Narrowing the impunity gap?

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4. Prosecution of those excluded under 1F(a) outside the state of refuge

4.1. Introduction

Over the last decade, states have increasingly prioritized the identification of alleged perpetrators of international crimes and serious non-political crimes with the aim of excluding them from refugee protection as per Article 1F of the Refugee Convention. Pursuant to the principle of *aut dedere aut judicare* states should either extradite or prosecute international crimes suspects. Since prosecution on the basis of universal jurisdiction has proven to be expensive and difficult, extradition has emerged as a more attractive alternative for governments. Extradition has the supplementary advantage of justice being seen to be delivered in the country where the alleged crimes were committed. Extraditing alleged perpetrators of international crimes is, however, far from straightforward. For many years after the genocide, Rwandan requests to extradite suspects living outside of the country were consistently turned down by European states such as Germany, Switzerland, Finland, the United

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2 The United Nations Convention relating to the Status of Refugees (hereinafter ‘Refugee Convention’) was adopted in 1951. Art. 1F reads: ‘The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’ In this chapter the term exclusion refers solely to Art. 1F Refugee Convention; the other exclusion clauses (Arts 1(D) and (E)), are not addressed. Whenever mention is made of ‘excluded’ individuals, applicants who have been denied refugee protection due to Art. 1F are referred to with the masculine pronoun.

3 Lit.: ‘to extradite or prosecute.’ This obligation only pertains to international crimes and not to serious non-political crimes (Art. 1F(b) Refugee Convention). See Rikhof (2012: 461-462).

Kingdom,\(^5\) Italy\(^6\) and France.\(^7\) Courts and governments were concerned that extradition would violate human rights obligations: in particular, the prohibition of torture and inhuman or degrading treatment; and the right to a fair trial. This trend started to turn in 2011, when the United States extradited, and the International Criminal Tribunal for Rwanda (ICTR) referred, alleged genocide perpetrators to Rwanda for the first time. Subsequently, the ICTR referred another detained suspect and the case files for six fugitives, while the United States and Canada deported two other suspects.\(^8\)

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Thereafter, courts in Sweden,9 Denmark,10 Norway11 and the Netherlands,12 as well as the European Court of Human Rights (ECtHR) authorized further extraditions of suspects to Rwanda. In the Netherlands, the recent authorization of Rwandan extradition requests is framed as an important development in support of the State Secretary for Security and Justice’s ‘programmatic approach’ towards international crimes.13 This approach aims at preventing perpetrators from entering and settling in the Netherlands and ending their impunity. Part of the programme entails assisting countries of origin in strengthening their criminal justice system to facilitate prosecution of alleged perpetrators. In his latest annual report the State Secretary stated: ‘Where possible, the Netherlands supports countries by enabling them to deal with cases in accordance with international standards regarding a fair trial, thus paving the road for extradition.’14 According to the State Secretary, Rwanda serves as an example of how the programmatic approach works and he maintains that a similar approach should be pursued with respect to other countries.15 The above proposition raises the question: how likely is it that the Netherlands will actually be able to extradite excluded individuals to other states in the future? To answer

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9 The extradition request for Sylvère Ahorugze was granted by the Supreme Court of Sweden on 26 May 2009 and was approved by the ECtHR in October 2011; the decision became final in June 2012. See TRIAL, Sylvère Ahorugze, 17 January 2013, available online at <http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/476/action/show/controller/Profile/tab/legal-procedure.html> (last visited 25 November 2013).

10 The Supreme Court of Denmark approved the extradition of Emmanuel Mbaru shima na on 6 November 2013. See Højesterets Kendelse (Order of the Supreme Court of Denmark), 6 November 2013, Director of Public Prosecutions vs. T., Case No. 105/2013; translation available online at <http://www.internationalcrimesdatabase.org/upload/ICD/Upload1215/200131106_Danish_Supreme_Court_decision_on_extradition_to_Rwanda.pdf> (last visited 21 July 2014).


12 On 17 June 2014, the Dutch Supreme Court confirmed the approval of the extradition request for Jean Claude I. See Supreme Court of the Netherlands, 17 June 2014, ECLI:NL:HR:2014:1441. Soon after this first case was approved in first instance, another alleged génocidaire, Jean Baptiste M., was arrested in the Netherlands on 23 January 2014. His extradition was also approved on 11 July 2014. See District Court of The Hague, 11 July 2014, ECLI:NL:RBSGR:2014:8484. In the period since the publication of the original article on which this chapter is based, the case has continued: both individuals were extradited on 12 November 2016; see attachment to Kamerstukken II 2016/17, 34550 VI, no. 105, blg-802100.


14 Ibid.

15 Ibid.
this question, we analysed why Rwandan extradition requests to the Netherlands and other European countries – typically concerning individuals excluded on the basis of Article 1F – have been authorized. We will argue that, for a number of reasons, the Rwandan case could be considered exceptional. In the second section, we examine why it is unlikely in the near future that other, post-conflict countries will successfully request the extradition of Article 1F-excluded individuals from the Netherlands. In contrast to Rwanda, governments in many countries of origin lack the willingness – and capacity – to domestically prosecute excluded asylum seekers. Moreover, even if such willingness exists, extradition law and human rights law requirements are likely to obstruct future extraditions. This chapter is based on an analysis of case law, academic literature and information taken from popular media, such as news articles and websites. To contextualize our data, we refer to interviews with two experts on transitional justice in Rwanda.16 In order to describe the characteristics of Article 1F-excluded individuals in the Netherlands, we refer to an analysis of 745 files of Article 1F-excluded individuals who had their asylum requests processed between January 2000 and November 2010.17 This chapter focuses mainly on extradition for crimes that would fall within the scope of Article 1F(a), but also mentions extradition requests for crimes that would fall under 1F(b).

4.2. Extradition of alleged génocidaires from Europe to Rwanda: a long, bumpy road

Governments of post-conflict countries are not necessarily interested in holding alleged perpetrators of international crimes individually criminally accountable. Prosecutions – or threat thereof – may have destabilizing effects. Moreover, governments are particularly unlikely to prosecute people belonging to their own political, ethnic or religious groups. For such reasons, countries may opt to grant amnesties, appoint truth commissions, use restorative justice mechanisms or restrict prosecutions to a limited number of persons. In Rwanda, however, ‘doing justice’ has always set the tone. From December 1996 until 2006, Rwanda’s national courts tried nearly 10,000 génocidaires.18 Next to these ‘classic’ criminal trials, Rwanda also installed traditional grassroots gacaca courts which tried hundreds of thousands of

16 Vice Rector Academic Affairs and Research at the Institute for Legal Practice and Development (ILPD) in Nyanza, Rwanda, May 2011-December 2013 (R1) and Senior Policy Advisor Rule of Law at the Dutch Ministry of Foreign Affairs and Vice Rector Academic Affairs and Research at the ILPD 2008-2010 (R2). Whenever we refer to information provided by these experts, reference will be made to the respective codes (R1, R2).
17 For an elaborate description of this dataset, see §1.3.
individuals between March 2005 and June 2012. In other words, since 1994, Rwanda has been more than willing to prosecute perpetrators of genocide committed against the Tutsis, including those living abroad. Willingness to prosecute international crimes, however, is not enough for successful extradition. Before any viable request can be made, a country needs to have the organizational capacity and expertise to investigate, prosecute and try such complex cases. In post-conflict situations, the infrastructure for prosecuting conventional criminal cases, let alone for prosecuting international crimes may often be damaged or even eradicated. Directly after the genocide and the protracted civil war, Rwanda’s criminal justice system was in ruins, lacking the necessary capacity and expertise. Instead, prosecutions were initiated by the ICTR, which was established in November 1994. Simultaneously, the international community contributed considerably to rebuilding and strengthening the criminal justice system in Rwanda. At first, development aid typically focused on investing in the construction of courthouses and prisons (R2). In the later phase, investments were expanded to offering training to judges, prosecutors and lawyers aiming at gaining expertise on dealing with atrocity crimes. Additionally, a system of legal aid was instituted (R2).

Before domestic prosecutions could be expanded to accused residing out of the country, Rwanda had to invest in the identification and tracking down of this group while gaining the necessary expertise in extradition law. Although personal details and information on the crimes committed by foreign nationals may be known to the authorities of a state of refuge, this information is not necessarily transferred to countries of origin with an interest in prosecuting these individuals; particularly where the foreign national has applied for asylum. This means that countries of origin have to trace the people for whom they are searching. The Rwandan government has been active in this search; again with the assistance of the international community. In 2004, Interpol, together with the Rwandan National Prosecution Service and ICTR, set up the Rwandan Genocide Fugitives Project in order to support the localization


21 The ICTR was established by the UN Security Council through SC Res. 955, 8 November 1994.

22 For example, in 2011 several professionals from the Dutch police, public prosecution office and judiciary visited Rwanda to give training, while a training week was organized in the Netherlands for Rwandan judges and prosecutors. Such trainings sought to increase the quality of the administration of justice and to ensure the independence of the judiciary. See State Secretary of Security and Justice, Rapportagebrief Internationale Misdrijven (reporting letter international crimes) 2011, 21 June 2012, No. 220338; State Secretary of Foreign Affairs, (Kamerstukken II 2011/12, 29237, no. 142, 17 November 2011).
and apprehension of the fugitives wanted by these two organizations. In 2006, the Rwandan government issued a list of 193 fugitives wanted for genocide related crimes. In addition to the Interpol project, the Rwandan National Prosecution Services also established its own Genocide Fugitive Tracking Unit (GFTU) in 2007, tasked with identifying the whereabouts of genocide suspects abroad, investigating allegations and cooperating with national prosecution services and international judicial bodies to either prosecute the accused domestically or extradite them to Rwanda. European states continue to assist Rwanda in building up relevant expertise. The Netherlands, in particular, signed a letter of intent with the Rwandan government in 2010 which allowed the exchange of non-operational knowledge between Dutch and Rwandan public prosecution, judiciary and bar associations. In 2012, the GFTU issued a list with names of more than 70,000 genocide fugitives who had been convicted by gacaca courts in absentia. The list, according to the government of Rwanda, includes a substantial number of the architects, planners and key organizers of the genocide. By November 2012, the GFTU had transmitted 156 arrest warrants to 27 countries. When Rwanda issued its first extradition requests to European states in 2007, the country showed willingness to identify and prosecute alleged perpetrators of international crimes living abroad. A specially dedicated unit with good international contacts had the ability to track down fugitives, while a trained staff of prosecutors and judges had the capacity and expertise to prosecute possibly extradited persons. However, legal obstacles posed another obstruction to authorization of extraditions: national extradition law requirements and human


27 See Permanent Secretary of Ministry of Justice Rwanda, supra note 25.


29 We propose that the italicized terms are factors determining the likelihood of extraditions of individuals excluded under Art. 1F Refugee Convention; we will use these factors in the analysis in §4.3.
rights law requirements. Below, we will discuss how Rwanda and a number of European states eventually managed to comply with those requirements.

4.2.1. Requirements of national extradition law
The key principles governing extradition in most European states are those of sovereignty, reciprocity, specialty and double criminality. The principle of double criminality will be discussed below. The other principles play less of a role in Rwandan extradition cases. In short, the sovereignty principle entails that no state is bound to extradite, unless so agreed by treaty. Reciprocity means that extradition takes place on the premise that any future request will be respectively honoured in return. Specialty means that, as a rule, a person may only be prosecuted for the offences for which he has been extradited. Exceptions are also largely the same across Europe and include political offences, death penalty, discriminatory prosecution, hardship and double jeopardy. 30 In this section we will not discuss the various principles, laws and procedures in relation to all European states. Instead, we will focus our attention on the most prominent elements which actually barred the extradition of alleged Rwandan génocidaires.

Legal Basis
In most of the researched states, extradition takes place on the basis of an ad hoc agreement between requesting and requested state. Although national laws may provide for bilateral or multilateral extradition treaties, they only serve to regulate extradition in general terms while formalizing trust between two states in each other’s criminal justice system. Treaties may also ensure that extradition is reciprocal by making it mandatory for both states to cooperate with one another’s requests. However, in general, the existence of a treaty is not a requirement per se. For example, in the United Kingdom, the Foreign Secretary may enter into special arrangements with another state if no other extradition provisions exist to define the conditions under which extradition is to take place. 31 This was done in relation to four extradition requests made by Rwanda in 2006. 32 In France, Sweden, Finland and Germany, extradition in absence of a treaty is also permissible, although higher evidentiary standards than usual will apply in the last three countries mentioned. 33 The idea behind a higher standard of proof is that the absence of a treaty implies that there is less trust in the

30 For a more exhaustive discussion of the meaning of these principles and exceptions, see Van Sliedregt, Sjöcrona and Orie (2008: 155-165); Jones and Davidson (2008, 15 et seq.).
31 Section 194 Extradition Act 2003 (United Kingdom).
33 Ibid.
requesting state’s judicial system. Contrary to other states, under Dutch constitutional law treaties alone may form the legal basis for extradition.\textsuperscript{34} Notably, although a letter of intent to conclude an extradition treaty had been exchanged between the governments of the Netherlands and Rwanda,\textsuperscript{35} no such treaty ever materialized. Instead, the Dutch government focused on amending its own extradition laws. Unlike the Extradition Act, which governs most extraditions, the War Crimes Surrender Act of 1954 (\textit{Wet Overlevering inzake Oorlogsmisdrijven}, WCSA) already designated certain multilateral conventions as the constitutionally required treaty basis, if no bilateral treaty between the Netherlands and the requesting state otherwise existed. However, the application of the WCSA is limited in scope: originally, only crimes listed in the four Geneva Conventions and the Convention Against Torture (CAT) were subject to extradition to countries with which the Netherlands had not concluded an extradition treaty. Consequently, genocide and crimes against humanity were not included. In 2012, as part of a series of legislative reforms, the list of treaties in the WCSA was expanded to include the Genocide Convention.\textsuperscript{36} In this way, the Netherlands created a legal basis for extraditing alleged génocidaires to Rwanda, without having to negotiate a treaty or circumvent the constitution.

Double Criminality and Retroactive Application of Criminal Law
The double criminality principle entails that the offence for which extradition is requested must have been criminalized in both the requesting and the requested state, at the time of the alleged perpetration of the offence. The principle protects the sovereignty of the requested state, especially in cases where a state is bound by a treaty to extradite, so that it does not have to cooperate with the prosecution of behaviour it does not consider criminally reprehensible.\textsuperscript{37} It also aims to prevent circumvention of the legality principle by the requested state, and thus serves human rights interests as well (Van Sliedregt, Sjöcrona & Orie, 2008: 197). The double criminality principle has complicated extradition of Rwandan génocidaires in several ways.

\textsuperscript{34} \textit{Ibid.}, at 9; see Art. 2(3) Constitution of the Netherlands, Art. 2 Extradition Act. This, by the way, also applies to Belgium. See Art. 1 Belgian Extradition Act.

\textsuperscript{35} See ‘Rapportagebrief Internationale Misdrijven 2010’ \textit{supra} note 26, at 7.

\textsuperscript{36} See Wet van 8 december 2011, Stb. 2011 605, which came into effect on 1 April 2012. However, crimes against humanity still were not included in the WCSA, because no international treaty which obliges states to prosecute or extradite crimes against humanity exists. See \textit{Kamerstukken} II 2009/10, 32475, no. 3, published on 14 September 2010.

\textsuperscript{37} For example: abortions and prostitution.
A requested state is not obliged to cooperate with an extradition for a crime which was not criminalized in the requesting state at the alleged time of perpetration if that would violate the prohibition of retroactive application of criminal law as laid down in Article 7 European Convention on Human Rights (ECHR).\textsuperscript{38} In its judgment of 26 February 2014, the Court of Cassation of France ruled that genocide had not been properly defined as a crime in the 1994 Rwandan criminal code. Accordingly, the Court held that extradition would be a violation of the legality principle and the prohibition of retroactive application of criminal law.\textsuperscript{39} It should be noted that the Court’s interpretation of the double criminality requirement is rather unique, as the ICTR has consistently ruled that Rwanda has proper jurisdiction.\textsuperscript{40} The double criminality principle also demands that the act for which extradition is requested be criminalized in the requested state. In the past, this principle has complicated extradition of Rwandans as well. In \textit{Ahorugeze v. Sweden} and other cases, Rwanda not only requested Sweden to extradite for genocide, but also for ‘formation, membership, leadership and participation in an association of a criminal gang, whose purpose and existence were to do harm to people or their property’.\textsuperscript{41} As the described conduct did not constitute an offence under Swedish law, the extradition request was only partially granted. This means that, pursuant to the specialty rule, Rwanda is precluded from prosecuting this particular conduct after the factual extradition takes place, even though the suspect is in its custody. In the United Kingdom, a temporal limitation applies to the criminality of the offence in the requested state. As the 1969 Genocide Act of the United Kingdom already criminalized genocide committed outside the United Kingdom, this element of the double criminality principle has, however, never barred extradition to Rwanda.\textsuperscript{42}

\textsuperscript{38} See Harris et al. (2009: 332, footnote 16). Although Art. 7(2) derogates from this rule, it is thought to apply to war crimes and crimes against humanity committed during or immediately after the Second World War. See \textit{ibid.}, at 338-339.


\textsuperscript{40} See P. Bradfield, ‘France vs The Rest of the World – Who Is Right?’ Beyond the Hague blogpost 3 March 2014, available online at <https://beyondthehague.com/2014/03/03/800/> (last visited 25 May 2014); Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, Munyagishari (ICTR-2005-89-R11bis), Referral Chamber, 6 June 2012, paras. 9-10. Referral Chambers at the ICTR have confirmed repeatedly that Rwandan law prohibits genocide and crimes against humanity and may therefore prosecute for such crimes if cases are referred from ICTR. However, this discussion was mostly held as a jurisdictional issue within the context of Rule 11bis RPE ICTR, and not framed as a human rights issue. See also Decision on the Prosecutor’s Request for Referral to the Republic of Rwanda, Kanyarukiga (ICTR-2002-78-R11bis), Referral Chamber, 6 June 2008, para. 19; Decision on Prosecutor’s Request for Referral of the Case of Ildephonse hategekimana to Rwanda, Hategekimana (ICTR-00-55B-Rule 11bis), Referral Chamber, 19 June 2008, para. 17.

\textsuperscript{41} \textit{Ahorugeze v. Sweden}, para. 13.

\textsuperscript{42} Genocide Act 1969 (United Kingdom). For crimes against humanity, however, this problem may exist as it appears such conduct was not criminalized if committed outside the United Kingdom before 2001.
Unlike British law, the Dutch Supreme Court does not require that the conduct was criminalized under Dutch law at the time of the offence. Instead, it is sufficient for the conduct to be criminal at the time of request. 43

4.2.2. Requirements of human rights law

In its famous judgment in Soering v. UK, the ECtHR held that a state party may be in breach of the Convention if it extradites a person to a state where he is likely to be subjected to treatment which is contrary to Article 3 ECHR (prohibition of torture, inhumane or degrading treatment) or, in exceptional cases, Article 6 ECHR (right to a fair trial). 44 Human rights concerns in relation to the Rwandan criminal justice system, have been numerous and have previously obstructed extraditions from France, United Kingdom, Germany, Finland and Switzerland. 45 The main issues included the possible imposition of the death penalty or life imprisonment in isolation; general conditions in detention and prison facilities; the inability of the defence to have witnesses from abroad testify in court; witness protection; the independence of the judiciary and the availability of legal aid. Concurrent to extradition proceedings in Europe, the ICTR has carried out its completion strategy. This included the referral of outstanding cases to Rwanda. Pursuant to Rule 11bis (C) ICTR Rules of Procedure and Evidence, a case may only be referred if the accused is likely to receive a fair trial and if the death penalty is excluded. Instead of giving diplomatic assurances, as is often the case with interstate extradition, Rwanda enacted legislation which abolished capital punishment altogether and aimed to guarantee a fair trial in 2007. 46 With the help of international aid, Rwandan prison conditions were improved and the judiciary trained (R2). Nevertheless, despite the above measures in 2008 the Tribunal was still not convinced that the Rwandan criminal justice system met international standards. 47 In the apparent belief that the Tribunal was best equipped to make such assessments, the requested European states and the ECtHR largely follow the assessment of the ICTR with regard to the human rights situation in Rwanda from 2008 onwards. In this section we therefore

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43 Supreme Court of the Netherlands, 20 May 2003, ECLI:NL:HR:2003:AF1909. This case concerned the transfer of a convicted person to serve his sentence in the Netherlands, however it is likely to apply mutatis mutandis to extradition cases. See Van Sliedregt, Sjöcrona, and Orie (2008: 197).

44 Soering v. United Kingdom, ECtHR (1989) Series A, No. 14038/88, 7 July 1989, paras. 88 and 113 (hereinafter ‘Soering v. United Kingdom’).

45 These cases are mentioned in the introduction.


47 Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, Munyakazi (ICTR-97-36-R11bis), Trial Chamber, 28 May 2008, para. 32.
first analyse ICTR case law on this issue, before discussing the case law of some European states and the landmark ECtHR judgment in *Ahorugeze v. Sweden*.

**ICTR Case Law**

In 2008, an ICTR Trial Chamber denied the referral of a case to Rwanda. Although the Chamber was satisfied that Rwanda would not impose the death penalty, it held that the alternative sentence of life imprisonment spent in isolation remained an unacceptable possibility.\(^{48}\) Secondly, because the competent court would try the accused with only a single judge, the Chamber was concerned that the court would be susceptible to undue governmental influence. The ICTR based this concern on the aggressive reaction of the Rwandan government towards the release of Jean-Bosco Barayagwiza on fair trial grounds by the Appeals Chamber. Investigations undertaken against Rwandan Patriotic Army officers by prosecutors and investigating judges in Europe were also met with strong criticism from Rwandan authorities.\(^{49}\)

Thirdly, the Trial Chamber was concerned that the defence would not be able to call witnesses in the same fashion as the prosecution would, which was an equality of arms problem. In particular, the Chamber questioned the protection of witnesses against intimidation, abuse and even killing, and expressed its concerns over cases in which defence witnesses were indicted for promoting ‘genocidal ideologies’ in court.\(^{50}\) The Chamber was also concerned that Rwanda did not take the necessary steps to secure the attendance of witnesses from abroad or cooperate with other states for the purposes of testimony through video-link. In this respect the Chamber furthermore held that testimony delivered by witnesses from abroad through video-link may disadvantage the defence, as the prosecution, contrary to the defence, would in most cases be able to have its own witnesses testify viva voce in the courtroom.\(^{51}\)

In a ruling later that year, the Appeals Chamber upheld the objection regarding the possibility of a life sentence spent in isolation.\(^{52}\) However, it overturned the Trial Chamber’s finding that Rwanda did not respect the independence of the judiciary. According to the Appeals Chamber the evidence of government influence was not sufficient and the Trial Chamber, erroneously, had not taken the availability of monitoring and revocation procedures into account.\(^{53}\) With regard to equality of arms issues the Appeals Chamber was satisfied that Rwanda had undertaken

\(^{48}\) Ibid., para. 32.

\(^{49}\) Ibid., paras. 41-44.

\(^{50}\) Ibid., paras. 60-63.

\(^{51}\) Ibid., paras. 64-65.

\(^{52}\) Ibid., para. 20.

\(^{53}\) Ibid., paras. 22-30.
steps to make video-link sufficiently available to have witnesses testify from abroad. However, it agreed with the Trial Chamber that equality of arms was still not guaranteed if the majority of defence witnesses testified through video, while the majority of prosecution witnesses could testify in person. In its decision in Kanyarukiga of the same year, the Appeals Chamber found that there were reports of witnesses who had faced threats, beatings, torture, arrests, detentions and killings. Regardless the veracity of these reports, the Chamber found that such reports could affect witnesses’ willingness to testify, and thereby the right of the defendant to a fair trial. To satisfy all these objections, Rwanda amended the transfer law so that life imprisonment in solitary confinement would not be imposed. In addition, the witness protection programme was improved with new legislation and expanded with various new witness units under the authority of the courts, rather than the Ministry of Justice, as was previously the case. In 2011, the Referral Chamber finally approved a first referral. It was satisfied with the reforms made and observed that in 36 recent genocide cases tried before Rwandan courts, almost all defence teams were able to secure attendance of witnesses. The Chamber acknowledged that fears may still be present among witnesses, but found that the new laws should be ‘given a chance to operate before being held to be defective’. Concerns regarding equality of arms in relation to witnesses testifying through video-link from abroad were largely dismissed, since judges were now deemed able to travel abroad to hear the witnesses. Before finally authorizing the referral, the Chamber noted the availability of monitoring mechanisms and the possibility for the ICTR to revoke the transfer if no longer satisfied of a fair trial. It should be noted that the ICTR had been facing strong pressure by the Security Council to finish the completion strategy for quite some time when the first referral was approved. In light of this, the weight that was given to the availability of a revocation mechanism is not entirely proper as the ICTR and its successor Mechanism for International Criminal Tribunals (MICT) would have to withstand strong political resistance if it would actually revoke a referral.

54 Ibid., para. 42.
55 Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, Kanyarukiga (ICTR-2002-78-R11bis), Trial Chamber, 30 October 2008, § 35.
56 Decision on Prosecutor’s Request For Referral To The Republic Of Rwanda, Uwinkindi (ICTR-2001-75-R11bis), Referral Chamber, 28 June 2011, paras. 51 and 60.
57 Uwinkindi, supra note 56. The Decision was upheld on appeal, see: Decision on Uwinkindi’s Appeal Against the Referral of His Case to Rwanda and Related Motions, Uwinkindi (ICTR-2001-75-R11bis), Appeals Chamber, 16 December 2011.
58 Ibid., paras. 99-100.
59 Ibid., para. 103.
60 Ibid., paras. 109-113.
Having discussed the human rights issues surrounding referrals from the ICTR to Rwanda, we turn to the case law of the ECtHR and national courts in respect of extradition to Rwanda. At the outset, it should be noted that, in theory, the human rights protection offered by the ICTR differs somewhat from the human rights obligations of European states. As noted, pursuant to Rule 11bis (C) ICTR Rules of Procedure and Evidence, the Tribunal needs to be satisfied that the accused will receive a fair trial upon transfer. Pursuant to settled ECtHR case law, the extraditing state is only in violation of the ECHR if the individual who is to be extradited would risk a 'flagrant denial' of justice in the requesting country. According to Ahorugeze v. Sweden 'a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself'. In other words, similar to the ICTR, a state party to the Convention must offer the full range of rights as laid down in Article 6. However, unlike the ICTR, if a state party extradites rather than prosecutes, the ECHR does not impose a duty upon the extraditing state to ensure that the extradited person enjoys all fair trial rights in the requesting state which he would be entitled to if the extraditing state chose to prosecute instead. Only the most serious denials of justice, which the court does not define, are an issue under ECHR law. Concerns over Rwandan prison conditions and the death penalty fall under the absolute prohibitions of Article 3 ECHR, which, contrary to Article 6 rights, permit no derogation. In theory, no difference between ICTR and ECHR standards exists. Notwithstanding different fair trial standards, it would appear that most European national governments/courts fully relied on the ICTR's assessment of the human rights situation in Rwanda when examining extradition requests. For example, between 2008 and 2010 the Frankfurt Appeals Court and various French courts denied extraditions citing the ICTR's jurisprudence on fair trial rights. In 2009, the Finnish Ministry of Justice denied an extradition request, reasoning that Finland had committed itself to conduct fair trials by acceding to the ECHR and that it thus could not cooperate with requests which raised justified concerns as to whether the trial would be conducted in a fair manner. Finally, the Oslo District Court accorded extradition to Rwanda in 2011, citing the Uwinkindi

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63 Ahorugeze v. Sweden, paras. 62-64.

64 Ibid., para. 65.
decision and Norway’s own experience with the Rwandan criminal justice system.\textsuperscript{65} \textit{Ahorugeze v. Sweden} thus far has been the only published case concerning extradition to Rwanda to appear before the ECtHR. This 2011 judgment focused on Articles 3 and 6 ECHR. The Court was brief on the Article 3 complaints. Since the ICTR, the Special Court of Sierra Leone (which uses a Rwandan prison to have convicts serve their sentence), the government of the Netherlands and the Oslo District Court all found that the detention and prison facilities where the transferred and extradited defendants are to be detained are up to international standards, the Court was satisfied that there was no risk of torture or ill-treatment. Ahorugeze’s complaints in relation to Article 6 focused on the lack of a proper witness protection system and the lack of qualified lawyers in Rwanda. He also questioned the independence of the Rwandan judiciary. With regard to witness availability, the ECtHR noted the recent improvements made to the witness protection program and video link technology and readily dismissed the complaint. The Court also held that legal assistance would be sufficiently available and concluded that the criminal justice system operates sufficiently independently; again, by relying on the assessments of the ICTR, the Netherlands and Sweden. In obiter, the Court held that an invitation by Rwanda to monitor the proceedings was superfluous. Accordingly, the Court dismissed all fair trial complaints, and paved the way for future extraditions to Rwanda.

4.3. Factors determining the likelihood of future extraditions of excluded asylum seekers residing in the Netherlands

The above shows that Rwanda – in close cooperation with the international community – has taken many steps before successfully requesting extradition of alleged génocidaires from Europe. Extradition to Rwanda would never have become possible if Rwanda had not been willing to prosecute alleged perpetrators of genocide, developed the capacity and expertise to prosecute international crimes, invested in the ability to trace alleged perpetrators abroad, and if European countries and Rwanda had not initiated reforms to comply with national extradition law and human rights requirements. One of the states that played a significant role in this process has been the Netherlands, as it was an important contributor in strengthening the Rwandan criminal justice system (R1, R2).\textsuperscript{66} Indeed, some of the investments by the Dutch government have resolved human rights concerns which had previously obstructed extradition. For example, in 2004, the Dutch government invested seven million dollars in constructing a model detention facility which would later become the main detention and prison facility for the transferred and

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\textsuperscript{65} \textit{Ahorugeze v. Sweden}, paras. 72-74.

\textsuperscript{66} State Secretary of Security and Justice to parliament, Letter of 31 January 2014, No. 477611, at 1.
extradited suspects.\textsuperscript{67} The Netherlands also financed trainings for the judiciary and the fugitive tracking unit (R1, R2). As mentioned earlier, the Dutch State Secretary of Security and Justice argued that these Dutch efforts aimed to increase the possibilities for extradition and transfer of criminal prosecution for international crimes.\textsuperscript{68} The State Secretary mentioned that the Ministries of Security and Justice, and of Foreign Affairs, invested in building the rule of law in Rwanda to ensure that ‘a good and careful cooperation regarding extradition remains intact’ and contends that a similar approach is pursued for excluded refugees from other states.\textsuperscript{69} This leads to the question how likely it is that individuals excluded under Article 1F of the Refugee Convention from other countries will indeed in the near future also be extradited by the Netherlands. Focusing on the same elements as discussed above, in the remainder of the chapter we assess the likelihood of extradition of Article 1F non-Rwandan excluded individuals residing in the Netherlands. Acknowledging that more factors may be relevant in making such an assessment, this explorative exercise should be seen as a first step in developing a more thorough understanding of the challenges and possibilities related to (facilitating) the extradition of Article 1F-excluded individuals.

Characteristics of excluded asylum seekers in the Netherlands
Exclusion on the basis of Article 1F of the Refugee Convention is based on the threshold of ‘serious reasons for considering’ that someone committed any of the crimes listed in the provision. As this threshold is lower than the threshold for a criminal conviction, the statement of an asylum seeker that he has worked for a certain unit or organization may suffice, if ‘authoritative reports’ confirm that this unit or organization may have been responsible for international crimes at the time of

\textsuperscript{67} During trial, the accused are detained in Kigali Central Prison. See Decision On Prosecutor’s Request For Referral To The Republic Of Rwanda, Uwinkindi (ICTR-2001-75-R1bis), Referral Chamber, 28 June 2011, para. 59. On Mpanga, see ‘Mpanga, A Stronghold for the UN in Rwanda’, RNW, 5 May 2008, available online at <https://www.justicetribune.com/articles/mpanga-stronghold-un-rwanda> (last visited 4 January 2014). To meet international standards, the Mpanga prison was partially reconstructed in 2008. Eight convicts of the Special Court for Sierra Leone currently serve their sentence in Mpanga; see ‘SCSL: Convicts Serve Time in Rwanda’, RNW, available online at <http://www.rnw.nl/international-justice/article/scsl-convicts-serve-time-rwanda> (last visited 4 January 2014). The two ICTR detainees who were transferred to Rwanda (Uwinkindi and Munyagishari), as well as Ahorugeze, Bandora and Emmanuel Mbarushimana, were to serve their sentence in the special section of Mpanga. See Uwinkindi, ibid., paras. 52, 60; Tingrett (District Court) Oslo, 11 July 2011, 11-050224ENE-OTIR/01, at 13; Ahorugeze v. Sweden, para. 24; Højesterets Kendelse, supra note 10.

\textsuperscript{68} State Secretary of Security and Justice, supra note 13.

\textsuperscript{69} Ibid., at 6-8. One of our respondents (R2) disputes that Foreign Affairs investments in strengthening the Rwandan justice sector, in the context of development cooperation, should be seen in this light. He argues that these investments are first and foremost done to strengthen the rule of law in general, and that the fact that these investments may have promoted extradition is merely a side effect.
his employment. In the Netherlands, Article 1F has been invoked against 870 persons between 1992 and 2013. A total of 745 of those were excluded between January 2000 and November 2010. Our file analysis shows that the majority of excluded individuals in the Netherlands comes from Afghanistan (448 individuals), followed by Iraq (62), Angola (26), Democratic Republic of the Congo (23), Sierra Leone (20), the former Yugoslavia (20), Turkey (18) and Iran (17). With 12 excluded individuals, Rwanda ranks ninth in our database. Nigeria completes the so-called ‘top ten’, with 11 excluded individuals. The remaining 88 individuals come from 28 other countries. The majority of individuals are excluded on the basis of Article 1F(a), which concerns genocide, crimes against humanity, war crimes and crimes against peace. The over-representation of Afghans can – apart from a relatively large influx of Afghans to the Netherlands – be explained by the policy of categorical exclusion, which means that for some nationalities mere association with a certain position within a designated organization suffices as a basis for exclusion. The largest group to which this categorical exclusion applies are people who held military ranks of non-commissioned officers or higher within Afghan communist security services (Reijven & Van Wijk, 2014a). Excluded Afghans are typically associated with crimes committed in the 1980s. A similar type of categorical exclusion applies to Iraq, namely for high officials of the former Iraqi security services. The last group to which a categorical exclusion applies are corporals and non-civilian leaders of the Sierra Leonean Revolutionary United Front (RUF). Falling outside a categorical policy, the excluded Angolans are typically believed to have committed war crimes in the 1990s while fighting for either government or rebel forces. The same generally applies for excluded individuals from the Democratic Republic of the Congo (DRC), Sierra Leone and the former Yugoslavia. Turks and Nigerians form an exception, as they are often solely excluded on the basis of Article 1F(b): Turks because of suspected links with organizations designated as ‘terrorist’ by the Turkish government, such as Dev Sol or the Kurdistan Workers’ Party (PKK); Nigerians, because they are believed to have committed serious crimes as members of radical occult or religious groups, such as the ‘Egbesu Boys’ and Ijaw youth groups. In conclusion, excluded individuals from Iran are typically excluded because they allegedly contributed to crimes against humanity in their capacity as employees of secret services or prison security.

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70 See Chapter 5.

71 State Secretary of Security and Justice, Kamerstukken 2013/14, 19637, no. 1808, 14 April 2014, at 14.

72 As is the case with other countries, this number may be higher by now. Particular to Rwanda, however, is that the IND in 2008 started reassessing all asylum and regular permit requests on the basis of new information stemming from gacaca courts and the ICTR; see State Secretary of Security and Justice, supra note 66, at 3.


1. Willingness to Prosecute Article 1F Related Crimes

Without (political) willingness to domestically prosecute alleged perpetrators, a state is unlikely to request the extradition of excluded individuals. A quick scan of the countries appearing in our dataset suggests that many current administrations of the top ten countries lack such willingness. In 2008, Afghanistan provided a blanket amnesty for all parties in the conflicts of the past three decades (Kouvo & Mazoori, 2011: 495). Similarly, as part of a peace deal, Angola provided unconditional amnesty for all crimes committed during its thirty years of civil wars (Van Wijk, 2012). In Iraq, the establishment of the Iraqi High Tribunal may show that there has been willingness to prosecute international crimes, but its activities have been limited to prosecuting Saddam Hussein and a few other senior Ba’athists. The same goes for Sierra Leone. The Special Court for Sierra Leone has prosecuted a number of high level perpetrators, but the current government does not seem willing to do so with the scores of low level perpetrators who remain unpunished. To them an amnesty applies (Hayner, 2007). Sierra Leone and Iraq highlight another important caveat. Willingness to prosecute certain high level perpetrators does not necessarily imply an interest to prosecute the predominantly low level alleged perpetrators who are excluded in the Netherlands. Our analysis shows that most excluded from Sierra Leone, Angola, DRC, Nigeria and Iran are anonymous foot soldiers or bureaucrats. The top ten country most willing to prosecute – high as well as low level – excluded individuals residing in the Netherlands is probably Turkey. Over the years, Turkey has sought extradition of many alleged terrorists living in Europe.75 The same goes for Bosnia-Herzegovina and Croatia, which in recent years requested the extradition of several alleged war criminals around the world.76

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2. Capacity and Expertise to Prosecute the Alleged Crimes Domestically

Apart from showing a clear willingness to prosecute international crimes domestically, countries also need to have the capacity and expertise to do so. Firstly, this implies that there is a functioning criminal justice system which has the capacity to investigate, prosecute and try crimes. In the direct aftermath of war this may be problematic, as already noted with respect to Rwanda. In particular, the two countries that have generated the majority of excluded individuals (Afghanistan and Iraq) face ongoing security issues, which inevitably affect the functioning of the criminal justice system. In Afghanistan, after the Taliban regime was overthrown in 2001, power was distributed among factional commanders; as a result, corruption, organized crime and religious and ethnic divisions have led to destabilization and re-emergence of conflict (Kouvo & Mazoori, 2011: 493), making 2011 and 2013 the most violent years since 2001.77 In Iraq, the normal functioning of the criminal justice system has continuously been hindered by a high level of terrorist and insurgency attacks, which are often also directed at policemen and judges (Christova, 2013: 430). The recent invasion of the Islamic State (IS) – reportedly responsible for killing the judge who sentenced Saddam Hussein – has only complicated matters in this regard.78 Moreover, it has to be taken into account that the prosecution of Article 1F related crimes is even more challenging than prosecuting conventional crimes. International crimes trials in particular are incredibly complex – both in legal and in practical terms. For this reason some countries have concentrated the required knowledge in specialized investigative and judicial bodies.79 As happened in Rwanda, international donors have contributed to the establishment of organs for war crimes investigations and criminal proceedings in some of the top ten countries, such as Bosnia-Herzegovina, Croatia and Serbia.80 The Iraqi High Tribunal (IHT) has also been politically and financially supported by international donors, in particular by the United States (Scharf, 2007: 259). However, while the domestic prosecution of


79 See Chapter 5.

war criminals got off the ground in the former Yugoslavia,\textsuperscript{81} this cannot be said about Iraq. Although the IHT proceedings after the trial of Saddam Hussein did show that it had capacity and expertise to try complex cases, numerous other problems made it dysfunctional; this, and a lack of broader international involvement have hampered its functioning.\textsuperscript{82} In all likelihood related to the lack of willingness to prosecute such crimes, other top ten countries – for example, Angola, Sierra Leone and Iran – are not known to have specific expertise to successfully prosecute international crimes. The recent upheaval about three detained witnesses at the International Criminal Court (ICC) illustrates the ill-functioning of the Congolese criminal justice system in dealing with international crimes. Before testifying in 2011, two witnesses had been detained in DRC in connection with allegations of war crimes for over six years. Although DRC demonstrates willingness to prosecute – certain – suspects of international crimes, it is generally acknowledged that it currently lacks capacity and expertise to properly do so.\textsuperscript{83} Since its government in 2013 noted the importance of establishing ‘specialized mixed chambers’ to deal with war crimes, this may, however, change in the near future.\textsuperscript{84} Although individuals from Turkey and Nigeria are mostly believed to have committed acts of terrorism rather than core international crimes, prosecution would also demand considerable expertise and knowledge. One of our experts (R2) was convinced that as soon as a country showed a sincere willingness to domestically prosecute international crimes, international donors would be prepared to fund such initiatives. The cause of pursuing accountability for international crimes is considered prudent and related investment leads to measurable output: convictions and acquittals. Arguably, however, financial support can more easily be mobilized when there is a strong international outrage regarding the alleged crimes, such as Rwanda, the former Yugoslavia and Sierra Leone, than when it concerns, what Baines calls, ‘complex political perpetrators’ such as members of the Kurdish independence movement or Iranian secret service defectors (Baines, 2009).

\textsuperscript{81} Although the domestic war crimes courts in Bosnia-Herzegovina, Croatia and Serbia are regularly criticized for e.g. their selectivity, low number of prosecutions or lack of political and popular support, the number of cases handled by these courts is substantial. The Organization for Security and Co-operation in Europe (OSCE) concluded in a 2011 report that in Bosnia-Herzegovina, ‘[o]verall, the state level institutions have delivered efficient, fair, and human rights compliant proceedings’ and that ‘certain courts and prosecutor’s offices [on the regional/local level] demonstrated ample capacity, willingness, and professionalism to fairly and efficiently process war crimes cases, free of any indication of ethnic bias, although problems remain with some courts and prosecutor’s offices’. See OSCE, ‘Delivering Justice in Bosnia and Herzegovina’, May 2011, available online at <http://www.osce.org/bih/108103?download=true> (last visited 19 August 2014), at 7.


\textsuperscript{84} \textit{Ibid.}
3. Ability to Trace Alleged Perpetrators Living Abroad

Establishing to what extent governments have the ability to trace wanted individuals living abroad is extremely challenging. Some countries undoubtedly have their intelligence services searching for fugitives abroad, but it is in the nature of such operations that information on such activities is not publicly available. The little we can establish, however, is that apart from Rwanda, Bosnia-Herzegovina, Croatia and Serbia, the rest of the top ten countries are not known to have units specialized in tracking international crimes suspects which share and discuss lists of fugitives with Interpol and national investigative bodies. As for Turkey, one of the few top ten countries likely to be interested in its Article 1F-excluded nationals in the Netherlands, recent allegations that its secret services ordered the killing of three PKK activists in Paris in 2013 are likely to complicate matters of exchanging information with European counterparts.85

4. National Extradition Law Requirements

Dutch law requires that extraditions can only occur on the basis of a (bi- or multilateral) treaty. Of the top ten countries of origin, Bosnia-Herzegovina, Croatia, Serbia and Turkey are party to the (multilateral) European Convention on Extradition. No bilateral treaty has been concluded between The Netherlands and any of the other top ten countries.86 This means that for these countries, extradition can only take place on the basis of the multilateral treaties mentioned in Article 1(2) of the War Crimes Surrender Act and only since amendments to the Act came into force on 1 April 2012.87 These amendments have made extradition for genocide, war crimes and torture possible. However, crimes against humanity as yet do not fall under these treaties. In so far there is no overlap with any of the other international crimes listed, this will continue to be a problem. For Afghans excluded in the Netherlands, this means that crimes against humanity such as rape, murder and persecution are not grounds for extradition. Other crimes that do not fall under these treaties include those mentioned in Article 1F(b), serious non-political crimes. This means, for example, that a treaty basis for the extradition of all 11 Nigerians in our dataset is currently lacking. Above, we indicated that countries which emerged from the former Yugoslavia and Turkey have requested the extradition of individuals suspected of committing international or serious non-political crimes in the sense


86 See the Dutch Ministry of Foreign Affairs’ treaty database, available online at <https://verdragenbank.overheid.nl/> (last visited 19 August 2014).

87 See supra note 36.
of Article 1F in the past. Of these, only the Bosnian request for Senad A. has so far been approved and effected. A Croatian and a Turkish request were both rejected on the ground that the double criminality requirement was not satisfied. Croatia was seeking extradition for the execution of a sentence imposed in absentia for war crimes. The Dutch court ruled that the Croatian verdict did not sufficiently substantiate the conclusion that the suspect's behaviour satisfied the relevant provisions of Dutch war crime law. In the Turkish case, the court was not convinced that the requested accused participated in a ‘criminal organization’ in the sense of the Dutch Criminal Code, but rather merely participated in political protests. In two other Turkish cases, extradition was judged inadmissible due to the political offender exemption. In both of these cases, the courts deemed the crimes to be of a political character.

5. Human Rights Law Requirements
States that are party to the ECHR or an extradition treaty with the Netherlands, generally enjoy the benefit of the doubt when it comes to their respect for human rights. The request for the extradition to Bosnia-Herzegovina of Senad A. was approved on the basis of the principle of mutual trust and because the requested person had access to an effective remedy if his right to a fair trial was compromised. Apart from countries which emerged from the former Yugoslavia and Turkey, however, there is no legal basis for mutual trust with any of the other top ten countries, nor do these countries fall under the supervision of the ECtHR. It is likely that extradition requests from these countries will be received with suspicion because of human rights concerns. As was the case with Rwanda, this could mean that these states would need to change laws (abolish the death penalty or life imprisonment in isolation), build new prisons, or train judges and prosecutors to foster an independent, non-corrupt and impartial judiciary. However, in specific cases, even with countries whose criminal justice system is generally trusted

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88 Which not necessarily means that the requested persons were all excluded on the basis of Art. 1F Refugee Convention.
89 District Court of The Hague, 22 April 2010, ECLI:NL:RBSGR:2010:BM2047. Senad A. was, after his extradition, convicted to an eight-year prison sentence in Bosnia in May 2011. See Openbaar Ministerie (Public Prosecution Office of the Netherlands), Bosnia-Herzegovina, available online at <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/bosnia-herzegovina/> (last visited 3 October 2017).
90 District Court of Leeuwarden, 3 September 2008, ECLI:NL:RBLEE:2008:BG2721 (Ranko Š.). The case was also dismissed because original copies of the verdict and arrest warrant were not provided.
93 See supra note 89.
extradition might be denied because of human rights concerns. A notable case concerns PKK leader Nuriye Kesbir. Although her extradition had initially been approved in 2004, the Dutch Supreme Court, in 2006, decided that extraditing her would constitute a ‘wrongful act’ because the Turkish assurances that Article 3 ECHR would not be violated were too broadly formulated. In a case against another PKK leader, Hasan Adir, the extradition request was deemed inadmissible, partly because the suspect had already been convicted and completed a sentence for the alleged crimes, and partly because the court established that he had been tortured during his detention. Having a bilateral treaty and being party to the ECtHR, in other words, is no guarantee that extradition of excluded individuals will be authorized.

4.4. Conclusion
Extradition or transfer of individuals who are excluded on the basis of Article 1F of the Refugee Convention may appear to be an attractive alternative to prosecution on the basis of universal jurisdiction. The Netherlands has even aimed to strengthen the criminal justice sector in countries of origin in order to facilitate the extradition of alleged perpetrators residing in the Netherlands. Since 1992, however, the Netherlands has extradited and transferred only four out of 1,000 1F-excluded individuals: two 1F-excluded individuals were extradited to Rwanda (Jean Baptiste M. and Jean-Claude I.) and two individuals were transferred to an international court, the ICTR (Simon B. and Ephrem S.). The number of 1F-excluded individuals that has been extradited or transferred thus represents only 0.4 percent of the total number of 1F-excluded individuals in the Netherlands.

This chapter described the numerous essential steps taken before Rwanda could successfully request extradition of alleged génocidaires from Europe, including the extradition of Jean Baptiste M. and Jean-Claude I. from the Netherlands. Rwanda has always been willing to prosecute alleged perpetrators of the genocide, but also developed the capacity and expertise to prosecute international crimes in addition to investing in the ability to trace alleged perpetrators abroad; while European countries and Rwanda have both initiated reforms to comply with national extradition law requirements and human rights law requirements. We argued that it is not likely

97 Apart from the cases mentioned here, more extradition requests brought to Dutch courts may have been declined because of human rights law requirements; we have limited ourselves here to requests made by the countries of origin in the dataset.
that many other (post-conflict) countries will, in the near future, successfully request the extradition of Article 1F-excluded persons residing in the Netherlands. Most countries producing Article 1F-excluded individuals seem to lack the political willingness – and the corresponding capacity and ability – to locate and domestically prosecute the type of alleged perpetrators residing in the Netherlands. For those willing, such as Turkey, serious challenges exist in relation to extradition law and human rights law requirements. The countries which emerged from the former Yugoslavia seem to be the exception. With willing governments and capable criminal justice systems Bosnia-Herzegovina, Croatia and Serbia are – next to Rwanda – the most likely to successfully request the extradition of Article 1F-excluded individuals residing in the Netherlands in the future. This is no coincidence. The international community not only invested substantially in the ICTY and ICTR, but also in the infrastructure which enables domestic prosecution in these countries. In all of these countries, many reforms were driven by the fact that the ad hoc tribunals, as part of their completion strategy, wanted to refer outstanding cases to the respective national jurisdictions. We conclude that it is possible to facilitate and promote extradition of Article 1F-excluded asylum seekers under certain circumstances. However, states hosting suspects of international crimes can only influence these circumstances to a limited extent. When (post-conflict) countries wish to prosecute international and serious crime, the international community could by means of capacity building, training and financial input create a situation in which extradition stands a chance of success. On the other hand, the findings also suggest that the Rwandan case is rather exceptional. In Rwanda, prosecuting perpetrators of international crimes was intrinsically motivated; soon after the 1994 genocide, the Rwandan government itself strongly pushed for domestic prosecution of its Hutu génocidaires. Similarly, the Turkish government has been keen to prosecute terrorism; however, these prosecutions are not broadly supported outside Turkey. Like in Rwanda, prosecuting perpetrators of international crimes in states which emerged from the former Yugoslavia may have been intrinsically motivated, but exogenous factors, like the perspective of accession to the European Union, may have been equally important. The question arises which other ‘weak’ states will be intrinsically interested in receiving assistance to strengthen the rule of law and to file a substantial number of extradition requests in relation to Article 1F-excluded asylum seekers in the foreseeable future. The above also leads to more questions. Although extradition from the Netherlands to Rwanda has turned out to be possible, and although Rwandan prosecutors and judges may have the capacity and expertise to deal with international crimes, it is not clear to what extent the Rwandan judicial
system is indeed capable of rendering an independent and impartial trial. While the ICTR installed trial monitoring to ensure a fair trial in the cases it referred to Rwanda, the ECtHR did not impose monitoring as a precondition for the extradition of Ahorugeze, despite an invitation of the Rwandan government to do so. The Dutch State Secretary of Security and Justice, who finally decides on extradition requests, did not intend to have the trial of Jean Claude I. monitored either. What will happen if the trials of those extradited from the Netherlands – or any other European country – turn out to be unfair? Unlike the ICTR under Rule 11bis(F) ICTR Rules of Procedure and Evidence, national governments have no means to take back a case from another sovereign state. Another practical issue is who will pay the costs of the extradited persons’ defence lawyers. They have the right to be represented by a lawyer of their choice. Is there a limit to these costs? Moreover, one could argue that supporting Rwanda's transitional justice model, as the international community has done, comes at a price. A common critique is that only Hutu perpetrators – the ones responsible for the 1994 genocide – have been held accountable. Alleged Tutsi perpetrators of atrocities committed immediately before and after the genocide, generally remain unpunished. By cooperating, through extraditions, with states whose judicial systems openly engage in ‘victor’s justice’, European states are susceptible to similar criticism. It will be interesting to see how these states will deal with similar situations in the future.

98 Since the publication of the article on which this chapter is based, the UK High Court of Justice concluded that the Rwandan judicial is not capable of rendering an independent and impartial trial, and that five individuals for whom extradition from the UK was sought by Rwanda would be at risk of a flagrant denial of fair trial, confirming an earlier conclusion by a lower court. This may have consequences for future extraditions to Rwanda. The case is also interesting because it provides some answers to the questions raised here. High Court of Justice, *Rwanda v. Nteziryayo and others*, 28 July 2017, [2017] EWHC 1912 (Admin).


100 See Vaste Commissie voor Veiligheid en Justitie, Verslag van een Schriftelijk Overleg, Kamerstukken II 2013/14, 19637, No. 1808, 14 April 2014, 32. Since the publication of the article on which this chapter is based, it has turned out that in the end the Minister of Security and Justice decided to follow the advice of the extradition chamber of the The Hague Appeals Court (see ECLI:NL:GH:2016:1924, 5 July 2016) to have the trials of these individuals monitored (see the Minister’s letter to parliament of 29 March 2017, reference no. 2058834, available online at <https://www.rijksoverheid.nl/documenten/kamerstukken/2017/03/29/tk-monitoring-uitlevering-jean-claude-i-en-jean-baptiste-m>; last visited 4 October 2017). The monitoring has been carried out by the International Commission of Jurists (ICJ). Reports of the monitoring are published on the website of the Dutch government; see the first report at <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2017/03/29/tk-bijlage-ii-monitoring-uitlevering-jean-claude-i-en-jean-baptiste-m/tk-bijlage-ii-monitoring-uitlevering-jean-claude-i-en-jean-baptiste-m.pdf> (last visited 4 October 2017).

101 See *Uwinkindi*, supra note 56, paras. 135-140.