

## Conference report

### Preliminary workshop

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

27 March 2015  
VU University Amsterdam

After a word of welcome by Prof. Van Sliedregt, Dean of the Faculty of Law (VU University Amsterdam), David Cantor (Refugee Law Initiative) and Joris van Wijk (Center for International Criminal Justice) introduced the background of the project and expressed that the goal of the project is to map the problem and come with concrete proposals of coordinated and harmonized solutions (policies) for undesirable and unreturnable migrants.

**Session 1:** Presentations of situation-specific papers on United Kingdom, Netherlands, Norway and Italy, followed by discussion.

(UK - Sarah Singer; Netherlands – Maarten Bolhuis; Norway – Terje Einarsen and Mi Hanne Christiansen; Italy – Marco Odello)

**Session 2:** Presentations of situation-specific papers on Canada, United States, Brazil and UNHCR, followed by discussion.

(Brazil – Liliana Jubilut; United States – Deborah Anker, Canada – Jennifer Bond; UNHCR – James Simeon).

**Session 3:** Presentations of papers on criminal prosecution of undesirable and unreturnable migrants, followed by discussion.

(Prosecution – Joseph Rikhof; Extradition – Geoff Gilbert)

**Session 4:** Presentations of papers on alternative solutions for the issue of undesirable and unreturnable migrants, followed by discussion.

(Memoranda of understanding – Mariagiulia Giuffré; Humanitarian alternatives – Satvinder Juss; Voluntary return/deportation/relocation – Joris van Wijk)

The first two sessions concentrated on the country-specific situations in the United Kingdom, the Netherlands, Norway, Italy, the United States and Canada. The different presenters highlighted specific characteristics of the issue of 'undesirable and unreturnable' migrants in the respective countries and the policies that exist in dealing with the issue. In doing so, interesting differences and similarities were brought to the surface.

Firstly, it became very clear that there are major differences in policies leading to undesirable immigrants. For example, where the UK, the Netherlands, Canada and Norway actively apply article 1F of the Refugee Convention, this is less common or countries like Italy, Brazil or the USA. In terms of other policies leading to undesirability, major differences exist. It also became clear that gathering data on the scale of the problem can be frustrated by lack of registration of the reasons for refusing asylum. There is a plethora of policies to deal with the issue, but a coherent policy is lacking.

Another important difference between countries is the diversity in approaches governments take in dealing with undesirables who are non-removable. In some countries, in particular Italy and Brazil, the issue of 'undesirable unremovables' is not an issue at all and hence, there is no specific policy focus on the issue. Other countries which are faced with non-removables continue to try to actively push out such individuals, e.g. by giving them no form of residence or by seeking all sorts of 'innovative' modes to ensure deportation still takes place. Other countries on the other hand, provide (limited) forms of temporary leave to stay, which gives the individuals concerned some opportunities to integrate into society. These forms of leave often do entail restrictions, e.g. on residence and employment, and in some cases individuals are required to regularly report themselves.

Many presenters highlighted that there are different reasons for non-removability. Next to human rights grounds, there can be all kinds of practical reasons, such as administrative reasons and non-cooperation. Participants in the ensuing discussion indicated that it would be good to define whether all of these issues fall under the scope of the project or whether the scope is more limited.

Since UNHCR is very significant player in the field of refugee status determinations which could lead to 1F exclusion and, consequently, undesirable individuals, a paper on UNHCR's exclusion and post-exclusion policy was also presented. In the ensuing discussion some participants called upon UNHCR to increase transparency of their policies towards exclusion and views on post-exclusion. It would be good to include UNHCR in the project, also with an eye on developing solutions for the issues discussed. Some participants representing governments mentioned that they also count on UNHCR to give guidance in this respect.

In the third and fourth sessions presenters focused on possible follow-ups to refugee exclusion and other forms of undesirability. Firstly, it was noted that subsequent prosecution of 1F excluded individuals is only likely to occur in a very limited number of cases. In thirteen countries where excluded individuals have been prosecuted, forty have been convicted, on a total of three thousand excluded individuals. The number of extraditions and other forms of rendition are currently very limited and likely to be so in the future. Since there are numerous practical and normative restraints from entering into Memoranda of Understanding to ensure return of undesirable individuals, this too is not likely to provide a solution on how to deal with unremovable immigrants. Voluntary return or independently or institutionally arranged relocation schemes do in many instances also not take place, which means that countries for a considerable period of time remain 'stuck' with a considerable number of undesirable and unremovable individuals.

In the ensuing discussion it was noted that it is sometimes possible to resolve problems in unconventional ways. If removal is e.g. blocked by a lack of appropriate medical care in the country of origin, medicines could be sent. On the other hand, providing undesirable and unreturnable individuals with resources for returning may not be greeted with enthusiasm by the greater public. At the same time, governments should not be afraid trying to explain to the public what they have done and why they have done it. Investing in the institutional build up of a country, for instance by strengthening the justice system, may be a way to remove concerns relating to human rights and eventually ensure that return is possible.

It was further noted that it might be necessary to collectively address general matters in a wider context, perhaps within the EU, so that the most difficult issues can be dealt with bilaterally. There seems to be a need for harmonization of approaches towards refugee exclusion and related matters.

If a global policy recommendation is pursued, an important question will be who is best suited to deal with this in the international community.

It should also be clear what the exact scale of the problems is. A question that was raised in this regard was how big the problem actually is if undesirable and unreturnable individuals do not pose a security threat. In those cases, exclusion has served its purpose. This is especially true if the crimes concerned are not perceived to be of the highest level of seriousness and the individuals do not seem to cause too much trouble. Temporary permits allow for some monitoring of the individuals. Consequently, the question was raised how big the group of 'dangerous' individuals actually is. With little prospect for criminal prosecution, is the state of limbo actually such a bad situation?

It was however also noted that present dangers is not the only issue of interest; exclusion also serves to make sure the integrity of the asylum system is not undermined. Next to that, the perspective of the victims of the crimes should not be forgotten.

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

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

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

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

Similar questions emerged in terms of what 'unremovable' means. Is the project limited to non-refoulement because of non-refoulement, or also administrative reasons or practical issues?

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