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Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F(b) of the Refugee Convention in the Netherlands

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Alleged perpetrators of serious non-political crimes are excluded from refugee protection on the basis of Article 1F(b) of the Refugee Convention. This study offers a first complete and systematic empirical analysis of the application of Article 1F(b) in a given country, in this case the Netherlands. The analysis shows that most of the cases in which 1F(b) is applied are crimes motivated not by personal reasons or gain, but rather by political, ideological, ethnic and/or religious beliefs. The study furthermore suggests that, in determining what constitutes 'serious' non-political crimes, factors extraneous to the commission of the crime itself, such as post-crime rehabilitation, are deemed irrelevant. Finally, the study shows that the post-exclusion phase of 1F(b) cases is full of hurdles: domestic prosecution and extradition are often not possible, while voluntary or forced return may be barred because of *non-refoulement* obligations. Consequently, possibly dangerous, unwanted but unreturnable individuals disappear from the radar and travel around in Europe.

Keywords: Article 1F, exclusion, serious non-political crimes, terrorism

Introduction

On the basis of Article 1F(b) of the UN Convention Relating to the Status of Refugees 1951 (the Refugee Convention), refugee status should be denied to

> any person with respect to whom there are serious reasons for considering that ... he has committed a serious non-political crime outside the country of refuge prior to his admission.

State practice with respect to the application of Article 1F(b) differs considerably from state to state. A 2007 exploratory study by the United Nations High Commissioner for Refugees (UNHCR) suggests that, as opposed to Article 1F(a) and (c), which concentrate on crimes against peace, war crimes and crimes against humanity, and acts contrary to the purposes and principles of the UN, respectively, Article 1F(b) is rarely applied in France, Germany, Greece, the Slovak Republic and Sweden (UNHCR 2007: 98–100). In contrast, a study into the application of Article 1F(b) in Canada suggests that it is applied much more often there, in about one-third of the cases reviewed (Kaushal and Dauvergne 2011: 64). In Norway, about two-thirds of all 1F cases are based on Article 1F(b) (Aas 2013).

A complete and systematic empirical analysis of how often, and in particular for what crimes, Article 1F(b) in a given country is invoked is non-existent. We were granted the opportunity to analyse all 1F(b) exclusion decisions in the Netherlands—a country that is relatively active in applying Article 1F[1]—issued between 2000 and 2010. On the basis of this file analysis, a literature study and an analysis of policy documents, we will review the Dutch policy regarding Article 1F(b) in practice. The results allow academics to engage in comparative research and help policy and decision makers both inside and outside the Netherlands to reflect on the application of Article 1F. First, we will discuss why and when 1F(b) should be applied according to international guidelines and legal instruments. Next, we will describe how many and what type of applicants the Netherlands excludes on the basis of Article 1F(b). This will be followed by a critical review of the Dutch interpretation of Article 1F(b) and its application in practice. Finally, we will address the increasingly more relevant question of what (can) happen(s) to the alleged perpetrators of serious non-political crimes after being excluded.

File Analysis

The authors received a list of all decisions ('*beschikkingen*') in which Article 1F was invoked between January 2000 and November 2010. Only the 1F decisions that were definite—in the sense that they were not revoked or not (yet) successfully appealed—at the moment of data collection were scored using an extensive list of criteria; 745 decisions met this definition. The majority (448 decisions) related to Afghan nationals. The overrepresentation of Afghans can be explained by the exclusion of certain designated categories of persons which the Minister of Justice has determined fall within Article 1F, also known as 'categorical exclusion'. This means that the assumption that someone held a certain position within a designated organization suffices as a basis for exclusion, if the applicant does not rebut this assumption. The largest group to which this categorical exclusion applies are people who held the military rank of non-commissioned officer or higher who served in the communist security services in Afghanistan. Considering the heavy workload and the size and expected homogeneity of this group, the authors took a systematic sample of the group of excluded Afghans

($n = 61$). Whenever information from the file analysis is used, reference will be made to the file codes used for internal communication such as '(*J1*)' (these denominations have no value except for internal registration purposes).

The Scope of Article 1F(b)

In its 2003 'Background Note on the Application of the Exclusion Clauses', the UNHCR contends that Article 1F has been included in the Refugee Convention because the drafters had two objectives in mind: firstly, to make sure that persons suspected of committing certain crimes cannot benefit from refugee protection because the gravity of the acts deems them 'undeserving' of such protection and, secondly, to ensure that such persons will not abuse the protection offered to refugees to avoid being held criminally accountable for their acts (UNHCR 2003). In this way, Article 1F serves to protect the 'integrity of the institution of asylum' (UNHCR 2009: 6).[2] Since the interest in, and application of, this exclusion clause has revived in the last one-and-a-half decades, a third rationale has ever more prominently come to the fore, namely to protect the receiving society from the potential danger caused by criminal refugees. While concerns for the national public order or security are understandable in light of the alleged nature of the conduct excluded asylum seekers are generally associated with, it is subject to debate whether applying Article 1F actually is the appropriate measure to address such concerns.[3]

The evidentiary threshold for applying Article 1F ('serious reasons for considering') is lower than a criminal standard of proof (UNHCR 2003). This is considered justifiable because of the gravity of the crimes (Rasulov 2002: 816). However, while the egregious nature of the acts listed under Article 1F(a) and (c) is 'obvious' (UNHCR 2009: 9), this is less so for the acts addressed by sub (b). This is also reflected in the phrasing of Article 1F(b): only crimes of a 'serious' and 'non-political' nature that have been committed 'outside the country of refuge prior to [the applicant's] admission' fall under its scope. The Refugee Convention itself does not define how the different criteria are to be understood, nor are there binding or universally accepted definitions of the notions 'serious' and 'non-political' (Kälin and Künzli 2000). Goodwin-Gill and McAdam (2007: 177) argue that it is generally agreed upon that 'serious crimes' are crimes directed against physical integrity, life and liberty. The UNHCR proposes that the seriousness of a crime should be assessed on the basis of international standards and depends on factors like 'the actual harm inflicted', 'the nature of the penalty' and 'whether a crime is considered serious by most jurisdictions' (UNHCR 2003: 14). Serious crimes include murder, rape and armed robbery but not petty theft (*ibid.*). This approach contrasts with the 'mechanistic' approach adopted in some states, where the seriousness of a crime is determined on the basis of national standards with respect to what crime a given act would constitute under the national criminal code and what penalty could be imposed (Goodwin-Gill and McAdam 2007: 183; Djordevic 2014: 1067).[4] State practice shows that not only

crimes directed against physical integrity, life and liberty are seen as 'serious' in the sense of Article 1F(b). The notion is also seen by some states to include drug offences (Gottwald 2006: 91) and economic crimes.[5]

The concept of 'political crimes' is based on the principle from extradition law that 'political offenders', those who commit common crimes with a political character, are not to be extradited (Kälin and Künzli 2000). Crimes are non-political when motives other than political ones, such as personal reasons or gain, are the 'predominant feature' of the committed crime or when they are not clearly linked or disproportionate to that objective (UNHCR 2003: 15). Determining the predominance of political or other features, however, can be difficult, as becomes clear from the application of the label of 'terrorism'. Article 1F(b) is increasingly seen as 'the appropriate doctrinal environment' for dealing with alleged terrorists seeking asylum (Djordevic 2014: 1059). In absence of a universally accepted definition of terrorism in international law, deciding what does and does not constitute a terrorist act is, as Gilbert (2003: 440) has put it, a 'matter of political choice, rather than legal analysis'. The UNHCR asserts that terrorist acts are 'wholly disproportionate to any political objective' and are therefore almost by definition non-political (*ibid.*). This view, according to some academics, does however not account for situations of severe and systematic state repression where legitimate violent resistance may involve very violent conduct that under different circumstances would amount to a crime or a terrorist act (Kälin and Künzli 2000: 76; Saul 2004: 6; Kaushal and Dauvergne 2011: 73–74). The UNHCR stresses that whether membership or support of an organization designated as 'terrorist' meets the seriousness threshold depends on individual involvement in an organization and individual responsibility for crimes. Mere affiliation or association with such an organization 'should not lead to an automatic application of the exclusion clauses' (UNHCR 2009: 21). The Court of Justice of the European Union (CJEU) reached a similar conclusion in *Deutschland v. B. and D.* (Guild and Garlick 2010: 80; Djordevic 2014: 1071).[6]

Article 1F(b) is furthermore limited to crimes committed 'outside the country of refuge and prior to admission to that country as a refugee'. Despite the seemingly straightforward formulation, there is disagreement on how 'admission to a country as a refugee' should be interpreted. In one view, serious crimes committed after having physically entered the territory of a country of refuge are covered by domestic criminal law and by the Convention's Articles 32 and 33(2) (UNHCR 2003: para. 44). In line with an opposing view, Article 12(2) of the 2004 European Council Qualification Directive Article (2004/83/EC) expands the scope of 1F(b) by interpreting admission as a refugee as the moment a residence permit is issued after refugee status has been granted, thereby including acts committed between entering the country of refuge and recognition as a refugee (Guild and Garlick 2010: 72; Hathaway and Foster 2014: 545).

In addition to these criteria included in the phrasing of the provision, there are two other factors that can, according to the UNHCR, be relevant in determining whether the commission of particular crimes should lead to someone's exclusion from refugee protection on the basis of 1F(b). First, the degree of the expected persecution after exclusion and removal should be in balance with the gravity of the alleged crime: 'If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant' (UNHCR 2009: 11). While this 'proportionality test' has been adopted by some European states and also regionally by the European Union, some other European countries and common law countries have rejected it (Kälin and Künzli 2000: 72–73; Bliss 2000: 110–111; Rasulov 2002: 824–833; Rikhof 2012: 116–122). In concurrence with this rejection, the CJEU ruled in *Deutschland v. B. and D.* that the proportionality test does not need to be applied, as the determination of whether an act is 'serious' already incorporates an assessment of the circumstances surrounding the act and the situation of the individual. Besides, the question of whether the individual can be deported is a separate issue, according to the Court.[7]

Second, the UNHCR deems the consequences of expiation—having served a sentence or having been granted a pardon or amnesty for the crime but also the lapse of time or 'other rehabilitative measures' (UNHCR 2003: para. 72)—relevant in the application of Article 1F(b) (UNHCR 1992: para. 157). In the case of pardons or amnesties, it notes that 'there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates' (UNHCR 2003: para 75). The UNHCR thus proposes that, when a perpetrator of serious non-political crimes has been held accountable or has been pardoned for his crimes, his past involvement in crimes can, in principle, no longer be a reason to exclude him from refugee protection under 1F(b).[8]

Who Are Excluded in the Netherlands on the Basis of 1F(b)?

In the Netherlands, Article 1F(b) is often applied in combination with 1F(a). To put it more accurately, in most 1F(a) cases, 1F(b) is deemed applicable as well, since most of the crimes that fall under Article 1F(a) are also listed as serious non-political crimes in Article C2/6.2.8 of the Dutch *Aliens Manual*. For the purposes of this study, we therefore selected those cases in which Article 1F(b) is invoked either as the sole ground or in combination with 1F(c).[9]

From 2000 to 2010, a total of 40 asylum applicants have been excluded on the basis of 1F(b) exclusively, while another nine persons were excluded on the basis of 1F(b) in combination with 1F(c). These 49 cases represent only 6.6 per cent of the total number of 1F exclusions in the investigated period. Of these 49 individuals, those of Nigerian and Turkish origin form the largest groups. Because of concerns with respect to traceability, due to the small numbers, the authors did not get permission to mention all the nationalities

of excluded individuals from other countries. We can, however, give an indication of the regions the individuals excluded under 1F(b) originate from: Western Asia (12), Southern Asia (11), Eastern and Central Asia (<10), Western Africa (12), Central and Eastern Africa (<10) and South America (<10).[10] Four individuals were regarded as stateless or their nationality at the moment of asylum application was unknown.

By analysing the motivations to commit the alleged crimes, we will characterize and categorize individuals who are excluded on the basis of Article 1F(b). This exercise is explorative in nature and meant to give more insight into the kind of cases in which the Netherlands applied 1F(b). We are aware that it may in some instances be debatable whether cases should be included in one category or another. The analysis should certainly not be seen as a typology of perpetrators of serious non-political crimes.

Motivated by Personal Reasons or Gain

A first strand of cases are serious common crimes—crimes committed by an individual who seems to be motivated by personal reasons or gain. Ten out of the 49 1F(b)-excluded persons fit best into this first category (see Table 1).

The alleged crimes found in this group include violent and sexual crimes such as assault, rape and murder, but also transnational crimes such as human smuggling and drug trafficking, and white-collar crime such as embezzlement. These cases, for example, include that of a man (*J137*) who claimed he had threatened wealthy people and abducted women and children to solve his personal financial problems. Another man (*M23*) claimed he raped his sister under the influence of alcohol, while another applicant (*J6*) claimed he was part of a criminal group of youngsters that provided for its livelihood by stealing. The group furthermore abducted, tortured and killed several young

Table 1.

Non-Political Crimes Motivated by Personal Reasons or Gain

Code	Crimes associated with…
J6	Assault, murder
J117	Human smuggling
J133	Rape, attempted murder, sexual assault, attempted assault, theft, damaging property and assisting prisoners to escape
J137	Unlawful detention, abduction, hostage-taking
J201	Aggravated assault, theft with violence or threat of violence
LI4	Human smuggling
LI5	Human smuggling
LI149	Attempted homicide
LI154	Embezzlement, taking bribes as an official
M23	Rape

women and hid their bodies. The applicant stated that he used a sword to cut off a woman's breasts and nose while she was still living.

Acts of Terrorism

A second category of crimes which Article 1F(b)-excluded individuals are associated with are crimes that have an alleged political objective but are deemed non-political because they were disproportionate or not clearly linked to that (political) objective. In these 16 cases, the acts and/or the organization the applicant was associated with were quoted as having a 'terrorist' nature by the Dutch immigration service (Immigratie en Naturalisatie Dienst, IND) in the 1F decision (see Table 2).

The cases concern alleged participation in activities such as hostage-taking, armed robbery, arson and murder. One individual (*LE61*) was allegedly responsible for the diversion that was supposed to keep the police away, while another man from within the militant group that both were part of was allegedly involved in an assassination. Another man (*LI178*) declared during the asylum interview to have reported a 'spy' within an opposition group. After he reported this, the spy was executed. One man (*J138*) was associated with acts of terrorism on the basis of an indictment by a prosecutor in his country of origin, accusing him of taking part in armed robberies on a jewellery store and a currency exchange office and throwing Molotov cocktails, and a conviction for extortion of a clothing workshop and participation in a criminal organization. Another man (*J147*) was excluded for allegedly having held someone in captivity for 10 days in his capacity as a board member of the national department of an opposition group somewhere in Europe.

Motivated by Political, Ideological, Ethnic and/or Religious Beliefs

The common denominator of the remaining category, consisting of 23 cases, is negatively formulated that they do *not* concern cases which the IND identified as 'terrorist' cases and that the alleged perpetrators do *not* seem to have been primarily motivated by personal reasons or gain. Positively formulated, they first of all have in common that the alleged perpetrators were part of (in)formal groups (including groups associated with the formal government). Secondly, their motivation is associated with beliefs held by a group that they belonged to, as the applicants often claim that they committed crimes in the context of their membership of political, ideological, ethnic and/or religious groups (see Table 3).

It is striking that by far the majority of this group consists of individuals from Western Africa. These cases include, for instance, two men (*C22* and *M30*) who claimed that they were members of a locally operating youth group/vigilante known for arresting, mistreating, torturing and killing people they believed were 'criminals'. According to IND information, the group also regularly turned against the police. Four other men (*C25*, *C27*, *C28* and *LE49*) are associated with killing people with guns, sticks and machetes in riots

Table 2.

Acts of 'Terrorism' or Crimes Committed for a 'Terrorist' Organization

Code	Organization	Crimes associated with...
J113	Radical political opposition group	Participation in terrorist activities
J118	Radical political opposition group	Complicity in hostage-taking
J136	Radical political opposition group	Fire bomb attack, conspiracy to commit arson
J138	Radical political opposition group	Armed robbery, arson
J141	Radical political opposition group	Assault, murder, threat with violence against officials
J143	Radical political opposition group	Committing attacks qualified as terrorist acts
J147	Separatist opposition group	Hostage-taking
J148	Radical political opposition group	Assault, committing attacks against and murder of police officers
J153	Separatist opposition group	Murder of special police force officer
J155	Radical political opposition group	Armed robbery, homicide
LE61	Separatist opposition group	Terrorist activities, complicity in assassination
LE62	Radical religious opposition group	Facilitation of terrorist activities, complicity in homicide and murder
LI35	Radical religious opposition group	Leading a terrorist organization, co-perpetration of terrorist acts (bomb attacks) and complicity in murder
LI36	Radical religious opposition group	Leading a terrorist organization, complicity in terrorist acts (murder)
LI160	Radical religious opposition group	Complicity in terrorist activities
LI178	Separatist opposition group	Facilitation of extrajudicial execution

between different ethnic or religious groups. Two men (*C24* and *C30*) alleged they were members of organizations associated with crimes such as extortion, sabotage, hijacking, abduction and killing. Another applicant (*C26*) allegedly collected children with an age of between one and two in a hospital, who were bought by the secret cult he was a member of. The children were killed and their blood was used in the cult's rituals. Yet another (*C31*) is associated with a university confraternity, which fought for the 'interests of students' by killing 'corrupt' teachers and fighting other confraternities. The organization allegedly did so very violently and with the use of weapons; the man claimed to have held the rank of 'butcher'. The organization was also employed for stealing

Table 3.

Crimes Motivated by Political, Ideological, Ethnic and/or Religious Beliefs

Code	Organization or group	Crimes associated with...
C22	Vigilante group	Unlawful detention and interrogation, murder
C24	Vigilante group	Hostage-taking, homicide, murder of police officers
C25	Political/religious group	Murder
C26	Political/religious group	Complicity in unlawful detention and murder
C27	Political/religious group	Aggravated assault and homicide
C28	Political/religious group	Homicide
C29	State security services	Unlawful detention and torture
C30	Vigilante group	Hostage-taking, homicide, murder
C31	Vigilante group	Abduction, armed robbery, assault, murder
C111	Political/religious group	Participation in violent action with civilian casualties
J54	Private army	Drug trafficking, torture, murder
J55	Private army	Murder
JM6	Ethnic group/militia	Murder, abduction
LE2	Military intelligence service	Hostage-taking, assault, torture
LE49	Ethnic group	Homicide
LI33	—(directed against members of opposition group)	(Attempted) arson, unlawful detention, (attempted) aggravated assault or homicide, (attempted) murder
M2	Political group	Facilitation of torture and extrajudicial execution, participation in attacks and ambushes
M16	Judicial police	Complicity in torture
M30	Vigilante group	Unlawful detention, complicity in aggravated assault and complicity in murder
M45	Separatist opposition group	Complicity in aggravated assault, unlawful detention
M53	Ethnic group	Murder
M71	Separatist opposition group	Facilitation of aggravated assault, murder
M90	Volunteer army	Facilitation of torture

ballots and manipulating election outcomes. A man (*JM6*) from a Western African country claimed to have transmitted errands to his uncle, who was a member of a militia group, and abducted a child who was sacrificed and killed a woman for his uncle. He also stabbed his fiancée to death after another man took her away. Another man (*LE2*) claimed he arrested 'opponents of the state' and handed them over to the secret service. He also planted anti-personnel and anti-tank mines. An applicant from a Southern Asian country

(*M45*) claimed he worked for an investigative committee, and arrested and punished 'criminals' and opponents of the organization he was associated with.

The above analysis shows that the majority of 1F(b) exclusions in the Netherlands (80 per cent) do not concern serious 'common' crimes motivated by personal reasons or gain. Whether or not labelled as terrorist cases, most cases have a connection with membership of politically, ideologically, ethnically and/or religiously motivated groups. Many crimes that apparently fall under the reach of 1F(b) occur in situations of conflict or civil war and thus, perhaps surprisingly, may have more resemblances to crimes that would be seen to fall under 1F(a) than one would expect. The study by Aas (2013) shows that this also seems to be the case for the majority of the 1F(b) cases in Norway. Rikhof's (2012: 310–344) extensive review of 1F(b) case law suggests that, in nine sampled countries, many of the cases referred to would fall in the same category, although it must be noted that his review is based on a selection of case law. Interestingly, Aas (2013: 75) found that, in some cases where Article 1F(a) could have been applied, 1F(b) was used instead, as 'the legal test of article 1F(b) was considered less complex and more straightforward to apply'. Similar pragmatic considerations may have also played a role in some of the Dutch cases. *JM6*, for example, committed crimes as a member of a relatively large armed faction at the time of a civil war and was excluded under 1F(b). It is generally accepted that the faction he was fighting for has been responsible for committing war crimes. The fact that cases such as these are excluded under 1F(b) instead of 1F(a) indicates that 1F(b) may, similarly to Norway, also in the Netherlands be used as a 'residual' exclusion ground in some cases. One important difference is, however, that the proportion of 1F(b) cases in the Netherlands compared to Norway is much smaller (6.6 per cent against about two-thirds of the total number of 1F cases).

Article 1F(b) in Dutch Policy and Practice

The Dutch policy on Article 1F(b) is worked out in Article C2/6.2.8 of the *Vreemdelingencirculaire* (*Aliens Manual*). With respect to the notion of non-political crimes, it determines that a crime is only 'political' when there is a clear link with and proportionality of the crime relative to the political objective, when it is an effective means of reaching the political objective and when the individual has no peaceful alternative at his disposal. 'Purely' or 'absolute' political offences, which are directed at the state, in principle do not fall under 1F(b) (Rikhof 2012: 329). Certain crimes are deemed serious and non-political by definition: murder, killing, rape, war crimes, crimes against humanity, genocide,[11] torture, slavery, slave trade and crimes of which a binding international instrument declares that it is non-political and/or cannot lead to refugee status.[12] This suggests that what Goodwin-Gill and McAdam (2007) have called a mechanistic approach is adopted.

The *Aliens Manual* is silent on balancing (the proportionality test)[13] and rehabilitation or expiation.

If we analyse, on the basis of the file analysis, how this policy works out in practice and relates to the international guidelines discussed above, a few observations are striking. In the first place, many of the crimes the excluded are generally associated with (e.g. abduction, drug trafficking, arson, bombing, torture, rape, killing and murder) are violent crimes that inflict great harm, attract heavy penalties and are considered serious crimes by most jurisdictions.[14] For other crimes, such as embezzlement or human smuggling, it is less clear whether these criteria are met and therefore they do not automatically meet the 'seriousness' threshold. In an embezzlement case, the Council of State confirmed that, because of the amount of money involved (an estimated 253 million yuan, approximately 30 million Euros), the duration of the embezzlement scheme and because corruption is seen internationally as a serious crime, the case did fall under the reach of 1F(b).[15] Regarding human smuggling, there is international consensus that this is seen as a serious crime.[16] And, indeed, smugglers can do great harm, as is currently all too obvious on the Mediterranean Sea where hundreds of migrants die because of dire travel conditions. Not all forms of human smuggling are, however, evenly harmful. In our file analysis, we, for example, encountered the case of *J117*, a man who was excluded for involvement in illegally transferring six persons by air from a country in Southern Asia to the Netherlands. He applied for asylum after being convicted in the Netherlands. Here, the harm is less apparent, as is reflected by the relatively low prison sentence of nine months that was handed down by a Dutch criminal court.[17] As the actual sentence that was handed down apparently is not part of the assessment as to whether a crime is serious, the approach taken in the Netherlands could also be qualified as mechanistic.[18]

A second observation in relation to the application of 1F(b) criteria is that many of the cases are deemed non-political, not because there is no political element, but because that element does not predominate the common element. In the case of *J155*, who claimed to have committed robberies to generate income for his organization, for instance, the IND notes in the preliminary decision that it is 'inconceivable why the political purpose could not have been reached by any other means than through robbery and similar criminal acts'. It is not impossible, however, that even a crime as serious as murder can be justified by a political objective. The District Court of The Hague annulled an exclusion decision by the IND concerning a man from Iraq who gathered information on members of the secret service and the Ba'ath party, which resulted in the killing of two men. The court considered that the organization aimed to overthrow the Saddam Hussein regime, that there was a direct connection between the acts and the political objective, that the acts were effective and proportional, and that the man had no peaceful alternatives at his disposal (Rikhof 2012: 330).[19] In the files in which the 'terrorist' label was used, the exclusion was based on the statements

of the applicants in combination with what is known, from public sources or the applicant's statements, of the crimes the organization is believed to have been involved in. We did not encounter the use of listings of names of members of terrorist organizations as a basis for exclusion under 1F(b).

In most cases, the prerequisite that crimes have to be committed outside the country of asylum and before entering this country is met. This is, however, more disputable for 'transnational crimes' such as drug trafficking and human smuggling, as they may involve the trespassing of the Dutch border. The earlier discussed human smuggler *J117*, for example, *partially* committed the offence in the Netherlands.[20] As discussed above, crimes committed by refugees after entry to the country where the asylum application is filed are generally considered not to be subject to Article 1F but covered by Article 33(2) of the Convention. It makes one wonder why 1F was employed in this case, as it could have also been dealt with by applying Article 33(2). By now, policy may have changed. In a later case against an Iranian man convicted to an 18-month prison sentence on charges of human smuggling, the District Court of The Hague ruled that 1F(b) was not applicable, as the crime was committed from within the Netherlands.[21]

The Dutch authorities in some cases explicitly applied a proportionality test. This was, for example, the case with the human smuggler (*J117*) mentioned above. As the IND deemed his crimes 'so serious' that they 'cannot weigh up against any fear for persecution' (quote from decision in *J117*), the test failed. One could question whether this interpretation is not too strict. If smuggling six persons to the Netherlands is in itself considered so serious that exclusion always precludes over the risk of persecution, there is the risk that the balancing test is in actual practice a dead letter.[22]

Finally, the file analysis suggests that expiation, for instance in the form of sentence completion, is not taken into consideration. In the five cases in which the applicant had already served a sentence for the crimes that were the basis for the 'serious reasons' (*J117*, *J133*, *J136*, *LI4* and *LI5*), this fact did not bar exclusion. *LI5*, for instance, claims he was convicted in Austria to two years in prison for human trafficking. He co-operated in the investigation and, because of his co-operation, several other members of the organization were convicted as well. In cases such as these, the fact that someone has been convicted of the crime is being used to support the conclusion that 1F applies but the fact that he served a sentence for the crime does not lead to the conclusion that 1F does not apply.[23]

What Happens to Persons Excluded under Article 1F(b)?

Once Article 1F(b) is invoked, there are several possibilities as to what happens to the excluded. A first option is prosecution in the Netherlands. As a follow-up to a 1F(b) exclusion, prosecution is, however, very unlikely, since courts in the Netherlands will almost always lack competence to prosecute 1F(b) crimes. Different from 1F(a) crimes, these crimes are typically not

subject to universal jurisdiction.[24] In case someone has already been acquitted or convicted elsewhere (which is more likely with 1F(b) crimes than with 1F(a) and (c) crimes), prosecution will in most instances be blocked by the *ne bis in idem* principle. In our dataset, we have found no instances of 1F(b)-excluded individuals who were later prosecuted.

Second, there is the possibility of extradition to another state for the purpose of prosecution. This, however, also does not occur often (Bolhuis *et al.* 2014). The first barrier is very practical in nature. If states would wish the extradition of someone who has been excluded in the Netherlands, they have to be aware of his presence in the Netherlands. This is difficult, as the Netherlands is often not in the position to proactively share such asylum-related information with the country of origin or any third country interested in prosecuting the excluded individual because of confidentiality issues.[25] But, even if a country interested in prosecuting the excluded individual is aware of the presence of an individual in the Netherlands, a second barrier in many cases is the absence of a bilateral or multilateral extradition treaty. Of the states from which the 1F(b) applicants originate, only five have such agreements with the Netherlands. Even if there is an extradition agreement, extradition is only possible if the alleged crimes satisfy the double criminality requirement: the act has to be a crime in the country that requested the extradition as well as in the Netherlands. Past extradition requests of 1F(b)-excluded individuals from Turkey were refused, as they failed to meet this requirement (Bolhuis *et al.* 2014).

If prosecution and extradition are not options, the individual will have to leave the Netherlands within 28 days or, under certain circumstances, immediately (Article 62 of the Aliens Act). In addition, the excluded person will be declared *persona non grata* (Article 67 of the Aliens Act) or receive an entry ban (Article 66a of the Aliens Act). Reijven and Van Wijk (2012) already discussed that persons excluded on the basis of 1F(a) are not likely to return voluntarily and that forced deportation may be barred by the *non-refoulement* principle laid down Article 3 of the European Convention on Human Rights (ECHR). The chances that 1F(b)-excluded individuals who were allegedly involved in crimes for personal gain or profit are protected by *non-refoulement* is relatively low. It is, however, much more likely that politically motivated alleged perpetrators are protected from deportation. If this is the case, the excluded find themselves in a situation of legal 'limbo'; there is no prospect for their departure, while remaining in the Netherlands is illegal. In the Netherlands, such individuals are not entitled to work, have no access to education and do not receive financial support.[26] Sooner or later, they may disappear from the government's radar, illegally roaming around in the Netherlands, or anywhere else in the 'Schengen' territory. In some cases, they pop up in another Schengen country and again apply for asylum or try to get subsidiary protection in another way. In such instances, these possibly dangerous persons are typically passed on from one country to the next like a 'hot potato'.

Let us illustrate this by zooming in on the post-exclusion phase of *J136*, who applied for asylum in England in 1993. In 1995—probably while his case was still pending but this is unknown—he was convicted to a four-year sentence for firebombing a bank. After having served his sentence, he was expelled to his country of origin, where he was arrested and detained from 1998 to 2005 for being a member of a certain organization. In 2005, he entered the Netherlands and applied for asylum. The application was denied on the basis of 1F(b). In order to substantiate the exclusion, the IND had requested a printout of the conviction with the UK authorities, but to no avail. In 2010—five years later—he emerged in France, where he again applied for asylum. On the basis of the 'Dublin Regulation',[27] the French authorities transferred him to the Netherlands, where he again filed an asylum application. In June 2010, he was released from alien detention because he could not be deported to his country of origin. In November that same year, he filed yet another asylum application in the UK. The UK authorities, on the basis of the Dublin Regulation, requested the Netherlands to take him back. The request was, however, turned down, as the applicant had claimed he had been to his country of origin after he was released in the Netherlands. And, indeed, on the basis of the Dublin Regulation, there is no obligation to arrange for a Dublin transfer if the alien has spent three months or more outside Schengen territory. Upon this request, the Netherlands reiterated that the UK authorities mentioned that the applicant's statements were credible. Since the applicant could indeed have left the territory of the member states for more than three months, the Netherlands informed the UK that it 'unfortunately' saw no other possibility than to reject the request for transfer. As we stopped analysing, the case was still pending, and it is unknown where *J136* currently is. It is also unknown how many more of these 1F(b)-excluded 'hot potatoes' roam around in Europe.

Conclusion and Discussion

From 2000 to 2010, the Netherlands excluded 49 individuals on the basis of Article 1F(b) of the Refugee Convention. Nigerian and Turkish nationals form the largest groups within this population. The crimes that individuals excluded on the basis of Article 1F(b) have allegedly committed can be categorized as serious common crimes committed by individuals, non-political crimes with an alleged political objective and crimes motivated by political, ideological, ethnic and/or religious beliefs. Interestingly, most of the cases fall into the third category. In the Netherlands, a mechanistic approach is taken to determine the seriousness of the alleged crimes. We have seen cases in which a proportionality test was employed but recent case law suggests that this is now no longer always used. Factors such as expiation are deemed irrelevant to the applicability of Article 1F(b).

In absence of a universal meaning of the concept of serious non-political crimes, states have a significant amount of discretion to decide which crimes

fall under 1F(b). Essentially, debates on the rationale behind and scope of Article 1F(b) can be summarized by these two questions recently posed by the Supreme Court of Canada:

- Does Article 1F(b) apply to 'anyone who has ever committed a serious non-political crime outside the country of refuge'?
- Does the seriousness of the crimes have to be 'balanced against factors extraneous to commission of the crime such as current dangerousness or post-crime rehabilitation or expiation'?[28]

This study suggests that the Netherlands tends to exclude anyone who has ever committed a serious non-political crime outside the Netherlands and that factors such as dangerousness, rehabilitation and expiation are irrelevant in determining whether the crime is serious. This contradicts the approach taken in some other European states and advocated by the UNHCR and human rights organizations.

Finally, this study suggests that the post-exclusion phase of 1F(b) cases is full of hurdles. Domestic prosecution and extradition are often not possible, while voluntary or forced return may be barred because of *non-refoulement* obligations. Consequently, possibly dangerous unwanted but unreturnable individuals travel around in Europe, while immigration authorities of the respective countries where they set foot toss these 'hot potatoes' around in the hope that they themselves do not have to deal with the matter. With the increased attention on identifying possible terrorists amongst the asylum population, Europe is likely to be confronted with more 1F(b) exclusions in the future. However, as it stands, it does not have a coherent approach on how to deal with these individuals after exclusion.

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1. Article 1F was invoked against 920 persons between 1992 and 2014. See *Kamerstukken II 2013/14*, 19637–1808, 14 April 2014, p. 14; *Kamerstukken II 2014/15*, 19637–1952, 3 March 2015.
2. The Court of Justice of the European Union (CJEU) quotes maintaining the 'credibility' of refugee protection system as the underlying purpose of refugee exclusion; see CJEU Grand Chamber, *Bundesrepublik Deutschland v. B and D, C-57/09 and C-101/09*, judgment of 9 November 2010, ECR I-10979, at 115.
3. In its 1992 Handbook, the UNHCR stated that '[t]he aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime'. The view that Article 1F serves (solely or in part) to protect the receiving state's interests has been endorsed inter alia in Australia, New Zealand and in some Canadian cases (see Hathaway and Foster 2014: 538). On the contrary, in its 2009 'Statement on Article 1F', the UNHCR contends that '[w]hile Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country' (UNHCR 2009: 8). This position was also adopted by the CJEU in *Deutschland v. B. and D.*, *supra* note 2, para. 101. The Supreme Court of

Canada recently considered that the Refugee Convention 'aims to strike a balance between helping victims of oppression by allowing them to start new lives in other countries, while also protecting the interests of receiving countries, which they did not renounce simply by negotiating specific provisions to aid victims of oppression. The Refugee Convention is not itself an abstract principle but an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests'. Supreme Court of Canada, *Febles v. Canada* (Citizenship and Immigration), judgment of 30 October 2014, 2014 SCC 68.

4. In the UK, for instance, crimes for which a minimum imprisonment of two years would be likely had the crime been prosecuted in the UK are considered 'serious' (Rikhof 2012: 345). In Canada, in principle, a crime is seen as serious when a maximum sentence of 10 years or more could have been imposed (*ibid.*: 316; Rikhof 2013: 219); this has led to exclusion under Article 1F(b) for crimes such as 'using a false passport, taking bribes, possession of 0.9 grams of cocaine, falsifying business records, and operation of a motor vehicle while impaired' (see Canadian Association of Refugee Lawyers 2014: para. 12). However, as noted by some commentators (Rikhof 2013: 231; Djordevic 2014: 1069), in both the UK and Canada, there seems to be a move away from purely mechanistic approaches, as, for example, becomes clear from the judgments Court of Appeal of England and Wales, *AH (Algeria) v. Secretary of State for the Home Department*, judgment of 2 April 2012, 2012 EWCA Civ 395, para. 40; Federal Court of Appeal, *Jayakasera v. Canada* (Citizenship and Immigration), judgment of 17 December 2008, 2008 FCA 404, para. 44; and *Febles v. Canada*, *supra* note 3, para. 62.
5. Canada, the Netherlands and the United States have, for instance, included economic crimes under this notion (Rikhof 2012: 345).
6 *Deutschland v. B. and D.*, *supra* note 2.
7. *Ibid.*, paras. 109–111.
8. The issue of whether serving a sentence negates the applicability of Article 1F is dealt with differently in different countries. In Belgium, Switzerland and France, for instance, serving a sentence can be a relevant factor (UNHCR 2014: para. 26). The French *Cour Nationale du Droit d'Asil* (National Asylum Court, CNDA) in one case even considered that completion of a sentence in itself resulted in the inapplicability of 1F(b); the Council of State argued that this is only true if the individual does not pose a danger to the state; see *Conseil d'Etat*, Ofpra c/ M.A., judgment of 4 May 2011, 320910. In Canada, the Supreme Court in *Febles v. Canada* (*supra* note 3) recently saw completion of a sentence as a factor 'extraneous' to the commission of the crime and therefore irrelevant. See also Rikhof (2013: 219–220). The same point of view was recently adopted by the Court of Appeal of England and Wales; see *AH (Algeria) v. Secretary of State for the Home Department*, judgment of 14 October 2015, [2015] EWCA Civ 1003, paras. 19–33. Related is the issue of whether it should be taken into account whether the individual poses a present danger to the country of refuge. The CJEU in *Deutschland v. B. and D.* argued that making application of 1F(b) (or (c)) conditional on the individual posing a present danger would be inconsistent with the dual objective of 1F exclusion (excluding those undeserving of refugee status and preventing refugee status from enabling perpetrators of serious crimes to escape criminal liability); see *supra* note 2, paras. 100–105.
9. In theory, Article 1F(c) is only invoked in combination with sub (a), (b) or both, as it is considered not to suffice as an independent ground for exclusion in the

Netherlands; see Letter of the State Secretary of Justice to Parliament, *Kamerstukken II 1997/98*, 19 637–295, 28 November 1997. Persons excluded on the basis of 1F(b) in combination with 1F(c) generally concern people who are believed to have held relatively high positions; the crimes they are associated with are not necessarily more 'serious', but the individuals concerned are considered to have carried greater responsibility. For an elaborate overview of the characteristics of individuals excluded under Article 1F(a), see Bolhuis and Van Wijk (2015).

10. These regions are in accordance with the United Nations Statistics Division (UNSD) M49 coding classification.
11. These 'international crimes' also fall under the reach of 1F(a). Hathaway and Foster (2014: 547) argues that interpreting Article 1F(b) in a way to also include international crimes creates redundancy.
12. These binding instruments, for instance, include the 1977 European Convention on the Suppression of Terrorism and UN SC Resolutions 1269 and 1373 of 19 October 1999 and 28 September 2001, respectively. Earlier versions of the *Aliens Manual* made explicit reference to these instruments but this reference was omitted in the *Manual* that is currently in force.
13. A 'durability and proportionality' test has been developed in Dutch jurisprudence but it only assesses the proportionality of the consequences of exclusion in 'durable' situations of non-removal, namely situations that have lasted at least 10 years (Reijven and Van Wijk 2012).
14. The fact that a crime is not seen as a crime by some jurisdictions can also block the application of 1F, as becomes clear from a case concerning female genital mutilation. *Raad van State* (Council of State), judgment of 10 February 2014, ECLI:NL:RVS:2014:550.
15. *Raad van State*, judgment of 30 December 2009, AbRvS 200902983/1; see Rikhof (2012: 331, 345). In a case in which the IND applied 1F(b) to an Afghan judge for allegedly accepting bribes in her capacity as a judge, the court argued that the seriousness threshold was not met. See *Rechtbank Den Haag* (District Court of The Hague), judgment of 2 October 2012, ECLI:NL:RBSGR:2012:BX9081.
16. Human smuggling is regarded to undermine the international system and can bring 'great harm' to states and can 'endanger the lives or security of the migrants involved' (preamble to the Protocol against the Smuggling of Migrants supplementing the UN Convention against Transnational Crime).
17. Interestingly, in an Australian human smuggling case, the Administrative Appeals Tribunal of Australia (AATA) took a different approach, arguing that 'a distinction must be drawn between the offence in law, which is of a serious character, and the Applicant's conduct which, in the Tribunal's view, is not so serious. [The applicant's] criminal conduct comprised, on a number of occasions, his repairing an engine on the boat. He did not so do for profit but merely to facilitate the boat continuing on its voyage and reaching its destination. In the Tribunal's view, this is not the sort of ''serious non-political crime'' which should give rise to Australia's protection obligations under the Refugees Convention not applying'. AATA, *'SRBBBB' and Minister for Immigration and Multicultural and Indigenous Affairs*, judgment of 24 October 2003, [2003] AATA 1066, para. 59. A similar conclusion was reached in AATA, *'SRCCCC' and Minister for Immigration and Multicultural and Indigenous Affairs*, judgment of 26 March 2004, [2004] AATA 315.
18. In a recent case in which an individual convicted in Germany for importing 32 kilograms of raw opium had been excluded on the basis of 1F(b) by the Dutch

State Secretary of Security and Justice, the Council of State, however, took an approach that seems to be less mechanistic. While the State Secretary confirmed that, in deciding whether 1F applies, he only takes into account whether the nature of the offence makes it can be qualified as a serious non-political crime (para. 1.4), the court considered that, since not every drug crime is a serious non-political crime, the State Secretary has to show on the basis of what criteria and under what circumstances a drug crime constitutes a serious non-political crime (para. 1.6). See *Raad van State*, judgment of 14 September 2015, ECLI:NL:RVS:2015:3008. Gottwald (2006) already argued that the fact that different degrees of seriousness exist, as reflected in the UN Trafficking Convention, should be taken into account in deciding on the applicability of 1F(b). Arguably, the same could be said about human smuggling.

19. *Rechtbank Den Haag*, judgment of 19 July 2004, Awb 02/60920.
20. In an Australian case, the AATA also found that the crime in question fell under 1F(b), as it was committed both in and outside Australia. See *'WAT' and Minister for Immigration and Multicultural and Indigenous Affairs*, judgment of 7 November 2002, [2002] AATA 1150, paras. 18–20.
21. *Rechtbank Den Haag*, judgment of 28 June 2007, ECLI: NL:RBSGR: 2007:BA8765.
22. As the Netherlands was one of four governments expressing to the CJEU that an assessment of proportionality is not necessary as all relevant circumstances are already considered in determining the seriousness of an act, and the CJEU adopted this view, it could be that the proportionality test is currently not used any more. See *Deutschland v. B. and D.*, *supra* note 2, at para. 109. At the same time, the Council of State, in the above-mentioned recent decision, for example, stressed that 'the application of [Article 1F(b)] should be proportionate to the objective pursued, which involves weighing the seriousness of the crime against the consequences of exclusion' (translation by the authors); Council of State, *supra* note 18, para. 1.5.
23. Remarkably, the above-mentioned recent decision by the Council of State seems to suggest that the passage of time and absence of recidivism *are* relevant in deciding on whether there are serious reasons for considering that someone has committed acts referred to in Article 1F(b). See Council of State, *supra* note 18, para. 1.3.
24. Exceptions are acts of torture that do not qualify as 1F(a) crimes. On the basis of the 1989 Torture Convention, Dutch courts have competence to adjudicate those crimes. We encountered at least three cases (*M2*, *M16* and *M90*) in which the exclusion was based on alleged commission of acts of torture in the sense of the Torture Convention.
25. Another possibility is that the country of origin has issued an international arrest warrant; in the one case in which we encountered this (*J136*), it did not lead to the arrest and extradition of the person concerned.
26. Since a recent verdict by the European Committee for Social Rights, the Dutch government is obliged to offer them basic humanitarian aid, however (see European Committee for Social Rights, European Federation of National Organisations Working with the Homeless vs. the Netherlands, Complaint no. 86/2012, Decision on the merits, 2 July 2014. Available at http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC86Merits_en.pdf (accessed on 6 February 2015)).

27. Regulation 2003/343/EC.
28. *Febles v. Canada*, Supreme Court of Canada, judgment of 30 October 2014, 2014 SCC 68, paras. 44 and 60.

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