3. 1F-excluded individuals and other ‘undesirable but unreturnable’ migrants in the Netherlands

3.1. Introduction
States are increasingly confronted with migrants who are undesirable but unreturnable (UBUs). This chapter discusses to what extent and how this issue affects the Netherlands, in particular regarding persons excluded from legal status on the basis of Article 1F of the 1951 Convention relating to the Status of Refugees. The chapter first discusses the relevant legal framework that sets out the parameters of undesirability and unreturnability. Next, it describes the size and key characteristics of UBUs in the Netherlands and considers what policy measures exist to deal with UBUs. We will subsequently discuss strategies and activities that can be used to promote forced and independent return to the country of origin, prosecution within or outside the Netherlands, and relocation to third countries. Ad hoc measures that address vulnerable UBUs in protracted situations of unreturnability include the discretionary competence to grant a temporary residence permit and a unique and tailored approach for 1F-excluded individuals, the “durability and proportionality” assessment. The chapter continues by discussing the compatibility with European Union (EU) law of the blanket bar of 1F-excluded persons to all other residence statuses, including those covered by the Family Reunification Directive and the Citizenship Directive, and concludes that elements of the “Dutch approach” to dealing with 1F-excluded individuals may be at odds with EU law.

3.2. UBU in the Netherlands
3.2.1. The legal framework
In the context of this chapter, UBUs are considered undesirable individuals when they are asylum seekers believed to have committed crimes before arriving in the state of refuge under Article 1F of the Refugee Convention; immigrants who had their status revoked for having committed crimes in the Netherlands; or immigrants who were not granted a status or had their status revoked because they are considered to pose

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1 This chapter was originally published as M.P. Bolhuis, H. Battjes & J. van Wijk (2017). Undesirable but Unreturnable Migrants in the Netherlands, Refugee Survey Quarterly, 36(1), 61-84.
a current or future security concern to the Netherlands. They can be considered *unreturnable* because of different legal and practical reasons. Legal reasons in particular stem from the principle of *non-refoulement* which does not allow forced removal to the country of origin where there is a real risk of serious harm to the individual, e.g. under the European Convention on Human Rights (ECHR) or the Convention Against Torture. Practical reasons that may lead to unreturnability include in particular lack of travel documents or non-cooperation by the excluded individual or the state of origin.

When there are serious reasons for considering that asylum applicants have committed serious crimes prior to arrival in the Netherlands, the Dutch Government can exclude them from international protection under certain conditions on the basis of Article 1F of the Refugee Convention, its equivalents in Articles 12(2) and 17(1) of the Qualification Directive 2004/83/EC⁶ as implemented in Article 30b(1)(j) of the Vreemdelingenwet (Aliens Act, Vw) and 3.105e of the 2000 Vreemdelingenbesluit (Aliens Regulation, Vb), elaborated in paragraph C2/7.2.10 in the 2000 Dutch Vreemdelingencirculaire (Aliens Act implementation guidelines, Vc).⁷ Crimes committed prior to arrival that fall outside the scope of 1F exclusion can also be a reason to refuse residence, when they are considered to have shocked the legal order ("geschokte rechtsorde") and are serious crimes according to Dutch law.⁸ Individuals excluded from refugee protection are by definition considered to pose a danger to public order, because of the nature of the crimes they have allegedly been involved in.⁹ In this regard, it does not matter whether someone is believed to have personally committed a crime against humanity in Syria in 2015, or facilitated a war crime in Afghanistan in the 1980s.

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⁴ European Convention on Human Rights (ECHR), ETS No. 005, 4 November 1950 (entry into force: 3 September 1953); and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987). An analysis of the development of the principle of *non-refoulement* and its relation to Article 1F is beyond the scope of this study. For an overview, see e.g. Spijkerboer & Vermeulen (2005).

⁵ This definition is derived from Refugee Law Initiative/Center for International Criminal Justice (2016).


⁷ For an extensive description of the application of Art. 1F of the Refugee Convention worldwide, see Rikhof (2012).


⁹ Art. 3.77(1)(a) Vb 2000. Art. 3.77(1)(a) Vb 2000 forms the basis for the policy. The Council of State of the Netherlands has confirmed that acts listed in Article 1F by their nature represent a long term or even lasting “present threat affecting one of the fundamental interests of society” as required by Court of Justice of the European Union (CJEU) jurisprudence, e.g. in decisions ECLI:NL:RVS:2008:BF1415 of 12 September 2008 and ECLI:NL:RVS:2015:2008 of 16 June 2015 (§§7.6 and 7.7). See §3.4 below.
The issue of how to deal with foreign nationals who commit crimes after arrival in the Netherlands has been the subject of much debate in Dutch parliament. Under new legislation that came into force in June 2016, holders of a refugee or subsidiary status can have their residence permit revoked if they are considered to pose a danger to the public order and to the community. A danger to public order is assumed when someone is convicted by final judgment of a crime that can be qualified as “particularly serious” (in case of refugee protection) or “serious” (in case of subsidiary protection), to an unconditional custodial sentence of at least 10 or 6 months, respectively. If part of the custodial sentence is suspended, this part also counts if it concerns drug-related crimes, sexual and violent crimes, arson, human trafficking, and committing, preparing, or facilitating terrorist crimes. In deciding whether someone poses a danger to the public order a community sentence can also be taken into account, as can crimes committed abroad. A danger to the community is assumed based on the nature of the crime and the sentence imposed, but is assumed in any case when the crimes committed constitute drug-related crimes, sex and violent crimes, arson, human trafficking, and illicit trade in weapons or human organs. Applications for non-asylum permits can also be denied when someone is deemed to constitute a danger to the public order. This is inter alia the case when someone, because of a criminal offence, has accepted a transaction offer, been imposed a penalty order, or has been convicted to inter alia a custodial sentence, community service, or a fine in the Netherlands. Furthermore, a request for an extension of a temporary residence permit can be denied or a granted permanent permit can be revoked because of a danger to public order in case someone has been convicted to a custodial or certain non-custodial sentences. This is subject to a “sliding scale” (glijdende schaal) whereby a balancing test between the duration of the sentence and the duration of the legal stay is performed. The application of the sliding scale is not restricted to offences committed in the Netherlands; it is also possible to take into account breaches of public policy committed outside the Netherlands.

13 Arts. 3.86(2) and 3.98 Vb 2000.
14 Ibid.
Except for a danger to the public order, a danger to national security can also be a reason to end or revoke a legal status. Article 32 of the Refugee Convention determines that reasons of national security can be a ground to expel a convention refugee. A danger to national security is assumed on the basis of an individual report drafted by the national or a foreign intelligence service; assuming such a danger is not dependent on a criminal conviction.\textsuperscript{16}

Denial or termination of a residence permit means that, unless there is another ground for legal stay, the migrant has to leave the Netherlands within 28 days or immediately in case he or she is considered to constitute a danger to public order, public security, or national security.\textsuperscript{17} In principle, when the alien is to independently leave the Netherlands, assistance is available via the International Organization for Migration (IOM). The Dutch Government will start forced removal proceedings in case the alien does not independently leave the country. Additional measures can be taken to emphasise the undesirability of these migrants and to encourage the individuals to leave the country, namely by means of issuing an entry ban,\textsuperscript{18} or by declaring the individual \textit{persona non grata}.\textsuperscript{19} Since its introduction in 2012, when the Return Directive was implemented in Dutch legislation,\textsuperscript{20} the entry ban prevails over the \textit{persona non grata} declaration;\textsuperscript{21} the latter is now reserved for EU citizens. An entry ban can be imposed when an individual who has no legal residence has to leave the country immediately or has not left within the designated period. The entry ban is imposed for a maximum period of five years, unless the alien, in the opinion of the responsible Minister, forms a serious threat for public order, public security, or national security, in which case the entry ban can be imposed for up to 20 years (this is referred to as a “heavy,” as opposed to a “light”, entry ban) (Leerkes, Boersema & Chotkowski, 2014). Non-compliance with an entry ban or \textit{persona non grata} declaration is a criminal offence on the basis of Article 197 of the Dutch Criminal Code. When an undesirable immigrant, for whatever legal or practical reasons, is also unreturnable or otherwise unremovable this does not lift the obligation to leave the Netherlands.

\begin{itemize}
\item \textsuperscript{16} Para. B1/4.4 Vc 2000.
\item \textsuperscript{17} Art. 62 Vw 2000.
\item \textsuperscript{18} Art. 66a Vw 2000.
\item \textsuperscript{19} Art. 67 Vw 2000.
\item \textsuperscript{21} Art. 67 Vw 2000 reads: “Unless [Articles 66a and 66b] apply, our Minister can declare the alien persona non grata” (authors’ translation).
\end{itemize}
3.2.2. Key characteristics of UBUs in the Netherlands

One of the first and most notorious undesirable and unreturnable migrants in the Netherlands is José Maria Sison, founder of the Communist Party of the Philippines (CPP) in the 1960s. Sison is also said to have been involved in founding the military wing of the CPP, the New People’s Army, which is regarded as a terrorist organization by *inter alia* the United States (US)\(^{22}\) and the EU.\(^{23}\) He has been living in the Netherlands since 1987 and his repeated requests for asylum and a permanent residence permit have consistently been turned down. Courts established that the suspicions of his involvement in criminal activities are well-founded, but cannot lead to the conclusion that there are serious reasons for considering that he is guilty of one of the crimes listed in Article 1F. For this reason, he is not excluded from refugee protection under 1F. The State Secretary of Justice decided that, although he qualifies for a residence permit, residence should be refused because there is a “significant interest of the state of the Netherlands”, namely the integrity and the credibility of the state in relation to its responsibilities towards other states.\(^{24}\)

Article 3 ECHR blocks removal to the Philippines. In August 2002, the US and the EU placed Sison on a list of terror suspects, as a consequence of which his assets were frozen and he could no longer obtain insurance and travel documents, limiting his free movement. This decision was overruled; on 30 September 2009, the Court of Justice of the European Union (CJEU) ruled that Sison had to be removed from the list.\(^{25}\) At the time of writing, Sison still resides in the Netherlands from where he runs his own website and regularly publishes articles and books.\(^{26}\)

Sison is not the only UBU who makes it to the headlines. As will be elaborated below, in particular the issue how to deal with unreturnable Afghan 1F-excluded individuals is highly politicised in the Netherlands. The Dutch Government has for this reason over the past years regularly informed parliament about this particular group of UBUs. Supplemented with our earlier research on ‘post-exclusion’ policies in the Netherlands, we can give quite an accurate description of unreturnable 1F-excluded individuals in the Netherlands. This is unfortunately not the case with respect to unreturnable immigrants whose legal residence is revoked because of committing serious crimes *in* the Netherlands (foreign national offenders, FNOs) or due to

\(^{22}\) For organizations considered on the terrorist list in the US, see <http://www.state.gov/j/ct/rls/other/des/123085.htm#> (last visited 30 November 2016).


\(^{25}\) CJEU, Jose Maria Sison v. Council of the European Union, Case T-47/03, 30 September 2009.

\(^{26}\) José Maria Sison Website, available online at <http://josemariasison.org/> (last visited 30 November 2016).
security concerns. Very little accurate (statistical) information is published in this regard and academic work on this topic is similarly sparse. An article by De Vries (2014), however, provides some information on procedures and developments with regard to FNOs. A special unit (‘Vreemdeling in de strafrechtketen’, VRIS) within the Ministry of Security and Justice’s Repatriation and Departure Service (DT&V) is tasked with the removal of FNOs. Table 3.1 shows the number of FNOs that flow out of the VRIS per year and the number of independent departures without supervision (those FNOs who have not been removed because of legal or practical impediments). The table demonstrates that the total number of unremovable FNOs over the years 2010–2013 is 950 (the sum of all independent departures without supervision). In many instances these individuals proved unremovable because they either did not cooperate themselves or because the governments of their (alleged) countries of origin did not (De Vries, 2014: 7-9).

Table 3.1
Outflow VRIS and independent departure without supervision, 2010-2013 (rounded)

<table>
<thead>
<tr>
<th>Year</th>
<th>Outflow</th>
<th>Independent departure without supervision</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>840</td>
<td>240</td>
</tr>
<tr>
<td>2011</td>
<td>840</td>
<td>230</td>
</tr>
<tr>
<td>2012</td>
<td>970</td>
<td>220</td>
</tr>
<tr>
<td>2013</td>
<td>1,200</td>
<td>260</td>
</tr>
</tbody>
</table>

Since 2012 VRIS’ work has been eased by the introduction of regulations that allow for a suspension of sentences for this group of individuals (Regeling Strafonderbreking). Only FNOs who fully cooperate with their removal and also actually leave the Netherlands can benefit from the suspension; aliens with a sentence of three or more years can make use of it after having served at least two-thirds of the sentence, in case of a sentence lower than three years at least half of the sentence has to be served. Since the introduction of this policy on 1 April 2012 until 1 January 2014 about 520 aliens made use of it (De Vries, 2014, 7). Because of the lack of further information on criminal and security cases, we will in the remainder of this chapter concentrate on undesirable and unreturnable 1F-excluded individuals.

27 The lack of available accurate figures on foreign nationals convicted of crimes was also highlighted in a recent letter by the Advisory Committee on Immigration Affairs (ACVZ): ‘Brief over wijziging van de Vreemdelingencirculaire 2000 i.v.m. aanscherping van het beleid inzake weigeren en intrekken asielvergunning na ernstig misdrijf’, 10 March 2016, 6.

1F-excluded individuals: nationalities and types of alleged crimes

In the Netherlands, Article 1F has between 1992 and 2017 been invoked against 1,000 persons. In most 1F cases, Article 1F(a) is applied, which means that the Dutch Government considered there are serious reasons for considering that the applicant has committed “a crime against peace, a war crime, or a crime against humanity”. Exclusion is considered before inclusion: before it is determined whether an individual would qualify for asylum, it is first assessed whether he would qualify to be excluded on the basis of Article 1F. The consequence is that the number of 1F-excluded in the Netherlands individuals is relatively high compared to countries that consider inclusion first. A second consequence is that all excluded individuals in the Netherlands are in principle considered to be deportable, unless human rights put a bar on refoulement.

An analysis of all 1F decisions between 2000 and 2010 showed that the most prevalent countries of origin among 1F-excluded individuals in that period were Afghanistan (448 individuals), Iraq (62), Angola (26), Democratic Republic of the Congo (23), Sierra Leone (20), former Yugoslavia (20), Turkey (18), and Iran (17). The top five of countries of origin in 2015 (30 1F-excluded individuals in total) were Syria, Eritrea, Nigeria, Sudan, and Georgia.

Because about half of exclusion cases so far concern Afghan nationals, and Afghanistan has for a long time been considered too unsafe to deport to, the biggest group of unreturnable 1F-excluded individuals consists of Afghans. Earlier figures on this group, from June 2012, show that of the about 190 1F-excluded Afghans still residing in the Netherlands at that time, 40 were in an on-going removal procedure, 20 had lawful residence, and about 45 were protected from deportation by Article 3

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29 Kamerstukken II 2017/18, 34775 VI, no. 94, 5 March 2018, p. 7.
30 See Chapter 5.
31 Kamerstukken II 2015/16, 19637, no. 2152, 29 February 2016.
32 The question whether Afghanistan is safe enough for an excluded individual to return to differs from case-to-case, but in the period 2014–2016, the group of Afghans in the caseload was decreasing in absolute numbers (see the annual reporting letters to parliament, infra note 41), which may mean the number of unreturnable migrants will decrease significantly (see Chapter 7). In a recent case, the European Court of Human Rights (ECHR) confirmed that an Art. 3 ECHR impediment was no longer in place for five excluded individuals from Afghanistan: S.D.M. and Others v. the Netherlands, Application No. 8161/07, 12 January 2016. In the period since the publication of the original article on which this chapter is based, the ECHR reached a similar conclusion in the case of M.M. and Others v. the Netherlands, Application No. 15993/09, 8 June 2017. In October 2017, a report by Amnesty International confirmed that the overall number of deportations from Europe to Afghanistan increased significantly in 2016. Amnesty also sharply criticised these deportations, however, as it claimed the country was “deeply unsafe, and has become more so in recent years”; Amnesty International, ‘Forced back to danger. Asylum-seekers returned from Europe to Afghanistan’, available online at <https://www.amnesty.org/download/Documents/ASA1168662017ENGLISH.PDF> (last visited 5 October 2017), 10.
In less than five cases, deportation was not possible for medical reasons. In another 30 cases, the European Court of Human Rights (ECtHR) imposed an interim measure.

The overrepresentation of Afghan nationals can – apart from a relatively large influx of Afghans to the Netherlands – be explained by the policy of categorical exclusion, which means that for some nationalities mere association with a certain position within a designated organization suffices as a basis for exclusion. The largest group to which categorical exclusion applies are people who held the military ranks of non-commissioned officer and officer who have served in the Afghan KhAD/WAD security service. Persons in certain positions within the Hezb-i-Wahdat (Islamic Unity Party of Afghanistan) and the Sarandoy (Afghan police) are also categorically excluded. Categorical exclusion has also been in place for high officials of the Iraqi security services under Saddam Hussein’s rule, and corporals and non-civilian leaders of the Sierra Leonean Revolutionary United Front (RUF), which partly explains the high number of excluded individuals from these countries. Excluded persons from Angola, the Democratic Republic of the Congo (DRC), Sierra Leone, and the former Yugoslavia are typically believed to have committed war crimes in the 1990s while fighting for either government or rebel forces. Since the security situation in their country has improved over the past years, they are by now generally not protected from refoulement. Excluded individuals from Iran are often excluded because they allegedly contributed to crimes against humanity in their capacity as employees of secret services or prison security. As no regime change has taken place since, they are generally still unreturnable. Turks are often excluded on the basis of Article 1F(b) because of suspected links with organizations designated as “terrorist”, such as the Kurdistan Workers’ Party (PKK). They are typically protected from refoulement. A new group of 1F-excluded individuals who also qualify for Article 3 ECHR protection

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33 Other prohibitions of refoulement under the ECHR, such as the prohibition to expel a person who runs a real risk of suffering a flagrant denial of due process as meant in Art. 6 ECHR, play a role in Dutch practice only in extradition cases and are therefore not addressed in the context of this chapter.

34 Kamerstukken II 2011/12, 19637, no. 1547, 1 June 2012, 2. For more insights on interim measures, see Reijven and Van Wijk (2014a: 11).

35 It must be noted that many of them were initially granted asylum.


38 See Chapter 4.

39 See Chapter 6.
in most cases are Syrians. As the Netherlands – similar to many other European countries – is faced with a sharp increase of Syrian asylum seekers, the number of 1F-excluded individuals from Syria is likely to grow accordingly. Over the period 2014-2015 Syrians have comprised the biggest group of 1F-excluded individuals.  

Unreturnable 1F-excluded individuals: scale of the problem

The Repatriation and Departure Service DT&V monitors how many excluded individuals have “demonstrably” left the country, through forced deportation or independent departure. The overview in Table 3.2 shows that, according to the figures until 2016, a total of roughly 110 1F-excluded individuals have demonstrably left the country between 2007 and 2016.

Table 3.2
Forced deportations and independent departures 1F-excluded, 2008–2017

<table>
<thead>
<tr>
<th>Year</th>
<th>1F-cases monitored by DT&amp;V (end of year)</th>
<th>Number of forced deportations</th>
<th>Number of independent departures</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>270</td>
<td>5</td>
<td>Unknown</td>
</tr>
<tr>
<td>2009</td>
<td>210</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>160</td>
<td>&lt;5</td>
<td>10*</td>
</tr>
<tr>
<td>2011</td>
<td>145</td>
<td>5</td>
<td>&lt;5</td>
</tr>
<tr>
<td>2012</td>
<td>160</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>2013</td>
<td>180</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>2014</td>
<td>170</td>
<td>&lt;10</td>
<td>15</td>
</tr>
<tr>
<td>2015</td>
<td>150</td>
<td>&lt;10</td>
<td>&lt;10</td>
</tr>
<tr>
<td>2016</td>
<td>110</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>2017*</td>
<td>100</td>
<td>&gt;5</td>
<td>&lt;5</td>
</tr>
</tbody>
</table>

* This figure is not included in the Reporting Letter, but as a total of 60 persons “demonstrably” left the country between January 2009 and March 2014, it can be inferred that about 10 individuals should have left the country independently in 2009.

** The figures for 2016 and 2017 were not available online at the time of the publication of Bolhuis, Battjes and Van Wijk (2017) and have been added later on.

40 Until 2013, only a handful Syrians have been excluded. In 2014 as well as 2015 10 Syrians were excluded under 1F. See Kamerstukken II 2014/15, 34000 VI, no. 4, 25 September 2014, 19.

Article 3 ECHR blocked deportation in about 180 of 630 cases in the total number of cases monitored by the DT&V from 2007, when it started registering the number of departures, to 2014.\textsuperscript{42} Thus, in this period about 30 percent of the individuals excluded under Article 1F can at least for a considerable period of time be regarded unreturnable because of an Article 3 ECHR impediment.

### 3.3. Policy measures to deal with the issue of unreturnable 1F-excluded persons

Once there is a 1F decision, the alien has no right to stay on Dutch territory because of the entry ban, and for this reason receiving any other residence permit is out of the question. Furthermore, access to other forms of residence permits is also explicitly blocked for excluded individuals.\textsuperscript{43} 1F-excluded individuals do not receive any form of temporary leave to stay nor are they entitled to social allowances, work, or education.\textsuperscript{44} They only have access to a minimal level of services, such as legal aid and urgent primary healthcare. Unreturnable 1F-excluded individuals are for many years, or even decades, destined to live a life in “legal limbo” and are faced with serious economic, social, and psychological challenges (Reijven & Van Wijk, 2014a: 12). Over the years, the Dutch Government has pushed more strongly for an increase in the capacity to promote the return of 1F-excluded individuals. It does not actively promote relocation, but does actively try to prosecute or facilitate the extradition of 1F-excluded individuals. Special policies are in place that allow for granting a temporary status for vulnerable 1F-excluded individuals in a protracted situation of unreturnability.

### 3.3.1. Return

Like many other European countries, the Netherlands for many years did not have a particularly proactive return policy. Expulsion of failed asylum seekers and other undocumented migrants only seriously started in 2007 with the establishment of the DT&V. At present, DT&V is actively monitoring and “pushing” 1F-excluded individuals to return to their country of origin. All excluded individuals – including those with Article 3 ECHR protection – are visited by DT&V case managers every six months. They are informed that they are not allowed to stay in the Netherlands and asked about their plans to leave the country. This includes individuals for whom it has been well established that they cannot be expected to return any time soon.

\textsuperscript{42} Kamerstukken II 2013/14, 19637, no. 1808, 14 April 2014, 16.

\textsuperscript{43} Art. 3.77 Vb 2000.

\textsuperscript{44} Art. 10(2) Vw 2000 allows for exceptions in certain specifically mentioned circumstances; in general, illegally present minors are allowed access to education, and emergency health care is being issued.
When DT&V considers a country of origin safe enough to return to and believes that there is a foreseeable chance of deporting the alien, it may request the ‘aliens police’ to apprehend the undocumented immigrant, place him/her in aliens detention, and start the removal process. Since the implementation of the 2008 EU Return Directive, aliens can be held in detention for a maximum period of six months, which can be prolonged to 18 months in special circumstances. For a variety of reasons, the total number of individuals in aliens detention has significantly decreased since 2011 (Van Schijndel & Van Gemmert, 2014). There are no publicly available figures on the number of 1F-excluded individuals in aliens detention, but given the trend of using aliens detention only as an ultimum remedium it is likely that this number is low.

Similar to many other countries, (the threat of) deportation of 1F-excluded individuals leads to much legal arm wrestling and political controversy. If the excluded individuals can find a lawyer willing to take their case, excluded individuals will use all national and international legal procedures available to (temporarily) block such removal. Different from many other countries, in the Netherlands political controversies about (imminent) removals of 1F-excluded individuals are typically not given in by interest groups pushing for removal, but instead, by interest groups trying to block and frustrate expulsion. In particular, threats to deport 1F-excluded Afghans may create much media attention and serve as impetus for parliamentary debates. If excluded Afghan men generally reside with relatives who remain lawfully in the Netherlands and actively participate in social life in the local community (Reijven & Van Wijk, 2014). 1F-excluded individuals without family members may be taken care of by interest groups or church shelters. While defined as alleged war criminals by the Immigration and Naturalisation Service (IND) (which is usually confirmed by the Council of State), neighbours of excluded claimants often perceive them as law abiding citizens who are well integrated in Dutch society. Since the excluded persons themselves have no access to paid lawful employment, many work as volunteers. Unique to the Dutch context is the collective – and relatively successful – lobby of Afghan 1F-excluded individuals for media attention and calls for sympathy.

45 Art. 6 (sub. 5 and 6) Vw 2000.
On several occasions, entire villages have been mobilised to lobby for the fate of excluded Afghan men. Neighbours and others in the communities in which the men and their families reside are often aware of the fact that they have been excluded but could not return for many years, and threats to deport their cherished neighbour often lead to critical questions about the Dutch 1F policy. The removal of a 54-year-old Afghan in January 2015, for instance, was one of such several episodes that made it to the national headlines when one of his daughters started a social media campaign in order to take him off the plane. Teaming up with a relatively well-known artist, she regularly appeared on television and in national newspapers, often accompanied by the founder of “Stichting 1F”, a foundation dedicated to lobbying for the fate of 1F-excluded individuals, in particular Afghans. Local politicians (including mayors) and members of Parliament have also proved supportive. Disagreement between local representatives and the national Government led to much consternation in 2011 and 2012. In those years around 40 mayors began to advocate for a review of the current 1F policy with regard to Afghan men whose 1F-exclusion was based on a Ministry of Foreign Affairs report on Afghanistan of 2000. An illustration of how tainted the relationship between municipalities and the national Government had become, is that one mayor had ordered the local police not to arrest and deport an excluded Afghan inhabitant of her municipality in spite of orders to that effect from the Minister for Immigration, Integration, and Asylum. Whereas the Minister argued mayors do not have a say on matters of alien removal, the mayor contested that public order in her municipality would be at risk if the beloved Afghan neighbours were to be deported. The mayor feared that the Afghan's wife, who suffered from depression, would (threaten to) commit suicide, which would lead to fierce protests in the local community. Part of the ensuing discussion between mayors and the Minister was the mayors’ demand for


more information on the reasons for the application of Article 1F to the cases of asylum claimants residing in their community. They also demanded suspension of the removal proceedings concerning excluded Afghans.

The Dutch Government does not facilitate the independent return of 1F-excluded individuals. Similar to all other immigrants with an entry ban for a period longer than five years, 1F-excluded individuals are barred from receiving reintegration packages that are offered by the IOM.53 Interesting is that not all European countries take the same approach in this regard. IOM Norway, for example, provides reintegration packages of up to 2,300 Euros (20,000 Norwegian krones) for undocumented migrants who voluntarily return to their country of origin without making any reservations in relation to individuals with travel bans or 1F exclusions.54

3.3.2. Relocation
There are two ways in which undesirable and unreturnable immigrants can be relocated to third countries. The first modality concerns institutionally arranged modalities of relocation, whereby governments actively facilitate the relocation. Apart from rogue states, few countries willingly accept alleged war criminals or génocidaires, and institutionally arranged relocations generally involve a certain level of “wheeling and dealing”. The most well-known institutionally arranged relocation scheme of UBUs concerns unreturnable Guantanamo Bay inmates. The Obama administration has over the past years managed to relocate a considerable number of unreturnable Guantanamo Bay inmates to a variety of countries, including Estonia, Oman, Kazakhstan, Uruguay, and Saudi Arabia.55 No quid pro quo has become public, but even the tropical island of Bermuda has received four Uighurs from Guantanamo Bay in 2009.56 There is no information in the public domain that the Netherlands has ever engaged in similar schemes in relocating its unreturnable 1F-excluded individuals.

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53 IOM policy Return and Reintegration Regulation (HRT), Info-sheet HRT Engels 2014-06-620. HRT funding is financed by the Ministry of Foreign Affairs from the development aid budget. We could not find any formal line of argumentation as to why the HRT allowance is not available for excluded persons.


Rather than making use of institutionally arranged relocation schemes, 1F-excluded individuals in the Netherlands must engage in what we would refer to as self-arranged modalities of relocation. In this regard it is possible to differentiate between formal and alternative self-arranged schemes. An illustration of a formal self-arranged relocation scheme would be if an undesirable individual personally requests another state for a visa with the intention to apply for a residence permit there. 1F-excluded individuals in the Netherlands regularly try to do this because they have to demonstrate that they have done everything in their power to leave the Netherlands in order to qualify for a temporary residence permit on the basis of the “durability and proportionality test” (see section 3.3.4). We can take it from their experiences that it is far from easy to find a country willing to accept 1F-excluded individuals. Even if the receiving state is not obliged to deny ‘undeserving’ refugees asylum – for example, when it has not ratified the Refugee Convention – the (habitual) lack of identity documents, problems in obtaining the required visa, and limited financial means to purchase tickets seriously hamper self-arranged relocation attempts. This can be illustrated by the efforts of one unreturnable 1F-excluded individual from Afghanistan that is discussed by Reijven and Van Wijk (2014a). He requested Belgium, Denmark, Finland, Sweden, Italy, Malta, Lithuania and Switzerland to host him. All countries answered in the negative and referred to the Dublin Convention. He then, in vain, approached non-European countries such as Canada, Australia, the US, Turkey, and Mexico for a visa (ibid.). Notwithstanding these practical barriers, the Dutch government expects the 1F-excluded individuals to leave the Netherlands.

A number of unreturnable 1F-excluded individuals have started using alternative strategies in trying to relocate to other European countries. Rafiq Naibzay, an Afghan national, was one of them (Reijven & Van Wijk, 2014b). His case attracted much media attention when the Dutch government threatened to deport him. Early in 2013 it turned out that there was no need any more to obstruct his deportation. A press briefing on the website of the town where he used to live stated: “The man has fought for more than fifteen years to obtain a passport, just like his family had. He has given up hope and now chooses to leave his rightless situation in the Netherlands behind and to build a new life abroad”. Naibzay had obtained a residence permit in Belgium. How did he manage to do this? The State Secretary of Immigration Affairs informed the Dutch Parliament that he had used what is often referred to as the “Europe-route”. According to media reporting two of Naibzay’s children,


who are EU citizens, lived and studied in Antwerp.\textsuperscript{59} On the basis of Article 10 of the Citizenship Directive, an EU citizen has the right to live in another EU country for three months, as long as he/she does not “become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence” and is not considered to pose a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society” in accordance with Article 27(2) of the Directive. Family members of EU citizens are free to travel and stay in the same EU countries as their kin as long as their identity and a sustainable family relation are determined. If after three months the family member meets the criteria posed by Article 7 of the Directive, he/she can apply for family reunification. In the case of Rafiq Naibzay, the Belgian immigration authorities apparently approved this application. For this reason, he could obtain a temporary residence permit for five years after which he and his children can apply for a permanent residence permit.

Naibzay is not the only 1F-excluded individual who has taken advantage of what has been referred to as the “Europe route”.\textsuperscript{60} There may be different reasons why other states, like Belgium in this case, are not denying residence permit requests to individuals who have been excluded in the Netherlands. Firstly, it is possible that they are simply not aware of the fact that someone has been excluded. A study issued by the Norwegian immigration authorities concluded there is currently little to no information exchange between European states on 1F exclusion (Bolhuis & Van Wijk, 2015b). Few states alert 1F-excluded individuals as a matter of standard practice in the Schengen Information System and alerts as such do not reveal that, let alone why, an individual was previously excluded. Secondly, it is possible that other European countries actually are aware of the fact that someone has been excluded in the Netherlands, but do not consider the individual to pose a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society” in accordance with Article 27(2) of the Directive.

The above demonstrates that undesirable and unreturnable migrants, with some creative strategies, may not be ‘unrelocationable’. The fact that these individuals still manage to find ways to legally reside in Europe can be seen as problematic. Unwanted and possibly dangerous individuals continue to live in Europe and are likely to


escape criminal accountability. At the same time, one could argue that the Europe route may be regarded a pragmatic solution not only for the individuals concerned, but also for the Netherlands, to a fundamental system error in international law. The Europe route offers a pragmatic solution for a ‘deadlocked’ situation: an alleged war criminal, who cannot be deported, has left the country, without complex legal procedures and without violating any international obligations.

3.3.3. Prosecution
For cases where return or relocation proves impossible, the Netherlands has over the years developed several strategies to promote prosecution within or outside the Netherlands. All files of 1F-excluded individuals are sent to the specialised domestic “war crimes prosecutor”, who can deploy a dedicated team of investigators to work on these cases. Although a relatively large amount of time and energy is invested in the prosecution of 1F-excluded individuals, the fact that so far only four individuals have irrevocably been convicted proves that this is in practice very difficult.61

For this reason, the Netherlands also tries to improve the circumstances in countries of origin to allow for prosecution there: not so much by negotiating specific diplomatic assurances (Giuffre, 2017), but rather by trying to create more favourable conditions for extradition in general. This happened in particular with respect to Rwanda, where Article 3 ECHR and extradition law requirements blocked extradition to Rwanda for many years. The Netherlands has invested significant funds and energy in rebuilding Rwanda’s criminal justice system. Although this may have started out as a form of development cooperation, these investments have now been presented as part of a policy specifically directed at facilitating extradition of 1F-excluded individuals for the purpose of criminal prosecution.62 After many of the human rights concerns were taken away, partially because of foreign investments in the criminal justice system, extradition was accorded by inter alia the ECtHR and different states started to extradite suspects to Rwanda.63 Initially, however, the extradition of a Rwandan national that was approved in 2014 was denied in November 2015, because the right to legal assistance was not sufficiently guaranteed.64 Ironically, this conclusion was largely based on a report drafted by an expert who was stationed in Rwanda in the

61 See Chapter 5.
62 See Chapter 4.
63 Ibid.
context of the Dutch support programme.\footnote{Former investigating judge Mr. Martin Witteveen, who provided the expert report the decision not to extradite was largely based on, worked as an advisor to the Rwandan National Public Prosecution Authority.} In July of 2016, however, an appeals court ruled that the extradition was allowed.\footnote{Appeals Court of The Hague, ECLI:NL:GHSGR:2016:1924 and ECLI:NL:GHSGR:2016:1925, 5 July 2016.} He was extradited together with another Rwandan national on 12 November 2016.\footnote{See Chapter 4.}

### 3.3.4. Ad hoc measures to deal with protracted situations of vulnerable UBUs

When return, relocation, and prosecution fail, 1F-excluded individuals may remain in legal limbo for many years. There are two \textit{ad hoc} policy measures for vulnerable UBUs in protracted situations of unreturnability that could lift the applicability of Article 1F on humanitarian grounds or otherwise end the unlawfulness of residence. First, the Minister of Security and Justice has a discretionary competence to grant a temporary residence permit to an individual who has been refused residence on the basis of Article 3.4 para. 3 Vb 2000. This competence is not limited to 1F-excluded individuals but can extend to all aliens who have applied for asylum or a residence permit. In those cases that are not regulated by the policy laid down in Article 3.4 para. 1 Vb 2000, there have to be unique circumstances that relate specifically to the individual and that make that refusal of residence results in an “unintended extraordinary harshness”, usually referred to as a “harrowing” (\textit{schrijnende}) situation (ACVZ, 2011). The Minister has determined that a high level of integration and a long stay by themselves are insufficient to lead to acceptance of residence and that, in addition, there have to be compelling humanitarian circumstances (a harrowing situation). It is not known in how many cases the Minister has used his discretionary competence to grant a residence permit to 1F-excluded individuals. Reijven and Van Wijk (2014a: 18) report that it happened in at least one case, where the children of a 1F-excluded individual would have been left in the Netherlands without parents would the individual had been expelled.

A second and unique \textit{ad hoc} measure for vulnerable 1F-excluded individuals is the so-called “durability and proportionality” assessment (\textit{duurzaamheids- en proportionaliteitstest}), which was developed in the case-law of the administrative branch of the Council of State.\footnote{Council of State of the Netherlands, ECLI:NL:RVS:2007:BB1436, 18 July 2007; and Minister and State Secretary of Justice, \textit{Notitie betreffende de toepassing van artikel 1F}; 6 June 2008, 26.} If an excluded individual is unreturnable for a considerable number of years, this test can be applied to revoke the application of Article 1F, upon request by the excluded individual. As the seriousness of the alleged offence is weighted against actual humanitarian concerns in the Netherlands
or the country of origin, it is a kind of “post-exclusion balancing test” (Reijven & Van Wijk, 2014a). According to the State Secretary of Security and Justice, a durable bar to expulsion is assumed when: a) the alien has been in the Netherlands for 10 years without a residence permit, in a situation where he cannot be expelled to the country of origin because of Article 3 ECHR; b) there is no prospect for change in this situation; and c) the alien has made plausible that departure to a third country is not possible. A durable bar to expulsion exists only when these requirements are met, and only then the proportionality will be assessed. Proportionality will be determined by reviewing whether the alien has made plausible that there are highly exceptional circumstances on the basis of which permanently refraining from granting him a residence permit is disproportional. The “exceptional circumstances” refer to a medical or other humanitarian emergency affecting the individual’s family life, a concept that is well established in the Netherlands (Reijven & Van Wijk, 2014a: 17).

Application of the durability and proportionality test has so far led to the granting of a residence permit only in a very limited number of cases. The first requirement – that the person can demonstrably not be expelled due to human rights concerns during at least 10 years of uninterrupted stay in the Netherlands – is rarely satisfied because a human rights impediment to expulsion, such as Article 3 ECHR protection, is non-permanent (ibid.). To meet the second criterion the applicant has to make a convincing claim that it will in the foreseeable future be impossible to return to the country of origin. To meet the third requirement, the applicant has to show that he has done all that is in his capacity to depart to a third country, which could for example mean showing dozens of failed visa requests for third countries. If durability is accepted, the proportionality part of the test subsequently requires the applicant to show that his case is exceptional. Case-law shows that the standard for this requirement is rather high. Circumstances such as having “almost finished a university education”, having “no right to housing or income during the waiting period” or a combination of several factors such as suffering from the accusation of being a war criminal, having been a victim of torture, and having achieved a high level of integration, among other things, have been found not to be disproportionate (Rikhof, 2012: 480). If the number of 1F-exclusions is high, as is the case in the Netherlands, more people will be in a comparable situation where they are undesirable and unreturnable at the same time, and it will be more difficult for the individual to claim that he/she is in an exceptional situation. However, as the test was specifically developed for unreturnable 1F-excluded individuals, determining the proportionality of the consequences of applying 1F for an individual, relative to

the consequences for other 1F-excluded individuals, has been accepted in case-law (Reijven & Van Wijk, 2014a: 17).

Until January 2016, in about 10 cases the durability and proportionality test has led to the granting of a residence permit to 1F-excluded individuals with an Article 3 ECHR impediment to removal. Shortly after it was introduced, the Advisory Committee on Migration Affairs warned that the requirements of the test should not be so high that it would in practice be a dead letter (ACVZ, 2008: 16). According to the State Secretary, however, the fact that the durability and proportionality test can and does lead to residence permits in some very exceptional cases shows that it is an effective policy measure, while the fact that the policy is applied very strictly is justified by the nature and gravity of the applicability of Article 1F.

3.4. Constraints on the Dutch approach posed by EU law and case law

EU migration law does not deal explicitly with the position of or required policies towards 1F-excluded persons in general; it leaves the matter to the domestic law of the Member States. Still, EU law may set constraints on the Dutch practice, in particular on the blanket bar of 1F-excluded individuals to all residence statuses (the issue of a permit in “harrowing” situations being the only exception). This blanket exclusion also applies to persons who apply for family reunification as covered by the Family Reunification Directive or the Citizenship Directive.

Article 1F-excluded persons fall within the ambit of these Directives in the following situation. The Citizenship Directive is relevant for 1F-excluded persons who are married to or have an equivalent relationship with a Union citizen. If the Union citizen makes use of his/her right to freedom of movement, he/she has the right to be joined by his/her family members, including third-country family members. Would the Union citizen return to his/her Member State after enjoying his/her right of freedom of movement, the (third-country national) spouse must be admitted there. The Family Reunification Directive states in which cases a third-country national family member must be issued a residence permit by the Member State where a third-country national family member resides (and who fulfils certain conditions).

70 Kamerstukken II 2015/16, 19637, no. 2152, 29 February 2016.
71 Kamerstukken II 2013/14, 34000 VI, no. 2, 16 September 2014, 16 and 21.
72 As noted, 1F-excluded persons are usually not entitled to a residence permit and hence illegally present third-country nationals, to whom the Return Directive applies.
73 E.g. CJEU, S. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. G., Case C-457/12, 12 March 2014.
The Family Reunification Directive and the Citizenship Directive both state grounds for refusing admission for the third-country national spouse, most importantly for reason of public order. Article 1F is not, or at least not explicitly, mentioned as a ground for refusal. Hence, it is not self-evident that EU law, in particular the public order ground, allows blanket exclusion of 1F-excluded persons from the entitlements of both Directives. Below, we will discuss whether this blanket exclusion of Article 1F persons is compatible with EU law.

3.4.1. B and D and statuses other than international protection

The CJEU has not yet ruled on the issue of exclusion from other residence statuses of Article 1F-excluded persons, but did touch upon it in *B and D*.

It stated that exclusion from international protection is obligatory, hence from both refugee and subsidiary protection status. But this obligatory exclusion is explicitly confined to these statuses defined in the Qualification Directive: national protection statuses fall outside the scope of that Directive.

In *B and D*, the CJEU held that, if national law permits “a clear distinction” between the national status and the international protection statuses as meant in the Directive, Member States are allowed to grant national protection to (inter alia) a person to whom Article 1F applies. The Court did not state whether or not it is permissible to grant 1F-excluded individuals EU migration statuses other than international protection. But importantly, it stated that exclusion from international protection is obligatory because of the purpose underlying the exclusion ground, “which is to maintain the credibility of the protection system provided for in that directive”. That purpose does not apply to other statuses. Arguably, the case cannot be read as categorically excluding Article 1F-persons from all EU migration statuses.

Still, both the Citizenship Directive and the Family Reunification Directive allow Member States to exclude people from the status they would otherwise be entitled to if the public order ground applies. Hence, we will subsequently address the question of how far the applicability of Article 1F may count as a ground for exclusion from other migration statuses on public order grounds.

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76 *Ibid.*, para. 118. Recital 9 of the 2004 Qualification Directive reads as follows: “Those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive.”

77 CJEU, *Bundesrepublik Deutschland v. B. and D.*, para. 120.


79 Art. 6 of the Family Reunification Directive; Arts. 27 and 28 of the Citizenship Directive.
3.4.2. Public policy threats

The CJEU has developed a well-established case-law on the notions of public policy and national security applying to Union citizens and their family members who make use of their freedom of movement under the Treaty. In general, Member States enjoy some discretion when adopting rules on and applying these exceptions. That discretion is, however, not unlimited. In particular, the exclusion ground can only apply if the person poses a “real, actual and sufficiently serious threat” to public order or national security. This case-law also applies to third-country national family members of migrated Union citizens. For some time, it was unclear whether it also applied to the public order ground for third-country nationals in the Family Reunification Directive and other Directives. Some authors held that Member States enjoyed much greater discretion in the latter case: when a Union citizen is concerned, or his third country national family member, the public order clause functions as an exception to a previously established right (freedom of movement, which is established by the Treaty). That would not be the case if a third-country national applied, for instance, for family reunification.

But the CJEU ruled otherwise in the cases of Zh.Z. and I. O. v. Staatssecretaris voor Justitie and, even more outspoken in H.T. The latter case concerned the repeal of a residence permit of a refugee by Germany because of the refugee’s involvement with the PKK, an organization on the list of terrorist organizations. The issue was how to interpret the notions “public policy” and “public order” in Article 24 of the Qualification Directive, which requires the issue of a residence permit unless a public policy or public order ground applies. Having observed that the provision itself does not define these notions, the Court stated that:

The Court has already had an opportunity to interpret the concepts of “public security” and “public order” contained in Articles 27 and 28 of Directive 2004/38 [i.e. the Citizenship Directive]. While that directive pursues different objectives to those pursued by Directive 2004/83 and Member States retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another [...], the extent of the protection a company [sic]
The term “company” seems an erroneous translation – the French, German, and Dutch versions have “society” instead. The Court added that “the concept of ‘public order’ contained in Directive 2004/38, in particular in Articles 27 and 28 thereof, has been interpreted in the case-law of the Court as meaning that recourse to that concept presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”, referring to its freedom of movement case-law. There is no reason whatsoever to assume that the outcome would be different as regards the Family Reunification Directive. Therefore, the real, actual, and sufficiently serious threat test must be applied if a Member State wishes to bar Article 1F-excluded persons from entitlements set out in the Citizenship and Family Reunification Directives.

3.4.3. The public policy standard and excluded persons: the Council of State

Does the public policy case-law allow for excluding all 1F-excluded persons from the benefits of the Citizenship and Family Reunification Directive? The Dutch Council of State stated so in a judgment it delivered eight days before the CJEU judgment in *H.T. v. Land Baden Württemberg*, but months after *Zh.Z. and I.O.* The case concerned a third-country national to whom asylum application had been denied in 2007 because of his rank within the KhAD/WAD. This amounted to serious grounds for considering that he had committed war crimes and crimes against humanity. In 2009, he and his Dutch wife moved to Belgium, which issued him a residence permit as a family member of a Union citizen. In 2011, he requested that the entry ban, imposed when the asylum claim was denied, be lifted so that he and his wife could legally enter and settle in the Netherlands. The first instance court reasoned that, as Article 1F applied merely because of his position within the KhAD/WAD, hence not because of personal participation in torture and so on, it had not been substantiated that the threat was still “present”. The Council of State however reasoned otherwise. As Article 1F had been applied, the Afghan could be held personally responsible, so the distinction drawn by the first instance court, between personally committing and other means of perpetrating crimes was not relevant. The Council continued to

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85 French “société”, German “Gesellschaft”, Dutch “samenleving”.
86 CJEU, *H. T. V. Land Baden-Württemberg*, para. 79.
reason that several treaty provisions like Article 3 ECHR bear witness to how heinous the crimes set out in Article 1F(a) (war crimes and crimes against humanity) are considered to be. The seriousness of the crimes rendered the threat both “relevant” and “present”.

Thus, under this analysis, because of the seriousness of the threat the other two elements of the CJEU test are automatically fulfilled and hence denied independent meaning. The Council of State gave two reasons why this conflation was allowed for. First, “this thought” (deze gedachte, i.e. that if Article 1F applies the threat is by definition present) was also embodied in Article 12 of the Qualification Directive (i.e. Article 1F of the Refugee Convention) as interpreted by the CJEU in B and D, where it stated that Article 12 serves the double purpose of excluding people “unworthy” of the status and ensuring that they cannot escape criminal justice. These purposes are also served by exclusion from the Citizenship Directive. Second, the Council of State stated that this approach “joined in with” (vindt aansluiting bij) the CJEU cases Bouchereau and P.I., as both cases showed that the CJEU does not “always” require assessment of future behaviour.

Arguably, both arguments beg questions. There is no reason to suppose Article 12 of the Qualification Directive serves to elaborate on public policy or national security in the particular case of war crimes, etc. On the contrary, in B and D, the CJEU drew a strict distinction between Article 12(2) of the Qualification Directive (i.e. Article 1F of the Refugee Convention) and the provisions addressing public order, Articles 14(4) and 21(2) – “[...] danger which a refugee may currently pose to the Member State concerned is to be taken into consideration, not under Article 12(2) of the directive but under (i) Article 14(4)(a) [...] and Article 21(2)”88 Exclusion pursuant to Article 12(2) on the other hand is “intended as a penalty for acts committed in the past”.89 Thus, according to the Court, the purpose of Article 12(2) is preserving the “credibility” of asylum, and the public policy the protection of the society of the state of refuge. Indeed, this reflects the difference between Article 1F on the one hand and Article 33(2) of the Refugee Convention on the other hand. Thus, the link to public policy and national security does not follow in any way from either the text of the Directive or the CJEU judgment.

88 CJEU, Bundesrepublik Deutschland v. B. and D., para. 101.
89 Ibid., para. 103.
As to the CJEU case-law referred to by the Council of State, in Bouchereau the CJEU reasoned that:

The existence of a previous criminal conviction can [...] only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. 29 Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.90

The Council of State concluded that this quote showed that “an assessment of the foreigner’s future behaviour is not always required”.91 It added that this was “repeated” by the CJEU in the case of P.I., which reads as follows:

The issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future.92

We may observe that in P.I. the CJEU does not repeat its statement of some 25 years before that “it is possible that past conduct alone may constitute such a threat to the requirements of public policy”. The words “in general” in P.I. are insufficient to be understood as a confirmation as the judgment does nowhere refer to Bouchereau. But also if we assume that indeed past conduct may still exceptionally be sufficient for assuming an actual and serious threat to public order, there is no reason to assume that that reasoning would also apply if it has not been established that the foreigner did pose a threat to the society of refuge in the past. In other words, these cases do not lead to the conclusion that the seriousness of past behaviour by definition amounts to a threat. Indeed, the CJEU does not say that the actuality of a threat may follow from its seriousness. In this respect it is relevant to note that Bouchereau concerned a repeat drug offender, and P.I. a condemned paedophile, hence both persons who did pose a threat to public policy. Therefore, it appears that the Council of State has not sufficiently

substantiated its interpretation that Article 1F-excluded persons by definition pose a genuine, actual, and sufficiently serious threat to public order.

3.4.4. The public policy standard and excluded persons: the Council for Aliens Disputes

How does the Dutch approach compare to that of other Member States? Bolhuis and Van Wijk (2015b) conducted a comparative study in a selected number of European states. It turned out that Denmark and the UK systematically bar access of 1F-excluded persons to residence on the basis of family reunification; Belgium, Norway, and Sweden on the other hand do not do so (ibid. p. 14, 15, 19, 22). The way in which the public policy exception of Articles 27 and 28 of the Citizenship Directive is being applied in these and other Member States was not a subject of this study.

What is most interesting in this regard is Belgium, as the country is directly confronted with the consequences of the Dutch policy: 1F-excluded persons who do have a relationship with a Union citizen did move to Belgium in order to invoke entitlements pursuant to the Citizenship Directive. In at least one case, the Council for Alien Law Litigation (Conseil du Contentieux des Etrangers/Raad voor Vreemdelingenbetwistingen), the highest Belgian court on aliens law, had to address the consequences of the Dutch 1F policy. The case concerned a family member of a Dutch man residing in Belgium. This family member had been denied asylum by the Netherlands as he had served as an officer in the KhAD/WAD; therefore, Article 1F applied.93 The Belgian authorities argued that 1F crimes are so serious that they continue to pose a threat to society.94 The Council did not follow this approach. It observed that the crimes had allegedly been committed “25 to 20 years ago”; therefore, the negative decision did not address the real, actual, and sufficiently serious nature of the threat the alien might pose; Article 1F rather concerns the past.95 Accordingly, the decision was quashed.

This reasoning is far more in line with the application of the public policy exception by the CJEU proposed above. In any case, this interpretation differs markedly from the one given by the Dutch Council of State. According to well-established case-law, a domestic court whose rulings are not subject to domestic review must refer a question on interpretation of EU law to the CJEU, unless the answer is beyond

94 Ibid., para. 3.3.
95 Ibid., paras. 3.12–3.13.
reasonable doubt and the domestic court is convinced that the matter is equally obvious to the courts of the other Member States. 96 Obviously, the latter condition is not fulfilled. Rightly, both a Dutch and a Belgian first instance court referred questions on this issue to the CJEU. 97

3.5. Conclusion

Between 1992 and 2017 the Netherlands has on the basis of Article 1F Refugee Convention excluded 1.000 asylum seekers who are believed to have committed serious crimes prior to arrival in the Netherlands. No figures are available on the number of foreign nationals who have had their residence permits revoked because they had committed crimes after arrival in the Netherlands. Neither are there publicly available data on the number of immigrants who have been denied legal residence because they are considered to pose a danger to national security. The Netherlands imposes an entry ban on all undesirable immigrants. They have to leave the country immediately or within the designated period. When an undesirable immigrant, for whatever legal or practical reasons, is also unreturnable or otherwise unremovable this does not lift the obligation to leave the Netherlands.

96 CJEU, CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, Case C-283/81, 6 October 1982, para. 16.
97 K. v. Staatssecretaris van Justitie and H.F. v. Belgische staat, Joined Cases C-331/16 & 366/16. The Dutch court referred the following questions in Case C-331/16 “Does Article 27(2) of Directive 2004/38/EC permit a Union citizen, as in the present case, in respect of whom it has been established in law that Article 1F(a) and (b) of the Refugee Convention is applicable to him, to be declared undesirable because the exceptional seriousness of the crimes to which that Convention relates leads to the conclusion that it must be assumed that, by its very nature, the threat affecting one of the fundamental interests of society is permanently present? If the answer to question 1 is in the negative, how should an assessment be carried out, in the context of an intended declaration of undesirability, of whether the conduct of a Union citizen, as referred to above, to whom Article 1F(a) and (b) of the Refugee Convention has been declared applicable, should be regarded as a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society? To what extent does the fact that the 1F conduct, as in the present case, took place long ago – in this case: in the period between 1992 and 1994 – play a role therein? In what way does the principle of proportionality play a role in the assessment of whether a declaration of undesirability can be imposed on a Union citizen to whom Article 1F(a) and (b) of the Refugee Convention has been declared applicable, as in the present case? Should the factors mentioned in Article 28(1) of the Residence Directive be involved, either as part of such an assessment, or separately? Should the period of ten years’ residence in the host country mentioned in Article 28(3)(a) be taken into account, either as part of such an assessment, or separately? Should the factors listed in paragraph 3.3 of the Guidance for better transposition and application of Directive 2004/38/EC, (COM(2009)313), be fully involved?”; the Belgian referred the following question in Case C-366/16: “Should Union law, in particular Article 27(2) of the Citizenship Directive 1, whether or not in conjunction with Article 7 of the Charter, be interpreted as meaning that a residence application, lodged by a third country family member in the context of family reunification with a Union citizen, who in turn has used his right of free movement and residence, can be refused in a Member State because of a threat resulting from the mere presence in society of that family member, who in another Member State was excluded from refugee status pursuant to Article 1F of the Refugee Convention and Article 12(2) of the Qualification Directive 2 because of his involvement in events within a certain socio-historical context in his country of origin, where the genuineness and the reality of the threat posed by the conduct of that family member in the Member State of residence is based solely on a reference to the exclusion decision in the absence of an assessment of the risk of recidivism in the Member State of residence?”. For the status of the case, see <http://curia.europa.eu/juris/liste.jsf?language=en&jur=CT,F&num=c-331/16> (last visited 24 October 2017).
As to the application of Article 1F exclusion, a decision to exclude is taken before inclusion: before it is determined whether an individual would qualify for asylum, it is first assessed whether he would qualify to be excluded on the basis of Article 1F. As a consequence, the number of 1F-excluded in the Netherlands individuals is relatively high compared to countries that consider inclusion first. Between 2000 and 2010 most excluded individuals stem from Afghanistan, Iraq, and Angola. More recently, also Syrians have been excluded. The overrepresentation of Afghan nationals can in particular 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. 30 percent of the individuals excluded under Article 1F can at least for a considerable period of time be regarded unreturnable because of an Article 3 ECHR impediment.

Unreturnable 1F-excluded individuals do not receive any form of temporary leave to stay nor are they entitled to social allowances, work, or education. The Netherlands periodically assesses if deportation is feasible. Unique to the Dutch context is the collective lobby of Afghan 1F-excluded individuals for sympathy when threatened with deportation. Rather than making use of institutionally arranged relocation schemes, 1F-excluded individuals have engaged in self-arranged modalities of relocation by means of taking the “Europe route”, whereby 1F-excluded persons who do have a relationship with a Union citizen moved to Belgium in order to invoke entitlements pursuant to the Citizenship Directive.

Despite much investment, only four 1F-excluded individuals have so far been successfully prosecuted. Extradition proves complex too. A unique ad hoc measure in dealing with vulnerable 1F-excluded individuals is the so-called “durability and proportionality” assessment, on the basis of which ill individuals who have not been deportable for more than 10 years and without much perspective to be deported any time can be granted a temporary status. Until January 2016, about 10 1F-excluded individuals with an Article 3 ECHR impediment have received such a status.

This chapter concluded by arguing that the blanket exclusion of 1F-excluded persons from all residence permits is in certain circumstances at odds with EU law. The Council of State misconstrues the Citizenship and Family Reunification Directives where it conflates Article 1F and public order. Exclusion on public policy grounds is allowed if a person poses a real, actual, and sufficiently serious threat to society. Obviously, there may be persons who in the past committed 1F crimes and who do now pose an actual threat to Dutch society, but such a threat does not follow from
the alleged 1F crime itself. As stated by the Belgian Council of Alien Law Litigation, Article 1F addresses the past and is therefore hardly informative of the actuality of a threat. Arguably, the diversity in approach among Member States in general and between the Dutch and Belgian Councils in particular warrant the questions referred to the CJEU for a preliminary ruling.