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Non-disclosure of evidence in cases concerning withdrawal of nationality of persons suspected of involvement in the Rwandan genocide

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1. Introduction

This expert opinion addresses the withdrawal of nationality of persons who fled Rwanda during or after the genocide in 1994 and obtained an asylum status and subsequently Dutch nationality in the Netherlands. The decisions to withdraw nationality are based on an individual report (*individueel ambtsbericht*) of the Dutch Ministry of Foreign Affairs, which provides information about the alleged involvement of the person concerned in the Rwandan genocide. This report makes use of anonymous witness statements and does not disclose the methods of investigation. This expert opinion examines whether this violates the right to adversarial proceedings and the principle of equality of arms guaranteed by Article 47 of the EU Charter of fundamental rights (henceforth: the Charter).

This expert opinion does not address the question whether the persons concerned in the cases discussed in this expert opinion are guilty of crimes related to the Rwandan genocide. The expert opinion only focuses on the fairness of the withdrawal proceedings.

This research was conducted at the request of Mr. M. Wijngaarden (Prakken D'Oliveira Human Rights Lawyers) and Mr. J.A Nijland (Robin Advocaten), who both represent several individuals in the process of challenging the decision to withdraw their Dutch nationality.

1.1 Background of the cases

This expert opinion concerns a number of cases of persons from the Hutu-community who fled Rwanda after the genocide. During the genocide, which started on 6 April 1994, around 800.000 Tutsis and moderate Hutus were systematically killed by extremist Hutus in a period of three months.[1] Most of the persons concerned in this expert opinion arrived in the Netherlands in the end of the nineties. They have received an asylum status or a regular residence permit in the Netherlands and were granted Dutch nationality. Years later, the Dutch immigration service (henceforth: IND) decided to withdraw their Dutch nationality on the basis that there were serious reasons for believing that they had committed crimes during the genocide, which fall within the scope of Article 1F of the Refugee Convention. The cases are currently in different stages of the proceedings, some are pending before the European Court of Human Rights (henceforth: ECtHR), some are pending before the Dutch courts and some are still pending in the administrative phase (see Annex 1 for an overview of the procedures).

The withdrawals were the result of renewed attention of the IND for Rwandan cases.[2] In 2008, the IND decided to screen cases of Rwandan migrants on possible indications that these migrants had committed crimes in the meaning of Article 1F of the Refugee Convention. The extra screening took place because in the previous years more information had become available concerning (possible perpetrators of) the Rwandan genocide. It concerned both online information and information provided in the context of the proceedings before the International Criminal Court for Rwanda (henceforth: ICTR).[3] In some of the cases, a 1F investigation had already taken place in the context of the asylum procedure. At that moment there was insufficient evidence to reject the asylum application on the basis of Article 1F.[4]

[1] See for example, Dutch Ministry of Foreign Affairs, Thematic Country Report Rwanda, August 2016, p 5.

[2] Between 1999 and 2008, Article 1F was applied in around 10 Rwandan cases. Kamerstukken II 2013-2014, 33750 VI, nr 108, p 3.

[3] Kamerstukken II 2013-2014, 33750 VI, nr 108, p 3 and District Court the Hague, 18 December 2018, ECLI:NL:RBDHA:2018:15461, para 4.2.

[4] District Court Arnhem 20 October 2015, AWB 14/3072, para 1.

The Netherlands chose to withdraw the Dutch nationality (and/or residence permit) of Rwandan genocide suspects instead of subjecting them to criminal prosecution.[5] So far only two persons, Yvonne B.[6] and Joseph M.[7], have been prosecuted and convicted for crimes committed in the context of the Rwandan genocide. Many more have lost Dutch nationality or their residence permit. As we will demonstrate in this expert opinion, the level of procedural protection in (those two) criminal proceedings is much higher than that in the administrative proceedings concerning the withdrawal of Dutch nationality.[8] Not only is the standard of proof in these administrative cases lower than in criminal cases, the extent of non-disclosure is also much greater, leading to severe limitations on the right to adversarial proceedings. This approach is different than in Belgium and France, which both host a large Rwandan community. These countries do not seem to revoke the nationality of persons suspected of involvement in the genocide on a large scale. Moreover, if they do revoke nationality, this can only be done on the basis of a procedure, which complies with criminal law standards (see Annex II of this expert opinion).

Each decision to withdraw Dutch nationality is based on an individual report of the Ministry of Foreign Affairs. The report is the result of the investigation of a confident of the Dutch embassy in Kigali, which consists primarily of interviews with witnesses. The report, which is disclosed to the persons whose nationality is withdrawn, only provides Dutch summaries of the witness statements. The report does not mention the identity and background of the confident or the witnesses, provide the full witness statements or explain the methods of investigation used. The Dutch courts have accepted that the non-disclosure of this information to the person concerned is justified in the light of the protection of witnesses and the methods of investigation used by the Ministry. With the consent of the person concerned, the IND discloses the information underlying the individual report to the courts in the (higher) appeal against the decision to withdraw, but not the persons concerned themselves. The courts examine the correctness and completeness of the report on the basis of this underlying information. However, the fact that the information is not disclosed to the persons concerned makes it very difficult for them to defend themselves against the allegations in the individual report.

While this in itself raises questions concerning the fairness of the withdrawal proceedings, it is extra problematic given the fact that the reliability of witnesses of the Rwandan genocide has been questioned amongst others in the context of ICTR, Rwandan and Dutch criminal cases.[9] In this context, the political situation in Rwanda plays an important role. Rwanda has been ruled by the Tutsi Rwandan Patriotic Front (RPF), headed by President Paul Kagame, since 1994. Already in 2014, Human Rights Watch recognised that the RPF regime had repressed individuals, both inside and outside Rwanda, who expressed political opposition to the current regime.[10] According to a report of Freedom House of 2022, the RPF's regime has continued to suppress political dissents through pervasive surveillance, torture and intimidations.[11] Reports were made of trained witnesses within Rwanda who were instructed to make

[5] See M.P. Bolhuis, L.P. Middelkoop and J. van Wijk, 'Refugee Exclusion and Extradition in the Netherlands, Rwanda as Precedent?' *Journal of International Criminal Justice* (2014) pp 1115-1139.
[6] District Court The Hague 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292.
[7] Appeal Court the Hague 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.
[8] Nevertheless, there are also doubts about the conviction of Joseph M. See G. de Bruïne and others, *Een Rwandees Kaartenhuis, Een wirwar van wankelende verklaringen* (Den Haag, Boom criminology, 2017).
[9] See Chapter 3 of this expert opinion.
[10] Human Rights Watch, *Rwanda: Repression Across Borders, Attacks and Threats against Rwandan Opponents and Critics Abroad* (2014) available at https://www.hrw.org/news/2014/01/28/rwanda-repression-across-borders accessed 5 October 2022.
[11] Freedom House, *Freedom in the World — Rwanda Country Report* (2022) available at https://freedomhouse.org/country/rwanda/freedom-world/2022 accessed 6 May 2022. See also S. Thomson, 'The Darker Side of Transitional Justice: The Power Dynamics behind Rwanda's Gacaca Courts' *Africa* (2011) p 377.

incriminating statements about different events, people and trials.[12] This may include false accusations relating to the Rwandan genocide.[13] Palmer notes that '[a]ll of Rwanda's post-genocide justice processes have been criticized for being strategically used by the government to repress political opposition, particularly within Hutu communities.[14] According to Thomason, the RPF labelled 'all Hutu as probable perpetrators of the genocide, guilty until proven innocent' thus collectivising Hutu guilt for the genocide as a manner of control.[15] The repression extends to political opponents residing abroad. A Freedom House report of 2021 states that the RPF's regime specifically targets Rwandans abroad, and that minor negative remarks made about the regime can lead to individuals being regarded as dissidents and measures being taken against them - including threats, kidnapping and murder.[16] According to Freedom House, the Rwandan government is known to pursue arbitrary detentions of political opponents living in exile'.[17] According to Palmer, the penal power of the Rwandan Government has an impact on the capacity of the Rwandan diaspora to politically organize.[18]

The persons confronted with withdrawal of their Dutch nationality are generally Hutus with a high (political) profile. It concerns for example a former Director of the cabinet of the Rwandan Ministry of Planning[19], a chief commander of the Rwandan gendarmerie[20], a former Director of the Institution of Higher Education (ISAE) and cousin of the former president of Rwanda Habyarimana[21], a nurse and women's leader[22], a former chair of women's organisation URAMA and the former Director-General of the Institute of Agronomic Science of Rwanda (ISAR).[23] Many of these persons were politically active in Rwanda before the genocide. Some of them may still be considered political opponents of the regime of Kagame. Two cases concern the husband[24] and the mother[25] of opposition leader Victoire Ingabire, who has been imprisoned by the Rwandan government. Another case regards a prominent member of opposition party FDU-Inkingi[26] or persons active in Rwandan organisations in the Netherlands[27]. This means that the Dutch authorities must be extra vigilant when taking decisions in these cases and that it is

[12] Human Rights Watch, *We Will Force you to Confess: Torture and Unlawful Military Detention in Rwanda* (2017) available at pp 2, 23 and 67 available at https://www.hrw.org/sites/default/files/report_pdf/rwanda1017_web_0.pdf accessed 6 May 2022.
[13] US Department of State, *2016 Country Reports on Human Rights Practices: Rwanda* (2016) available at https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/rwanda/ accessed 19 November 2022, p 14.
[14] N. Palmer, 'International criminal law and border control: The expressive role of deportation and extradition of genocide suspects to Rwanda' *Leiden Law Journal* (2020) p 806.
[15] S. Thomson, 'The Darker Side of Transitional Justice: The Power Dynamics behind Rwanda's Gacaca Courts'd *Africa* (2011) p 378.
[16] Freedom House, *Out of Sight, Not Out of Reach* (2021) available at https://freedomhouse.org/sites/default/files/2021-02/Complete_FH_TransnationalRepressionReport2021_rev020221.pdf accessed 6 May 2022, p 22.
[17] Freedom House, *Freedom in the World — Rwanda Country Report* (2022).
[18] N. Palmer, 'International criminal law and border control: The expressive role of deportation and extradition of genocide suspects to Rwanda' *Leiden Law Journal* (2020) p 805.
[19] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360
[20] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267.
[21] Council of State 20 January 2021, ECLI:NL:RVS:2021:115 and C. Buisman and others, 'Melding knellende wetgeving en jurisprudentie Afdeling' (2021) p 2.
[22] Council of State 20 January 2021, ECLI:NL:RVS:2021:114.
[23] District Court The Hague 3 July 2015, ECLI:NL:RBDHA:2015:7860.
[24] District Court the Hague 18 December 2018, ECLI:NL:RBDHA:2018:15461.
[25] Council of State 20 January 2021, ECLI:NL:RVS:2021:114.
[26] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267.
[27] District Court the Hague 18 December 2018, ECLI:NL:RBDHA:2018:15461, para 4.2.

(therefore) crucial that the persons concerned have an effective opportunity to defend themselves against the allegations against them.

Finally, it may be argued that a high level of procedural protection is required in the light of the severe consequences of the decisions to withdraw Dutch nationality for the persons concerned and their families. They have lived in the Netherlands for around 25 years and their children have grown up in the Netherlands. The loss of their Dutch nationality will subsequently lead to the loss of their right to residence in the Netherlands. Moreover, the Netherlands extradites suspects of the Rwandan genocide to Rwanda, where they will face criminal prosecution.[28] There are concerns about the fairness of the criminal proceedings in Rwanda in genocide cases.[29] Therefore, several European States (including France and the United Kingdom) do not extradite genocide suspects to Rwanda.[30]

1.2 Research question

This expert opinion will examine the fairness of the proceedings to withdraw Dutch nationality of persons suspected of involvement in the Rwandan genocide in particular in the light of the non-disclosure of information. It answers the following research question:

Do the Dutch proceedings, in which the Dutch nationality of Rwandan (asylum) status holders is withdrawn on the basis of an individual report that makes use of anonymous witness statements and does not disclose the methods of investigation, comply with the right to adversarial proceedings and the principle of equality of arms guaranteed by Article 47 of the Charter?

1.3 Methodology

This expert opinion uses doctrinal legal research in order to set out the relevant EU and national legal framework. The requirements following from the right to adversarial proceedings and the principle of equality of arms guaranteed by Article 47 of the Charter were derived from case law of the Court of Justice of the European Union (hereafter: CJEU) and case law of the European Court of Human Rights (ECtHR) under Articles 6 and 13 of the European Convention on Human Rights (henceforth: ECHR), which inspires the interpretation of Article 47 of the Charter. Dutch legislation and case law of the Administrative Jurisdiction Division of the Council of State (henceforth: the Council of State) were used to establish the Dutch legal framework for non-disclosure of evidence. With regard to the evidentiary standards for the application of Article 1F of the Refugee Convention, we have taken into account UNHCR documents. Moreover, academic literature was reviewed, in particular where it concerned the evidentiary standards in Article 1F cases.

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[28] See Kamerstukken II 2013-2014, 33750 VI, nr 27, p 8. Since 12 November 2016, three genocide suspects have been extradited to Rwanda. Reports monitoring the situation of these persons can be found here: Monitoring Rwandese uitleveringszaken | Internationale vrede en veiligheid | Rijksoverheid.nl. A fourth genocide suspect has been detained with a view to his extradition to Rwanda. See The New Times, 'Rwanda to issue fresh extradition request for Genocide fugitive Karangwa' (25 May 2022) accessible at <Rwanda to issue fresh extradition request for Genocide fugitive Karangwa - The New Times> accessed 13 September 2022. However, the District Court of the Hague abolished this extradition because this would lead to a flagrant violation of the right to fair trial in Rwanda. See District Court The Hague 9 November 2022, ECLI:NL:RBDHA:2022:11719.

[29] See for example US Department of State, *Rwanda 2021 Human Rights Report, Executive Summary* (2021) available at https://www.state.gov/wp-content/uploads/2022/03/313615_RWANDA-2021-HUMAN-RIGHTS-REPORT.pdf accessed 7 October 2022, p 10.

[30] N. Palmer, 'International criminal law and border control: The expressive role of deportation and extradition of genocide suspects to Rwanda' *Leiden Law Journal* (2020) pp 789-807.

In order to understand how proceedings concerning the withdrawal of Dutch nationality of persons suspected of involvement in the Rwandan genocide (hereinafter genocide suspects) work in practice, we looked at case law of the Dutch District Courts and the Council of State.[31] Here, we included not only cases concerning the withdrawal of nationality, but also cases concerning the withdrawal of residence permits of Rwandan asylum status holders based on an individual report of the Ministry of Foreign affairs.[32] In both categories of cases the same questions arise with regard to non-disclosure of evidence. Moreover, we selected the judgments of the Dutch criminal courts concerning the two (and so far only) Rwandan nationals who were suspected of acts of genocide and were subjected to criminal prosecution in the Netherlands. This provided valuable insight in the differences between the examination of allegations concerning involvement in the Rwandan genocide by the administrative and criminal courts.

The lawyers who requested this expert opinion provided the researchers with the opportunity to examine the case files of 6 cases in which the nationality was withdrawn, including the individual reports and their (censured) underlying documents. This enabled the researchers to better understand the nature of the allegations at issue and the extent of non-disclosure. Examples from these cases are used as an illustration. We have not carried out a comprehensive analysis of all these cases. The case files also contained (censured) internal working instructions of the Ministry of Foreign Affairs concerning the way individual reports are drafted.[33] These instructions were obtained by the lawyers as a result of a Freedom of Information Act (*Wet openbaarheid van bestuur*) request. They were used to explain the process of writing an individual report in Chapter 2 of this expert opinion. A letter written by the IND to the District Court Arnhem of 7 November 2019 found in one case file provided details about the justifications for non-disclosure in the cases at hand.[34] These justifications were also found in documents in other cases. Moreover, the judgments of the confidentiality chambers (*geheimhoudingskamers*) of the courts provided insight in the judicial review of non-disclosure by the courts.

Finally, we have reviewed academic literature with regard to non-disclosure of witness identity and protection of witnesses in ICTR proceedings and the reliability of witnesses in general and in particular of the Rwandan genocide. This literature is used to examine the IND's justifications for non-disclosure of the identity of confidents and witnesses and the methods of investigation respectively to examine the proportionality of the limitations of the right to adversarial proceedings.

1.4 Structure of this expert opinion

Chapter 2 of this expert opinion will first explain the process of drafting an individual report of the Ministry of Foreign Affairs. It will address the reasons why an investigation into a person is started, how the acts of a person are investigated and how the findings are reflected in the individual report. Moreover, it will set out how the reliability of this report is checked during this process.

Anonymous witness statements are the primary sources of individual reports. Therefore Chapter 3 of this expert opinion will address different factors, which may undermine the reliability of the statements of witnesses of the Rwandan genocide. Due to the non-disclosure of the information

[31] Cases were found through rechtspraak.nl, Vluchtweb.nl and www.raadvanstate.nl by using the key words 'genocide' and 'Rwanda'.

[32] District Court The Hague 20 March 2013, ECLI:NL:RBDHA:2013:BZ6895, District Court Zwolle 14 March 2014, AWB 13/11697, District Court the Hague 25 March 2014, ECLI:NL:RBDHA:2014:3626 and District Court The Hague 13 March 2015, ECLI:NL:RBDHA:2015:2740.

[33] Ministry of Foreign Affairs, *Vertrouwenspersoon op de Post ten behoeve van asielonderzoek, Leidraad bij werving en selectie, de dossiervorming en rapportage door de vertrouwenspersoon* (June 2018) and Ministry of Foreign Affairs, *Onderzoek ten behoeve van individuele ambtsberichten op de post* (February 2019).

[34] Letter of 7 November 2019 to the District Court of Arnhem, ref KIG151102.0060.

underlying the individual report, the person concerned and their lawyer are not able to examine whether these factors are applicable in their case.

The expert opinion will proceed to assess whether the extent of non-disclosure in the cases at hand violates the right to adversarial proceedings and equality of arms. Therefore, Chapter 4 first sets out the applicable legal framework. It will explain the legal basis for withdrawing nationality in Rwandan cases and the relevance of Article 47 of the Charter and Articles 6 and 13 ECHR. Subsequently, Chapter 5 will assess the justifications for non-disclosure of the evidence underlying the individual reports underlying the decision to withdraw nationality in the light of the right to adversarial proceedings. It will be argued that the fact that the IND and the Dutch courts fail to assess the necessity of, and state the specific reasons for non-disclosure in each individual case and that non-disclosure of evidence is not strictly necessary leads to a violation of the right to adversarial proceedings guaranteed by Article 47 of the Charter.

Chapter 6 will contend that in the Rwandan cases at hand in this expert opinion, the persons concerned are not able to defend themselves against the allegations in the individual reports due to the combination of the use of the presumption that the individual report is reliable, the weight attached to the individual report in the decision to withdraw nationality and the lack of procedural measures counterbalancing the (large extent of) non-disclosure. Finally, Chapter 7 will draw conclusions and formulates preliminary questions, which may be referred to the CJEU by the Dutch courts.

2. Individual reports of the Ministry of Foreign Affairs

The withdrawal of Dutch nationality of a person suspected of involvement in the Rwandan genocide (hereinafter: the person concerned) is primarily based on an individual report of the Ministry of Foreign Affairs. This chapter will explain the process of drafting such an individual report. It will address the reasons why an investigation into a person is started, how the acts of a person are investigated and how the findings are reflected in the individual report. Moreover, it will set out how the reliability of this report is checked during this process.

2.1 The reason for starting an investigation

When the IND has indications that a person may have committed crimes mentioned in Article 1F, it refers the case to the 1F Unit of the IND. This unit is specialised in researching Article 1F allegations, which *inter alia* means that interviews with the person concerned are being conducted by a specialised IND officer. This officer also assesses whether it is necessary to gather additional information to substantiate a 1F claim. The 1F Unit may then ask the Ministry of Foreign Affairs to write an individual report about the person concerned.[35]

It is not always clear on the basis of which 1F indications the IND asked the Ministry of Foreign Affairs to start an investigation into the case of a specific person. In some Rwandan cases, one or more reports of NGO African Rights and/or African Rights and Redress were the reason to start the 1F investigation.[36] In other cases, an investigation was started on the basis of publications in the Rwandan and Dutch media[37], public statements of the person concerned about genocidaires convicted by the ICTR[38] and/or the fact that the person concerned acted as a defence witness in a case of a convicted genocidaire[39]. Moreover, the Office of the Public Prosecution sometimes receives reports that persons involved in the Rwandan genocide reside in the Netherlands.[40] These reports may be shared with the IND and lead to an investigation.

2.2 The process of writing the individual report

The IND can request the cluster official reports (*Cluster Ambtsberichten*, henceforth: CAB) of the Ministry of Foreign Affairs to write an individual report about a person who they suspect of having committed Article 1F crimes. For this purpose, the IND refers specific questions to the CAB. The CAB tasks a policy officer of the embassy of the country of origin of the person concerned with the investigation. This policy officer selects and instructs a confident (*vertrouwenspersoon*) to carry out the investigation in practice.[41]

Confidents usually seem to be local persons, often lawyers, living and/or working in the country of origin of the person concerned.[42] The Ministry acknowledges that these confidents often need to do

[35] IND Werkinstructie 2020/15 Procedurele werkwijze met betrekking tot artikel 1F Vluchtelingenverdrag.
[36] See Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 2, Letter of the IND to the Ministry of Foreign Affairs of 26 October 2015, ref 9801.13.2095.
[37] District Court Den Bosch 14 February 2020, ECLI:NL:RBOBR:2020:838, para 6.
[38] District Court the Hague 18 December 2018, ECLI:NL:RBDHA:2018:15461, para 4.2.
[39] Ibid, para 4.2.
[40] Kamerstukken II 2009/2010 Aanhangsel van de Handelingen nr. 2744.
[41] Ministerie van Buitenlandse Zaken, Onderzoek ten behoeve van individuele ambtsberichten op de post, (February 2019) p 13, 15.
[42] G. de Bruïne and others, *Een Rwandees Kaartenhuis, Een Wirwar van Wankelende Verklaringen* (Den Haag, Boom criminologie, 2017) p 29.

their work under difficult circumstances and that the information they obtain can often not be verified.[43] The Ministry of Foreign Affairs has not disclosed how it recruits confidents. The parts of the internal working instructions, which describe the recruitment process have largely been blanked in order to protect methods of investigation.[44] They only mention that recruitment is based on an assessment of the quality and reliability of the confident by the Ministry and the recommendations of others. In this context, the Ministry looks at the profession and working experience of the confident. The confident first works on probation (on around three test cases files) and their results are evaluated before they will be recruited for a longer period of time. The file concerning the functioning of the confident is strictly confidential and only accessible to the embassy for which the confident works and a specific person of the CAB. The functioning of the confident is evaluated on a yearly basis.[45]

The confident is not allowed to inform others that they work for the Netherlands. Moreover, the link between the person concerned and the Netherlands may not be revealed during the investigation process. The confident may only orally discuss the investigation with the embassy staff. The method of investigation of the confident may include interviews of witnesses and investigation of documents. In Rwandan cases most allegations are primarily based on information provided by witnesses to the informant.

When the confident has completed the investigation in the country of origin, they will discuss the investigation with the policy officer of the embassy. During this discussion, the policy officer checks whether the sources used and the investigation methods are clear and examines whether the findings with regard to each question are unambiguous.[46] Moreover, the confident is asked whether they have encountered any problems during the investigation. In some cases, the policy officer of the embassy drafts an investigation report (*onderzoeksverslag*) in Dutch on the basis of the information provided by the confident.[47] However, in other cases an investigation report in English[48] or French[49], which was apparently written by the confident, is underlying the individual report. The investigation reports are partly disclosed to the person concerned.

Once the embassy has completed the draft investigation report, the CAB of the Ministry of Foreign Affairs will take over. It may ask additional questions to the policy officer of the embassy, who may contact the confident for this purpose. Subsequently the CAB writes the individual report on the basis of the research report and blanks confidential parts of this report if necessary.[50]

After the investigation has taken place and the individual report has been finalised, the IND gets one-time access to all underlying documents of the report in order to enable it to check whether the report has been carefully prepared (the so-called REK-check). Subsequently, the IND writes a letter in which it indicates whether they can conclude that the individual report has been prepared in a careful

[43] Ministerie van Buitenlandse Zaken, Onderzoek ten behoeve van individuele ambtsberichten op de post (February 2019) p 6.
[44] Ministry of Foreign Affairs, Decision on objection (beslissing op bezwaar) of 4 March 2019, ref. 2019.140335.
[45] Ministerie van Buitenlandse Zaken, Onderzoek ten behoeve van individuele ambtsberichten op de post (February 2019) pp 8-12.
[46] Ibid, p 15.
[47] Investigation report underlying Council of State 11 May 2022, ECLI:NL:RVS:2022:1267.
[48] Investigation report underlying Council of State 20 January 2021, ECLI:NL:RVS:2021:114, Council of State 11 May 2022, ECLI:NL:RVS:2022:1360 and District Court The Hague, 3 July 2015, ECLI:NL:RBDHA:2015:7860. Investigation report underlying an individual report of 3 May 2017, KIG1609010045.
[49]Investigation report underlying Council of State 11 May 2022, ECLI:NL:RVS:2022:1360.
[50] Ministerie van Buitenlandse Zaken, Onderzoek ten behoeve van individuele ambtsberichten op de post (February 2019) p 7.

manner and is transparent as to the content. If this conclusion cannot be drawn, the IND asks the Ministry of Foreign Affairs for additional information and improvement of the research report.[51]

2.3 The content of the investigation report

The internal working instructions contain a format for the investigation report. This report first sets out the details of the person concerned. After that, it explains the methods of investigation. According to the internal working instructions, the investigation report needs to contain as many details as possible about the sources and methods of investigation used.[52] It needs to mention who carried out the investigation, which methods and techniques of investigation have been used and the reason why they have been chosen, how many times it was attempted to find an answer to the specific questions (including attempts which were not successful), how the information was transferred, when it was obtained and how the reliability of the information was guaranteed.[53] The report must also mention the period of time in which the investigation was carried out. Finally, the investigation report contains the questions asked by the IND and the answers to or findings relating to these questions. The answers/findings must mention on which source they are based.

All sources used, including witnesses, institutions, systems and registers, must be listed in the investigation report. The report must also describe how information was received from this source. In some situations, the confident can refuse to reveal the identity of a source. The internal instructions mention that in such a situation, 'usually a value judgment can be contributed to the source'.[54] The name of the confident does not seem to be disclosed in the investigation report. Moreover, according to the Bruïne and others, the investigation report does not need to contain transcripts of the interviews with the witnesses. Moreover, confidents are not required to provide recordings of the interviews or copies of the identity documents of the witnesses.[55]

In practice, the description of the methodology in the investigation report seems to be brief. We have seen six censured investigation reports. As far as can be derived from the non-disclosed information in these reports, these reports do not explain elaborately how the confident has selected and interviewed the witnesses. Moreover, they do not seem to enter into detail about how the reliability of sources has been tested. Four investigation reports only contain one page in which the methodology was explained, which sometimes also included a list of witnesses and other sources, which leaves very little space for explanations about the reliability of these witnesses and sources.[56] Another investigation report only mentioned the sources used for the report and the first step taken by the confident in the investigation: the meeting with a particular witness.[57] Finally, in one report it is not clear how much space the methodology paragraph took in the investigation report.[58] Also the District Court concluded in one of these cases that the documents underlying the individual report contained insufficient information

[51] Ministerie van Buitenlandse Zaken, Onderzoek ten behoeve van individuele ambtsberichten op de post (February 2019) p 6.
[52] Ibid p 17.
[53] Ibid.
[54] Ibid p 18.
[55] G. de Bruïne and others, *Een Rwandees Kaartenhuis, Een wirwar van wankelende verklaringen* (Den Haag, Boom criminology, 2017) p 30.
[56] Investigation reports underlying Council of State 22 May 2022, ECLI:NL:RVS:2022:1267, Council of State 11 May 2022, ECLI:NL:RVS:2022:1360, District Court The Hague 3 July 2015, ECLI:NL:RBDHA:2015:7860 and District Court Arnhem 18 February 2022, ARN AWB 20/2679.
[57] Research report underlying Council of State 20 January 2021, ECLI:NL:RVS:2021:114.
[58] Investigation report underlying individual report of 3 May 2017, KIG1609010045.

regarding the identity of the confident and the methodology used. It requested the IND to send it more information.[59]

2.4 The content of the (disclosed) individual report

The CAB writes the individual report on the basis of the investigation report. This report is disclosed to the person concerned and their lawyer. The report contains questions in English[60] or numbers of questions[61] and answers in Dutch. For example, in one individual report amongst others the following question was included: 'Did [the person concerned] take part in the participations [sic] of the massacres and the massacres themselves that took place at the Catholic Parish of Mugina?'. Under this question, a brief summary of the witness statements is given in Dutch.[62] For example, under the question mentioned above, it was (only) reported that '[t]wo witnesses stated that [the person concerned] actively participated in the killing of Tutsi's. With regard to the mass killing, which took place in the church of Mugina one witness stated that he has recognised [the person concerned] as one of the leaders.'[63]

The level of non-disclosure in the individual report is high. First, the individual report does not contain the name of the confident or a list of sources. The confident and the witnesses thus remain anonymous. Moreover, the person concerned and their lawyer do not receive information about the background of the confident and the witnesses, including their place of residence, profession and expertise. Moreover, it is not mentioned whether the witnesses were themselves involved in and/or convicted for acts of genocide (insider witnesses) and whether they are or were detained in Rwanda or elsewhere. As we will see in Chapter 3, this information is important when assessing the reliability of a witness. Finally, it can often not be derived from the individual report how many witnesses in total have made statements in a case and which statements were made by the same witness.[64]

Second, many aspects of the method of investigation have not been disclosed to the persons concerned.[65] It is unclear in which period of time the investigation has taken place. The individual report does not disclose which archives have been visited, how these archives have been selected and how the reliability of the information in the archives was checked. Moreover, it is unknown to the persons concerned how the confident was selected by the Ministry of Foreign Affairs and how the witnesses were selected by the confident, how (duration, location, language) and how many times the witnesses were interviewed, which questions were posed to the witnesses, whether recordings or transcripts were made of the interviews and whether and if so how the confident has looked for and had access to witnesses who could confirm the account of the person concerned.[66]

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[59] District Court Arnhem 20 June 2022, ARN 20/4676.

[60] See for example the individual Report of the Ministry of Foreign Affairs underlying Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, Individual Report of the Ministry of Foreign Affairs underlying judgment of District Court The Hague, 3 July 2015, ECLI:NL:RBDHA:2015:7860.

[61] See for example the individual report of 3 November 2014 underlying Council of State 20 January 2021, ECLI:NL:RVS:2021:114, Individual report of 3 May 2017, Individual report of 3 May 2017, KIG1609010045.

[62] See for a public example of an individual report the annex with District Court The Hague, 18 December 2018, ECLI:NL:RBDHA:15461.

[63] Text translated by the authors. Individual Report of the Ministry of Foreign Affairs in the case leading to the judgment Council of State 11 May 2022, ECLI:NL:RVS:2022:1267.

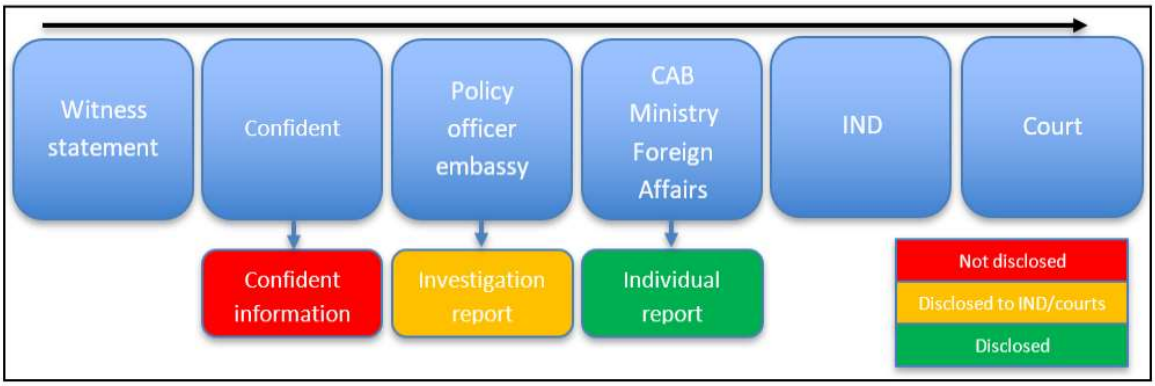
[64] C. Buisman and others, 'Melding knellende wetgeving en jurisprudentie Afdeling' (2021) p 10.

[65] Ibid.

[66] Investigation report of the Ministry of Justice in relation to questions of the District Court of Arnhem of 30 July 2019 in case ARN 17 I 5886 RWNL 616. Reydams asks similar questions with regard to the reports of NGO African Rights. L. Reydams, 'NGO Justice: African Rights as Pseudo-Prosecutor of the Rwandan Genocide', *Human Rights Quarterly* (2016) p 552.

2.5 A chain of confidence

It must be concluded that the information provided by a source (for example a witness) goes through many different filters before it ends up in the individual report on which the IND bases its decision to withdraw Dutch nationality. How the information provided by a witness and the confident is reflected in the investigation report does not seem to be subjected to review by the Ministry of Foreign Affairs, the IND and the courts. According to de Bruïne and others the responsible person of the embassy does not receive transcripts or recordings of the witness interviews from the confidents.[67] Moreover, it follows clearly from the internal instructions of the Ministry of Foreign Affairs that the Dutch courts only receive the investigation report from the Ministry of Foreign affairs.[68] They do not seem to receive the information gathered by the confident, including full transcripts of the witness statements made to the confident.[69] They also do not seem to (always) know the identity of the confident as their name is not mentioned in the investigation report. Therefore the lawyers who requested this expert opinion speak about a 'chain of confidence'.



There is no thorough (judicial) review of the information processed in all pieces of the chain: it is assumed that the confident and the policy officer of the embassy have done their work carefully see also section 6.2). The person concerned and their lawyer only receive the individual report, which only contains a summary of witness statements in Dutch answering the questions of the IND. The identity and background of the confident and the witnesses and the methods of investigation are not disclosed to them, as they do not receive the documents underlying the individual report. This extensively limits their opportunities to challenge the reliability of the information processed in the chain. This is problematic since the reliability of witnesses of the Rwandan genocide, who are the primary source of the individual reports in the cases at hand in this expert opinion, may be questioned for many reasons. The next chapter addresses the reliability of such witnesses.

[67] G. de Bruïne and others, *Een Rwandees Kaartenhuis, Een wirwar van wankelende verklaringen* (Den Haag, Boom criminology, 2017) p 30.
[68] Ministerie van Buitenlandse Zaken, Onderzoek ten behoeve van individuele ambtsberichten op de post, (February 2019) p 16. See also District Court Breda 2 November 2020, ECLI:NL:RBZWB:2020:5495, para 7.5.
[69] It does not follow from the judgments of the courts which information underlying the individual report they have exactly examined.

3. The reliability of witnesses of the Rwandan genocide

Authors have pointed out, mostly in the context of ICTR proceedings, that there are reasons to question the reliability of witnesses accusing Rwandans of involvement in the genocide. These relate, amongst others, to the lapse of time since the genocide, the traumatic nature of the events and the fact that witness sometimes do not distinguish between events they experienced and hearsay. These are all factors, on which the witnesses themselves have little influence. However, research has also shown that Rwandan witnesses have intentionally misled courts by lying about a person's involvement in the genocide. These factors will be discussed below.

3.1 Lapse of time

The genocide occurred in 1994, more than 25 years ago. This can have effects on the accuracy of a witness' memory. Lacy and Stark write that over time memories, including memories of traumatic events, 'typically become less episodic (highly detailed and specific) and more semantic (more broad and generalized) as the information is repeatedly retrieved and re-encoded in varying contexts'.[70] Such memory distortions increase as people age.[71]

The District Court of The Hague considered in 2013 that the time lapse of more than 20 years between the genocide and the trial of Yvonne B. 'called for great caution' when using witness statements.[72] Similarly, the Appeal Court in the case of Joseph M., considered in 2011 that the lapse of time since the events for which the accused was charged had a big influence on the accuracy and reliability of the memory of most witnesses in the case. Referring to literature, it stated that both internal processes and external factors (including the integration of later obtained information in the memory trace of the original experience or the acceptance of a suggested event as real memory) can change or add to the memory trace of the original experience. For this reason, the Court ignored statements which contained repetitive contradictions or gaps, unless essential parts of the statement were confirmed by other evidence.[73]

3.2 Trauma

Second, it is widely recognised that the memory of witnesses may be distorted as a result of trauma. In particular, 'autobiographical memory can be modified to protect or re-establish a sense of identity and self'.[74] Marschner argues that '[d]espite suffering from trauma, witnesses can be reliable and credible', but that an individual assessment is needed 'to determine if a witness needs special support and protection, as well as if and to what extent the witness's statements are reliable'.[75]

[70] J.W. Lacy and C.E.L. Stark, 'The Neuroscience of Memory: Implications for the Courtroom' *Nature Reviews Neuroscience* (2013) p 653.
[71] Ibid, p 652.
[72] District Court the Hague, 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292, para 11.
[73] Appeal Court the Hague, 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, para 9.1.
[74] See L. Marschner, 'Implications of Trauma on Testimonial Evidence in International Criminal Trials' in: P. Alston and S. Knuckey, The Transforming of Human Rights Fact-Finding (Oxford, Oxford University Press, 2016) pp 219-220 and references to other literature.
[75] Ibid, p 224.

International criminal courts have recognised that trauma may affect a witnesses' memory[76] and so did the District Court of the Hague in the criminal case against Yvonne B. It considered that it cannot be said that a traumatised witness is less reliable than a witness who has not been traumatised. However, 'memories on central details of a traumatic event are often more accurate and complete than memories concerning peripheral details of the same event'. This is the result of the fact that people focus on the threatening, central details of an event and the fact that victims of a traumatic event observe less background details as a result of a narrowed vision.[77] In the case of Yvonne B., the District Court did not take into account the statement of a witness who the court considered to be traumatised. In its view, the risk was too great that her original memories had mixed with information later known to her.[78]

3.3 Hearsay

Third, in Rwandan cases, witnesses do not always distinguish between events that they have witnessed themselves and events that were recounted by others (hearsay). According to several authors and courts, this is a result of Rwandans oral culture.[79] In the case of *Akayesu*, the ICTR cited an expert who stated that

> most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else. Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener.[80]

In Dutch criminal cases against Rwandans accused of genocide, the courts took into account this factor. The District Court noted in the case of Yvonne B. that the investigating judge asked each witness whether they could make a distinction between events they saw and experienced themselves and what they had heard from others. Moreover, the Court assessed with respect to each witness whether they were indeed able to make this distinction.[81] With regard to two witnesses, the Court concluded that the witnesses were not able to make a clear distinction between their own experience and hearsay.[82] Also in the case of Joseph M., the Appeal Court made remarks about whether the witness made statements about their own experiences.[83]

3.4 Perjury

Finally, many witnesses have lied about another person's involvement in the Rwandan genocide. Combs concluded on the basis of her research of cases tried by the ICTR that 'willfully false testimony is a common

[76] See L. Marschner, 'Implications of Trauma on Testimonial Evidence in International Criminal Trials' in: P. Alston and S. Knuckey, The Transforming of Human Rights Fact-Finding (Oxford, Oxford University Press, 32016) pp 220-224.
[77] District Court the Hague 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292, para 8.16.
[78] Ibid, para 10.66.
[79] J. Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTE Trials', *International Law and Politics* (2006) p 308, N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) pp 94-98.
[80] ICTR 2 September 1998, *The Prosecutor v Jean-Paul Akayesu* (Trial judgement), ICTR-96-4-T, para 155.
[81] District Court the Hague 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292, para 9.2.
[82] Ibid, paras 9.65 and 9.115.
[83] Appeal Court the Hague 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, paras 15.1. and 15.2.

feature of many ICTR trials'.[84] She bases this conclusion on the large prevalence of serious inconsistencies between pretrial and trial statements (approximately 50% of all witnesses). This includes witnesses who have made irreconcilable statements in one case, for example first incriminating a person and then denying the same person's involvement in the genocide. Several witnesses have also demonstrably given irreconcilable statements before different bodies such as the ICTR, Rwandan courts, gacaca courts and national courts of other States.[85] For example, there are witnesses who have accused different persons for the same crime before the same or different courts.[86] In such a situation, it is difficult to determine which allegation is a lie and which is the truth.[87] Finally, both Combs and Zahar mention several examples of witnesses who admitted to have lied before the ICTR.[88]

Researchers have pointed out that witnesses of the Rwandan genocide may have different reasons for lying.[89] This includes fear for retaliation and pressure by individuals or the Rwandan government to make false statements. Lyons writes in 2011 that the Rwandan Government prepared witnesses for the prosecution in ICTR cases. She states that in her experience 'the Prosecution witnesses appear to be a determined and well-trained cadre for the Rwandan state' and that there is question of 'state obstruction in finding the truth at the ICTR'.[90] Thomson states that Rwandans who were participating in Gacaca proceedings and did 'not perform according to the assigned script fall foul of the post-genocide state and its agents, and are subject to a variety of sanctions'.[91] De Bruïne and others note that in the Dutch criminal case against Joseph M. almost all witnesses were provided by the Rwandan Government.[92] Due to non-disclosure of information it is unknown whether this is also the case in investigations in the context of withdrawal of nationality.

At the same time, Lyons writes that the Rwandan Government threats defence witnesses and hinders defence investigations.[93] According to Noel, '[t]he current Government in Rwanda considers that

[84] N. Combs, 'A New Look at Fact-Finding at the ICTE: Advances in Judicial Acknowledgment' *Criminal Law Forum* (2015) pp 393, 396.
[85] Ibid, pp 393, 400.
[86] A. Zahar, 'The Problem of false Testimony at the International Criminal Tribunal for Rwanda' in: A. Klip and G. Sluiter, Annotated Leading Cases of International Criminal Tribunals, vol 25: International Criminal Tribunal for Rwanda, 2006-2007 (Antwerp, Intersentia, 2010), p 522 and N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) p 150
[87] N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) p 155. See also G. de Bruïne and others, *Een Rwandees Kaartenhuis, Een wirwar van wankelende verklaringen* (Den Haag, Boom criminology, 2017) p 57.
[88] N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) p 155. A. Zahar, 'The Problem of false Testimony at the International Criminal Tribunal for Rwanda' in: A. Klip and G. Sluiter, Annotated Leading Cases of International Criminal Tribunals, vol 25: International Criminal Tribunal for Rwanda, 2006-2007 (Antwerp, Intersentia, 2010) pp 529-531.
[89] N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) p 130 and further.
[90] B.S. Lyons, 'Enough is enough: the illegitimacy of international criminal convictions: a review essay of Fact-Finding Without Facts, The Uncertain Evidentiary Foundation of International Criminal Convictions by Nancy Armoury Combs' *Journal of Genocide Research* (2011) p 294.
[91] S. Thomson, 'The Darker Side of Transitional Justice: The Power Dynamics behind Rwanda's Gacaca Courts' *Africa* (2011) p 379.
[92] G. de Bruïne and others, *Een Rwandees Kaartenhuis, Een wirwar van wankelende verklaringen* (Den Haag, Boom criminology, 2017) p 24.
[93] B.S. Lyons, 'Enough is enough: the illegitimacy of international criminal convictions: a review essay of Fact-Finding Without Facts, The Uncertain Evidentiary Foundation of International Criminal Convictions by Nancy Armoury Combs' *Journal of Genocide Research* (2011) pp 294-295.

all persons charged in ICTR are guilty and thus seeks their conviction, Rwandans are very aware of this and the stigma in testifying for the Defence'.[94]

Researchers also mention that witnesses lie as a result of their loyalty to specific persons or organisations. Combs notes that

> International criminal trials necessarily will feature many fact witnesses who have reason to be biased because these witnesses are members of the group that was targeted while the defendant is a member of the offenders group. Certainly every Tutsi witness has a reason to want to revenge from the Hutu.[95]

Chlevickaité and others state that persons who were implicated in genocide themselves (insider witnesses)

> owing to their involvement in or familiarity with the criminal activities, are perceived as likely to be motivated by the avoidance of self-incrimination, loyalty to the armed forces or political groups to which they belonged, or discontent towards their former comrades. Further, owing to their involvement and relationships, insiders may be more vulnerable to pressure from third parties or the fear for retaliation by their former comrades.[96]

Insider witnesses may also give witness statements in order to receive immunity or be released from detention.[97]

Furthermore, witnesses may make false statements out of self-interest.[98] The ICTR awarded, financial compensation, such as stipends and medical care to witnesses and sometimes arranged for their relocation. Witnesses may also make false accusations in an attempt to obtain the post or property of the accused.[99]

Combs notes that 'a final factor motivating many witnesses to perjure themselves is the very ease with which they can do so'. In Rwandan cases, it is almost impossible to prove that a witness has lied as a result of the lack of documentary evidence.[100] Zahar indeed shows that the ICTR has hardly started any criminal proceedings for perjury, even though there were strong indications in a range of cases that witnesses had made false statements.[101] Pozen adds to that, that non-disclosure of witness identities to

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[94] M. Noel, *Can We Expect Fair Trials At the International Criminal Tribunal for Rwanda?* (2011) available at http://societyofblacklawyers.co.uk/wp-content/uploads/2015/11/Fair-Trials-At-The-ICTR.pdf accessed 13 July 2022, p 18.

[95] N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) p 136.

[96] G. Chlevickaité, B. Holá, C. Bijleveld, 'Suspicious minds? Empirical analysis of insider witness assessments at the ICTY, ICTR and ICC' *European Journal of Criminology* (2021) pp 7-8.

[97] B.S. Lyons, 'Enough is enough: the illegitimacy of international criminal convictions: a review essay of Fact-Finding Without Facts, The Uncertain Evidentiary Foundation of International Criminal Convictions by Nancy Armoury Combs' *Journal of Genocide Research* (2011) pp 292-293.

[98] M. Findley and S. Ngane, 'Sham of the Moral Court? Testimony Sold as the Spoils of War, *Global Journal of Comparative Law* (2012) p 86.

[99] Ibid. See also N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) pp 137-142.

[100] N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) p 143.

[101] A. Zahar, 'The Problem of false Testimony at the International Criminal Tribunal for Rwanda' in: A. Klip and G. Sluiter, Annotated Leading Cases of International Criminal Tribunals, vol 25: International Criminal Tribunal for Rwanda, 2006-2007 (Antwerp, Intersentia, 2010).

the public and the resulting lack of public scrutiny 'can allow witnesses to give false or misleading testimony that can prejudice the outcome of the trial'.[102]

Finally, Combs explains that in Rwandan culture 'truth and lies do not carry the same moral connotations' as in the Western world.[103] In some situations lying is seen as acceptable or even smart. The relationship between the two speaking parties will determine what is said. For example, in some of the interviews conducted for her research, international tribunal personnel stated that Rwandan witnesses were 'inclined to tailor their testimony to convey what they believed the Western investigator, lawyer, or judge questioning them wished to hear'.[104] Moreover, Rwandan witnesses may not want to reveal the (entire) truth to persons they do not know and trust.[105]

3.5 Impossibility to test the reliability of witnesses in the cases at hand

Expectedly, many of the factors discussed in this section are also affecting the reliability of witnesses of the Rwandan genocide in the cases concerning the withdrawal of Dutch nationality. The witness statements which form the basis of the individual report of the Ministry of Foreign Affairs are made long after the 1994 genocide and concern crimes that are similar to those tried before the ICTR (and Rwandan and other national criminal courts). Moreover, the witnesses have the same cultural background and live in the same political reality as the witnesses testifying before the mentioned courts. As was mentioned in the introduction, the Rwandan government may want to target Rwandans residing in the Netherlands, who they consider to be political opponents. Inciting witnesses to make false statements might be a way to do this and (in the end) accomplish the extradition of these opponents to Rwanda.

However, due to the non-disclosure of the identity and other information about the witnesses, the witness statements themselves and the methods of investigation, the person concerned and their lawyer are not able to identify which factors that may render a witness statement unreliable, are at play. The persons concerned do not know whether the witness was a (traumatised) victim or an insider witness, whether the witness has been imprisoned or had a self-interest in their testimony. They do not know whether the witness has testified before in international, Rwandan or other criminal proceedings and are thus unable to compare testimonies. Moreover, they often do not know when the statements were taken from the witness, how many times the witness was interviewed, who was the interviewer and which questions were asked. The person concerned thus also cannot check whether the interviewer has specifically asked whether the witness has seen the events themselves or whether they have heard about them from others. Furthermore, it is unclear who brought the witness in contact with the confident and whether the witness has received any compensation for their testimony.

The court judgments examined for the purpose of this expert opinion do not reveal whether the courts took into account all these factors when examining the reliability of the witness statements on the basis of the investigation report.

In conclusion, the large extent of non-disclosure of the information underlying an individual report on which the withdrawal of Dutch nationality is based, prevents that the person concerned (and potentially also the courts) can effectively test the reliability of the witnesses used for this report. In the next section,

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[102] J. Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTE Trials, *International Law and Politics* (2006) p 291. See also M. Noel, Can We Expect Fair Trials At the International Criminal Tribunal for Rwanda?' (2011) available at http://societyofblacklawyers.co.uk/wp-content/uploads/2015/11/Fair-Trials-At-The-ICTR.pdf accessed 13 July 2022, p 19.

[103] N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) p 133.

[104] Ibid, p 131.

[105] Ibid, p 135.

we will set out the legal framework for the withdrawal of Dutch nationality. This framework will be used to examine whether this extent of non-disclosure in the cases at hand violates the right to adversarial proceedings and the principle of equality of arms guaranteed in Article 47 of the Charter.

4 Dutch and European Legal Framework

This chapter of the expert opinion sets out the general legal framework applicable to the withdrawal of the Dutch nationality of persons suspected of involvement in the Rwandan genocide. First, we will discuss the applicable ground for withdrawal of national under Dutch law in section 4.1. This ground for withdrawal is closely linked to the application of Article 1F of the Refugee Convention, which will be examined in section 4.2. The remedies against withdrawal of nationality offered in the Dutch legal system will be addressed in section 4.3. Section 4.4 will explain which national and European procedural rights and guarantees are applicable to these proceedings.

4.1 Granting and withdrawal of nationality under Dutch law

After having received an asylum status, asylum status holders have the possibility to acquire Dutch nationality through naturalisation. According to Articles 8 and 9 of the Dutch Nationality Act (*Rijkswet op het Nederlanderschap*), asylum status holders can obtain Dutch nationality if they are above the age of 18 years old[106], live within Dutch territory[107] and have resided within this territory for at least five years before their application for naturalisation[108]. Further, Article 8(1)(d) of the Dutch Nationality Act requires individuals to have knowledge of the Dutch language and state apparatus and to be integrated in Dutch society. The authorities have the competence to decide on each individual application. Put differently, nationality is not a right to acquire but a favour to be granted by the Dutch state.[109]

Authorities have a discretionary power to withdraw Dutch nationality on the basis of Article 14 of the Dutch Nationality Act.[110] The ground for withdrawal used in the cases at hand in this expert opinion is that the persons concerned have committed fraud.[111] This means that the acquisition or grant of nationality is based on a false statement or deceit by the person concerned or on the concealment of any relevant fact to this acquisition or grant. Concealment may regard facts of which the person concerned knows or must reasonably suspect that they are relevant for the examination of the naturalisation request.[112]

In the cases at hand in this expert opinion, Dutch nationality has been withdrawn because the IND finds that there are *serious reasons to consider* that the person concerned has committed serious crimes in the meaning of Article 1F Refugee Convention. According to the IND, the persons concerned have concealed that they were involved in the genocide in Rwanda and thus committed crimes mentioned in Article 1F of the Refugee Convention. If this information would have been known, Dutch nationality would never have been granted. According to the Council of State, this is a sufficient basis to withdraw nationality. It is not necessary that the concealed fact (the involvement of the person concerned in the genocide in Rwanda) has been proven.[113] This interpretation by the Council of State has been criticised. De Groot argues that it follows from the text of the Dutch Nationality Act that the fraud must be proven,

[106] Art 8(1)(a) Dutch Nationality Act.
[107] Art 8(1)(b) Dutch Nationality Act.
[108] Art 8(1)(c) Dutch Nationality Act.
[109] G.R. de Groot and M. Tratnik, *Nederlands nationaliteitsrecht (Monografieën Privaatrecht nr. 14)* (Deventer: Wolters Kluwer 2021) para 5.4.1.
[110] Ibid, para 6.1.1.
[111] Art 14(1) Dutch Nationality Act.
[112] Ibid.
[113] See for example Council of State 20 January 2021, ECLI:NL:RVS:2021:115, para 5.1.

both as to the act of fraud and the underlying withheld facts.[114] This issue will not be further discussed in this expert opinion.

In the decision whether to withdraw Dutch nationality, the IND must balance all interests at stake, including the severity of the fraud, the possibility of statelessness and the period that the person concerned has had Dutch nationality.[115] In the cases at hand, the IND has considered that the withdrawal of nationality was not disproportionate, which was confirmed by the Dutch courts. Withdrawal on the basis of fraud becomes impossible after a period of 12 years since the grant of Dutch nationality.[116]

In the next section, the grounds for application of Article 1F of the Refugee Convention will be addressed. Moreover, we will discuss the standard and burden of proof applicable in 1F cases.

4.2 Application of Article 1F of the Refugee Convention

Article 1F excludes persons who have committed serious crimes from refugee protection. The rationale of Article 1F is that 'certain acts are so grave as to render their perpetrators undeserving of international protection as refugees'.[117] It aims to 'deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts'.[118]

Article 1F provides that refugee status shall not be granted to any person if there are serious reasons for considering that:

a) he or she has committed a crime against peace, a war crime, or a crime against humanity;
b) he or she has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or
c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations.

Acts of genocide fall within the scope of Article 1F under a Refugee Convention.[119] In order to be excluded, an individual needs to be individually responsible for such acts.[120] UNHCR stresses that 'given the possible serious consequences of exclusion, it is important to apply [the exclusion clauses] with great caution and only after a full assessment of the individual circumstances of the case.[121]

According to Dutch law, the exclusion grounds of Article 1F may lead to the denial and withdrawal of refugee status[122] and subsidiary protection[123] or any other asylum[124] or regular residence permit[125].

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[114] G.R. de Groot, Annotation with Council of State 20 January 2021, ECLI:NL:RVS:2021:114, *Jurisprudentie Vreemdelingenrecht* 2021/53.
[115] Handleiding Rijkswet op het Nederlanderschap, Art 14(1), para 2.3.
[116] The exception to this rule if in case of conviction of Article 6,7,8 and 8bis Rome status crimes, according to Article 14 paragraph 1 of the Dutch Nationality Act.
[117] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para 2.
[118] Ibid, para 2.
[119] Ibid, para 13.
[120] Ibid, para 18.
[121] Ibid, para 2.
[122] Art 3.105c Aliens Decree.
[123] Art 3.105e and 3.105f Aliens Decree.
[124] Art 3.107(2) Aliens Decree.
[125] Art 3.77(1) Aliens Decree.

Moreover, the family members of persons excluded on the basis of Article 1F will only receive an asylum status if they have independent asylum motives, which warrant international protection.[126]

When examining 1F cases, the IND applies the 'personal and knowing participation test'. The IND assesses whether the person concerned had or should have had knowledge about the committing of a 1F crime (knowing participation) and whether they have personally participated in it in any way (personal participation). According to the Council of State, the statement of reasons and the evidentiary assessment in the context of an Article 1F decision have to meet high standards in the light of seriousness of the crimes covered by Article 1F and the far-reaching character of its application.[127]

4.2.1 Burden and standard of proof

It is both recognised under international law[128] and Dutch law[129] that in 1F cases, the burden of proof is on the State. This means that the State needs to show that there are serious reasons for considering that the person concerned has committed a 1F crime. If the State fails to do so, an asylum status cannot be refused and a residence permit or Dutch nationality cannot be withdrawn on this ground.

There is more discussion on the standard of proof applicable in Article 1F cases. According to the text of Article 1F, exclusion can take place if there are 'are serious reasons for considering' that the person concerned has committed a crime mentioned in Article 1F. This standard is not a familiar concept in most States and, as a result, State practice is diverging.[130] However, there seems to be consensus that the standard of proof of Article 1F is lower than the criminal standard of proof that a crime is 'proven beyond reasonable doubt'.[131] This lower standard can be seen as motivated by the recognition that there would be evidentiary difficulties in fact-finding in relation to 1F crimes, as the crimes have mostly taken place in (war-torn) countries of origin.[132] Also the Dutch Council of State has held that the standard of proof in 1F cases is lower than in criminal cases. [133] It considered that it follows the UNHCR guidelines on the Application of the Exclusion Clauses[134] and UNHCR's Background Note on the application of the Exclusion Clauses[135] in this regard.

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[126] Art 3.107(3) Aliens Decree.
[127] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 6.1.
[128] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (4 September 2003) para 34.
[129] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 6.1, para C2/7.10.2.4 Aliens Circular.
[130] UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003) para 107, available at https://www.refworld.org/docid/3f5857d24.html accessed 4 July 2022.
[131] M. Holvoet, 'Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law' *Journal of International Criminal Justice* (2014) p 1042. UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (4 September 2003) para 35, UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003) para 107, available at https://www.refworld.org/docid/3f5857d24.html accessed 4 July 2022.
[132] M. Holvoet, 'Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law' *Journal of International Criminal Justice* (2014) p 1050.
[133] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 6.1.
[134] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (4 September 2003).
[135] UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003) available at https://www.refworld.org/docid/3f5857d24.html accessed 4 July 2022.

Even though the standard of proof in 1F cases is lower than in criminal cases, it can still be considered a high one.[136] According to the UNHCR Guidelines and Background note, 'clear and credible evidence' is required to satisfy the standard of proof under Article 1F[137], a requirement which is also applied in many domestic systems.[138] Gilbert writes that '[a]lthough a status determination hearing can never replicate a criminal trial, exclusion is only justified where there is strong evidence that the applicant has committed a crime under Article 1F(a) or (b) or is guilty of an act contrary to the purposes and principles of the United Nations – there needs to be high proof of individual criminal responsibility'.[139] In his view, the standard serious reasons of considering must 'at least approach the level of proof necessary for a criminal conviction of the individual'.[140] Moreover, it follows from the UNHCR guidelines concerning exclusion on the basis of Article 1F that the applicant should be given the benefit of the doubt.[141] As was mentioned before, in practice the standard of proof varies between States. Holvoet has considered the standard of proof as applied in the Netherlands 'as a fairly low one' in comparison to other States.[142]

4.3 Dutch procedure for withdrawal of nationality

The Minister of Justice and Security has the authority to withdraw Dutch nationality, which in practice is carried out by the (1F-unit of the) IND. The IF-unit also takes the decision to reject or withdraw a residence permit or withdraw nationality on the basis of Article 1F. The person concerned can submit an objection (bezwaar) at the IND against the decision to withdraw nationality.[143] The IND will then review the decision.

If the objection is declared unfounded, the persons concerned can appeal this decision to the District Courts.[144] The District Court will examine on the basis of the grounds of appeal whether the decision taken by the IND is legal.[145] The court will particularly assess whether the decision has been carefully prepared and whether it is sufficiently reasoned. The court is not allowed to replace its own decision for that of the IND.[146] If the appeal is well-founded, the case will generally be referred back to

[136] M. Bliss, ''Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' *International Journal of Refugee Law* (2000) p 116, G. Gilbert, 'Current issues in the application of the exclusion clauses' in: E. Feller, V. Türk and F. Nicholson, Refugee Protection in International Law (Cambridge, Cambridge University Press, June 2003) pp 470-471.

[137] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (4 September 2003) para 35, UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003) para 108, available at https://www.refworld.org/docid/3f5857d24.html accessed 4 July 2022.

[138] M. Holvoet, 'Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law' *Journal of International Criminal Justice* (2014) pp 1043-1046.

[139] G. Gilbert, 'Current issues in the application of the exclusion clauses' in: E. Feller, V. Türk and F. Nicholson, Refugee Protection in International Law (Cambridge, Cambridge University Press, June 2003) p 471.

[140] Ibid, p 470.

[141] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (4 September 2003) para 34. See also M. Bliss, ''Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' *International Journal of Refugee Law* (2000) p 113.

[142] M. Holvoet, 'Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law' *Journal of International Criminal Justice* (2014) p 1047.

[143] Art 7:1 GALA.

[144] Art 8:1 GALA.

[145] Art 8:69 GALA.

[146] Art 3:2 and 3:46 GALA.

the IND.[147] Both the State and the person concerned can appeal the judgment of the District Court before the Council of State.[148] The Council of State will examine on the basis of the higher appeal grounds whether the District Court's judgment is legal. If the higher appeal is well-founded, the Council of State may also asses the legality of the underlying decision of the IND.

The central question of this expert opinion is whether the non-disclosure of evidence underlying the decision to withdraw nationality violates the right to adversarial proceedings and the principle of equality of arms guaranteed by Article 47 of the Charter. In the next section, we will therefore demonstrate that Article 47 of the Charter is applicable and that it is inspired by the ECtHR's case law on Articles 6 and 13 ECHR.

4.4 Applicable European procedural standards

In the European Union, Member States have sovereignty to decide who their nationals are. This was recognised in Declaration No 2 of the Maastricht Treaty on the nationality of a Member State[149] and confirmed in the case law of the CJEU. For instance, in the case *Micheletti*, the CJEU determined that it is for each Member State to lay down the conditions for the acquisition and loss of nationality.[150]

The acquisition and withdrawal of Dutch nationality on the basis of the Dutch Nationality Act directly affects European Union citizenship. Article 20(1) of the Treaty on the Functioning of the European Union (hereafter: TFEU) states that every person holding the nationality of a Member State shall be a citizen of the Union[151], thus enforcing an exclusive relationship between Union citizenship and Member State nationality.[152] Therefore, Union citizenship is dependent on the formal status of nationality of the Member States.[153] In the case of *Rottmann*, the CJEU ruled that when an applicant is in a position capable of causing him or her to lose the status of Union citizenship and the rights attached to this status, this situation falls by reason of its nature and consequences within the ambit of EU law.[154] This means that the withdrawal of the Dutch nationality, and consequently the loss of Union citizenship, of Rwandans residing in the Netherlands, falls within the scope of EU law. Therefore, the EU Charter of Fundamental Rights of the European Union[155] and general principles of EU law[156] are applicable to the cases at hand in this expert opinion.[157]

4.4.1 The EU right to an effective remedy and a fair trial

The EU rights and principles that are most applicable to the non-disclosure of evidence in Rwandan cases are those which relate to the right to an effective remedy and a fair trial. Within European Union law, the right to an effective remedy and a fair trial is contained within Article 47 of the Charter.[158] Article 47 of

[147] Art 8:72 GALA.
[148] Art 8:104 and 8:105 GALA.
[149] Treaty on European Union [1992] OJ C 191/1 (hereinafter: TEU).
[150] CJEU Case C-369/90 *Mario Vicente Micheletti* [1992] ECLI:EU:C:1992:295, para 10.
[151] Treaty on the Functioning of the European Union [2012] OJ C 326/49.
[152] A.P. van der Mei, 'EU Citizenship and Loss of Member State Nationality' *European Papers 1319* (2008).
[153] L.J. Wagner, 'Member State Nationality under EU law - To Be or Not To Be a Union Citizen?' (2021) 28 *Maastricht Journal of European and Comparative Law* p 304, 305.
[154] CJEU Case C-135/08 *Rottmann* [2010] ECLI:EU:C:2010:104, para 42.
[155] See Art 51(1) of the Charter.
[156] CJEU Case 5/88 *Wachauf* [1989] paras 17-19.
[157] See also CJEU Case C-221/17 *Tjebbes and others* [2019] para 32.
[158] See also Art 19(1) TEU.

the Charter states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. Moreover, it provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal and that '[e]veryone shall have the possibility of being advised, defended and represented'. Generally, the right to an effective remedy aims to secure the effective protection of the fundamental rights granted by EU law to individuals.[159]

The right to an effective remedy guaranteed by Article 47 of the Charter comprises various elements, among which the rights of the defence, which in its turn includes the right to adversarial proceedings and the principle of equality of arms.[160] These rights are particularly relevant to the Rwandan cases at hand in this expert opinion. The principle of adversarial procedures means that all parties to a trial know of and are able to comment on all evidence adduced or observations filed during the proceedings.[161] The principle of equality of arms requires that both parties to proceedings are given a reasonable opportunity to present their case under conditions that do not place them at substantial disadvantage vis-à-vis one another.[162] Chapter 5 will discuss which requirements follow from these principles with regard to the non-disclosure of evidence underlying a decision to withdraw Dutch nationality.

4.4.2 Relevance of Articles 13 and 6 ECHR

Articles 6 and 13 ECHR may not be directly applicable to the withdrawal of the Dutch nationality on the basis of fraud due to their limited scope of application.[163] However, the ECtHR's case law concerning Articles 6 and 13 ECHR is relevant for the interpretation of Article 47 of the Charter. It follows from Article 52(3) that, since Article 47 of the Charter corresponds with Articles 13 and 6 ECHR, its meaning shall be the same as that of those ECHR provisions. When interpreting the right to a fair trial and the right to an effective remedy, the CJEU regularly refers to the ECtHR's case law under Articles 6 and 13 ECHR.[164] The protection offered by Article 47 of the Charter may nevertheless be broader than 'the mere sum of the provisions of Article 6 and 13 of the ECHR'.[165]

Both Article 6 and 13 ECHR comprise the right to adversarial proceedings and the principle of equality of arms.[166] However, the level of protection offered by those principles is different depending on the nature of the right at issue. For example, where it concerns non-disclosure of evidence the level of

[159] CJEU Case C-340/89 *Vlassopoulou* [1991] para 22.
[160] CJEU Case C-199/11 *Otis and Others* [2012] para 48.
[161] ECtHR 20 February 1996, *Lobo Machado v Portugal*, Appl No 15764/89, para 31.
[162] ECtHR 27 October 1993, *Dombo Beheer v the Netherlands*, Appl No 14448/88, para 33.
[163] Withdrawal of nationality is generally not considered to be a civil obligation or a criminal charge in the meaning of Article 6 ECHR (see ECtHR 5 October 2000, *Maaouia v France*, Appl No 39652/98 and ECtHR 25 June 2020, *Ghoumid v France*, Appl No 52273/16). Moreover, withdrawal of nationality, which does not directly lead to expulsion or extradition may not constitute an arguable claim of a violation of the ECHR as is required under Article 13 ECHR.
[164] See for example CJEU Case C-279/09 *DEB* [2010] paras 35-36 and 45-52 (art 6 ECHR) and Case C-562/13 *Abdida* [2014] para 52 (Article 13 ECHR).
[165] CJEU Case C-69/10 *Brahim Samba Diouf* [2011] ECLI:EU:C:2011:524, Opinion of AG Cruz Villalón, para 39.
[166] ECtHR 16 February 2000, *Jasper v UK*, Appl No 27052/95 (Art 6 ECHR), ECtHR 20 June 2002, *Al Nashif v Bulgaria*, Appl No 50963/99 (Art 13 ECHR, adversarial proceedings) and ECtHR 7 June 2011, *Csüllög v Hungary*, Appl No 30042/08.

procedural protection is higher under Article 6 in a criminal case[167] than under Article 13 ECHR in a case concerning expulsion[168].

It should be noted in this context that the scope of the right to a fair trial guaranteed by Article 47 of the Charter is not limited to criminal charges and civil obligations and extends to cases concerning the entry, stay and deportation of migrants. Through Article 47 of the Charter, the procedural safeguards following from Article 6 ECHR have thus become relevant to cases which, according to the ECtHR's case law, fall outside the scope of Article 6 ECHR.[169]

4.4.3 Procedural standards concerning the application of Article 1F Refugee Convention

The withdrawal of nationality in the cases at hand in this expert opinion is (indirectly) based on the ground that there are serious reasons for believing that the person concerned has committed 1F crimes. In fact, a 1F examination is done within the scope of the withdrawal procedure, which will in the end also leads to the loss of the asylum status or other residence permit. Therefore, it is relevant to look at the procedural standards applicable to exclusion on the basis of Article 1F. These standards may also inform the interpretation of Article 47 of the Charter.

According to the UNHCR guidelines concerning exclusion on the basis of Article 1F, 'it is essential that rigorous procedural safeguards are built into the exclusion determination procedure'. Bliss states that 1F decisions 'must be taken in accordance with the strictest procedural safeguards to minimize the possibility of asylum seeker being wrongly excluded'.[170] These procedural safeguards include 'the right to have evidence on which the decision maker intends to rely presented to him or her, and to be given an opportunity to comment on it'.[171] The UNHCR guidelines thus require a high level of procedural protection in Article 1F cases.

4.5 Sub conclusion

In the cases at hand, the IND has withdrawn Dutch nationality because the person would have concealed their involvement in the genocide in Rwanda. According to the IND and the Dutch courts, such withdrawal is possible where there are 'serious reasons to consider' that the person concerned has knowingly and personally participated in the Rwandan genocide. This is the standard of proof, which is applied under Article 1F of the Refugee Convention. This standard is considered lower than the standard that a crime must be proved beyond reasonable doubt, which is generally applied in criminal cases.

However, this does not necessarily mean that the level of procedural protection in these withdrawal cases should also be lower than in criminal law cases. In this chapter, we have seen that EU procedural standards apply to proceedings concerning the withdrawal of Dutch (and thus Union) citizenship. It follows from the right to an effective remedy and a fair trial laid down in Article 47 of the Charter that those proceedings must comply with the right to adversarial proceedings and the principle of equality of arms. The ECtHR's case law concerning Articles 6 and 13 ECHR inspires the interpretation of these principles. The same applies to the non-binding standards set by UNHCR in their guidelines concerning the application of Article 1F, which require a high level of procedural protection.

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[167] ECtHR 16 February 2000, *Jasper v UK*, Appl No 27052/95.
[168] ECtHR 20 June 2002, *Al Nashif v Bulgaria*, Appl No 50963/99.
[169] Explanations relating to the Charter of Fundamental Rights of the European Union (2007/C 303/02) [2007] OJ C-303/17.
[170] M. Bliss, ''Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' *International Journal of Refugee Law* (2000) p 93.
[171] Ibid, p 100.

The next chapter will examine whether the non-disclosure of information underlying the decision to withdraw the Dutch nationality of Rwandans during the administrative and appeal proceedings can be justified under the EU right to adversarial proceedings. The central question there is whether such non-disclosure can be considered strictly necessary.

5. Necessity of non-disclosure

Chapter 2 of this expert opinion explained that in all cases at hand in this expert opinion the most important source underlying the withdrawal decision is an individual report issued by the Ministry of Foreign Affairs. This chapter also described the extent of non-disclosure of the information underlying this individual report, in particular the identity and background of the confident and the witnesses and the methods of investigation. Both the IND and the Dutch courts consider the non-disclosure necessary in order to protect the confident and the witnesses as well as the methods of investigation applied by the Ministry of Foreign Affairs.

This chapter will argue that the (automatic) non-disclosure of the information is not in conformity with the EU right to adversarial proceedings guaranteed in Article 47 of the Charter. First, it will show that the IND and the Dutch courts fail to assess the necessity of, and state the specific reasons for non-disclosure in each individual case. They refer to the same general grounds for non-disclosure in all Rwandan cases. Second, this chapter will contend that the non-disclosure of evidence is not strictly necessary or at least not to the extent as is now applied by the Dutch authorities. For this purpose, it will first set out the Dutch and EU legal framework for non-disclosure of evidence. Subsequently, it will specifically discuss the non-disclosure of the identity and background of the confident and witnesses and of the methods of investigation in the Rwandan cases at hand in this expert opinion.

5.1 Non-disclosure under Dutch administrative law

Under Dutch administrative law, the point of departure is that information underlying a decision must be disclosed. However, it also recognises that non-disclosure can be justified in some situations. In the phase of administrative review (*bezwaar*), the administrative authority can refuse disclosure of documents before the hearing for weighty reasons (*gewichtige redenen*).[172] Moreover, Article 8:29 of the General Administrative Law Act (henceforth: GALA) provides that, during the appeal before the District Court and the higher appeal before the Council of State, parties that are normally required to provide information or submit documents can refuse to do so or inform the court that only the court may have access to this information or documents, if there are weighty reasons. The confidentiality chamber (*geheimhoudingskamer*), a special chamber within the District Court or (in higher appeal) the Council of State, then assesses whether such refusal is justified. The procedure before the confidentiality chamber is a separate procedure from the main procedure involving judges who are not ruling in the main procedure.[173] There is no possibility for appeal against decisions of the confidentiality chamber. However, there is the possibility to address this decision in the main procedure.

In its decision whether non-disclosure of a document is justified, the Council of State balances the interest in non-disclosure and the interest of the principle of adversarial proceedings. In this context, the significance of the document for the ruling of the court in the case concerned and the procedural positioning of the parties play an important role. Moreover, it is of importance whether the party to which the document is not disclosed is hindered in their defence. The decision does not concern publication of the document concerned, but only disclosure to the parties involved in the procedure.[174]

The confidentiality chamber can take three types of decisions. First, it can rule that the refusal to (fully) disclose the information or documents is not justified. In that case, the document is sent back to the party that requested non-disclosure and that party is invited to send the (fully disclosed) document

[172] See Art 7:4(6) GALA.
[173] Council of State 10 June 2020, ECLI:NL:RVS:2020:1367, para 6.
[174] Ibid, para 8. See also Council of State 25 August 2021, ECLI:NL:RVS:2021:1923, para 4.

to the court.[175] Second, the court can rule that the refusal to (fully) disclose the information or documents is justified on the basis of weighty reasons. Then, the party concerned does not have the duty to provide the information to the other party. Subsequently, the court will ask the other party, whether it allows the court in the main proceedings to examine the non-disclosed information or documents and take them into account in its decision.[176] If the party does not give the court permission to do so, this comes at their own risk.[177] The Council of State has considered in the context of a withdrawal of an asylum status of a Rwandan person on the basis of Article 1F, that by refusing the Council of State permission to examine and take into account the non-disclosed documents underlying the individual report of the Ministry of Foreign Affairs this person had denied the Council of State the opportunity to assess whether there were any specific reasons to doubt the correctness or completeness of this report.[178]

Third, the confidentiality chamber of the court can decide to partly deny the request for non-disclosure. The part on which the court denied non-disclosure will be sent back to the party that requested non-disclosure. The court will ask the other party permission to examine and take into account the non-disclosed part.

5.2 Non-disclosure under Article 47 of the Charter

The CJEU has set out the standards following from Article 47 of the Charter with regard to non-disclosure of the grounds and the evidence on which a decision falling within the scope of EU law is based in the Case of ZZ. This case concerned a decision to exclude an EU-citizen from UK territory and to deny access to the territory on grounds of public security. In the appeal proceedings, the Secretary of State objected to the full disclosure to ZZ of the grounds for this decision and the evidence underlying it. The CJEU considered that

> having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them [..] The fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views.[179]

Strictly necessary limitations of the rights of the defence

The CJEU accepts that, under exceptional circumstances, non-disclosure of documents or information underlying a decision may be justified. It considers such non-disclosure to be a restriction of the procedural rights of the person concerned guaranteed by Article 47 of the Charter. According to Article 52(1) of the Charter, such limitations must be necessary and proportionate and 'genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

The CJEU held in *ZZ* that where national security is found to stand in the way of disclosure of the grounds of a decision, any interference with the exercise of the right to an effective remedy must be limited to that which is '*strictly necessary*'.[180] In the case of *G.M.* about non-disclosure of evidence in an

[175] Council of State 10 June 2020, ECLI:NL:RVS:2020:1367, para 17.
[176] Art 8:29(5) GALA.
[177] Council of State 4 August 2004, ECLI:NL:RVS:2004:AQ6010
[178] Council of State 10 February 2016, ECLI:RVS:2016:426, para 2.1.
[179] CJEU Case C-300/11 *ZZ* [2013] paras 55-56.
[180] Ibid, para 64.

asylum procedure, the CJEU did not repeat the 'strictly necessary' requirement but considered that non-disclosure is justified where it 'is likely to jeopardise the security of the Member State concerned in a *direct and specific manner*'.[181] In this judgment, the CJEU stressed several times that non-disclosure may be necessary particularly where the national security of the Member State is at stake.[182]

The 'strictly necessary' requirement can also be found in the ECtHR's case law under Article 6 ECHR concerning non-disclosure of evidence or information in criminal cases[183] and under Article 5 ECHR concerning indefinite migration detention[184]. The ECtHR held that this requirement means that 'if a less restrictive measure can suffice then that measure should be applied'.[185] Since Article 47 of the Charter is based on Article 6 ECHR, it is arguable that the 'strictly necessary' criterion flowing from Article 47 of the Charter has the same meaning.

Moreover, it should be noted that UNHCR applies a similarly high standard to the use of secret evidence in proceedings concerning the exclusion on the basis of Article 1F. The UNHCR guidelines provide that 'exclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned. Exceptionally, anonymous evidence (where the source is concealed) may be relied upon but only where this is 'absolutely necessary'.[186]

Both the CJEU and the ECtHR have considered that interests such as the protection of national security, the need to keep methods of investigation used by the police or the national security authorities secret, and the protection of the fundamental rights including the health and freedom of other persons may justify non-disclosure of evidence or information used in the proceedings.[187] Also UNHCR specifically mentions the protection of the safety of witnesses as a justification for the non-disclosure of the source of evidence.[188]

The CJEU has held that the invoked reasons for non-disclosure must be subjected to judicial review.[189] It considered that 'it is necessary for a court to be entrusted with verifying whether [the reasons for non-disclosure] stand in the way of precise and full disclosure of the grounds on which the decision in question is based and of the related evidence'.[190] In this context 'the competent national authority has the task of proving, in accordance with the national procedural rules, that State security would in fact be compromised by precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision [..] and of the related evidence [.]. It follows that there is no presumption that the reasons invoked by a national authority exist and are valid'.[191]

Application to the cases at hand in this expert opinion

As was mentioned before, in the cases at hand in this expert opinion the evidence underlying the decision to withdraw Dutch nationality mainly consists of witness statements that are summarised in the individual

[181] CJEU Case C-159/21 *G.M.* [2022] para 52.
[182] CJEU Case C-159/21 *G.M.* [2022] paras 50, 52, 53.
[183] ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, Appl No 29777/96, para 45.
[184] ECtHR (GC) 19 February 2009*, A. and Others* v *United Kingdom,* Appl No 3455/05.
[185] ECtHR 23 April 1997, *Van Mechelen and others v the Netherlands*, Appl Nos 21363/93, 21364/93, 21427/93 and 22056/93, para 58.
[186] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para 36.
[187] CJEU Case C-300/11 *ZZ* [2013] paras 57 and 66, ECtHR 16 February 2000, *Jasper v UK*, Appl No 207052/95, para 52, ECtHR (GC) 19 February 2009*, A. and Others* v *United Kingdom,* Appl No 3455/05, paras 205 and 218.
[188] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para 36.
[189] CJEU Case C-300/11 *ZZ* [2013] paras 58 and 60.
[190] Ibid, para 60.
[191] Ibid, para 61.

report, which is disclosed to the person concerned. The identity and background of the confident and witnesses, the statements of the witnesses and the methods of investigation used are not disclosed to this person. The next sections will address the necessity of the protection of confidents and witnesses (section 5.3) and the methods of investigation (section 5.4) in more detail. They will discuss whether the extent of the protective measures taken in Rwandan cases concerning withdrawal of nationality can be justified. They will first discuss relevant case law of the European courts and describe which justification for non-disclosure is provided by the Dutch authorities. After that, it will be tested whether these justifications indeed render non-disclosure strictly necessary.

5.3 Protection of confidents and witnesses in Rwandan genocide cases

We have seen in Chapter 2 that the level of non-disclosure is extensive in cases concerning persons who are suspected of involvement in the Rwandan genocide on the basis of an individual report of the Ministry of Foreign Affairs. The person concerned does not receive any information about the identity and background of the confident who carried out the investigation or the witnesses interviewed by this confident in order to protect the confident and the witnesses. Moreover, the person concerned only receives a Dutch summary of the witness statements.

The Court of Justice[192], the ECtHR and UNHCR[193] have recognised that it may be necessary to protect witnesses or informants. The ECtHR has provided most detailed standards in this regard. In *Doorson*, it considered in the context of criminal proceedings:

> It is true that Article 6 [..] does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 [..] of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.[194]

According to the ECtHR, this protection may be particularly necessary where it concerns minors and/or victims of sexual violence.[195] At the same time, the ECtHR has held that members of the police force of the State can only be used as anonymous witnesses in exceptional cases, because '[t]hey owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution'. Moreover, it is in the nature of things that their duties involve giving evidence in open court.[196] Nevertheless, the anonymity of an agent deployed in undercover activities may be justified, 'for his own or his family's protection and so as not to impair his usefulness for future operations'.[197] It thus depends

[192] CJEU Case C-300/11 *ZZ* [2013] para 66. See with regard to the anonymity of informants: CJEU C-411/04 P *Salzgitter Mannesmann GmbH v Commission* [2007] para 45.
[193] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para 36.
[194] ECtHR 26 March 1996, *Doorson v the Netherlands*, Appl No 20524/92, para 70.
[195] ECtHR 2 July 2002, *S.N. v Sweden*, Appl No 34209/96, para 47.
[196] ECtHR 23 April 1997, *Van Mechelen and others v the Netherlands*, Appl Nos 21363/93, 21364/93, 21427/93 and 22056/93, para 56.
[197] Ibid, para 57.

on the personal circumstances of the witness whether and if so which protective measures limiting the rights of the defence can be justified.

5.3.1 Justification for non-disclosure in Rwandan cases

The Dutch authorities argue that the non-disclosure of information concerning the confidents and witnesses used for the individual report is necessary to protect these confidents and witnesses. They state that if it becomes public that confidents and informants have cooperated in the investigation, they can run a serious danger from the side of the Rwandan authorities or from the side of the person concerned, their family members or acquaintances. The Ministry of Foreign Affairs notes that it has promised confidents and witnesses to ensure the confidentiality of their identity and information and that this promise can never be broken one-sidedly.[198] In the Ministry's view, the protection of sources should also extend to the background of the confident. As this information relates to the identity details of a person, the fact that this information is disclosed can lead to the easier disclosure of the confident's identity. According to the Ministry, his would frustrate future research and put confidents in danger.[199]

In its justification of the non-disclosure of information about the confident and the witnesses, the Ministry does not pay particular attention to the situation in Rwanda or the individual circumstances of the confident or witnesses: it uses standard considerations for non-disclosure. Moreover, it does not refer to any sources substantiating that the confident and witnesses will run a danger if any of the information mentioned above will be disclosed. Finally, the Ministry does not state the reasons why the interest to protect the confident and witnesses must weigh more than the interest of the person concerned to defend themselves.

The confidentiality chambers of the Dutch district courts and Council of State have accepted the justification for non-disclosure mentioned by the IND. Even though the courts should require strong reasons for non-disclosure from the IND[200], their judicial review of this reasons does not seem to be rigorous in practice. Their judgments are barely reasoned: they only mention that in their view the protection of the sources used weigh more than the interest that the person concerned has access to the documents[201] or repeat the grounds for confidentiality provided by the State.[202] Therefore, it is not clear

[198] See District Court Arnhem 17 October 2022, ARN 20/4676 RWNL, letter of the Ministry of Foreign Affairs to the District Court Arnhem of 7 November 2019, ref KIG151102.0060, p 2, Decision on administrative objection of 4 March 2019, ref 2019-140335, p 8, Letter of the Ministry of Foreign Affairs to the District Court The Hague of 26 April 2019, ref DCM/MA-U140114, p 2, Attachment with the individual report in the case concerned in District Court The Hague 3 July 2015, ECLI:NL:RBDHA:2015:7860, Letter of the Ministry of Foreign Affairs to the District Court Zeeland-West-Brabant of 17 July 2020, ref KIG160901.0048.

[199] See District Court Arnhem 17 October 2022, ARN 20/4676 RWNL, Letter of the Ministry of Foreign Affairs to the District Court Arnhem of 7 November 2019, ref KIG151102.0060, p 2, Decision on administrative objection of 4 March 2019, ref 2019-140335, pp 8-9, Letter of the Ministry of Foreign Affairs to the District Court Den Haag of 26 April 2019, ref DCM/MA-U140114, p 2, Attachment with the individual report in the case concerned in District Court The Hague, 3 July 2015, ECLI:NL:RBDHA:2015:7860.

[200] Council of State 10 June 2020, ECLI:NL:RVS:2020:1367, para 11.

[201] See for example: Council of State 3 August 2021, ECLI:NL:RVS: 2021:1712, Council of State 1 July 2021, ECLI:NL:RVS:2021:1992, Council of State 1 July 2021, ECLI:NL:RVS:2021:1993, District Court Zeeland-West-Brabant 28 July 2019, BRE 19/4607 RWNL, District Court Arnhem 2 July 2019, ARN 17/5886RWNL616, District Court The Hague 13 May 2019, SGR 18/7281.

[202] District Court Arnhem 16 November 2021, ARN 20/4676 and District Court Arnhem 17 October 2022, ARN 20/4676. The last judgment was revised because the person concerned had not been given the opportunity to react to the request of the Ministry of Foreign Affairs for non-disclosure of the documents underlying the individual report. See District Court Arnhem 21 October 2022, ARN 20/4676.

what the judicial review of the necessity of non-disclosure entails. However, given the fact that the justification provided by the IND for the non-disclosure of the identity and background of the confident and witnesses is of a general nature, it may be assumed that the courts do not review the necessity of non-disclosure on an individual basis. One exception is a judgment of the District Court Arnhem, in which it held that the non-disclosure of the number of witnesses underlying an allegation and the period of time in which the investigation took place was not justified.[203] However, also in this judgment the non-disclosure of the identity and background of the confident and witnesses and the methods of investigation was accepted without referring specifically to the situation in Rwanda. The court also considered that the information whether a witness has obtained information from their own observation or from others (hearsay) could not be disclosed because this could lead to the disclosure of the identity of this witness.[204]

Furthermore, the IND nor the Dutch courts have justified the extent of disclosure. They have not stated any reasons why less restrictive measures, such as anonymity of the witnesses to the public, the hearing of the witnesses via video-link in the presence of the lawyer of the person concerned or anonymising the transcripts of witness statements, would insufficiently protect the witnesses.

5.3.2 Threats to witnesses of the Rwandan genocide

It is clear that providing a witness statement about events which took place during the Rwandan genocide may be dangerous.[205] It is reported that directly after the genocide (until 1996), many witnesses were killed by Hutu extremists.[206] In October 2012 Redress wrote that witnesses are threatened by three different types of actors: family members, neighbours and local political, military and economic elites.[207] Threats against witnesses included 'verbal intimidation, false accusations of genocide crimes, physical injury, murder, theft or killing of livestock, throwing rocks on roofs during the night, family ostracism, forced removal of witnesses from their communities, bribery and other forms of financial coercion'.[208]

However, whether an individual witness needs protection from such threats depends on many factors. Mahony states that, 'a geopolitical and historical understanding of the situation is particularly important when considering the threat to witnesses and the protective measures to be adopted in response'.[209] Combs notes that 'optimal protection measures will depend not only on the needs of particular witnesses, but also on the nature and timing of the conflict, the location and features of the tribunal prosecuting the atrocities and the popular support enjoyed by the accused, amongst other factors.[210]

As to the location of the tribunal, which uses the witness statements, Combs states that 'tribunals located in the states where the conflict took place may need to be more sensitive to witness protection

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[203] District Court Arnhem 18 February 2022, ARN AWB 20/2679.
[204] Ibid.
[205] G. Sluiter, 'The ICTR and the Protection of Witnesses' *Journal of International Criminal Justice* (2005) p 965, S. Kim, 'The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals' *Journal of East Asia and International Law* (2016) p 73.
[206] N. Combs, Witness Protection in: S. Weill, K.T. Seelinger, and K.B. Carlson The President on Trial: Prosecuting Hissène Habré (Oxford, Oxford University Press, 2020) p 4.
[207] Redress, *Testifying to Genocide, Victim and Witness Protection in Rwanda* (2012) p 23, available at https://redress.org/wp-content/uploads/2018/01/Oct-12-Testifying-to-Genocide-Rwanda.pdf accessed on 13 July 2022.
[208] Ibid, p 23.
[209] Ch. Mahony, *The Justice Sector Afterthought: Witness Protection in* Africa (Tshwane, Institute for Security Studies, 2010) p 23.
[210] N. Combs, Witness Protection in: S. Weill, K.T. Seelinger, and K.B. Carlson The President on Trial: Prosecuting Hissène Habré (Oxford, Oxford University Press, 2020) p 386.

issues than courts located thousands of miles away.' Similarly, Pozen contends that as Gacaca trials took place near the place where witnesses and perpetrators lived, the risk for witnesses could be considered greater than that for witnesses who testified before the ICTR in Arusha.[211]

Other factors which are important to consider is the place of residence of the witness. Redress notes that threats are more prevalent in rural areas than in cities and that some regions in Rwanda are more dangerous for witnesses than others.[212] Moreover, it is relevant whether the witness has to travel in order to testify. In small communities in Rwanda, it was difficult to conceal that a person had travelled to the ICTR in order to testify.[213] The fact that a witness can testify via a video link instead of in person, may reduce the risks.[214] Moreover, it makes a difference whether the witness testifies against or in favour of the person accused of genocide crimes.[215] The Rwandan State has been accused by defence lawyers at the ICTR of having harassed and intimidated defence witnesses.[216]

It may be concluded that whether a witness needs protection will depend on the political and security situation in the country of origin, on individual factors (ethnicity, place of residence) and on factors concerning the procedure (location of the court, whether the witness has to testify in person, whether the witness testifies in favour or against the person accused of genocide crimes).

Moreover, it should be noted that in the cases at hand, witnesses made their statements more than 20 years after the genocide had taken place. Also this lapse of time may have impact on the level of threats against witnesses. It may be less dangerous to testify now, than shortly after the genocide had taken place. As was mentioned before, the IND and the Dutch courts did not (or at least not explicitly) take these factors in to account in their decision to keep the identity of witnesses and their statements secret and did not seem to make an individual assessment of the threat posed to the witness as a result of their testimony.

The next section will examine how (inter)national criminal courts have dealt with the protection of Rwandan witnesses of the genocide. It will show that these criminal courts have taken much less far-reaching measures to protect witnesses than the Dutch courts in cases concerning withdrawal of nationality. This may indicate that the extent of non-disclosure before the Dutch courts in proceedings concerning withdrawal of nationality may not be considered strictly necessary.

5.3.3 Protection of witnesses in criminal proceedings in Rwandan genocide cases

Criminal proceedings against Rwandans suspected of involvement in acts of genocide have taken place on different levels. Leading figures of the genocide have been tried before the International Criminal Tribunal for Rwanda (henceforth: ICTR). Moreover, in Rwanda itself suspects were brought before the Gacaca courts (a local model of dispute resolution) and the national courts.[217] Finally, Rwandans have been tried

[211] J. Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTE Trials, *International Law and Politics* (2006) p 296 and 310-311.
[212] Redress, *Testifying to Genocide, Victim and Witness Protection in Rwanda* (2012), p 24.
[213] N. Combs, Witness Protection in: S. Weill, K.T. Seelinger, and K.B. Carlson The President on Trial: Prosecuting Hissène Habré (Oxford, Oxford University Press, 2020) p 387.
[214] ECtHR 27 October 2011, *Ahorugeze v Sweden*, Appl No 37075/09, para 122.
[215] B.S. Lyons, 'Enough is enough: the illegitimacy of international criminal convictions: a review essay of Fact-Finding Without Facts, The Uncertain Evidentiary Foundation of International Criminal Convictions by Nancy Armoury Combs' *Journal of Genocide Research* (2011).
[216] N. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge, Cambridge University Press, 2010) p 147.
[217] Human Rights Watch, *Rwanda: 25 Years on, Solidarity with Victims* (2019) available at https://www.hrw.org/news/2019/04/04/rwanda-25-years-solidarity-victims accessed on 13 July 2022.

before national courts of other States than Rwanda.[218] As was mentioned before, two Rwandans have been prosecuted and convicted in the Netherlands.[219] In all these criminal proceedings, witnesses played a crucial role[220] and their protection has been a point of concern. It is therefore relevant to see which witness protection measures are/were taken in the context of these proceedings and for which reasons. It will be examined whether they reinforce or undermine the justification for witness protection in the context of Dutch administrative proceedings concerning the withdrawal of nationality.

The ICTR has protected witnesses by refraining from disclosing their identity to the public. This entailed for example the use of face and/or voice distortion, closed-circuit television, a pseudonym or closed sessions.[221] Anonymity of witnesses to the public could be applied only where the witness' fear for their or their family's safety is real, the witness is important to the case and the measure is 'strictly necessary'.[222] Note that the 'strictly necessary' criterion used under Article 47 of the Charter and Article 6 ECHR thus also applied in the context of ICTR proceedings. Like under Article 6 ECHR, it means that 'if a less restrictive measure can secure the required protection, that measure should be applied'.[223]

The identity of the witnesses could never be withheld from the defence.[224] Instead, the ICTR has delayed the disclosure of witnesses' identities to the defence until shortly before they would testify, in order to prevent that the defendant or their family members would threaten or harm them before the trial.[225] According to the rules of procedure of the ICTR[226], this was only possible in 'exceptional circumstances'. However, in practice, the ICTR has accepted that such exceptional circumstances were generally present in Rwandan cases. In this context, it had regard to the frequent violent incidents perpetrated against genocide victims in Rwanda, the security situation in Rwanda, the migration of large numbers of potential Gacaca accused persons to countries neighbouring Rwanda and the fact that supporters and family members of persons indicted or accused before the ICTR might be living in those countries.[227] It is clear that only the first two factors are relevant in the Dutch context.

Some scholars have criticized the blanket protection of witnesses by the ICTR, considering it problematic in the light of the rights of the defence.[228] First, they have argued that the non-disclosure of

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[218] Human Rights Watch, *Rwanda: 25 Years on, Solidarity with Victims* (2019) available at https://www.hrw.org/news/2019/04/04/rwanda-25-years-solidarity-victims accessed on 13 July 2022.

[219] District Court The Hague 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292 and Appeal Court The Hague 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.

[220] See for example for the ICTR: G. Sluiter, 'The ICTR and the Protection of Witnesses' *Journal of International Criminal Justice* (2005). See with regard to criminal proceedings in the Netherlands: Appeal Court The Hague 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, para 9.1.

[221] Ch. Mahony, *The Justice Sector Afterthought: Witness Protection in* Africa (Tshwane, Institute for Security Studies, 2010) pp 69-70, N. Combs, Witness Protection in: S. Weill, K.T. Seelinger, and K.B. Carlson The President on Trial: Prosecuting Hissène Habré (Oxford, Oxford University Press, 2020) p 384.

[222] S. Kim, 'The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals' *Journal of East Asia and International Law* (2016) pp 62-63.

[223] Ibid, p 63.

[224] G. Sluiter, 'The ICTR and the Protection of Witnesses' *Journal of International Criminal Justice* (2005) p 969, S. Kim, 'The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals' *Journal of East Asia and International Law* (2016) p 53.

[225] N. Combs, Witness Protection in: S. Weill, K.T. Seelinger, and K.B. Carlson The President on Trial: Prosecuting Hissène Habré (Oxford, Oxford University Press, 2020) p 384-385.

[226] Rule 69, Rules of Procedure ICTR.

[227] S. Kim, 'The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals' *Journal of East Asia and International Law* (2016) p 66.

[228] J. Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTE Trials' *International Law and Politics* (2006), G. Sluiter, 'The ICTR and the Protection of Witnesses' *Journal of International Criminal Justice*

witness identities to the public was insufficiently reasoned because the ICTR failed to assess the need for witness protection on a case by case basis.[229] Moreover, Pozen contends that the witness protection measures applied by the ICTR were not justified, because there was no ongoing war in Rwanda and the ICTR had a witness protection programme in place.[230]

Another factor challenging the justification of the witness protection measures applied by the ICTR is that in Rwanda the Gacaca tribunals tried crimes committed during the genocide with full disclosure of witnesses' identities. It is reported by NGOs that between 2005 and 2012 two million cases were tried by the Gacaca courts[231] and hundreds of thousands of witnesses testified.[232] For this reason, Pozen called for an individual assessment of the necessity of witness protection. Public Gacaca hearings could already have disclosed the identity of the witness. Moreover, some witnesses who testified before the ICTR, could be subjected to public Gacaca proceedings at a later moment. In these situations, witness protection measures would not achieve their aim and unnecessarily limit the rights of the defence and transparency of the proceedings.[233]

In the Netherlands, Yvonne B. and Joseph M. are the only Rwandans who have been tried and convicted for respectively incitement to commit genocide[234] and international war crimes[235]. In the public judgments in their criminal cases, the names of the witnesses interviewed in the context of the proceedings have been anonymised. The witnesses did not appear before the court, but made statements in front of the national police and the investigating judge in the presence of the public prosecutor and the defence lawyer. The names of the witnesses and their full statements have been disclosed to the accused. The court judgment mentions for example that Yvonne B. has identified several witnesses as her neighbours.[236] In neither of the criminal proceedings, the court found it necessary to protect the witnesses against threats by the defendant or their family members or the Rwandan authorities. Also in Belgium and France many witnesses have openly testified in criminal trials against suspects of the Rwandan genocide.[237]

In its submission to the ECtHR in the case of *Ahorugeze v Sweden*, the Dutch Government confirmed that Rwandan defence witnesses in criminal cases did not need protection. The Government stated that it

> had been investigating genocide cases in Rwanda since 2006 and Dutch detectives, prosecutors and investigating magistrates frequently visited Rwanda for this reason. The co-operation of the Rwandan judicial authorities, including on the issue of witness protection, had been exemplary

(2005), M. Noel, Can We Expect Fair Trials At the International Criminal Tribunal for Rwanda?' (2011) available at http://societyofblacklawyers.co.uk/wp-content/uploads/2015/11/Fair-Trials-At-The-ICTR.pdf accessed 13 July 2022.

[229] J. Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTE Trials', *International Law and Politics* (2006) pp 306-307.

[230] Ibid, pp 282, 296.

[231] Human Rights Watch, *Rwanda: 25 Years on, Solidarity with Victims* (2019) available at https://www.hrw.org/news/2019/04/04/rwanda-25-years-solidarity-victims accessed on 13 July 2022.

[232] Redress, *Testifying to Genocide, Victim and Witness Protection in Rwanda* (2012) p 34, available at https://redress.org/wp-content/uploads/2018/01/Oct-12-Testifying-to-Genocide-Rwanda.pdf accessed on 13 July 2022.

[233] J. Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTE Trials', *International Law and Politics* (2006) p 296 and 310-312.

[234] District Court The Hague 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292.

[235] Appeal Court The Hague 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.

[236] District Court The Hague 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292, para 10.3.

[237] See Annex II to this expert opinion.

and there were no indications of interference with the investigating teams or with witnesses. The officials never inquired about the witnesses or about the content of their testimonies.[238]

Similar assessments had been made by the Norwegian police.[239] The ECtHR concluded in this case that the applicant would be able to adduce witness testimony before the courts of Rwanda. There was no reason to believe that witnesses would refuse to come forward out of fear of reprisals.[240] The *Ahorugeze* judgment has been one of the reasons for the Dutch Government[241] and other governments[242] to allow extradition of genocide suspects to Rwanda.[243]

5.4 Non-disclosure of the methods of investigation

It was explained in Chapter 2 that many aspects of the methods of investigation used by the (confident of the) Ministry of Foreign Affairs when preparing the individual report have not been disclosed to the persons concerned and to the public. Both the CJEU and the ECtHR[244] have recognised that it may be necessary to protect the State's methods of investigation. In *ZZ t*he CJEU held that disclosure of evidence underlying a decision 'is liable to compromise State security in a direct and specific manner, in that it may, in particular, [..] reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities'.[245]

5.4.1 Justification of non-disclosure in Rwandan cases

In decisions and letters concerning the cases at hand in this expert opinion several justifications are given for the non-disclosure of the methods of investigation.[246] First, the disclosure of methods of investigation may provide insight into the scope and method of the research that can be done (sic) and lead to anticipatory behaviour. It can be used to make better forgeries of documents. Moreover, disclosure of the research possibilities of the Ministry of Foreign Affairs can be used for the improvement of future asylum accounts so that they cannot be checked on their accuracy anymore. It is not explained what type of documents may be forged or how disclosure of methods of investigation in Rwandan cases may lead to the improvement of asylum accounts.

The IND also argues that the method of investigation is sometimes closely connected to the background of the confident or the source, so that their identity may easily be discovered after disclosure of this method. It states that in some cases, it is relatively easy to find out who has verified certain

[238] ECtHR 27 October 2011, *Ahorugeze v Sweden*, Appl No 37075/09, para 110. See also Observations in intervention of the Government of the Netherlands concerning Application No 37075 09, para 7, available at Bijlagen-Wob-besluit-E-mails-CdP-Rwanda-2008-2012-9.pdf (overheid.nl) accessed 26 September 2022.
[239] ECtHR 27 October 2011, *Ahorugeze v Sweden*, Appl No 37075/09, para 121.
[240] Ibid, paras 121 and 123.
[241] Kamerstukken II 2013-2014, 33750 VI, nr. 108.
[242] Human Rights Watch, *Rwanda: 25 Years on, Solidarity with Victims* (2019) available at https://www.hrw.org/news/2019/04/04/rwanda-25-years-solidarity-victims accessed on 13 July 2022.
[243] See also M.P. Bolhuis, L.P. Middelkoop and J. van Wijk, 'Refugee Exclusion in the Netherlands, Rwanda as Precedent?' *Journal of International Criminal Justice* (2014) pp 1115-1139.
[244] ECtHR 16 February 2000, *Fitt v the United Kingdom*, Appl No 29777/96, para 45.
[245] CJEU Case C-300/11 *ZZ* [2013] para 66.
[246] Decision on administrative objection of 4 March 2019, ref 2019-140335, p 7, Letter of the Ministry of Foreign Affairs to the District Court The Hague of 26 April 2019, ref DCM/MA-U140114, p 2, Attachment with the individual report in the case concerned in District Court The Hague 3 July 2015, ECLI:NL:RBDHA:2015:7860.

information at a specific institution. This justification thus may apply to investigations carried out at an archive or library or State institutions.[247]

However, it is questionable whether the justifications mentioned above also apply to the methods used for the selection and particular for the interviewing witnesses. Nevertheless, the confidentiality chambers of the Dutch district courts and Council of State have accepted the justifications forwarded by the IND. Their judgments are barely reasoned: they only mention that the interest in protecting the methods of investigation weigh more than the interest that the person concerned has access to the documents.[248]

5.4.2 Protection of methods of investigation in criminal proceedings concerning the Rwandan genocide

In the two criminal proceedings against Rwandans before the Dutch courts the methods of investigation were fully disclosed.[249] The public judgments explain for example why a criminal investigation was started, how the witnesses and other relevant information were discovered, when visits were paid to Rwanda and how witnesses were questioned (including the language used and the presence of an interpreter, type of questions asked, available psychological support, expenses paid). The investigating judge made reports of all investigating acts, which were provided to the prosecution and the defence. During the process, the investigating judge worked closely together with the prosecution and the defence.

5.5 Sub conclusion

Article 47 of the Charter allows in exceptional circumstances that the right to adversarial proceedings is limited as a result of the non-disclosure of evidence or information underlying a decision. The CJEU indicated that it allows such non-disclosure where this is strictly necessary in particular where the interest of the national security of the Member State is jeopardized in a direct and specific manner.

In this regard, this chapter has identified two problems in proceedings concerning withdrawal of Dutch nationality of persons suspected of involvement in the Rwandan genocide. The first problem is that both the IND and the Dutch courts fail to (explicitly) assess the necessity of protection of an individual witness or the methods of investigation used in a particular case. It may be derived from the 'strictly necessary' requirement applied under both Article 47 of the Charter and Article 6 ECHR that the national court must assess on a case-by-case basis whether non-disclosure of evidence is 'strictly necessary'. This is also implied by the CJEU's consideration in *G.M.* that national security must be jeopardised in 'a direct and specific manner'.[250] The CJEU held that in this context, the burden of proof is on the State. No presumption that non-disclosure is justified may be applied.[251] Moreover, the ECtHR's case law concerning Article 6 ECHR requires that in the examination whether the use of anonymous witnesses is necessary, the specific circumstances of the individual witness must be taken into account. This chapter demonstrated that, in the case of Rwandan confidents and witnesses, many factors are relevant when

[247] See District Court Arnhem 17 October 2022, ARN 20/4676 RWNL, Letter of the Ministry of Foreign Affairs to the District Court Zeeland-West-Brabant of 17 July 2020, ref KIG160901.0048.
[248] See for example: Council of State 3 August 2021, ECLI:NL:RVS: 2021:1712, Council of State 1 July 2021, ECLI:NL:RVS:2021:1993, Council of State 1 July 2021, ECLI:NL:RVS:2021:1992, District Court Arnhem 2 July 2019, ARN 17/5886RWNL616.
[249] District Court The Hague March 2013, ECLI:NL:RBDHA:2013:BZ4292, Appeal Court The Hague, 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.
[250] CJEU Case C-159/21 *G.M.* [2022] para 52.
[251] CJEU Case C-300/11 *ZZ* [2013] para 61.

assessing the need for protection, including factors relating to the situation in the country of origin and/or the country of residence of the confident and witness and the proceedings in which the confident or witness participates. The fact that the Dutch IND and courts fail to take these factors into account in itself constitutes a violation of rights to adversarial proceedings guaranteed by Article 47 of the Charter.

The second problem is that, as far as can be seen from public decisions and judgments, the Dutch IND and courts do not examine whether the extent to which non-disclosure of evidence takes place is justified. In this context, it should be noted that the justifications for non-disclosure invoked by the Dutch authorities do not relate to the protection of national security of the Netherlands. Instead, it concerns the protection of witnesses residing outside of the Netherlands and the protection on methods of investigation used in 1F cases (concerning persons who usually do not jeopardise the national security of the Netherlands). It may be argued that these interests weigh less when balancing them against the interest of the person concerned in the right to adversarial proceedings than the interest of national security.

Chapter 2 has demonstrated that in cases concerning the withdrawal of Dutch nationality non-disclosure is extensive: the person concerned is only provided with the individual report of the Ministry of Foreign Affairs, which contains Dutch summaries of the statements made by witnesses. The IND and courts fail to examine whether this extent of non-disclosure is necessary. This section demonstrated that such extensive limitations of the rights of the defence would never be accepted in criminal proceedings. The ICTR and the Dutch criminal courts have always informed the defendant about the identity of witnesses of the genocide in Rwanda and have disclosed (written) witness statements in genocide cases. They have protected witnesses using less restrictive measures: the withholding of their identity from the public and (in case of the ICTR) the delayed disclosure of their identity to the defendant. The Gacaca proceedings in Rwanda were even completely public. Moreover, in criminal cases the methods of investigation used by the prosecution, including the selection and method of interviewing witnesses of the Rwandan genocide were disclosed. The failure of the Dutch IND and courts to (explicitly) examine whether less restrictive non-disclosure measures would sufficiently protect witnesses and methods of investigation also leads to a violation of the right to adversarial proceedings guaranteed by Article 47 of the Charter.

Even if it were accepted that the non-disclosure of the evidence underlying the individual report is strictly necessary, this does not mean that no violation of the right to adversarial proceedings has taken place. The European courts have held that the persons concerned still must have an effective opportunity to defend themselves against the allegations against them. The next section argues that this effective opportunity does not exist in Dutch proceedings concerning withdrawal of Dutch nationality of persons suspected of involvement in the Rwandan genocide.

6. An effective opportunity to challenge the individual report?

The non-disclosure of the identity and background of the witnesses and confidents, the (written or recorded) witness statements and the methods of investigation used in the Rwandan cases at hand severely limit the right to adversarial proceedings of the persons concerned. The ECtHR has recognised in the context of criminal proceedings that where a decision is based on witness statements, it is crucial that the person concerned can challenge their reliability. It held in the case of *Kostovski v the Netherlands*

> If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.[252]

This applies in particular where it concerns witnesses of the Rwandan genocide. Several authors have stressed the importance of the rights of the defence and criticised the late disclosure of witness identity to the defence and the anonymity of witnesses to the public in the proceedings before the ICTR.[253] Combes states that 'it is only through careful, painstaking investigations that defence counsel can identify and highlight [a witness'] inaccurate statement: careful painstaking investigations that may be impeded by robust witness protection measures'.[254]

The CJEU has considered that, even if the non-disclosure of an element of the file underlying a decision is justified, it cannot lead 'to depriving the rights of defence of the person concerned of all effectiveness and to rendering meaningless the right to a remedy'.[255] The procedure 'must ensure, to the greatest possible extent, that the adversarial principle is complied with'.[256] The question is thus whether the persons concerned have an effective opportunity to defend themselves against the allegations contained in the individual report.

This section will first show that the fact that the national court has access to the non-disclosed information and is thus able to review the decision on the basis of this information is not sufficient to guarantee the right to adversarial proceedings. The persons concerned must be able to defend themselves against the allegations against them. It will be argued that in the Rwandan cases at hand in this expert opinion, the persons concerned are not able to do this due to three factors, which will be discussed in this chapter:

1. The presumption applied by the Dutch authorities that the individual report of the Ministry of Foreign affairs and the witness statements on which it is based are reliable;
2. The weight of the individual report and its underlying witness statements in the decision to withdraw nationality;

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[252] ECtHR 20 November 1989, *Kostovski v the Netherlands*, Appl No 11454/85, para 42.
[253] J. Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTE Trials' (2006) *International Law and Politics,* M. Noel, Can We Expect Fair Trials At the International Criminal Tribunal for Rwanda?' (2011) available at http://societyofblacklawyers.co.uk/wp-content/uploads/2015/11/Fair-Trials-At-The-ICTR.pdf accessed 13 July 2022, G. Sluiter, 'The ICTR and the Protection of Witnesses' (2005) 3 *Journal of International Criminal Justice*.
[254] N. Combs, Witness Protection in: S. Weill, K.T. Seelinger, and K.B. Carlson The President on Trial: Prosecuting Hissène Habré (Oxford, Oxford University Press, 2020) p 12.
[255] CJEU Case C-159/21 *GM* [2022] para 51.
[256] CJEU Case C-300/11 *ZZ*, [2013] para 65.

3. The lack of procedural measures counterbalancing the (large extent of) non-disclosure.

6.1 Judicial review of non-disclosed evidence

In cases concerning the withdrawal of Dutch nationality based on alleged involvement in the Rwandan genocide, the person concerned almost completely relies on the examination by the court of the non-disclosed information underlying the individual report. The Council of State recognises this, when considering that it is important that the administrative court is extra careful when examining the underlying documents. The court must assesses whether the information provided by the individual report is supported by these documents and gives a representative image of the information contained in the underlying documents. The court also needs to examine, as far as possible, to which extent the underlying documents themselves can be considered reliable. It must look at the consistency of the information, the sources on which the information is based and indications of possible bias or pressure on these sources.[257] This seems to imply a rather intensive judicial review.

However, the judgments of the Dutch administrative courts do not reflect the intensity of their examination of the reliability of the underlying information in their judgment. Given the role of the Dutch administrative courts (reviewing a decision, not fact-finding), it is also hardly imaginable that they would of their own motion for example compare the statements made by a witness to the confident of the Ministry of Foreign affairs with statements made by the same witness to the ICTR, Rwandan courts, Gacaca courts or other authorities. In one case, the person concerned explicitly asked the District Court to verify whether eight names of witnesses who made statements about a relevant event to the ICTR were among the witnesses interviewed by the confident of the Ministry of Foreign Affairs. These witnesses withdrew their statement to the ICTR or were considered to be unreliable. According to the person concerned, these witnesses conspired to make false allegations while in detention. The District Court did not mention in its judgment whether these names were indeed found in the non-disclosed documents, in order to prevent disclosure of the identity of the witnesses. It just held that the underlying documents did not raise doubts about the reliability of the individual report.[258] Also here, the contrast between the administrative courts and the criminal courts in the Netherlands should be noted. The criminal courts did actively compare witness statements in Rwandan genocide cases.[259]

Moreover, it must be questioned whether an (intensive) review of the reliability of the individual report, including the underlying witness statements is practically possible. As was mentioned before in section 2.5, the Dutch courts only seem to receive the investigation report on which the individual report is based, which only contains a summary of the witness statements. They do not seem to receive the witness statements themselves.[260] This makes it impossible for them to see whether the statements contain inconsistent, vague or implausible elements and to compare them with other witness statements.

The CJEU held that 'the power of the court having jurisdiction to have access to the file [..] cannot replace access to the information placed on that file by the person concerned or his or her adviser'.[261] Even if the Dutch courts would thus be able to fully review the reliability of the individual report, this would not be sufficient to comply with the right to adversarial proceedings. The CJEU held that where the court allows non-disclosure, the procedure followed must strike 'an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial

[257] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360, para 4.5.
[258] District Court Den Bosch 14 February 2020, AWB 18/2181, para 48.
[259] Appeal Court The Hague, 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, para 9.3.
[260] This is explicitly stated by the District Court of Breda in District Court Breda 2 November 2020, ECLI:NL:RBZWB:2020:5495, para 7.5.
[261] CJEU Case C-159/21 *GM* [2022] para 57.

protection'.[262] The next sections will demonstrate that there is no such balance. We will start with the fact that the Dutch courts presume that the individual reports underlying the withdrawal decision are reliable.

6.2 Presumption of correctness and completeness of individual reports

According to the Dutch Council of State, the individual report of the Ministry of Foreign Affairs must be considered an expert report. When taking a decision, the IND may assume that the information in such a report is correct, if the report provides information in an impartial, objective and transparent manner, while referring (where possible and responsible) to the underlying sources.[263] It is up to the IND to check whether this is the case.

The Council of State also assumes that the Ministry of Foreign Affairs has carefully selected the confident. This confident does not need to declare explicitly that they take responsibility for the reliability of the information of their sources.[264] According to the Council of State, it may be assumed that the Minister of Foreign Affairs is aware of the relevant political and cultural factors in Rwanda and that he has taken these factors in account when writing the individual report.[265] One district court even considered that it may be assumed that the sources recruited by the confident are reliable.[266]

The presumption of reliability of the individual report, the confident and the sources used can only be rebutted if the person concerned provides 'specific indications' (*concrete aanknopingspunten*) for doubting the correctness or completeness of the information in the report.[267] The Council of State explained in a judgment of 2022 that there must be a balance in the specificity of the findings in the individual report and the specific indications submitted by the person concerned: where these findings are less sharply delineated, the specific indications can also be less sharply delineated.[268] Nevertheless, providing such specific indications remains a difficult task given the limited possibilities this person has to challenge the witness statements and the methods of investigation due to their non-disclosure. The Dutch courts do not examine *ex officio* whether there are specific indication for doubting the reliability of the information in the individual report.

There are several examples of judgments, in which the Council of State found that there were specific indications for doubting the correctness of the individual report. These specific indications did not concern the reliability of witness statements, but the lack of substantiation of the allegations or the lack of explanations about the investigation methods used. In a judgment of 22 May 2022, the Council of State found, after an examination of the confidential documents underlying the individual report, that it could not be assumed that the individual report complied with the general requirements of reliability. It considered that the underlying documents did not clarify the investigation methods used. Moreover, it held that the involvement of the person concerned in the genocide did not follow from the individual report. The Council of State also took into account that some accusations against the person concerned were based on one witness statement, which was little detailed. In the light of these shortcomings, the Council of State held that it could not be assumed without further explanation that the confident had been carefully selected. The (confidential part of the) case file did not contain information about the

[262] CJEU Case C-300/11 *ZZ* [2013] para 64
[263] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360, para 4.3, Council of State 20 January 2021, ECLI:NL:RVS:2021:114, para 6.1.
[264] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360, para 4.3, Council of State, 9 August 2006, ECLI:NK:RVS:2006:AY6461, para 2.2.1.
[265] Council of State 20 January 2021, ECLI:NL:RVS:2021:114, para 6.2.
[266] District Court The Hague 13 March 2015, ECLI:NL:RBDHA:2015:2740, para 7.
[267] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360, para 4.3, Council of State, 24 February 2012, ECLI:NL:RVS:2012:2833, para 2.2.3.
[268] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360, para 4.5.

selection process.[269] The Council of State concluded that there were specific indications for doubting the reliability of the individual report.[270]

In another judgment of 22 May 2022, the Council of State similarly accepted that there were 'specific indications' for doubting the reliability of (a part of) the individual report, because only one witness made a statement about the involvement of the person concerned in a criminal act and this statement provided little details about the role of this person. In that case, four out of seven events on which the decision to withdraw nationality was initially based, were considered to be insufficiently substantiated. Nevertheless, this did not constitute 'specific indications' for doubting the reliability of the individual report with regard to the other three events in which the person concerned was allegedly involved.[271] Moreover, the Council of State did not doubt the carefulness of the selection of the confident in this case.[272] As a result, the decision to withdraw remained in place.

Comments about the correctness or completeness of the individual report are often not considered a 'specific indication'. For example, the remark that a witness statement reflected in the individual report is made in general wordings and does not specifically discuss the events of which the person concerned is accused, is insufficient to successfully challenge the reliability of the individual report.[273] In some cases, the person concerned requested third persons or organisations to comment on the individual reports.[274] In one case the person concerned submitted three statements about the unreliability of African Rights reports. The Council of State held that the IND had correctly considered that these statements were personal opinions, which did not factually refute the information contained in these reports. Moreover, these statements were not supported by objective evidence.[275] A report by Buro Kleurkracht[276] could not provide specific indications because it contained a general cultural analysis on the basis of which it could not be concluded that the statements of the witnesses in the individual case should be considered incorrect or unreliable. The Council of State and the District Court have also considered that the fact that there is general information that witnesses have made false accusations during Gacaca procedures and have changed or withdrawn their statements made to the ICTR does not mean that the witness statements made to the confident are unreliable or incorrect or need further investigation.[277]

In several cases, the person concerned has tried to demonstrate the unreliability of the witness statements on which the individual report is based by submitting statements of other witnesses. Such witness statements have been rejected as relevant evidence, because they were not considered to be provided by an objective source.[278] Courts held that it concerned statements made by a person who knew the witness and/or worked with them[279] and/or that the statement was made on the request of the person concerned[280]. For this reason, it could not be established that these statements came about in a

[269] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360, para 4.6.
[270] Ibid, para 4.7. See similarly District Court The Hague 18 December 2018, ECLI:NL:RBDHA:15461, para 5.5.
[271] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 8.2.
[272] Ibid, para 8.2
[273]Ibid, para 8.2.
[274] Ibid.
[275] Council of State 23 June 2014, ECLI:NL:RVS:2014:2382, para 7.
[276] Buro Kleurkracht is an organisation, which advises on intercultural communication.
[277] Council of State 23 June 2014, ECLI:NL:RVS:2014:2382, para 4.1, District Court Den Bosch 14 February 2020, AWB 18/2181, para 47.
[278] See for example, District Court Zwolle, AWB 13/11697.
[279] Council of State 20 January 2021, ECLI:NL:RVS:2021:114, para 7.1, Council of State 20 January 2021, ECLI:NL:RVS:2021:115, para 6.2.
[280] District Court The Hague 13 March 2015, ECLI:NL:RBDHA:2015:2740.

sufficiently impartial, objective and transparent manner.[281] Another reason to reject a witness statement was that the sources of knowledge of these witnesses were not transparent and verifiable.[282] Courts also do not usually facilitate the person concerned to hear other witnesses. In one case, the Council of State held that the district court correctly refused to hear witnesses on the request of the person concerned. It considered that 'the mere fact that the person concerned had submitted a list of persons, who could make exculpatory statements for him could not be considered specific indications'.[283] In several cases, the Council of State held against the person concerned that he had not ordered a contra-expertise.[284] All this places the person concerned at a substantial disadvantage vis-à-vis the State, which infringes the principle of equality of arms.

In one case, the person concerned asked an informant (a journalist) to interview witnesses in Rwanda. However, the District Court did not attach much weight to the witness statements obtained, some of which provided the person concerned with an alibi. It considered that 'leaving aside the question of whether the interviewees can be regarded as objective sources' various witnesses in other interviews held by the journalist stated

> that the person concerned allegedly stayed in many different places, including elsewhere in Rwanda. These witness statements also offer no specific indication for doubting the correctness of the findings of the individual report, since none of these witnesses was in the company of the person concerned during the entire genocide period. Whatever may be the case with the behaviour of the person concerned in the company of these witnesses, this does not exclude the possibility that the person concerned was involved in genocidal acts outside those moments. These witness statements therefore do not lead to doubts about the involvement of the claimant in the genocide mentioned in the individual report. Also the witness statements stating that the claimant would have saved Tutsis during the genocide do not offer any specific indications for doubting the correctness of the content of the individual report. Even if it were the case that the claimant helped certain Tutsis and moderate Hutus, this does not exclude that the claimant was also involved in the genocide of other Tutsis and moderate Hutus.[285]

The allegations against the person concerned must thus be refuted with very specific information, which excludes the possibility of the person concerned being involvement in the alleged facts.

Some applicants have referred to ICTR judgments, arguing that certain events of which they were accused had not taken place, because the ICTR had not mentioned those events at all or had not mentioned the applicant's involvement in these events. The Council of State did not grant this argument much weight. It considered that the judgments referred to did not focus on accusations against the applicant but against another person. Moreover, according to the Council of State, the fact that the ICTR had not mentioned the event did not mean that the event did not take place. The ICTR judgments were thus not considered a 'specific indication' that the individual report is not reliable.[286] Similarly, the District Court did not consider the fact that the person concerned did not appear in Gacaca case law a specific indication for doubting the individual report.[287]

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[281] Council of State 20 January 2021, ECLI:NL:RVS:2021:114, para 7.1, Council of State 20 January 2021, ECLI:NL:RVS:2021:115, para 6.2.
[282] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 8.2.
[283] Council of State 20 January 2021, ECLI:NL:RVS:2021:115, para 9.2.
[284] Ibid. See also Council of State 20 January 2021, ECLI:NL:RVS:2021:114, para 10.2.
[285] District Court The Hague 13 March 2015, ECLI:NL:RBDHA:2015:2740, para 9.3 (translation by the authors).
[286] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 8.1. See similarly District Court The Hague, 13 March 2015, ECLI:NL:RBDHA:2015:2740, para 9.3.
[287] District Court The Hague 25 March 2014, AWB 13/29482, para 10.

This section has demonstrated the difficulties for persons concerned to rebut the presumption that the individual report of the Ministry of Foreign Affairs is correct and reliable and that the confident has been carefully selected. The next section will show that the decision to withdraw nationality is often only or mainly based on the individual report.

6.3 Weight of the non-disclosed evidence and detail of the open materials

The CJEU held that, in order to ensure the right to adversarial proceedings, the person concerned or their lawyer must at least be informed about 'the essence of the grounds' of the decision.[288] It held in the context of the asylum procedure that EU legislation cannot be interpreted

> without infringing the principle of effectiveness, the right to sound administration and the right to an effective remedy, as allowing the competent authorities to place that person in a situation where neither he or she nor his or her representative would be able to gain effective knowledge, where applicable in the context of a specific procedure designed to protect national security, of the substance of the decisive elements contained in that file'.[289]

Similarly, under Article 5(4) ECHR the ECtHR takes into the level of detail of the information provided in the open information:

> [E]ven where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide [..] information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.[290]

The fact that some individual reports only contain rather vague allegations, can be considered problematic in this light. For example, one report mentions that the person concerned 'used her power as president of URAMA and many other offices she held, to influence the female members of MRND to embrace the ideology of hate, discrimination and disparity against the Tutsi's in Rwanda'. Moreover, it states that the person concerned organised and presided meetings, which aimed to spread a message of hate against the Tutsi's in the region by saying that Tutsi's were the enemy and that their extermination without mercy was the only solution.[291] Apart from that, no allegations relating directly to the genocide were made.

In most cases at hand in this expert opinion, the individual reports do mention details about the allegations against the person concerned. For example, they mention the places where the alleged events

[288] CJEU Case C-300/11 *ZZ*, [2013] para 65.
[289] CJEU Case C-159/21 *GM* [2022] para 53.
[290] ECtHR 19 February 2019, *A and others v UK*, Appl No 3455/05, para 220.
[291] Individual report of 3 May 2017, KIG1609010045.

took place, names of persons who were killed, names of persons with whom the person concerned cooperated and (sometimes) the date or the period (month) when the alleged events took place. This makes it in theory possible to contest these allegations, for example by providing an alibi. This is also mentioned by the Council of State where it held that the principle of equality of arms had not been violated in the cases of the persons concerned.[292] However, because of the lack of documentary evidence in Rwandan cases, this can almost only be done with other witness statements. We have seen above that the Dutch courts rarely attach weight to such statements.

The only way for the person concerned to defend themselves is thus to contest the reliability of the witness statements on which the individual report is based. However, no details are provided in the individual report on the basis of which the reliability of the witness statements can be contested. As was explained before, the identity and background of the witnesses and confident, the actual witness statements and all details concerning the method of investigation remain secret. Arguably, these elements must be considered decisive in Rwandan cases. The fact that the person concerned nor their lawyer is able to gain effective knowledge about these elements may undermine the right to adversarial proceedings guaranteed by Article 47 of the Charter.

Sole or decisive evidence

The ECtHR has made clear that the weight of the non-disclosed evidence for the decision taken must be taken into account in the examination whether the right to adversarial proceedings has been violated. In criminal cases in which witnesses remain anonymous and/or absent from the trial, the ECtHR applies the 'sole or decisive rule':

> When a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6.[293]

As to the question when witness statements must be considered 'decisive', the ECtHR held:

> the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive.[294]

In most cases at hand in this expert opinion, the individual report was decisive for the decision to withdraw Dutch nationality. Sometimes, the individual report was the only evidence on which the decision to withdraw nationality was based.[295] In one case, there was also information about Gacaca proceedings

[292] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 10.2, Council of State 20 January 2021, ECLI:NL:RVS:2021:115, para 9.2. Council of State 20 January 2021, para 10-10.2.

[293] ECtHR 15 November 2011, *Al-Khawaja and Tahery v UK*, Appl Nos 26766/05 and 22228/06. See also ECtHR 23 April 1997, *Van Mechelen and others v the Netherlands*, Appl Nos 21363/93, 21364/93, 21427/93 and 22056/93, para 55. See also with regard to migration detention ECtHR 19 February 2019, *A and others v UK*, Appl No 3455/05, para 220.

[294] ECtHR 15 November 2011, *Al-Khawaja and Tahery v UK*, Appl Nos 26766/05 and 22228/06, para 131.

[295] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360, Council of State 20 January 2021, ECI:NL:RVS:2021:114, District Court the Hague, 18 December 2018, ECLI:NL:RBDHA:2018:15461.

against the person concerned.[296] In a few cases, there was some other evidence. In one case, public sources linked the person concerned to the genocide.[297] In other cases there was a letter from other Dutch authorities, such as the chief public prosecutor[298] or the Korps Landelijke Politiediensten[299]. Moreover, in several cases the decision was partly based on reports of NGO African Rights and a report of African Rights and Redress.[300] However, also the sources underlying the African Rights reports remained (largely) confidential.[301] This makes it also very difficult for the person concerned to defend themselves against the allegations contained in these reports. Moreover, substantial criticism has been voiced with regard to the reliability of the reports of African Rights.[302]

It is also relevant that within the individual reports (anonymous) witness statements played a decisive role. Even though some individual reports were or seem to be based on materials from for example archives[303], or Rwandan media[304], the text of the individual reports mainly refers to witness statements.

It may thus be argued that in many cases the individual report and its underlying information, which was largely provided by anonymous witnesses was the sole or decisive evidence on which the decision to withdraw nationality was based. This must be taken account when examining whether the right to adversarial proceedings have been violated.

6.4 Lack of counterbalancing measures

According to the CJEU, where non-disclosure of evidence underlying a decision is justified, restricting the right to adversarial proceedings of the person concerned

> the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle.[305]

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[296] Council of State 20 January 2021, ECLI:NL:RVS:2021:114.

[297] District Court The Hague 20 March 2013, ECLI:NL:RBDHA:2013:BZ6895, para 6.3.

[298] District Court Den Bosch 14 February 2020, ECLI:NL:RBOBR:2020:838, Para 10. Council of State 20 January 2021, ECLI:NL:RVS:2021:115, paras 2 and 5.1.

[299] District Court The Hague 3 July 2015, ECLI:NL:RBDHA:2015:7860, paras 2 and 9.

[300] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 2, Council of State 23 June 2014, ECLI:NL:RVS:2014:2382.

[301] See for example District Court 20 October 2015, ECLI:NL:RBGEL:2015:6446, para 10**.**

[302] Reydams accuses African Rights of being 'an outright RPF-front organization, funded by and working closely with the RPF's intelligence service'. He questions the methods used for and reliability of the reports of African Rights. L. Reydams, 'NGO Justice: African Rights as Pseudo-Prosecutor of the Rwandan Genocide' (2016) *Human Rights Quarterly*, p 547. The Dutch District Courts were also critical about these reports. See District Court Arnhem 20 October 2015, AWB 14/3072, para 10 and District Court Amsterdam 21 December 2012, ECLI:NL:RBSGR:2012:CA1567, para 5.10.

[303] Investigation report underlying District Court Arnhem 18 February 2022, ARN AWB 20/2679, which was based on minutes of the Virunga Forces Steering Committee, which were found in the archive of the Commission National pour la Lutte contre le Genocide (CNLG). See also the individual reports underlying Council of State 22 May 2022, ECLI:NL:RVS:2022:1267, Council of State 20 January 2021, ECLI:NL:RVS:2021:114 and District Court The Hague 3 July 2015, ECLI:NL:RBDHA:2015:7860

[304] Individual report of 2 June 2017 underlying Council of State 11 May 2022, ECLI:NL:RVS:2022:1360.

[305] CJEU Case C-300/11 *ZZ* [2013] para 57.

Also UNHCR states that special procedural safeguards may ensure the protection of national security and the due process rights of the person concerned.[306]

An example of such techniques is the use of a special advocate, a security-cleared counsel who can cross-examine witnesses and/or see non-disclosed evidence and test the strength of the State's case' on behalf of the person concerned.[307] Special advocates are used in the United Kingdom and Canada in cases where disclosure of evidence underlying a decision is refused for national security reasons. This special advocate cannot not communicate with the person concerned 'about matters connected with the proceedings once material whose disclosure the Secretary of State opposes has been served on him'.[308] The ECtHR has accepted that such a special advocate 'could perform an important role in counterbalancing the lack of full disclosure'. However, the special advocate system can only work in a useful way if the person concerned is provided with sufficient information about the allegations against them, enabling them to give effective instructions to the special advocate.[309]

Special advocates are not the only technique, which can counterbalance the limitations to the rights of the defence caused by non-disclosure. The person concerned and their lawyer may for example be given the opportunity to ask questions to the witnesses or invited to ask the Ministry of Foreign Affairs to interview particular witnesses or investigate specific aspects of their case. Furthermore, the court could appoint an independent expert who could review the reliability of the non-disclosed evidence.

In the Dutch administrative system no such counterbalancing measures have been applied, even though lawyers have asked for them. According to the Dutch State the judicial review of the confidential material is in itself a counterbalancing measure.[310] The Dutch administrative system does not know a special advocate. The administrative courts have the power to appoint an expert. However, in several judgments, the Council of State considered that the statement of reasons in the decision to withdraw was sufficiently specific and that the person concerned had the opportunity to submit a contra-expertise. Therefore the appointment of an expert by the court was not necessary.[311] The person concerned also does not get the opportunity to ask the Ministry of Foreign Affairs to interview specific witnesses or investigate aspects of the case.[312]

Finally, it must be noted here that no measures are in place to prevent that the witnesses lie to the confident. They do not make their statements under oath, as is often the case in criminal law proceedings. This means that the witnesses do not have to face any legal consequences (such as criminal prosecution) if it turns out that they are lying. It was mentioned earlier that the very ease with which witnesses can lie is in itself factor motivating many witnesses of the Rwandan genocide to do so.[313]

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[306] UNHCR Guidelines on International Protection : Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para 36.

[307] This technique is used amongst others in Canada and the UK and has been mentioned for example in ECtHR 15 November 1995, *Chahal v UK*, Appl No 22414/93, paras 131 and 144 and ECtHR 19 February 2019, *A and others v UK*, Appl No 3455/05, paras 215-220 and CJEU Case C-300/11 *ZZ* [2013] paras 42-44.

[308] CJEU Case C-300/11 *ZZ* [2013] para 44.

[309] ECtHR (GC) 19 February 2009*, A. and Others* v *United Kingdom,* Appl No 3455/05, para 220.

[310] Letter of the Ministry of Foreign Affairs to the District Court The Hague of 26 April 2019, ref DCM/MA-U140114, p 2.

[311] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267, para 10.2, Council of State 20 January 2021, ECLI:NL:RVS:2021:115, para 9.2. Council of State 20 January 2021, paras 10-10.2.

[312] Council of State 20 January 2021, ECLI:NL:RVS:2021:115, para 9.2.

[313] N. Combs, *Fact-Finding Without Facts* (Cambridge, Cambridge University Press, 2010) p 143.

6.5 Sub conclusion

Even if the non-disclosure of evidence underlying the decision is justified and the national courts are able to perform a full judicial review of the non-disclosed evidence, this is not sufficient to guarantee the right to adversarial proceedings of the person concerned. The person concerned must be able to effectively defend themselves against the allegations of involvement in the Rwandan genocide. On the basis of the case law of the CJEU and ECtHR one could argue that the person concerned is able to do this in the Rwandan cases at hand in this expert opinion, because the allegations in the disclosed individual report underlying the decision to withdraw are sufficiently specific. They describe in some detail the events of which the person concerned is accused. Dates or periods of time, places where events have taken place and the names of victims and collaborators are mentioned, allowing the person concerned to contest this information for example by providing an alibi.

However, this ignores the fact that the presumption of reliability and the high standards for rebutting this presumption makes it practically impossible to contest the (sufficiently specific) allegations in the individual report. Witness statements and other information submitted by the person concerned to contest the information provided the individual reports are often not considered to be 'specific indications' which can rebut the presumption that the individual report is complete and reliable. The evidence provided by the person concerned is thus not assessed on an equal level as the evidence provided by the Ministry of Foreign Affairs in the individual report and the underlying documents. This violates the principle of equality of arms. The only remaining way the person concerned can effectively contest the individual report is by showing that the confident and/or witnesses were not carefully selected, that the witnesses and/or confident are unreliable because of their identity and background, that the witnesses were not questioned in a careful manner etc. With regard to these issues, no information is disclosed in the individual report, which severely limits the ability of the person concerned to effectively defend themselves.

There are two factors which further undermine the right to adversarial proceedings of the person concerned. First, the fact that the individual report plays a decisive role in the decision to withdraw nationality and the fact that complementing evidence is also often based on (partly) confidential information must be taken into account. Second, there is a complete lack of measures in the Dutch administrative procedure, which counterbalance the severe limitations of the right to adversarial proceedings of the person concerned.

7. Conclusion

In the past decade the Dutch IND has withdrawn the Dutch nationality of a number of persons on the grounds that they have concealed their involvement in the genocide in Rwanda. According to the IND and the Dutch courts, such withdrawal is possible where there are 'serious reasons to consider' that the person concerned has knowingly and personally participated in the Rwandan genocide. This is the standard of proof, which is also used in cases concerning Article 1F of the Refugee Convention. The decision to withdraw is based on an individual report of the Ministry of Foreign Affairs, which sets out the allegations against the person concerned. This report is primarily based on anonymous witness statements made to an anonymous confident. The identity and background of the confident and the witnesses, the (transcripts of the) witness statements and the methods of investigation are not disclosed to the person concerned or their lawyer. This severely limits the ability of the person concerned to defend themselves against the allegations contained in the individual report.

The decision to withdraw Dutch nationality entails the loss of EU citizenship of the person concerned. As a result, the withdrawal proceedings fall within the scope of EU law. Therefore, this expert opinion addressed the question whether the Dutch proceedings comply with the right to adversarial proceedings and the principle of equality of arms guaranteed by Article 47 of the Charter.

It is generally accepted that the burden of proof in Article 1F cases is on the State and that the standard of proof (serious reasons for considering) is lower than in criminal cases (proven beyond doubt). However, this does not mean that the level of procedural protection under the right to a fair trial guaranteed by Article 47 of the Charter should be (much) lower than in criminal law cases. In fact, in the cases at hand there are several factors which warrant for a high level of procedural protection under the right to adversarial proceedings and the principle of equality of arms guaranteed by that provision. First, the decision to withdraw has a severe impact on the life of the person concerned and their family members. The withdrawal of nationality may lead (and has led) to the extradition or expulsion of the person concerned to Rwanda or alternatively their irregular stay in the Netherlands. The persons concerned and their family members have developed close ties with the Netherlands during their long period of residence in the Netherlands. Moreover, there is controversy over the safety of extradition to Rwanda. Several EU Member States refrain from extraditions to Rwanda because of a lack of fair criminal trials for persons suspected of involvement in the Rwandan genocide.

A second reason to grant a high level of procedural protection is that research shows that many witnesses of the Rwandan genocide have made inadequate or false statements before international and national courts. This may be the result of the lapse of time since the genocide (now almost 30 years) or traumatic events experienced by the witnesses. Moreover, in Rwandan cases, witnesses often talk about events as if they experienced them themselves, while in reality they have heard about these events from other people (hearsay). Finally, pressure or fear of retaliation from the Rwandan authorities or individuals, self-interest or simply the opportunity to lie have made Rwandan witnesses commit perjury. Since the persons concerned in the cases at hand are Hutus with a high profile, who are often still politically active, the possibility of witnesses lying should not be underestimated. For all these reasons, it is crucial that the IND and courts are vigilant when examining witness statements and that the person concerned and their lawyer have the opportunity to test the reliability of these statements.

However, in reality the Dutch proceedings concerning withdrawal of nationality are characterised by a low level of procedural protection as a result of:

1. the large extent of non-disclosure of evidence underlying the individual report of the Ministry of Foreign Affairs;

2. the presumption of correctness and completeness of the individual report;
3. the fact that the decision to withdraw nationality is (generally) primarily based on the individual report;
4. the limited judicial review of the individual report as a result of the lack of access of the courts to the actual (transcripts or recordings of) witness statements; and
5. the lack of measures counterbalancing the limitations of the right to adversarial proceedings caused by the non-disclosure of the evidence underlying the individual report.

As will be concluded below, most of the mentioned aspects may separately be considered problematic in the light of the right to adversarial proceedings and equality of arms. However, it is particularly the combination of a low standard of proof and these aspects, which renders the withdrawal proceedings of the persons concerned unfair under Article 47 of the Charter. Due to the chain of confidence described in Chapter 2, there is no effective control on the reliability of the witness statements underlying the individual report by the IND or the Dutch courts, as they do not receive these statements, but only the investigation report written by the confident or embassy officer which summarises these statements. They are thus unable for example to compare these statements with the statements made by the same witnesses in the context of other proceedings.

At the same time, the large extent of non-disclosure makes it very difficult for the person concerned to defend themselves against the allegations in the individual report. This is reinforced by the fact that the person concerned needs to provide 'specific indications' that the individual report is incorrect or incomplete. Moreover, there is often little other evidence supporting the decision to withdraw and counterbalancing measures are lacking. This is a sharp contrast with Dutch criminal law proceedings concerning suspects of the Rwandan genocide, where the evidence (including witness statements and methods of investigation) was disclosed to the defendant and the court took an active role in examining the reliability of all evidence including the witness statements.

We conclude that the overall proceedings applicable to the withdrawal of Dutch nationality of the persons concerned in this expert opinion violates the right to adversarial proceedings, as enshrined in Article 47 of the Charter. Moreover, the non-disclosure of evidence combined with the presumption of correctness and completeness of the individual report and the lack of counterbalancing measures places the person concerned at substantial disadvantage vis-à-vis the IND. This leads to a violation of the principle of equality of arms as guaranteed by Article 47 of the Charter. It must be noted in this regard, that the fact that the individual report provides sufficiently detailed allegations against the person concerned (mentioning names of persons and places and dates of events) does not change this. Essential details enabling the person concerned to examine the reliability of the witness statements are not disclosed to them.

There are several procedural aspects, which on their own constitute a problem in the light of Article 47 of the Charter. These will be discussed below and with regard to each of these aspects preliminary questions will be formulated.

Non-disclosure of the evidence underlying the individual report

As a result of the large extent of non-disclosure in the Rwandan cases at hand, the person concerned and their lawyer are not able to examine the reliability of the witness statements on the basis of the factors identified in Chapter 3 of this expert opinion. According to the CJEU, a refusal to disclose information underlying a decision negatively affecting a person is only justified if it is strictly necessary. Chapter 5 of this expert opinion has shown that witnesses of the Rwandan genocide may be the target of violence. However, it also demonstrated on the basis of literature and comparisons with criminal law cases that full anonymity of witnesses, non-disclosure of the actual witness statements and the methods of investigation

may not be considered strictly necessary, or at least not to the extent as applied by the Dutch authorities. Moreover, it was argued that Article 47 of the Charter requires national courts to assess the need for non-disclosure on a case-by-case basis.

However, as far as can be derived from open judgments, the Dutch courts allow non-disclosure in Rwandan cases on the basis of general justifications forwarded by the Dutch authorities which are sometimes hardly applicable to the individual. Moreover, they do not assess whether less restrictive non-disclosure measures (such as those applied in criminal proceedings concerning persons suspected of involvement in the Rwandan genocide) would also sufficiently protect witnesses and methods of investigation. This leads to a violation of the right to adversarial proceedings guaranteed by Article 47 of the Charter. If the national courts have doubts about the interpretation of Article 47 of the Charter in this regard, they could refer the following preliminary questions to the CJEU:

- Does Article 47 of the Charter require that a national court reviewing the legality of a decision to withdraw Dutch nationality examine on a case-by-case basis whether non-disclosure for reasons of protection of witnesses and the methods of investigation of evidence underlying this decision is strictly necessary?

- Does the national court need to consider in this context whether less restrictive non-disclosure measures would sufficiently protect witnesses and methods of investigation?

The presumption of correctness and completeness of the individual report

An important factor reinforcing the unequal position of the person concerned vis-à-vis the IND caused by the non-disclosure of evidence is the presumption that the individual report of the Ministry of Foreign Affairs is correct and complete. This entails that the person concerned must provide 'specific indications' that the individual is incorrect or incomplete, which is in practice a high standard to meet. Witness statements (not considered to be objective) and reports of experts about the reliability of Rwandan witnesses (too general) provided by the person concerned usually do not constitute such specific indications. Moreover, the fact that the methods of investigation are not disclosed makes it almost impossible to contest the correctness and completeness of the report. This leads to a violation of the right to adversarial proceedings and the principle of equality of arms guaranteed by Article 47 of the Charter. If the national courts have doubts about the interpretation of Article 47 of the Charter in this regard, they could refer the following preliminary question to the CJEU:

- Does Article 47 of the Charter allow the national court to presume that a report of the Ministry of Foreign Affairs is correct and complete, requiring the individual concerned to rebut this presumption with specific indications in the situation where this report is decisive for the decision to withdraw Dutch nationality and the evidence underlying the report has not been disclosed to the individual concerned?

Limitations of judicial review

The Dutch courts only seem to receive the investigation report written by the policy officer of the Ministry of Foreign Affairs which underlies the individual report of the Ministry of Foreign Affairs which is disclosed to the person concerned. As far as can be seen in their judgments, they do not receive transcripts or recordings of the witness statements, which makes it impossible to effectively assess the reliability of these statements for example by comparing them with other statements made by these witnesses in the context of earlier (criminal) proceedings. Arguably this limitation of judicial review violates Article 47 of the Charter. If the national courts have doubts about the interpretation of Article 47 of the Charter in this regard, they could refer the following preliminary question to the CJEU:

- Does Article 47 of the Charter require a court reviewing the decision to withdraw Dutch nationality to receive and examine *all evidence* underlying the (disclosed) individual report of the Ministry of Foreign Affairs, including the recordings or transcripts of the witness statements, which form the basis of this report, in the situation where this report is considered decisive for the withdrawal decision?

The lack of counter balancing measures

According to the CJEU's case law, Article 47 of the Charter requires that where non-disclosure of evidence is considered justified, the national court 'have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle'.[314] No such counter-balancing measures are applied in the context of proceedings concerning the withdrawal of Dutch nationality. The person concerned is not provided with a special advocate, the opportunity to present questions to the witnesses or to have the court appoint an expert who can assess the reliability of the witness statements. This amounts to a violation of Article 47 of the Charter. If the national courts have doubts about the interpretation of Article 47 of the Charter in this regard, they could refer the following preliminary question to the CJEU:

- Does Article 47 of the Charter require the national court to apply techniques and rules of procedural law, which counterbalance the limitations of the right to adversarial proceedings of an individual due to the non-disclosure of the evidence underlying an individual report of the Ministry of Foreign Affairs, which is decisive for the decision to withdraw this person's nationality?

[314] CJEU Case C-300/11 *ZZ* [2013] para 57.

Annex 1: Overview of procedures

Case	Date of arrival	Date permit granted	Type of permit	Date grant Dutch Nationality	Date (first) decision withdrawal	State of the procedure
1	30 July 1999	26 July 2000	Asylum status	18 May 2006	11 May 2018	Higher appeal State unfounded[315]
2	13 January 1998	22 September 1999	Asylum status	9 October 2002	22 May 2013	Higher appeal applicant unfounded[316]
3	20 March 1998	26 October 1999	Regular residence permit	24 April 2009	28 September 2017	Higher appeal applicant unfounded[317]
4	22 July 1997	27 October 1997	Asylum status	25 February 2005	18 November 2013	Appeal applicant well-founded[318]
5	19 November 1999	11 March 2003	Asylum status	8 August 2006	9 July 2018	IND has withdrawn decision, case is pending
6	30 November 2000	3 March 2005	Asylum status	1 December 2006	27 November 2018	Pending before the District Court
7	21 January 1999	19 October 2001	Asylum status	11 September 2006	22 January 2014	Higher appeal applicant unfounded[319]
8	9 August 1994	31 October 1995	Asylum status	9 August 2011	24 August 2016	Appeal applicant well-founded[320]

Lawyer	**Colour**
Marq Wijngaarden	
Other lawyer	

[315] Council of State 11 May 2022, ECLI:NL:RVS:2022:1360.
[316] Council of State 11 May 2022, ECLI:NL:RVS:2022:1267.
[317] Council of State 20 January 2021, ECLI:NL:2021:114.
[318] District Court The Hague 3 July 2015, ECLI:NL:RBDHA:2015:7860.
[319] Council of State 20 January 2021, ECLI:NL:RVS:2021:115.
[320] District Court The Hague, 18 December 2018, ECLI:NL:RBDHA:2018:15461. No higher appeal submitted.

Annex 2: Practice in Belgium and France

This annex will examine the practice with regard to the application of Article 1F of the Refugee Convention and the withdrawal of nationality and criminal prosecution of persons suspected of involvement in the Rwandan genocide. Belgium and France were chosen for two reasons. The most important reason is that, due to the Belgian and French colonial and political ties with Rwanda, numerous Rwandans sought asylum in these countries after the genocide.[321] Between 1990 and 1997, when the threat of the Rwandan genocide was the most intense, Belgium received more than one-third (over 2.000) of all applications for asylum by Rwandan nationals in Europe. Moreover, Belgium recognised the highest number of asylum seekers from Rwanda in Europe: 1.200 Rwandan nationals received international protection in Belgium in the period between 1990 and 1997.[322] On 1 January 2018, 32.137 Rwandans were living in Belgium.[323] Also in France, the number of Rwandans who have requested asylum before the OFPRA was high, in particular directly after the genocide[324] and recognition rates were high as well.[325] UNHCR wrote in 1998 that together, Belgium and France granted Convention refugee status to 80 per cent of all Rwandan asylum-seekers recognized as refugees under the 1951 United Nations Convention during the past eight years.[326]

A second reason to choose Belgium and France is that the research team of the Migration Law Clinic included Belgian and French participants, with a thorough knowledge of the respective legal orders. This facilitated the collection of relevant information pertaining to Rwandans in those countries.

1. Application of Article 1F in Rwandan cases

According to Articles 55/2 and 55/4 of the Belgian Aliens Act, an asylum seeker is excluded from refugee status or from subsidiary protection status when they have committed a crime against peace, a war crime, or a crime against humanity (which also includes genocide).[327] Belgium started to apply the exclusion

[321] UN High Commissioner for Refugees, UNHCR CDR Background Paper on Refugees and Asylum Seekers from Rwanda (1998) available at https://www.refworld.org/docid/3ae6a63f8.html accessed 20 November 2022. S. Demart, B. Schoumaker, M. Godin and I. Adam, Burgers met Afrikaanse roots: een portret van Congolese, Rwandese en Burundese Belgen (2017) available at https://cris.unu.edu/sites/cris.unu.edu/files/Burgers%20met%20Afrikaanse%20roots%20een%20portret%20van%20Congolese%2C%20Rwandese%20en%20Burundese%20Belgen.pdf accessed 20 November 2022, p 40.

[322] UN High Commissioner for Refugees, UNHCR CDR Background Paper on Refugees and Asylum Seekers from Rwanda (1998).

[323] Ibid, p 15.

[324] UN High Commissioner for Refugees, UNHCR CDR Background Paper on Refugees and Asylum Seekers from Rwanda (1998). See for later statistics the Rapports d'Activité written by OFRA available at https://www.ofpra.gouv.fr/fr/l-ofpra/nos-publications/rapports-d-activite accessed 20 November 2022.

[325] UN High Commissioner for Refugees, UNHCR CDR Background Paper on Refugees and Asylum Seekers from Rwanda (1998) and OFPRA (2008) p 30. The recognition number was for example 76% in 2001 (see OFPRA Rapport d'activité 2001 available at https://ofpra.gouv.fr/sites/default/files/atoms/files/rapport_dactivite_2001.pdf accessed 22 November 2022, p 12) and slowly dropped to 38% in 2021 (see OFPRA Rapport d'activité 2021, available at https://ofpra.gouv.fr/sites/default/files/atoms/files/ra_2021_md.pdf accessed 22 November 2022).

[326] UN High Commissioner for Refugees, UNHCR CDR Background Paper on Refugees and Asylum Seekers from Rwanda (1998).

[327] The exclusion from refugee status under the Belgian Aliens Act is based on Article 1D, E and F of the Refugee Convention. The exclusion from subsidiary protection status under the Belgian Aliens Act is based on Article 1F of the Refugee Convention and on other conditions mentioned in Article 55/4 of the Belgian Aliens Act.

clauses only in the 1990s, in the context of the Yugoslavian civil war and the Rwandan genocide.[328] However, only a limited group of asylum seekers has been excluded from international protection in Belgium (an average 0.1% to 0.2%[329] of the total number of asylum seekers).[330] However, this number grew in recent years (to 1-3% in 2020 and 2021[331]). There is only very limited information about the number of Rwandan asylum cases in which Article 1F Refugee Convention was applied. In 1998, Belgium had excluded five Rwandans from refugee status, which was considered 'highly unusual'.[332] Therefore, several politicians considered Belgium to be a safe haven for Rwandans suspected of having actively participated in the planning or execution of genocide.[333] Borremans mentions that four Rwandans were excluded in 2017.[334] We found one judgment of the Foreigners' Appeals Board (*Raad voor de Vreemdelingenbetwistingen*) of 31 October 2018 in which a Rwandan national was excluded from international protection in Belgium for committing crimes against peace, war crimes and crimes against humanity during the genocide in Rwanda in 1994.[335] This may indicate that Article 1F Refugee Convention was not applied to Rwandan cases on a large scale.

In France, while the handling of cases involving the application of Article 1F had priority in the early 2000s, this has changed in the course of time. A 2011 report states with regards to Rwandan asylum claims: 'The exclusion clause is less and less often implemented by the OFPRA, except for some administrative or political administrative or political personnel of the former regime, who have been on the run since 1994 [..] and after a long journey, have decided to reach French territory'.[336] There is very little information available about the application of Article 1F to Rwandan cases. It follows from reports of the *Cour National du Droit d'Asile* (CNDA) that several high profile Rwandan have been excluded from

[328] J. Rikhof, 'War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context' *International Journal of Refugee Law* (2009) pp 453-507.

[329] M. Borremans, *Als daders slachtoffers worden: analyse van het Belgische asielbeleid rond artikel 1F van het Vluchtelingenverdrag* (2018) available at https://libstore.ugent.be/fulltxt/RUG01/002/509/695/RUG01-002509695_2018_0001_AC.pdf, pp 28-29.

[330] In 2005, Article 1F was applied in 6 cases (see 2005, available at https://www.cgvs.be/sites/default/files/jaaverslagen/jv2005_cgvs_nl.pdf, p 18), in 2006 in 4 cases (see Jaarverslag CVGS 2006, available at https://www.cgvs.be/sites/default/files/jaaverslagen/jv2006_cgvs_nl.pdf accessed 22 November 2022, p 23). Jaarverslag CVGS

[331] Jaarverslag CVGS, available at https://cgvs.be/sites/default/files/jaaverslagen/jaarverslag_cgvs_2020.pdf accessed 22 November 2022, p 17, Jaarverslag CVGS 2021, available at https://www.cgvs.be/nl/content/bescherming-belgie-2021 accessed 22 November 2022.

[332] Belgian Senate, Handelingen nr. 1-165 (17 February 1998) available at https://www.senate.be/www/?MIval=publications/viewPub&COLL=H&PUID=16780393&TID=16784526&POS=1&LANG=nl accessed 22 November 2022.

[333] Belgische Senaat, Vraag om uitleg van de Hostekint aan de vice-eerste minister en minister van Binnenlandse Zaken over het asielbeleid ten opzichte van personen met Rwandese nationaliteit, 1998, https://www.senate.be/www/?MIval=publications/viewPub&COLL=H&PUID=16780393&TID=16784526&POS=1&LANG=nl.

[334] M. Borremans, *Als daders slachtoffers worden: analyse van het Belgische asielbeleid rond artikel 1F van het Vluchtelingenverdrag* (2018) p 29.

[335] Conseil du Cotentieux des Etrangers, n° 211 842, 31 octobre 2018, https://www.rvv-cce.be/sites/default/files/arr/a211842.an_.pdf.

[336] Office français de protection des réfugiés et apatrides (OFPRA) Rapport d'activité 2011, available at https://ofpra.gouv.fr/sites/default/files/atoms/files/rapport_dactivite_2011.pdf accessed 22 November 2022, p 21

refugee status in the period 2006-2008. This includes a former Rwandan minister[337], the widow of the Rwandan president Juvénal Habyarimana[338] and a gynaecologist and member of the Rwandan Democratic Movement (RDM).[339] The French Council of State has also refused the asylum application of François-Xavier Nzuwonemeye, who was acquitted by the International Criminal Tribunal for Rwanda on the basis of 'serious suspicions' of involvement in the genocide.[340]

Mediapart, a French investigative newspaper, has recently shown that the OFPRA has been postponing sensitive Rwandan cases.[341] For example, the case of Aloys Ntiwiragabo, suspected of being one of the pillars of the genocide, has not been treated for the past 25 years. Moreover, the case of the doctor-gynaecologist Sosthène Munyemana, who was sentenced to life imprisonment in Rwanda was rejected in 2008, while he arrived in France in 1995. The French authorities also took a long time to decide in other Rwandan cases, such as those of the close collaborator of the Rwandan militia leaders (Thaddée Maniragaba, 6 years), the ex-minister of Justice (Stanislas Mbonampeka, 6 years) and a former sub-prefect of a hotbed for arms trafficking (Faustin Semasaka).[342]

2. Withdrawal of nationality in Rwandan cases

The Belgian authorities can revoke Belgian nationality of a person suspected of involvement in the Rwandan genocide on the basis of fraud.[343] In that case, they would have to follow a criminal law procedure. While the loss of nationality through adoption, long-term residence abroad or renunciation of Belgian nationality occurs in an administrative procedure[344], revocation of Belgian nationality is considered to be a punishment, to which criminal law and thus the standard of proof from criminal proceedings apply.[345] In the Belgian framework this period for revocation of Belgian nationality is limited to five years after its acquirement.[346] The most recent statistics of 2014 show that there were more than

[337] Commission des Recours de Réfugiés (CRR) Rapport d'activité 2006, available at http://www.cnda.fr/content/download/5114/15472/version/1/file/rapportdactivite2006.pdf accessed 22 November 2022, p 28
[338] CDNA Rapport d'activité 2007, available at http://www.cnda.fr/content/download/5115/15475/version/1/file/rapportdactivite2007.pdf accessed 22 November 2022, p 21.
[339] CNDA Rapport d'activité 2008, available at http://www.cnda.fr/content/download/5113/15469/version/1/file/cndarapportannuel2008.pdf accessed 22 November 2022, p 16
[340] Th. Englebert, 'Réfugiés rwandais: le dévoiement du droit d'asile' (22 August 2020) available at https://www.mediapart.fr/journal/international/220820/refugies-rwandais-le-devoiement-du-droit-d-asile accessed 22 November 2022.
[341] Ibid.
[342] Ibid.
[343] Art 23(1)(1) Wetboek van de Belgische nationaliteit.
[344] Agentschap Integratie en Inburgering, 'In welke gevallen verlies je de nationaliteit?' available at https://www.agii.be/thema/vreemdelingenrecht-internationaal-privaatrecht/nationaliteit/verlies-en-herkrijging-van-de-belgische-nationaliteit/in-welke-gevallen-verlies-je-de-nationaliteit accessed 22 November 2022.
[345] Agentschap Integratie en Inburgering, 'Verlies als straf' available at https://www.agii.be/thema/vreemdelingenrecht-internationaal-privaatrecht/nationaliteit/verlies-en-herkrijging-van-de-belgische-nationaliteit/verlies-als-straf-vervallenverklaring#:~:text=Door%20een%20vervallenverklaring%20verlies%20je,naturalisatie%2C%20wat%20de%20uitzonderingsprocedure%20is accessed 22 November 2022.
[346] Art 23(9) Wetboek van de Belgische nationaliteit.

12.000 Rwandan nationals living in Belgium who received the Belgian nationality.[347] Nevertheless, no Belgian examples of revocation of nationality in Rwandan cases have been found.

In France, nationality can be revoked on the basis of a conviction for acts against the fundamental interests of the nation, or conviction for ordinary or serious offenses which constitute acts of terrorism or when the person concerned engaged, for the benefit of a foreign state, in acts that are incompatible with the quality of French national or committed acts that are prejudicial to the interests of France.[348] Revocation of nationality only occurs if the acts for which the person concerned is accused took place prior to the acquisition of French nationality or within ten years of the date of acquisition, according to Article 25 bis of the French Civil Code. For cases of terrorism, this period of time is prolonged to 15 years.[349] A naturalisation decision can also be annulled when the person concerned has committed fraud. This must be done within two years after discovery of the fraud.[350] The revocation or annulment of nationality is an administrative procedure.[351]

We have not found statistics about the number of Rwandans, who have acquired French nationality. Nevertheless, it may be assumed that many Rwandans have. Also with regard to France no information has been found about revocations or annulments of nationality for (suspected) involvement in de Rwandan genocide. It is for example unclear whether French national Claude Muhayimana, who was sentenced to 14 years in prison for complicity in genocide and crimes against humanity[352] has been or will be stripped of his French nationality as a consequence of his conviction.

3. Criminal prosecution of persons suspected of the Rwandan genocide

There have been five criminal trials in Belgium before the Court of Assize since the Rwandan genocide in 1994 with regard to this genocide.[353] The Court of Assize is assisted by a jury, composed of twelve citizens[354], who have to decide on the question whether the crime suspect is guilty or not.[355] The standard of proof in criminal proceedings beyond any reasonable doubt does not apply here. However, the members of the jury must swear that they will decide on the question of guilt on the basis of the evidence and the means of defence with impartiality.[356] The proceedings before the Court of Assize are exclusively oral. This means that all investigative acts of the judicial investigation must be repeated in front of the parties. Moreover, all witnesses give their testimony in front of the court and the parties, after which the crime suspect is given the opportunity to respond to the testimonies or ask questions to the witnesses.[357]

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[347] International Organisation for Migration (IOM), 'Mapping the Rwandan Diaspora in Belgium' (2019) available at https://publications.iom.int/system/files/pdf/mapping-the-rwandan-diaspora-in-belgium.pdf, accessed 22 November 2022, p 22.
[348] Art 25 French Civil Code.
[349] Art 25-1 French Civil Code.
[350] Art 27-2 French Civil Code.
[351] Art 27-1 French Civil Code.
[352] 'French court sentences ex-driver to 14 years in jail for role in Rwanda genocide' (16 December 2021) available at https://www.france24.com/en/africa/20211216-french-court-sentences-ex-driver-to-14-years-in-jail-for-role-in-rwanda-genocide accessed 22 November 2022.
[353] De federale politie, 'Eerste veroordeling in België voor genocide' (23 December 2019) available at https://www.politie.be/5998/nl/nieuws/eerste-veroordeling-in-belgie-voor-genocide accessed22 November 2022.
[354] Art 114 Gerechtelijk Wetboek België.
[355] Federale Overheidsdienst Justitie, *Het Hof van assisen* available at https://www.om-mp.be/om_mp/files/en-savoir-plus/brochures/NL/14-Het%20hof%20van%20assisen.pdf, accessed at 22 November 2022.
[356] Ibid.
[357] Ibid.

Four of the trials between 2001 and 2009 before the Court of Assize with regard to the Rwandan genocide resulted in convictions on the ground of war crimes.[358] In December 2019, the Court of Assize ruled for the first time in Belgian history that a person was guilty for committing the crime of genocide.[359] Fabien Neresté was sentenced to 25 years in prison and a fine of EUR 317,000[360] for ordering the murder of 13 people and participating in the extermination of Tutsis in Rwanda.[361] In this case 123 witnesses and experts were heard, who were present physically in the courtroom or virtually through a video conference.[362]

France has prosecuted several high-profile Rwandans. As in Belgium, the Court of Assize has jurisdiction over crimes of genocide. The Court of Assize consists of three professional judges and a jury of six citizens or a jury of nine citizens in appeal cases. In 2016, the first criminal trial was held against Pascal Simbikangwa, a former captain of the presidential guard, considered to be one of the instigators of the genocide. He was convicted in appeal by the Court of Assize of Paris to 25 years of imprisonment for genocide and complicity in crimes against humanity. This sentence became final in 2018 after his appeal in cassation was rejected.[363] After this first criminal trial, Octavien Ngenzi, Tito Barahira[364], Claude Muhayumana[365] and Laurent Bucyibaruta[366] were found guilty of crimes of genocide before the Court of Assize. Furthermore, Sosthène Munyemana and Eugène Rwamucyo yet have to appear before the Court of Assize for being suspected of having participated in the Rwandan genocide.[367]

In all these trials many witnesses took the stand.[368] In particular where it concerned witness statements, the fairness of these French criminal trials has been questioned. The prosecution can travel

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[358] See D. Vandermeesch, H. D. Bosly and P. Meire, *Génocide Rwandais: le récit de quatre procès devant la court d'assises de Bruxelles* (Die Keure, 2011).

[359] De federale politie, 'Eerste veroordeling in België voor genocide' (23 December 2019).

[360] La Libre Afrique, 'Assises Bruxelles: Fabien Neretse, coupable de génocide, condamné à verser 317.000 euros d'indemnités' (30 January 2020) available at https://afrique.lalibre.be/46146/assises-bruxelles-fabien-neretse-coupable-de-genocide-condamne-a-verser-317-000-euros-dindemnites/ accessed 20 November 2022.

[361] S. Vercruysse, 'Eerste veroordeling in ons land wegens genocide: Rwandees Fabien Neresté krijgt 25 jaar cel' (20 December 2019) available at https://www.vrt.be/vrtnws/nl/2019/12/18/_-eerste-veroordeling-voor-genocidemisdaden-in-belgie/ accessed 22 November 2022.

[362] Ibid.

[363] See https://trialinternational.org/latest-post/pascal-simbikangwa/ accessed 22 November 2022. https://www.francetvinfo.fr/societe/justice/proces-rwanda-pascal-simbikangwa-condamne-a-25-ans-de-reclusion_1683409.html

[364] 'Rwanda : les condamnations dans le monde liées au genocide (18 May 2020) available at https://www.francetvinfo.fr/monde/afrique/societe-africaine/rwanda-les-condamnations-dans-le-monde-liees-au-genocide_3968475.html) accessed 22 November 2022.

[365] 'Génocide au Rwanda : un Franco-Rwandais condamné à 14 ans de réclusion pour complicité'(16 December 2021) available at https://www.france24.com/fr/afrique/20211216-g%C3%A9nocide-au-rwanda-un-franco-rwandais-condamn%C3%A9-%C3%A0-14-ans-de-r%C3%A9clusion-pour-complicit%C3%A9 accessed 22 November 2022.

[366] Le Monde, 'French court sentences Laurent Bucyibaruta to 20 years for 'complicity' in Rwandan genocide' (13 July 2022) available at https://www.lemonde.fr/en/le-monde-africa/article/2022/07/13/laurent-bucyibaruta-sentenced-to-20-years-for-complicity-in-rwandan-genocide_5990018_124.html accessed 22 November 2022.

[367] See https://www.collectifpartiescivilesrwanda.fr/sosthene-munyemana-comparaitra-bien-devant-la-cour-dassises/ and https://www.collectifpartiescivilesrwanda.fr/eugene-rwamucyo/ both accessed on 22 November 2022.

[368] See Le Monde, 'Rwanda : Claude Muhayimana condamné à quatorze ans de réclusion pour « complicité de génocide »'(16 December 2021) https://www.lemonde.fr/afrique/article/2021/12/16/rwanda-quinze-ans-de-prison-requis-contre-claude-muhayimana-pour-complicite-de-genocide_6106272_3212.html and https://www.justiceinfo.net/fr/42805-francoise-mathe-chausse-trapes-competence-universelle.html accessed 22 November 2022.

to Rwanda to hear witnesses, while the defence lawyer is neither summoned or informed about these hearings.[369] Moreover, there were doubts about the reliability of the numerous witnesses involved in the criminal proceedings. The defence lawyer of Claude Muhayima, Françoise Mathé, stated: 'Not all the witnesses are kind, they are all more or less in good faith, they are all more or less skilful', depending on their own interests.[370] She qualifies the value of the witness testimonies as 'meaningless, whether they are damning or exonerating'.[371] Florence Bourg defence lawyer of Wenceslas Munyeshyaka contended that hundreds of testimonies were analysed, for the justice to conclude that most of these testimonies were not very credible or false.[372]

4. Conclusion

Even though a large number of Rwandans have found refuge in Belgium and France only few of them seem to have been excluded from refugee status or have lost their Belgian or French nationality on the basis of their (suspected) involvement in the Rwandan genocide. In both countries, revocation of nationality for involvement in genocide can only take place after a procedure, which complies with criminal law standards. In Belgium revocation of nationality is considered to be a punishment, to which criminal law standards apply. In France, nationality can only be revoked on the basis of a criminal conviction. Criminal law trials against Rwandans for involvement in genocide have been widely reported in the media. In (particularly the French) criminal law proceedings, there is also criticism about the reliability of witness statements. However, it is clear that the level of protection in these proceedings is a lot higher than in the Dutch administrative proceedings concerning the withdrawal of nationality for reasons of involvement in the Rwandan genocide.

[369] See https://www.justiceinfo.net/fr/42805-francoise-mathe-chausse-trapes-competence-universelle.html accessed 22 November 2022.
[370] See https://www.collectifpartiescivilesrwanda.fr/proces-claude-muhayimana-mercredi-15-decembre-2021-j18/ and https://www.collectifpartiescivilesrwanda.fr/proces-claude-muhayimana-jeudi-2-decembre-2021-j9/ accessed 22 November 2022.
[371] See https://www.justiceinfo.net/fr/42805-francoise-mathe-chausse-trapes-competence-universelle.html accessed 22 November 2022.
[372] See https://www.justiceinfo.net/fr/2438-france-questions-sur-un-non-lieu-en-faveur-d-un-pretre-accuse-de-genocide.html accessed 22 November 2022.