

Prosecution of Persons Excluded for Reason of 1F

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Introduction

The purpose of this paper is to introduce the subject matter of the title by presenting an empirical overview of the attempts at the national level to use criminal prosecutions against persons who have been excluded for the serious crimes set in article 1F of the Refugee Convention (or articles 12.2 and 17.1 of the European Union Qualification Directive).

This general statement is subject to a number of qualifications, clarifications and caveats, the first one of which is the fact there is not always a clear correlation between prosecutions and a 1F background in that the prosecutions discussed in this paper have also been initiated against citizens of the jurisdictions in question (either as a result of citizenship at birth or acquired at a later stage) or people with an immigrant status.

Secondly, the cases discussed in this paper are all based on prosecutions in countries, which exercise some form of extra-territorial jurisdiction, in most cases universal jurisdiction, exclusively Europe or North America. While there have been a great number of prosecutions of international crimes based on territorial jurisdiction,¹ there are not part of the overview as there is no connection with 1F individuals in this type of prosecutions.

Lastly, most of the crimes prosecuted based on extra-territorial jurisdiction are the international crimes of genocide, war crimes, crimes against humanity and torture, which correspond broadly to 1F(a) criminality (although torture can also be a 1F(b) or 1F(c) crime). A fairly large number of countries in Europe also have universal jurisdiction for common crimes, which could involve persons excluded only on the basis of 1F(b) (1F(c) has been sparingly used in the exclusion context and mostly in situations, which would overlap with 1F(a) and/or 1F(b) crimes)², namely 15³ but only a few have exercised this jurisdiction in practice, namely, Belgium, Denmark and Germany⁴ while the Netherlands also prosecuted the international crime of terrorism, which would be equivalent to a 1F(b) exclusion ground as well.⁵

Jurisdiction to prosecute in general

¹ See for instance R. Currie and J. Rikhof, *International and Transnational Criminal Law* (Irwin Law, Toronto, 2013) at 284-285

² For the limited jurisprudence re 1F(c), see J. Rikhof, *The Criminal Refugee, The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters, Dordrecht, 2012) at 350-368 and J. Rikhof, 'Exclusion Law and International Law: Sui Generis or Overlap?', in *20 International Journal on Minority and Group Rights* (2013) at 226-228.

³ Austria, Belgium, Czech Republic, Denmark, Estonia, Germany (in limited circumstances), Hungary, Italy, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Slovenia and Sweden; see REDRESS/FIDH, *Extraterritorial jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010 at 21, table 2.

⁴ See table below.

⁵ In the Netherlands there have also been four cases in 2014 where exclusion 1F(b) decisions with respect to piracy followed the criminal conviction of these persons; these cases are not included in the table as this is the reverse of the issue at hand.

The most common type of criminal jurisdiction is based on the principle of sovereignty, namely that a state is entitled to prosecute crimes, which have taken place on its territory, hence the name territorial jurisdiction. However, international law also recognizes the ability of states to exercise jurisdiction for crimes committed outside its territory provided that there is some link between the state and this exercise of extra-territorial jurisdiction. Such links are found in the nationality of persons belonging to a state which can be further divided in the active nationality or active personality principle where a state can prosecute crimes committed by its nationals abroad and in the passive nationality or personality principle where a state can prosecute a crime abroad in which its national has been a victim. Lastly, a prosecution can be based on universal jurisdiction, which is present in a situation where the crime is not committed in the state wanting to prosecute but the link is found when a perpetrator of a crime abroad has subsequently gone to this state.⁶ In some instances this type of jurisdiction has also been used in circumstances where there is no perpetrator present in the state but investigations have been undertaken as a result of the very serious nature of the crimes committed for which any country is entitled to initiate a prosecution; this is frequently referred to as absolute jurisdiction or universal jurisdiction *in absentia*.⁷

The following crimes have traditionally been seen in customary international law to be subject of universal jurisdiction: piracy, genocide, war crimes, crimes against humanity and torture.⁸

Universal jurisdiction trials

In Europe⁹ 11 countries have initiated criminal prosecutions for committed elsewhere between 1994 and 2014, resulting in 42 indictments (of which almost 90% since 2000 alone) with 39 persons convicted (in 33 cases) and three acquittals.

⁶ See R. Currie and J. Rikhof, *International and Transnational Criminal Law* (Irwin Law, Toronto, 2013) at 50-100.

⁷ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 8672/1/09/REV 1, 16 April 2009 at 7-11, paragraph 8-14 (with examples of various national approaches at 12-30, paragraphs 15-27; UN Doc. A/65/181, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General prepared on the basis of comments and observations of Governments, 29 July 2010 at 5-6, paragraphs 12-17; REDRESS/FIDH, *Extraterritorial jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010 at 16-27 with a table of the types of jurisdictions available in the countries of the European Union at 17; F. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', 30 *Michigan Journal of International Law* (2009) at 959-961.

⁸ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 8672/1/09/REV 1, 16 April 2009 at 7-8, paragraph 9; it adds that under treaty law other crimes have also been added, primary terrorist offences; UN Doc. A/65/181, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General prepared on the basis of comments and observations of Governments, 29 July 2010 at 8-9, paragraphs 27-28, which indicates that slavery and crimes against peace could also fall under this type of jurisdiction under customary international law; REDRESS/FIDH, *Extraterritorial jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010 at 22-23 indicating the types of crimes the countries of European Union are subject to universal jurisdiction.

⁹ In addition to these investigative and prosecutorial efforts by individual countries, there have also been attempts at co-ordinating these activities by improving exchange of information pertaining to investigations and by establishing best practices. Interpol has convened four International Expert Meetings on Genocide, War Crimes, and Crimes Against Humanity since 2005 while three years earlier the European Union decided to establish a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, which meets on a regular basis, see the Official Journal of the European Communities L167/1 of 26/6/2002 and L118/2 of 14/5/2003; for more information as well as some other forms of international co-operation, see Human Rights Watch, *The Long Arm of Justice Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, September 2014 at 85-95. As well, the ICC has started to convene meetings with some of the specialized war crimes units in order to develop an efficient co-operation model between national states and the ICC based on the complementarity principle enshrined in article 17 of its Statute. On the non-governmental side, the

In North America two countries, the United States¹⁰ and Canada, have completed four criminal trials for such crimes, three in Canada (with one acquittal) and one in the United States.

In Africa, South Africa has started two investigations against nationals of other African states, namely Madagascar and Zimbabwe¹¹ while in Senegal a hybrid regional court was established to investigate and prosecute crimes against humanity committed in Chad.¹²

For details of the completed criminal trials in the 13 countries mentioned which have completed extra-territorial prosecutions, see the table below.

Country of trial	Country where crimes occurred	Conviction and date	Crimes mentioned in judgment	Sentence	Appeal
Netherlands	DRC	Yes; 2004	torture	10 years	No
Netherlands	Afghanistan (two persons)	Yes; 2005	war crimes/ torture	9 and 12 years	Yes; decision upheld
Netherlands ¹³	Netherlands/ Iraq	Yes; 2005	war crimes	15 years	Yes; decision upheld; again upheld by the ECtHR
Netherlands ¹⁴	Netherlands/ Liberia	Yes; 2006	UN sanctions violation	8 years	Yes; decision overruled by appeals court but reinstated by Supreme Court

International Association of Prosecutors (IAP) established in 2009 a Specialist War Crimes Forum (<http://www.iap-association.org/FICJ/Home.aspx>) while the International Bar Association had formed a War Crimes Committee a year earlier (http://www.ibanet.org/PPID/Constituent/War_Crimes_Committee/Default.aspx).

¹⁰ The U.S. has also arrested a number of persons for involvement in atrocities in their homeland but these prosecutions are launched under its immigration legislation for immigration fraud, resulting in both criminal convictions as well as deportations to the country where the crimes were committed.

¹¹ In terms of the obligation to prosecute the international crimes of torture and under which circumstances, see *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30.

¹² For more information re the court in Senegal, see R. Currie and J. Rikhof, *International and Transnational Criminal Law* (Irwin Law, Toronto, 2013) at 224-225.

¹³ As the accused was a Dutch national, it is not strictly correct to include this case as part of universal jurisdiction but it is relevant as the crimes occurred outside Netherlands.

¹⁴ As the accused was a Dutch national, it is not strictly correct to include this case as part of universal jurisdiction but it is relevant as the crimes occurred outside Netherlands.

Country of trial	Country where crimes occurred	Conviction and date	Crimes mentioned in judgment	Sentence	Appeal
Netherlands	Afghanistan	No; 2007	war crimes /torture	N/A	No
Netherlands	Rwanda	No; 2007	genocide	N/A	Yes; acquittal upheld
Netherlands ¹⁵	Rwanda	Yes, 2009	torture	20 years	Yes, sentence increased to life imprisonment
Netherlands ¹⁶	Sri Lanka (five persons)	Yes, 2011	terrorism and war crimes	2-6 years	Yes, both sentence and fact that war crimes aspect was denied
Netherlands	Rwanda	Yes, 2013	genocide	6 years, 8 months	No
Belgium	Rwanda (four persons)	Yes; 2001	war crimes	12-20 years	No
Belgium	Rwanda (two persons)	Yes; 2005	murder	10 and 12 years	No
Belgium	Rwanda	Yes, 2009	war crimes	30 years	Yes, decision upheld
Belgium	Rwanda	Yes, 2007	murder	20 years	Yes; decision upheld
Germany	Bosnia	Yes, 1997	manslaughter	5 years	No
Germany	Bosnia	Yes, 1997	genocide/ murder	life	Yes; decision upheld; again upheld by the ECtHR

¹⁵ This is the same case as the one mentioned before but with different charges.

¹⁶ As some of the offences occurred in the Netherlands it is not strictly correct to include this case as part of universal jurisdiction but it is relevant but as war crimes, some of which were alleged to have occurred outside the Netherlands, were included in the indictment.

Country of trial	Country where crimes occurred	Conviction and date	Crimes mentioned in judgment	Sentence	Appeal
Germany	Bosnia	Yes, 1999	genocide/war crimes	9 years	Yes; decision upheld
Germany	Bosnia	Yes, 1999	genocide/war crimes	life	Yes; decision upheld but only for war crimes
Germany	Rwanda	Yes, 2014	genocide	14 years	Under appeal
France	Argentina	Yes (in absentia), 1990	torture	life	No
France	Tunisia	Yes (in absentia), 2008	torture	8 years	Yes, decision upheld and sentence increased to 12 years
France	Rwanda	Yes, 2014	genocide/crimes against humanity	25 years	Not yet
Sweden	Bosnia	Yes, 2011	war crimes	5 years	No
Sweden	Kosovo	Yes, 2012	crimes against humanity	life	Yes, decision overturned
Sweden	Rwanda	Yes, 2013	genocide	life	Yes, decision upheld
Sweden ¹⁷	Syria	Yes, 2015	war crime/assault	5 years	Not yet
Canada ¹⁸	Bosnia	Yes, 2005	hostage taking	3 years	Yes, decision upheld
Canada	Rwanda	Yes, 2009	genocide, crimes against humanity, war crimes	life	Yes, decision upheld; again

¹⁷ As the accused was a Swedish permanent resident it is not strictly correct to include this case as part of universal jurisdiction but it is relevant as the crimes occurred outside Sweden.

¹⁸ As the accused was a Canadian national, it is not strictly correct to include this case as part of universal jurisdiction but it is relevant as the crimes occurred outside Canada.

Country of trial	Country where crimes occurred	Conviction and date	Crimes mentioned in judgment	Sentence	Appeal
					upheld by the Supreme Court
Canada	Rwanda	No, 2013	Genocide, crimes against humanity	N/A	No
Denmark	Bosnia	Yes, 1994	war crimes	8 years	Yes; decision upheld
Denmark	Uganda	Yes, 2004	armed robbery/abduction	No info	No
Denmark	Pakistan	No	murder	N/A	No
Norway	Bosnia	Yes, 2008	torture/rape/ forcible confinement (charges for international crimes held to be unconstitutional)	5 years	Yes; all aspects of the decision upheld by appeals court and Supreme Court
Norway	Rwanda	Yes, 2013	genocide	21 years	Yes
Spain	Argentina	Yes, 2005	genocide	640 years	Yes; decision upheld
Switzerland	Rwanda	Yes, 1999	war crimes	life	Yes, decision upheld but sentence reduced to 14 years which upheld again on further appeal
Switzerland	Guatemala	Yes, 2014	Extrajudicial killing	life	Yes
UK	Afghanistan	Yes, 2005	torture/hostage taking	20 years	No
Austria	Bosnia	No, 1994	genocide/murder	N/A	No

Country of trial	Country where crimes occurred	Conviction and date	Crimes mentioned in judgment	Sentence	Appeal
Finland	Rwanda	Yes, 2010	genocide	life	Yes; decision upheld
U.S.	Liberia	Yes, 2009	torture	97 years	Yes, decision upheld

Observations re domestic prosecutions

A number of comments can be made about the efforts in the last two decades to put perpetrators of international crimes on trial.

An encouraging trend is the fact that there have been some proceedings against corporate players, albeit some have not been successful in the end. While the prosecution of corporate executives is not a new phenomenon as there had already been prosecutions of this kind after the Second World War against German corporate officials, including by the International Military Tribunal in Nuremberg,¹⁹ there have been two convictions in the Netherlands for corporate executives for providing weapons to the Charles Taylor regime in Liberia and for selling precursors for chemical weapons to the Saddam Hussein regime in Iraq.

In the DRC, during the Kilwa trial both Congolese soldiers and three executives of the mining company Anvil were charged for war crimes but eventually acquitted in 2007;²⁰ this same incident is being investigated in Australia. As well, two executives of the French oil company TotalFinaElf, have been indicted in both France and Belgium in 2002 for involvement for crimes against humanity in Burma; the proceedings in Belgium came to an end in 2008. Although it might be difficult for international institutions to hold corporations themselves responsible for breaches of international criminal law (it is for instance explicitly forbidden in the Rome Statute),²¹ it is clear that the human actors representing such corporations are not immune from the reaches of this area of the law.

Secondly, by way of a detour by also including briefly the practice at the international level as well as domestic trials based on territorial jurisdiction, there are differences between the number of trials held and

¹⁹ Gustav Krupp von Bohlen und Halbach was indicted but did not stand trial during the IMT proceedings due to mental illness. Other trials carried out against industrialists included the Krupp (Law Reports of Trials of War Criminals, Volume X, 69), Flick (Law Reports of Trials of War Criminals, Volume IX, 1), I.G. Farben (Law Reports of Trials of War Criminals, Volume X, 1), Zyklon B (Law Reports of Trials of War Criminals, Volume I, 93) and the Roehling (Law Reports of Trials of War Criminals, Volume X, 56-57) trials.

²⁰ The trial has been severely and widely criticized. Two of the more poignant commentaries are that of the United Nations High Commissioner of Human Rights of July 4, 2007 and the detailed report by the NGO Global Witness of July 17, 2007 (<http://www.globalwitness.org/library/victims-kilwa-massacre-denied-justice-congolese-military-court>).

²¹ Article 25.1. In the United States this type of liability was denied under the Alien Tort Statute, see *Kiobel v. Royal Dutch Petroleum*, US Court of Appeal, 2nd Circuit, September 17, 2010, which was confirmed by the US Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

their modalities. Four categories can be distinguished, namely the truly international institutions (ICC, ICTY and ICTR) together with the two tribunals established by an agreement between the United Nations and a domestic jurisdiction (the SLSC in Sierra Leone and the ECCC in Cambodia); national tribunals with some international aspects (Bosnia, Kosovo, East Timor and Iraq); domestic courts exercising territorial jurisdiction; and domestic courts exercising universal jurisdiction. In terms of number of cases processed, the first and last categories have generally only be able to deal with a small numbers of situations while the second and third groups typically were able to put on trial much larger numbers of suspects.

This is not entirely surprising given the fact that the ICC, ICTY, ICTR and universal jurisdiction courts had to carry out their investigations outside their jurisdiction or where their seat was established; combined with the fact that because of finite resources, with its resultant limited mandate of investigating persons most responsible, these institutions, as well as the SLSC and ECCC, can only measure their success in the dozens of cases with some higher numbers for institutions, which have been operating for a much longer time and with more resources, such as the ICTY and ICTR. On other hand, national courts operating on the basis of territorial jurisdiction (either purely domestic courts or such courts with some international dimensions) were able to bring to justice hundreds and sometimes thousands of perpetrators. Of the 46 countries that have become involved in the prosecutions of perpetrators of international crimes in the last twenty years, the vast majority of convictions occurred in the national courts with territorial jurisdiction. More than 16,000 perpetrators have been brought to justice in 32 such countries compared to 180 persons convicted by the five international(ized) institutions (138) and the 13 countries relying on universal jurisdiction (42) combined.

The last observation is related to the above in that the level of persons convicted in criminal trials varies. The five international institutions, as a result of their objective to only investigate those most responsible, have put on trial persons who had exercised powerful or high level functions within their governments or organizations while on the other side of the spectrum, the universal jurisdictions courts typically prosecuted lower level operators with direct personal involvement.²² Domestic courts exercising territorial jurisdiction ran the gamut of type of perpetrators, from high officials based on extended liability principles to direct to perpetrators to persons on the ground committing crimes in an indirect fashion. It is likely that the prosecutors in universal jurisdiction countries had many more suspects given the fact that most criminal suspects had gone through refugee determination or immigration processes first²³ (while senior perpetrators often stayed away from these countries), which are often decided on indirect participation, but that because of resources limitations only the most serious of these cases were selected for criminal investigations.

Practical issues

Prosecutors and investigative judges have the discretion to decide when to investigate or prosecute. In general a decision to undertake a prosecution will entail a number of factors, usually related to the sufficiency of the evidence and the public interest.²⁴ With respect to crimes, which are subject to extra-

²² See for instance, Human Rights Watch, *The Long Arm of Justice Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, September 2014 at 13.

²³ See J. Rikhof, *The Criminal Refugee, The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters, Dordrecht, 2012) at 460-469.

²⁴ UN Doc. A/65/181, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General prepared on the basis of comments and observations of Governments, 29 July 2010 at 17, paragraph 71; F. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', 30 *Michigan Journal of International Law* (2009) at 962; Public Prosecutions Service of Canada, *The Federal Prosecutions Service Deskbook*, Chapter 15 (this discretion was confirmed judicially in *Kunlun Zhang v. Canada* (Minister of Citizenship and Immigration) 2006 FC 276 and *Kunlun Zhang v. Canada* (Attorney General) 2007 FCA 201); Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Chapter 2; Crown Law Office, *Prosecution Guidelines*, Chapter 3 (Australia); Crown Prosecution Service, *The Decision to Prosecute* (UK). Sufficiency of evidence

territorial jurisdiction, additional factors, such as international obligations, a better-situated forum, either domestically (for instance, before a court where the crime has occurred) or internationally (an international tribunal might have an interest in the case) can play a role as well.²⁵ At times, the discretion by a prosecutor or investigative judge to make a decision in respect to crimes subject to such jurisdiction is in addition made subject to approval of a high executive officer, such as the head of a prosecution service or the Attorney General.²⁶

Apart from legal constraints and the legal complexity of international crimes²⁷, a prosecution based on extraterritorial jurisdiction also faces a number of practical difficulties. The main difficulty is the costs of investigation and mounting a prosecution based on evidence, which for the most part must be collected outside the country.²⁸ As well, during the investigation special care needs to be taken with witnesses in terms of obtaining unfettered access through co-operation arrangements with the country where they are located; in terms of the manner in which the witnesses are interviewed in light of the different legal backgrounds of the witnesses and the interviewers; in terms of the passage of time between crimes and the interviews; and in terms of witness protection. Some of these concerns also apply to obtaining documents from local and international institutions. These same difficulties can apply to the trial phase of a criminal proceeding as well.²⁹ As a result of the resource intensity of criminal investigations and prosecutions of international crimes, both from a financial and human resources perspective, the discretionary factors for the determination of initiating an investigation or prosecutors are further broken down in the setting of priorities.

requires a reasonable prospect of obtaining a conviction while the public interest consideration tends to involve factors such as whether the offence is serious or trivial; any mitigating or aggravating circumstances; the age, intelligence, health or any special infirmity of the alleged offender, any witness or victim; the alleged offender's antecedents; the staleness of the offence; the availability and efficacy of any alternatives to prosecution; the attitude of the victim; the likely outcome in the event of a finding of guilt; and the need for deterrence.

²⁵ UN Doc. A/65/181, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General prepared on the basis of comments and observations of Governments, 29 July 2010 at 17, paragraph 71; REDRESS/FIDH, *Extraterritorial jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010 at 27-20.

²⁶ UN Doc. A/65/181, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General prepared on the basis of comments and observations of Governments, 29 July 2010 at 19, paragraph 78; REDRESS/FIDH, *Extraterritorial jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010 at 30-31.

²⁷ J. Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', in *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, edited by Morten Bergsmo (Torkel Opsahl Academic EPublisher, 2010) at 43-49.

²⁸ The costs of one such investigation and prosecution was estimated in a Canadian report to be four million dollars, see Department of Justice, Programs and Initiatives, Crimes against Humanity and War Crimes Program, 31 July 2009, Appendix D, Remedy 4.

²⁹ F. Kaleck at 961-962; V. Türk, 'Forced Migration and Security', 15 *International Journal of Refugee Law* (2003) at 122; B. Swart, 'Vluchtelingenrecht and Internationaal Strafrecht' 24(6) *NAV, Nieuwsbrief Asiel and Vreemdelingenrecht*, 1F Special (2008) at 424-427; Letter from the Minister and State Secretary of Justice to the House of Commons, 2007-2008 Session, 31 200 VI, Nr. 160, 9 June 2008 at 4-5; Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag at 19-20; Human Rights Watch, *The Long Arm of Justice Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, September 2014 at 2 and 5; with respect to witness protection and some resolutions, see REDRESS/FIDH, *Extraterritorial jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010 at 46-55; REDRESS/FIDH, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units*, December 2010 at 23-24; Human Rights Watch, *The Long Arm of Justice Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, September 2014 at 18-20.

For instance, in Canada a number of considerations are taken into account before embarking on a prosecution of a 1F case with a criminal investigation potential, including the fact that the allegation must disclose personal involvement or command responsibility, and that the evidence pertaining to the allegation must be corroborated and obtainable in a reasonable and rapid fashion.³⁰ In the Netherlands, factors such as whether another country has jurisdiction over the crimes in question; whether there are co-operation agreements in place with the countries where the witnesses are located; the level of security in the country where an investigation will take place; the level of protection which can be given to the witnesses; in how far the rights of the defence can be respected during an investigation; whether the person can be removed; and whether the person is still engaged in criminal activities will be taken into account in deciding whether and when to investigate an international crime.³¹

Conclusion

As a result of the above limitations with respect to the investigation and prosecution, it cannot be expected that a large number of persons who have been excluded and who cannot be removed will be facing a criminal trial. In the Netherlands, where most prosecutions based on universal jurisdictions have been launched, of the 700 persons who had been excluded between 2000 and 2008³² only four prosecutions were initiated during that same time period involving five persons (of the total of six cases two involved Dutch nationals) of which two cases, involving three persons, were successful.³³ This success rate represents less than half of a percent of the 1F population (although between 2008 and 2014 there have been another three prosecutions involving seven people, all of which were successful), which is unlikely to exceed in any of the other countries in this survey.

³⁰ Canada's Program on Crimes against Humanity and War Crimes, Tenth Annual Report, 2006-2007, under the headings 'Enforcement in Canada', Criminal Investigations and Prosecution'. Earlier there had been a longer list of factors for this type priority setting, which included factors such as the credibility of allegation; the seriousness of allegation; the seriousness of crime; whether the person had a military or civilian position; the strength of evidence; progress of investigation; the ability to secure cooperation with other country or international tribunal; the likelihood of effective cooperation with other countries; the presence of victims or witnesses in Canada; the presence of victims or witnesses in other countries with easy access; the likelihood of being part of group investigation in Canada; the likelihood of parallel investigation in other country or by international tribunal; the ability to conduct documentary research to test credibility of allegation; the likelihood of continuing offence or danger to the public; the likelihood of a reasonable prospect of fair and real prosecution in other country; whether a high profile case; whether an indictment by international tribunal or extradition request is likely; see Canada's Program on Crimes against Humanity and War Crimes, Fifth Annual Report, 2001-2002 under the heading 'Developments under the Crimes against Humanity and War Crimes Act'.

³¹ Letter from the Minister of Justice to the President of the House of Commons, 2007-2008 Session, 31 200-VI nr. 193, 9 September 2008 at 2.1.

³² Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag at 7.

³³ J. Rikhof, 'War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context', 21 *International Journal of Refugee Law* (2009) at 27-29; F. Kaleck at 942-945.