

Conference report

Preliminary workshop

Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Other Migrants Suspected of Serious Criminality but Who Cannot be Removed

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VU University Amsterdam

After a word of welcome from Professor Van Sliedregt, Dean of the Faculty of Law (VU University Amsterdam), David J. Cantor (Refugee Law Initiative) and Joris van Wijk (Center for International Criminal Justice) introduced the background and rationale of the project and explained that the goal is to map the problem of ‘undesirable and ‘unreturnable’ migrants and produce concrete proposals for coordinated and harmonized solutions (policies) in this area.

Session 1: Presentations of situation-specific papers on United Kingdom, Netherlands, Norway and Italy, followed by discussion.
(UK – Sarah Singer; Netherlands – Maarten Bolhuis; Norway – Terje Einarsen and Mi Hanne Christiansen; Italy – Marco Odello)

Session 2: Presentations of situation-specific papers on Canada, United States, Brazil and UNHCR, followed by discussion.
(Brazil – Liliana Jubilut; United States – Deborah Anker, Canada – Jennifer Bond; UNHCR – James Simeon).

Session 3: Presentations of papers on criminal prosecution of undesirable and unreturnable migrants, followed by discussion.
(Prosecution – Joseph Rikhof; Extradition – Geoff Gilbert)

Session 4: Presentations of papers on alternative solutions for the issue of undesirable and unreturnable migrants, followed by discussion.
(Memoranda of understanding – Mariagiulia Giuffré; Humanitarian alternatives – Satvinder Juss; Voluntary return/deportation/relocation – Joris van Wijk)

The first two sessions of the preliminary workshop focused on the country-specific situations in the United Kingdom, the Netherlands, Norway, Italy, the United States, Brazil and Canada. The presenters highlighted specific characteristics of the issue of ‘undesirable and unreturnable’ migrants in the respective countries, and the policies that exist to address (or

the absence of policies focusing on) this area. In doing so, interesting differences and similarities were brought to the surface.

Firstly, it became very clear that there are major differences in policies leading to migrants being considered 'undesirable'. For example, whereas the UK, the Netherlands, Canada and Norway actively apply article 1F of the Refugee Convention to exclude certain individuals from refugee status, this is less common for countries like Italy, Brazil or the USA. Major differences also exist in relation to other policies leading to undesirability. It also became clear that gathering data on the scale of the problem of 'undesirable' migrants can be frustrated for a number of reasons, including lack of reporting the reasons for refusing asylum. There are a plethora of policies to deal with the issue, but a coherent policy is lacking.

Another important difference between the countries considered is the diversity in approaches governments adopt in dealing with undesirables who are non-removable. In some countries, in particular Italy and Brazil, the issue of 'undesirable unremovables' is not high-profile and hence, there is no specific policy focus on this area. Other countries that are faced with non-removables continue to try to actively push out such individuals, e.g. by giving them no form of residence or by adopting a variety of 'innovative' methods to ensure that deportation takes place. Other countries, however, provide (limited) forms of temporary leave to remain in the host State, which gives the individuals concerned some opportunities to integrate into the host society. These forms of leave often entail restrictions, e.g. on residence and employment, and in some cases individuals are required to regularly report to the authorities.

Many presenters highlighted the fact that there are different reasons for the non-removability of these individuals. In addition to human rights barriers to removal, there can be all kinds of practical impediments such as administrative reasons and non-cooperation of the individuals concerned and third States. Participants in the ensuing discussion indicated that it was important to define whether all of these issues fall under the scope of the project or whether the scope is more limited.

Since UNHCR is a significant player in the field of refugee status determinations that could lead to 1F exclusion and, consequently, individuals deemed to be 'undesirable', a paper on UNHCR's exclusion and post-exclusion policy was also presented. In the ensuing discussion some participants called upon UNHCR to increase transparency of their policies regarding exclusion and post-exclusion. A positive development would be the inclusion of UNHCR in the project, with an eye to developing solutions for the issues discussed. A number of government representatives noted they also rely on UNHCR to give guidance in this respect.

In the third and fourth sessions of the workshop presenters focused on possible follow-ups to refugee exclusion under article 1F and other forms of undesirability. Firstly, it was noted that the subsequent prosecution of 1F excluded individuals is only likely to occur in a very limited number of cases. In thirteen countries where excluded individuals have been prosecuted, only forty out of a total of three thousand excluded individuals have been convicted to date. The number of extraditions and other forms of rendition are also currently very limited, and likely to be so in the future. Since there are numerous practical and normative restraints on entering into Memoranda of Understanding to facilitate the safe return of undesirable individuals, this too is not likely to provide a solution to the problem of how to deal with unremovable

immigrants. Voluntary return or independently or institutionally arranged relocation schemes in many instances do not take place, which means that for a considerable period of time countries remain 'stuck' with undesirable and unremovable individuals.

In the ensuing discussion it was noted that it is sometimes possible to resolve problems relating to unremovable migrants in unconventional ways. If removal is, for example, blocked due to lack of appropriate medical care in the country of origin, the host State could send medicines. However, providing undesirable individuals with resources for returning to their country of origin might not be greeted with enthusiasm by the greater public. At the same time, governments should not be afraid of seeking to explain to the general public what has occurred and why they have taken these measures. Investing in the institutional framework of a country, for instance by strengthening the justice system, may be a method of removing concerns relating to human rights and eventually ensuring that return is possible.

It was further noted that it might be necessary to collectively address general matters in a wider context, perhaps within the EU, so that the most difficult issues could be dealt with bilaterally. There seems to be a need for a harmonization of approaches towards refugee exclusion and related matters. If a global policy recommendation is pursued, an important question will be who is best suited to deal with this in the international community.

It should also be clear what the exact scale of the problems is. A question that was raised in this regard was how serious the problem of unremovability actually is if undesirable and unreturnable individuals do not pose a security threat to the host State. In those cases, exclusion has served its purpose. This is especially true if the crimes concerned are not perceived to be of the highest level of seriousness and the individuals do not pose a significant threat to the host State. Temporary residence permits or other forms of temporary leave to remain allow for monitoring of these individuals. Consequently, it was questioned how big the group of 'dangerous' unremovable individuals actually is. With little prospect of criminal prosecution, is the state of limbo actually such a bad situation for those concerned?

It was, however, also noted that the present danger posed by such individuals is not the only issue of interest; exclusion also serves to ensure that the integrity of the international refugee protection system is not undermined. The perspective of the victims of the crimes should also not be forgotten.

In terms of mapping the consequences for the individuals involved, the idea was raised that it would be interesting to bring experts from the medical profession, such as counselling services, to the table.

Throughout the day various participants raised the question of the exact scope of the project and the definition of the central concept of 'undesirable' individuals. One definition would be that these are 'persons who are not allowed to stay in a country because they are suspected of or have been convicted of committing serious crime(s)'. Another way of phrasing this is that persons who are deemed undesirable are:

1. Persons who are deemed undeserving of refugee protection or are otherwise undesirable because of alleged crimes committed prior to arrival in the host State, e.g. due to alleged participation in war crimes or acts terrorism, or;
2. Persons who are deemed undesirable because of public safety concerns relating to crimes they committed after arrival in the host State, e.g. because they have been involved in 'conventional crimes' such as theft or murder, or preparing for acts of terrorism.

Some noted that not all non-nationals who commit crimes are necessarily 'undesirable'. Others suggested that there are different degrees of 'undesirability'. The phenomenon of exclusion from refugee status is binary and does not account for the different degrees of involvement in or seriousness of crimes committed. It was suggested that it would be preferable to make a distinction between those who are considered 'undeserving' and those who are considered to pose a security threat to the State.

Similar questions emerged in terms of the meaning of 'unremovable'. Is the project limited to non-removability due to the risk of refoulement, or are administrative reasons or practical issues also relevant?

The organizers closed the preliminary workshop and thanked all presenters for their papers and workshop attendees for their active and engaged participation.