Ibid., page 21.
[30] Minister of Immigration and Asylum and State Secretary of Security and Justice, above note 20, page 2.

impediment is acknowledged, there are several other possible reasons for non-removability of undesirable individuals. Deportation can be blocked on medical grounds or because the ECtHR imposed an interim measure. In the Netherlands, Article 1(F) has been invoked against 870 persons between 1992 and 2013. About 30% of the individuals excluded under Article 1F are non-removable because of an Article 3 ECHR impediment. It is difficult to determine how many 1F-excluded individuals still reside in the Netherlands. A total of 100 1F-excluded individuals have 'demonstrably' left the country between 2007 and 2013. Next to this group, there are a significant number of excluded individuals of whom the whereabouts are not known exactly and who may have left the country, but who may also still reside there.

The starting point for the Dutch government is that undesirable and non-removable migrants are encouraged to leave. They are imposed an entry ban or are declared *persona non grata*. For excluded individuals persons who have been undesirable and non-removable for many years or find themselves in an exceptional situation, there are two ad hoc policy measures that could end their being 'in limbo'. First, when there is a durable bar to expulsion and there are highly exceptional circumstances on the basis of which permanently refraining from granting a residence permit is disproportional, a residence permit may be granted on the basis of the durability and proportionality test. Second, the responsible Minister may use his discretionary competence when there are unique circumstances that relate specifically to the individual and that make that refusal of residence would result in a harrowing situation. Until April 2014, the durability and proportionality test has led to the granting of a residence permit to 1F-excluded individuals with an Article 3 ECHR impediment in about 10 cases in total. The number of cases in which the Minister used his discretionary competence is unknown, but unlikely to be significantly higher.

References

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

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

Bolhuis, M.P. & Wijk, J. van (2015), Alleged war criminals in the Netherlands; excluded from refugee protection, wanted by the prosecutor, *European Journal of Criminology*, 12(2): 151-168.

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

Reijven, J. & Wijk, J. van (2014), Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands Are Affected by a Fundamental System Error in International Law, *International Journal of Refugee Law* 26(2): 1-24.