7. General discussion

7.1. Introduction

Article 1F is the ‘exclusion clause’ of the Refugee Convention. Individuals applying for asylum can be excluded from the protection offered by the Convention when there are serious reasons for considering that they have committed a serious crime. The exclusion clause is seen to fulfil different functions: excluding undeserving individuals from refugee protection, promoting criminal accountability for perpetrators of serious crimes, and protecting the community of the state of refuge.

The function of promoting criminal accountability is not served by the application of Article 1F in itself, but requires active follow-up by a capable and willing actor. The Refugee Convention does in this respect not assign responsibility to any actor in particular. As international criminal courts and tribunals have limited jurisdiction and focus, as domestic criminal justice systems in post-conflict states are often not willing or capable of prosecuting these cases, and as excluded individuals often remain in the states of refuge that have excluded them because they cannot return or be expelled, states of refuge arguably have a crucial role to play. Considering that one of the original aims of the exclusion clause was to prevent perpetrators of serious crimes from escaping criminal prosecution, and given the international dedication to close the ‘impunity gap’ for these crimes, it is important to know what states of refuge (can) contribute to these aims. To what extent are these states willing to bring people who allegedly have ‘blood on their hands’ residing on their territory to justice, and what can and do they actually do to promote accountability for these alleged perpetrators? What is realistically possible in this respect? These questions will likely remain topical for the time to come considering that people from conflict areas will continue to apply for asylum.

The purpose of this study was to empirically study the role that states of refuge can and do play in the administration of criminal justice to alleged perpetrators of serious crimes applying for asylum. The study focused on the case of the Netherlands, a country with a relatively high number of 1F exclusions, committed to the development and implementation of international criminal law, also on the domestic level. The central research question was: How has the Netherlands as a state of refuge contributed to administering criminal justice to asylum seekers who have been excluded under Article 1F of the Refugee Convention? In order to answer this question, different sub questions were formulated at the outset and have been addressed in the previous chapters:
• How does the application of Article 1F relate to other modes for exclusion of (allegedly) criminal immigrants, how is Article 1F being applied in the Netherlands, and what does the population of individuals excluded under Article 1F look like?
• To what extent and in what ways has the Netherlands facilitated and/or promoted criminal prosecution of individuals excluded under Article 1F outside the Netherlands?
• To what extent and in what ways has the Netherlands prosecuted individuals excluded under Article 1F within the Netherlands?
• What happens to those individuals excluded under Article 1F who are not criminally prosecuted but remain in the Netherlands?

This study has used a mixed-methods approach to answer these questions. An extensive dataset was used, consisting of all refugee status determination decisions taken between 2000 and 2010 by the Dutch immigration service where Article 1F has – at a certain point in the refugee status determination process – been considered or actually invoked. A sample of 358 case files, out of 745 files containing a definitive 1F decision, was analysed. Four categories of variables were scored: personal characteristics of the individual, legal characteristics of the case, characteristics relating to the alleged behaviour and sources used to substantiate the 1F decision. Besides this file analysis, a review of academic literature, case law and policy documents was conducted and interviews were held with experts. In addition, the second chapter drew from a study by Bolhuis and Van Wijk (2015b) into the information exchange between immigration, law enforcement and prosecution services in six European countries, commissioned by the Norwegian immigration service.

This chapter will summarise the results and answer the different research questions (section 7.2), reflect on strengths and limitations of the study (section 7.3), discuss the findings and their implications for policy and practice (sections 7.4 and 7.5) and, finally, reflect on directions for further research (section 7.6).

7.2. Summary of results
7.2.1. 1F exclusion in the Netherlands
As noted above, the first question was how the application of Article 1F relates to other modes of exclusion of (allegedly) criminal immigrants, how Article 1F is being applied in the Netherlands, and what the population of individuals excluded under Article 1F looks like. Besides exclusion from international protection on the basis of 1F, there are two other categories of immigrants who are ‘undesirable’ because of their past or possible future criminal conduct. Firstly, the commission of a crime by
someone in possession of a residence permit granted on the basis of international protection or another ground, can lead to the revocation of, or refusal to extend, a permit if there is reason to consider someone represents a danger to the public order or to the community. Whether such a danger is assumed depends on the nature of the crime or the penalty imposed: more serious crimes or penalties make denial of a residence permit more likely. Secondly, a danger to national security can also be a reason to end or revoke a legal status. Determination of whether someone poses a danger to national security is based on an individual report drafted by the national or a foreign intelligence service and is not dependent on a criminal conviction. In the context of international protection, an important difference between Article 1F on the one hand, and Articles 32 and 33(2) of the Refugee Convention on the other, is that in the latter cases it has already been determined that someone is a refugee, while in the case of 1F, the individual is considered to fall outside the refugee definition because of his past conduct. The study focused on those individuals excluded under Article 1F.

At the outset of the study, the circumstances and developments that led to the introduction of the Dutch 1F policy in 1997 were described. Unlike in other states, the increased attention for Article 1F in the Netherlands was not triggered so much by the crises in the former Yugoslavia and Rwanda or the terrorist attacks in the United States on 11 September 2001, but in particular by societal unrest relating to asylum applications by alleged leaders of the former Afghan communist regime. A publication in a popular magazine led to a public outcry because it listed thirty-five senior leaders from the former Afghan communist regime who resided in the Netherlands, some in possession of an asylum status, while their involvement in war crimes had reportedly not been thoroughly investigated. This led to the formulation of an Article 1F policy, which was set out in a policy letter by the responsible State Secretary in November 1997.

Three guiding principles of this policy are that Article 1F is to be interpreted restrictively, that the opportunities to apply Article 1F must (nonetheless) be maximally utilized, and that further consequences are to be connected to any exclusion on the basis of 1F. The policy entails several measures. In order to maximally utilize the opportunities to apply 1F, the investigation and decision in relation to the applicability of Article 1F were made the exclusive responsibility of a designated unit within the immigration service. The further consequences connected to the application of Article 1F are that the individual is declared persona non grata, which

1 These two Articles respectively allow for expulsion on grounds of national security or public order (32) and declare the refoulement prohibition inapplicable in case of danger to the security or community (33(2)).

entails an obligation to leave the territory of the state, and a standard assessment by
the public prosecutor of the possibilities for criminal prosecution. Other distinctive
elements of the Dutch policy are that exclusion under 1F is assessed before inclusion
under 1A Refugee Convention; that certain designated groups can be categorically
excluded, in which case it is up to the individual concerned to show that his case forms
an exception; that excluded individuals are by definition considered to pose a danger
to public order; and that 1F invokes a blanket bar to all other residence permits. When
this policy was communicated, the responsible State Secretary referred to moral and
legal obligations to prevent international crimes and expressed the conviction that the
Netherlands should not be a safe haven for persons excluded under 1F, because the
position of their victims is at stake, and because it is important that these persons do
not escape the penal consequences of their acts and that justice should have its course
as much as possible, in the Netherlands or elsewhere. These policy measures are largely
still in place. At the time of their introduction, they were unique internationally. Some
of these measures, such as the designation of a special unit and the standard assessment
of possibilities for criminal prosecution have also been introduced in other states.
Other elements – most notably the practice of categorical exclusion and the standard
assumption of a danger to public order – have not or only to a very limited extent been
followed by other European states. Those are also the elements that continue to be the
subject of criticism put forward by national and international observers.

This policy has driven up the number of 1F-exclusions in the Netherlands. Between
1992 and 2017, 1,000 asylum seekers have been excluded. Internationally, this is an
exceptionally high number. This is partially due to the fact that – unlike in most other
European states – exclusion is considered before inclusion in the Netherlands. This
means Article 1F can also apply to persons that would not fall within the refugee
definition of Article 1A. Nonetheless, the high number of 1F cases in the Netherlands
is also evidence of the Netherlands’ proactive, and relatively strict, 1F policy.

On the basis of the file analysis, several characteristics of the population of asylum
seekers excluded in the Netherlands were discerned. The file analysis showed that
in the period 2000-2010, individuals from Afghanistan are strongly overrepresented.
This can be explained by the policy of categorical exclusion, which means that mere
association with a certain position within a designated organization suffices as a
basis for exclusion; such a categorical exclusion was *inter alia* in place for certain
individuals who are believed to have served in the Afghan security services, police
or the Islamic Unity Party. The other countries of origin in the top ten in this period
are Iraq, Angola, Democratic Republic of the Congo, Sierra Leone, the former
Yugoslavia, Turkey, Iran, Rwanda and Nigeria. The remaining individuals come from
28 other countries. More recently in 2015, the top five of countries of origin of people excluded were Syria, Eritrea, Nigeria, Sudan, and Georgia.

The vast majority of individuals in the sample are excluded on the basis of Article 1F(a), which concerns genocide, crimes against humanity, war crimes and crimes against peace, or a combination of 1F(a) and the other limbs. Excluded individuals from Afghanistan and Iraq are typically believed to have committed war crimes or crimes against humanity as members of the organizations above. Excluded individuals from Angola, the Democratic Republic of the Congo (DRC), Sierra Leone, and the former Yugoslavia are typically believed to have committed war crimes in the 1990s while fighting for either government or rebel forces. Those individuals coming from Rwanda are mostly associated with the crime of genocide; individuals from Iran are often excluded because they allegedly contributed to crimes against humanity in their capacity as employees of secret services or prison security. The files show that for the crimes that fall under 1F(a), people in the lowest ranks are generally overrepresented, with the exception of the Afghan cases. Of the group of non-Afghan cases, the file analysis shows that about one-third are believed to have played a facilitating role rather than having been directly involved in the commission of crimes.

Only 49 out of the 358 cases in the sample are exclusively based on Article 1F(b); within this group, Nigerian and Turkish individuals are overrepresented. Three strands of 1F(b) cases can be distinguished. A first strand of cases are serious common crimes, committed by an individual who seems to be motivated by personal reasons or gain. The alleged crimes found in this group include violent and sexual crimes such as assault, rape and murder, but also transnational crimes such as human smuggling and drug trafficking, and white-collar crime such as embezzlement. A second category of cases concerns acts and/or organizations which were qualified as having a ‘terrorist’ nature by the Dutch immigration service. The cases concern alleged participation in activities such as hostage-taking, armed robbery, arson and murder. Cases in the third strand have in common that the alleged perpetrators were members of (in)formal political, ideological, ethnic and/or religious groups and often claimed that they committed crimes in the context of their membership of these groups.

The Netherlands as a state of refuge can play a role in bringing these alleged perpetrators to criminal justice by either facilitating their rendition to an international or national court outside the Netherlands (aut dedere), or prosecuting these individuals domestically in the Netherlands on the basis of universal
jurisdiction (*aut judicare*). Assessing the possibilities for criminal prosecution by the public prosecutor as a follow-up to exclusion is an integral part of the Dutch 1F policy. As was already mentioned, the analysis of the case files shows that most cases concern international crimes under 1F(a), which means that in most instances prosecution on the basis of universal jurisdiction is – in principle – possible. In those cases where exclusion was exclusively based on 1F(b), criminal prosecution would – in principle – only be possible after extradition to a country that does have jurisdiction.

7.2.2. Facilitation and promotion of criminal prosecution outside the Netherlands

In answer to the second sub question, the study has shown that the Netherlands has occasionally facilitated and promoted criminal prosecution of individuals excluded under Article 1F *outside the Netherlands*. This has resulted in the extradition of two 1F-excluded individuals from the Netherlands to Rwanda (Jean Baptiste M. and Jean-Claude I.) and the transfer of two excluded individuals from the Netherlands to an international court, the ICTR (Simon B. and Ephrem S.). Notwithstanding this relative success, the number of 1F-excluded individuals that have been extradited or transferred still represents only about 0,4 percent of the total number of 1F-excluded individuals in the Netherlands.

Extradition or transfer of individuals who are excluded on the basis of Article 1F of the Refugee Convention has several advantages compared to prosecution on the basis of universal jurisdiction. Prosecuting crimes close to the crime scene is likely to be less demanding in terms of energy, time and resources than prosecuting them from a place far away. A conviction by a court in closer vicinity to the crime scene is arguably also more effective for retributive or reconciliatory purposes. For these reasons, the Dutch government has put significant effort in (facilitating) the extradition of excluded asylum seekers. It has done so not only by (passively) cooperating with extradition requests, but in the case of Rwanda also by actively creating favourable circumstances that would make extradition possible, by strengthening the criminal justice sector in Rwanda by means of capacity building, training and financial input.

The case of Rwanda shows that despite several legal and practical complications and obstacles, it is possible to facilitate and promote extradition of 1F-excluded individuals in this way. In order to address legal obstacles, reforms in Dutch and Rwandan legislation have been made to meet extradition law requirements. Further reforms and other measures have been undertaken by the Rwandan government, supported by the Dutch government among others, in order to take away human rights concerns. These concerns related to the possible imposition of the death
penalty or life imprisonment in isolation; general conditions in detention and prison facilities; the inability of the defence to have witnesses from abroad testify in court; witness protection; the independence of the judiciary and the availability of legal aid. The Dutch government also took practical measures to overcome legal obstacles, for instance by financing the construction of a prison that meets international standards, training members of the judiciary and arranging trial monitoring. Based on *inter alia* these efforts, extraditions to Rwanda have been and continue to be accorded.\(^2\)

However, as discussed in Chapter 4, the case of Rwanda is arguably exceptional. Besides legal requirements posed by extradition and human rights law, essential preconditions for successful extradition include – on the part of the requesting state – willingness to prosecute Article 1F-related crimes, capacity and expertise to prosecute the alleged crimes domestically, and ability to trace alleged perpetrators living abroad. In Rwanda, the circumstances were such that these conditions could be fulfilled: the Rwandan government has always been willing to prosecute alleged perpetrators of the genocide, but also developed the capacity and expertise to prosecute international crimes in addition to investing in the ability to trace alleged perpetrators abroad, and has also been prepared to make modifications to its domestic laws and criminal justice system in order to take away concerns that extradited individuals would not receive a fair trial or would be detained under circumstances unacceptable to the extraditing state. Particular about the case of Rwanda is that prosecuting perpetrators of international crimes was intrinsically motivated; soon after the 1994 genocide, the Rwandan government itself strongly pushed for domestic prosecution of its Hutu génocidaires. States hosting suspects of international crimes can only influence the conditions for successful extradition to a limited extent.

Because of the exceptionality of the Rwandan case, it is not likely that many other (post-conflict) countries will, in the near future, successfully request the extradition of excluded persons residing in the Netherlands. Most states where the alleged crimes

\(^2\) Extradition of individuals to Rwanda has continued after the publication of the article on which Chapter 4 is based (Bolhuis, Middelkoop & Van Wijk, 2014). Besides the two extraditions from the Netherlands in November 2016, the US e.g. extradited Leopold Munyakazi in September of that year (see ‘US deports Rwanda genocide suspect Leopold Munyakazi’, BBC, 28 September 2016, available online at <http://www.bbc.com/news/world-africa-37493505>; last visited 22 September 2017), while Germany extradited Jean Twagiramungu in August 2017 (see ‘Official: Rwanda genocide suspect extradited from Germany’, Fox News, 18 August 2017, <http://www.foxnews.com/world/2017/08/18/official-rwanda-genocide-suspect-extradited-from-germany.html>; last visited 22 September 2017). However, the UK High Court of Justice in July 2017 blocked the extradition of five individuals to Rwanda because extradition would breach Article 6 ECHR; see High Court of Justice, Rwanda v. Ntezirya and others, 28 July 2017, [2017] EWHC 1912 (Admin).
occurred, seem to lack the political willingness or the necessary capacity and ability to locate and domestically prosecute the type of alleged perpetrators residing in the Netherlands. For those willing, such as Turkey, serious challenges exist in relation to extradition law and human rights law requirements. Together with Rwanda, the states which emerged from the former Yugoslavia seem to be the exception, because several individuals have been extradited to these states.\(^3\) It is not coincidental that Rwanda and countries in the former Yugoslavia are the most likely to successfully request for extradition of excluded individuals, as the international community invested substantially in the infrastructure which enables domestic prosecution in these countries, simultaneous to the establishment of the ICTR and ICTY. The extradition to countries such as Rwanda also is not without risks. While the trials of some of the extradited individuals are subject to international monitoring, there still is a possibility that the trials are unfair, which could negatively impact future willingness of the Dutch or other extradition judges to approve extradition requests.\(^4\)

7.2.3. Criminal prosecution of excluded individuals in the Netherlands

In answer to the question to what extent and in what ways the Netherlands has criminally prosecuted individuals excluded under Article 1F domestically, this study has shown that since 1992 only five individuals excluded under Article 1F have been criminally prosecuted in the country. Four of them have been convicted (Hesamuddin H. and Habibullah J. from Afghanistan, Joseph M. from Rwanda and Sebastien N. from the Democratic Republic of the Congo); hence, the number of domestically prosecuted 1F-excluded individuals represents about 0,5 percent of the total number of 1F-excluded individuals in the Netherlands. Despite a strong commitment to advancing the criminal prosecution of excluded individuals domestically and a standard assessment of the opportunities for prosecution in exclusion cases by the prosecutor, this low number illustrates the legal and practical challenges and complexities of domestic prosecution of excluded asylum seekers by states of refuge.

\(^3\) This is confirmed by the extraditions from the Netherlands of Senad A. and Damir L. to Bosnia and Herzegovina in 2010 and 2016 respectively, and Veljko S. to Croatia in 2016 (the first two of them are known to have held the Dutch nationality or a permanent residence permit, which means they have not been excluded on the basis of Article 1F). See <https://www.om.nl/onderwerpen/kopie-international/rechtszaken-per-land/bosnie/> (last visited 22 September 2017) and Kamerstukken II 2016/17, 34550 VI, no. 105, 8 March 2017. By April 2017, an estimated 28 individuals from different states had been extradited to Bosnia and Herzegovina alone, and 9 more extradition requests were pending; see ‘Bosnia awaits extradition of nine war crimes suspects,’ Balkan Insight, 5 April 2017, available online at <https://www.balkaninsight.com/en/article/bosnia-awaits-extradition-of-nine-war-crimes-suspects-04-05-2017/> (last visited 22 September 2017).

\(^4\) In this context, the July 2017 decision by the UK High Court in *Rwanda v. Nteziryayo and others* (supra note 2) could become influential in other countries, thereby making the extradition option more difficult even for Rwanda.
As elaborated in Chapter 5, the criminal prosecution of excluded individuals is hindered by a number of complications and challenges that are inherent to universal jurisdiction prosecutions in general. A first legal obstacle is that many of the alleged crimes took place before the coming into force of the Dutch International Crimes Act, meaning Dutch courts lack jurisdiction unless these crimes were covered by international treaties in force at the time. Practical complications hindering proper investigation are first of all caused by the passage of time between the alleged occurrence of the crimes and the assessment whether or not to prosecute, that characterises these cases. The more time has passed, the more complicated it is to collect evidence and find witnesses, and the more likely the reliability of witness statements decreases due to memory effects. The empirical analysis of the population of excluded asylum seekers in the Netherlands based on the 1F case files confirms that typically at least several years have passed between the moment of arrival and the commission of the alleged crime. A second practical challenge is access to and cooperation with the country where the crimes were committed. The empirical analysis of the population of excluded asylum seekers demonstrates that these individuals typically come from countries that are unsafe and difficult to access and cooperate with. A third practical challenge is that many of the excluded individuals are ‘insignificant’ individuals, which further complicates finding evidence and reliable witnesses. The empirical analysis shows that the population of excluded asylum seekers ranges from people in the lowest ranks, such as foot soldiers who have fought for the Uganda People’s Defence Force or UNITA’s rebel force in Angola, to high-level Afghan provincial governors and Rwandan politicians. Typically, however, the excluded asylum seekers are believed to be low-level perpetrators, a number of whom are also believed to have played a facilitating role, rather than being directly involved, in the commission of crimes. It is easier to identify witnesses who can testify about the acts of a well-known (local) politician, a general or rebel leader than those of a regular foot soldier. The four successful prosecutions all concern individuals who were relatively well-known or notorious at the time when, and in the area where, their crimes occurred; the majority of the excluded asylum seekers in the Netherlands are, however, ‘insignificant’ individuals. A final practical issue is the resource-intensiveness of these prosecutions and the large burden that this type of investigations places on the available capacity within the law enforcement and prosecution services.

5 These challenges are illustrated by the case of Joseph M., one of the four convicted 1F-excluded individuals. Although he was convicted, some have questioned the reliability of the witness statements that have been used in this case. In the context of the Project Gerede Twijfel [‘Beyond reasonable doubt’ project] at VU University Amsterdam, a team of researchers concluded that the witness statements are unreliable and an insufficient basis for a conviction (De Bruïne, De Boer, Dehaene, Vredevelt, & Van Koppen (2017)).
Many of the above-referred to challenges are problems related to (domestic) prosecution of international crimes in general. The domestic prosecution of 1F-excluded individuals by states of refuge, however, presents some additional challenges and complications that are inherent to the nature of exclusion cases. Arguably, the most important reason why most exclusion cases will not be followed up by criminal prosecution is the large gap between the threshold to exclude someone from refugee protection ('serious reasons for considering') and the threshold required to hold someone individually accountable in criminal law ('beyond reasonable doubt'). Because of this large gap, firstly the type of information that suffices to substantiate a 1F decision does not reach the level of detail or precision that is required to support a conclusion that someone beyond reasonable doubt is individually guilty of, and responsible for, the crimes in question. The sources that are used in the context of exclusion, are not specific: they draw general conclusions about possible crimes committed but typically do not provide explicit leads about individuals involved, except perhaps the most notorious. A second complication relates to the reliability of the information that is used to substantiate 1F decisions. As the analysed cases show, 1F decisions are for an important part based on personal statements of the excluded individuals themselves. While such statements in principle would seem to be very suitable as evidence in a criminal case, it cannot be ruled out that applicants who are unaware of the existence of Article 1F might embellish or fabricate stories, hoping that this will convince immigration officials that they risk persecution upon return and that it will thus increase their chances of obtaining refugee protection. The case files contain several examples that suggest that applicants exaggerated or even fabricated their role in organizations and crimes. In addition, these decisions rely heavily on ‘authoritative’ reports from (inter)governmental organizations and NGOs, but such reports are written for other purposes than allocating individual criminal responsibility.

Because of these different challenges and complications, only in a very limited number of cases, a 1F file forwarded by the immigration service will offer prosecution agencies a good perspective for a conviction for crimes that the individual is believed to be guilty of.

7.2.4. Those who are not prosecuted
If less than 1 percent of the excluded individuals is either extradited or domestically prosecuted, what happens to the others? In the Netherlands, besides the standard assessment of the possibilities for criminal prosecution by the public prosecutor, these individuals receive an entry ban or are declared persona non grata. This means that they have no legal right to stay and, in principle, have to leave the country immediately.
A substantial part of the 1F-excluded individuals are, however, ‘unremovable’ for various legal or practical reasons. Legal reasons in particular stem from the principle of non-refoulement which does not allow forced removal to the country of origin or any other country where there is a real risk of serious harm to the individual, e.g. under the European Convention on Human Rights (ECHR) or the Convention Against Torture (as was noted in Chapter 3, such an impediment to refoulement was in place for about a third of the excluded individuals between 2007 and 2014). Practical reasons that may lead to unremovability include in particular lack of travel documents or non-cooperation by the excluded individual or the state of origin.

Being unremovable does not lift the obligation to leave the Netherlands. Once a decision invoking Article 1F has been issued, the alien in question not only loses the right to stay on Dutch territory because of the entry ban, but any access to other forms of residence permits is also explicitly blocked. 1F-excluded individuals thus do not receive any form of temporary leave to stay. For as long as they are unreturnable, these individuals are destined to live a life in “legal limbo” and are faced with serious economic, social, and psychological challenges, as becomes clear from a study by Reijven and Van Wijk (2014a: 12-16). The individuals are not entitled to social allowances, employment, or education, and can only rely on a minimal level of legal aid and urgent primary healthcare. They constantly risk being arrested and avoid casual work or engaging in ‘survival criminality’ in order not to attract attention or lose support from individuals or organisations concerned with their fate. They depend heavily on such assistance, which is often offered by their family members. Allowances of those family members can be cut if the authorities believe that an undocumented migrant is benefiting. The dependence on the family can also lead to tensions within the family. Finally, excluded individuals experience different kinds of mental and physical health problems due to the great uncertainty and the experienced hopelessness of their situation (ibid.). At the end of 2016, at least 110⁶ 1F-excluded individuals remained in the Netherlands despite an obligation to leave. In reality, this number is likely to be higher, as the authorities do not have everyone on the radar.⁷ While the obstacles to removal are of a temporary nature

---

⁶ Kamerstukken II 2016/17, 34550 VI, no. 105, 8 March 2017, 7.

⁷ Out of the 358 cases analysed, 169 cases were marked as ‘MOB, met onbekende bestemming vertrokken’ [left with unknown destination] in the administrative system of the IND. While the assumption is that an individual marked as MOB has left the Netherlands, in reality this status means that his whereabouts are unknown, which means he may have also ‘disappeared’ into illegally or found (legal) residence in another European country.
and the Netherlands periodically assesses whether deportation is feasible,\textsuperscript{8} by the year 2017, some of these individuals have been in legal limbo in the Netherlands for twenty years.

In response to this situation, an unknown number of 1F-excluded individuals have, rather than making use of institutionally arranged relocation schemes, engaged in self-arranged modalities of relocation by means of taking the ‘Europe route’. In these cases, 1F-excluded individuals who have a (family) relationship with a Union citizen, have moved to surrounding countries such as Belgium in order to invoke entitlements pursuant to the EU Citizenship Directive. The analysis of 1F cases also shows that individuals who have been excluded in the Netherlands have tried – and sometimes succeeded – to obtain legal residence in other European states, as have individuals excluded elsewhere tried – and perhaps succeeded – to obtain legal residence in the Netherlands. As a consequence of an inconsistent or lacking post-exclusion policy in Europe, possibly dangerous unwanted but unreturnable individuals travel around in Europe, while immigration authorities of the respective countries where they set foot toss these ‘hot potatoes’ around in the hope that they themselves do not have to deal with the matter. With the ever-increasing attention for Article 1F also outside the Netherlands, European states are likely to be confronted with more 1F exclusions in the future. However, as it stands, they do not have a coherent approach on how to deal with these individuals after exclusion.

In sum, the policies of the Dutch government with respect to 1F exclusion and the criminal prosecution of international crimes have resulted in a relatively large number of excluded asylum seekers, and different efforts to promote their criminal prosecution. The Dutch government has put significant effort in (facilitating) the extradition of excluded asylum seekers. It has done so not only by (passively) cooperating with extradition

\textsuperscript{8} If the situation in the country of origin is deemed safe enough, a previously unremovable excluded individual could be deported. As the figures presented in §3.2.2 show, the number of unreturnable excluded individuals was much higher when the government started publishing this information in 2008 (280 individuals), than it was at the end of 2016 (110 individuals). More than half of the 280 individuals in 2008 reportedly originated from Afghanistan, a country which in general has been deemed safe to return to from 2014 onwards. The size of the group of unremovable Afghans in the caseload of the Departure and Repatriation Service DT&V has indeed decreased substantially in the period 2014-2016. This does not necessarily mean that the number of deportations of Afghans has also increased, however. Both in 2015 and 2016, for instance, about 60 percent of individuals in the caseload were reportedly Afghans, while the caseload decreased from 150 in 2015 to 110 in 2016 (see Kamerstukken II 2015/16, 34300 VI, no. 89, 23 May 2016 and Kamerstukken II 2016/17, 34550 VI, no. 105, 8 March 2017). This implies that of the 40 cases no longer in the caseload in 2016, also about 60 percent (about 24 individuals) originate from Afghanistan. The number of independent and forced departures, however, totals 10. If the 10 ‘known’ departures would all concern Afghans, then still 14 others ‘left with an unknown destination,’ which means they may also have disappeared into illegality or have found legal residence in another European country, possibly because they were aware that deportation to Afghanistan had become possible. Furthermore, while the DT&V caseload is decreasing, there are also new groups of unremovable excluded individuals that are protected against refoulement, such as Syrians.
requests, but in the case of Rwanda also by actively creating favourable circumstances that would make extradition possible, by strengthening the criminal justice sector in Rwanda by means of capacity building, training and financial input. Furthermore, the Dutch government has equipped its own criminal justice system to domestically prosecute excluded asylum seekers, by changing laws and investing in the capacity of its law enforcement and prosecution services. However, despite the strong commitment to the objective of administering criminal justice to excluded asylum seekers, because of different legal and practical complications, less than 1 percent of the excluded asylum seekers have been criminally prosecuted in the Netherlands or elsewhere, let alone convicted,\(^9\) for crimes that previously led to their exclusion. Finally, the Dutch 1F policy has also resulted in a considerable number of excluded asylum seekers who have not been prosecuted but cannot be removed and have ended up in a ‘legal limbo’.

7.3. Strengths and limitations of the study

Like every study, this study too has its methodological strengths and limitations. A first strength is its in-depth focus on one very suitable state of refuge, the Netherlands, which has excluded a relatively large number of asylum seekers on the basis of Article 1F. The Dutch government has gone to great lengths to promote the criminal prosecution of these individuals and equip its criminal justice system to process international crimes cases.

Another strength is the wealth of information available in the Netherlands on the application of Article 1F and subsequent criminal prosecutions. A lot of information on the application of Article 1F in the Netherlands is publicly available. In addition, access was obtained to the immigration files of all cases in which a decision to invoke Article 1F was taken between 2000 and 2010 in the Netherlands. This has made it possible, for the first time, to give an overview of a complete population of 1F-excluded individuals in a given country, over a longer period. This makes the Netherlands an ideal case for studying the role states of refuge (can) play in the administration of criminal justice to 1F-excluded individuals.

A final strength is the use of the multi-method approach, which makes it possible to combine insights from the case files, interviews, academic literature, case law and policy documents. Whereas the analysis of regulations, policy documents and case law has produced insight into the Dutch government’s position on the criminal prosecution

\(^9\) Four out of five excluded asylum seekers prosecuted in the Netherlands have been convicted (see §7.2.3). Of the four excluded asylum seekers extradited and transferred (see §7.2.2), the two individuals transferred to the ICTR have been convicted (see <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/rwanda/>; last visited 27 September 2017), while the cases of the two excluded individuals extradited to Rwanda are still ongoing.
of excluded individuals, the interviews have given new insights into how policy considerations work out in practice. Whereas the academic literature has allowed a structured analysis of the legal and practical challenges that the criminal prosecution of excluded individuals entails, the knowledge about the composition of the population of excluded individuals and the substantiation of exclusion decisions from the case files, and the interviews with experts and practitioners in the field, have given insight into how these challenges work out in practice.

The fact that the study mainly focuses on a single country, which could make it difficult to generalize the findings to other states of refuge, could be seen as a limitation of the study. On the one hand, the Netherlands does indeed present an atypical case: it has been a ‘frontrunner’ with respect to 1F exclusion and unlike many other states it uses the policy of ‘categorical exclusion’, which results in a larger number of excluded individuals. Furthermore, in relation to the criminal prosecution of excluded individuals, the Netherlands has arguably ‘pioneered’ and other states may now and in the future be relatively more successful because they can build on the early experiences of states such as the Netherlands. On the other hand, however, the case of the Netherlands is not so different that these findings are irrelevant with respect to other states of refuge. Although the number of excluded individuals is expected to be lower in other states, the nature of exclusion cases is unlikely to be very different. It can be expected that also in other states, excluded individuals will mainly be rather ‘insignificant’ individuals who held low or mid-level ranks. Most other states of refuge – in any case within Europe – are subject to the same refugee law and human rights law regimes, which means inter alia that the expected legal challenges with respect to extraditing and prosecuting the individuals are similar. Practical challenges in this respect are also unlikely to be different.

The available empirical work shows that since the 1990s there have been a considerable number of domestic prosecutions in the Netherlands and other countries, especially in Europe, of international or other serious crimes committed elsewhere (Rikhof, 2012; 2017). However, many of those cases do not concern 1F-excluded individuals, but individuals who had legal residence or even held the nationality of the state where the prosecution took place. Previous research has demonstrated challenges in relation to

10 Rikhof (2017) presents an overview of international crimes prosecutions undertaken by countries including the Netherlands, Germany, Sweden, France, Belgium, Finland, Norway, Switzerland, Austria, Denmark, Spain, the UK, Canada and the US.

‘unremovability’ of excluded individuals are also similar in other countries (see Bolhuis & Van Wijk, 2015b; RLI/CICJ, 2016). In fact, considering the wealth of information, the large 1F population and the efforts of the Dutch government aimed at promoting criminal accountability of this group, the Netherlands arguably offers the most suitable case available for answering the research questions posed in this study.

The fact that the case files have only been analysed until the year 2010 could also be seen as a limitation of this study. The study has looked retrospectively, which means the current status of the cases cannot be assessed. Since the start of data collection (end of 2010) at least 140 additional 1F decisions have been taken, often with regard to different nationalities and different contextual settings compared to the cases analysed here: the number of exclusion decisions relating to asylum seekers from Afghanistan has decreased since 2010, while the number of exclusion decision relating to individuals from Syria, for instance, has increased. However, the structural problems, such as the lack of possibilities for extradition, the gap between the different standards of proof, or the challenges in relation to evidence collection have remained the same. Furthermore – assuming that those cases in which 1F exclusion is followed up by criminal prosecution are usually publicized – publicly available information does not suggest that the number of criminal prosecutions of excluded asylum seekers has increased. This suggests that the conclusions of this study will hold for other time periods.

7.4. Discussion

At the time when the Refugee Convention was drafted, the world was recovering from two consecutive World Wars that had displaced great numbers of individuals. The exclusion clause was included in the Convention to ensure that ‘undeserving’ individuals who were guilty of serious crimes would not abuse the protection offered to refugees, thereby avoiding being held criminally accountable. Much has changed since the signing of the Refugee Convention in 1951. The scope of the Convention has been broadened,13 and the Convention has since been supplemented by regional instruments establishing refugee and subsidiary protection such as the EU ‘Qualification Directive’.14 Conflicts

---

12 This is based on the information provided in the Ministry of Security and Justice’s annual reporting letters on international crimes since 2011. Figures for 2012 are missing.


that have occurred since the Second World War have forcibly displaced an ever-larger number of people. The system of international protection is arguably more relevant than ever.

At the same time, the dynamics of migration have changed. Increased overall mobility and opportunities to travel to Western – in particular European – states, as well as increased awareness of these possibilities and of the procedures and rights in connection to asylum among migrants, *inter alia* due to the rise of the internet and social media, have not only resulted in an increased number of migrants in general, but also in diffusion of refugees and economically motivated migrants. ‘Who comes in’ and ‘who is worthy of protection’ is increasingly subject of political debates. Indeed, in tandem with the growing scale of migratory movements, calls to scrutinize the background of immigrants, and asylum seekers in particular, have increased. This scrutiny first of all relates to the entitlement of immigrants to international protection. On the basis of the Refugee Convention, but also based on concerns within the receiving society, governments in states of refuge are expected to separate individuals genuinely in need of international protection from other groups of migrants (including economically motivated migrants). They are in addition expected to identify and exclude ‘undeserving’ individuals who are believed to be guilty of serious crimes. Secondly, the increasing scrutiny is reinforced by increased emphasis on the security ‘risks’ of migration, partly given in by concerns in relation to the threat of terrorism, but also by increasing anti-immigration sentiments in receiving societies caused by the growing volume of immigration and the presumed resulting changes in these societies. This emphasis is evidenced by processes that have been described by scholars as the ‘securitisation of migration’ (the presentation of migration as a security problem; Huysmans, 2000: 756-7) and ‘crimmigration’ (the merger of criminal law and immigration law; Stumpf, 2006: 376). Finally, the growing scrutiny can be explained from the growing commitment to the aspiration of closing the ‘impunity gap’ for international crimes. This growing commitment is evidenced by the establishment of international courts and increasing possibilities for prosecuting perpetrators of international crimes, as well as the call upon states of refuge to prosecute them.

Hence, while the importance of the system of refugee protection still stands, upholding the integrity of the international protection system has arguably never been more relevant. More and better-informed migrants, driven by more diverse motives, are coming in, and the expectations from the governments within the receiving societies to prevent unentitled, undeserving and/or dangerous individuals from obtaining

---

15 See also Dauvergne (2013: 82).
asylum, are high. It is within this area of tension that policy and decision makers in the immigration domain have to operate.

With these developments, the use and function of the exclusion clause have also changed. The increasing relevance of Article 1F from the 1990s onwards can be explained from the different developments described above. The increased scrutiny of immigrants has resulted in maximizing the opportunities to use 1F exclusion by some states, or even the stretching of the possibilities of 1F exclusion. Consequently, some observers conclude, to their discontent, governments increasingly consider the exclusion clause to be a tool to protect the community in the state of refuge, rather than to protect the integrity of the protection regime.

This study focused on the exclusion clause’s function of preventing perpetrators from escaping criminal prosecution. As the exact scope and nature of the obligation to extradite or prosecute excluded individuals are unclear, what role states of refuge see for themselves in administering criminal justice to excluded asylum seekers arguably depends on what role they see for themselves in fighting impunity of international crimes. As discussed in this thesis, the Netherlands has in this regard taken a proactive stance, probably even reaching beyond its legal obligations. The Dutch Minister of Justice once remarked that “The Netherlands has chosen to lead the way internationally in the criminal investigation and prosecution of international crimes” and, on another occasion, underlined the government’s aspiration to “let justice take its course as much as possible with respect to persons to whom Article 1F Refugee Convention applies”.

A key element of the policy is the standard assessment of the feasibility of criminal prosecution based on the 1F casefiles by the criminal prosecutor. The designation of specialised units within the immigration, law enforcement and prosecution services and the accompanying allocation of budget, is telling in itself of the degree of importance afforded to criminal prosecution of international crimes in the Netherlands. Such a proactive attitude can be applauded from the perspective of ‘closing the impunity gap’.

---

16 As Larsaeus (2004: 70-71) notes, “the efforts invested in the criminal prosecution of a crime committed abroad will correlate with the perceived importance of bringing the perpetrators to justice. This in turn will be affected by what the state sees as its obligations”. Although states may be under a duty to prosecute some of the crimes that fall within the scope of article 1F, Gilbert and Rüsch (2014: 1109) have argued that “[t]he wide variation in competences that has developed over time and the reliance in all cases on states having implemented their treaty obligations to the fullest extent in domestic law means that impunity is still possible despite any international duty to prosecute or extradite.”

17 Kamerstukken II 2008/09, 31200 VI, no. 193, 9 September 2008.


19 Human Rights Watch (2014: 32) has described the Dutch specialised units within the immigration, law enforcement and prosecution services as “the most robust and well-resourced units in the world dedicated to pursuing grave international crimes on the basis of universal jurisdiction.”
However, despite strong commitment to bringing 1F-excluded individuals to justice, less than 1 percent of them have actually been criminally prosecuted in the Netherlands or elsewhere, let alone convicted. Taking into account that the successful criminal prosecution of an individual excluded under Article 1F will remain a sporadic occurrence, one that only occurs when different favourable circumstances that are largely outside the sphere of influence of a state of refuge happen to coincide, the prospects for states of refuge committed to closing the impunity gap by criminally prosecuting 1F-excluded asylum seekers is not promising. As far as the function of promoting criminal accountability is concerned, a strict 1F policy and subsequent efforts to prosecute 1F-excluded individuals do not seem to have had the desired effect.

This, however, does not necessarily mean that the application of the exclusion clause and investing in subsequent prosecutions serves no purpose at all. 1F exclusions combined with even a limited number of extraterritorial international crimes prosecutions may already impact the decision making of perpetrators as to whether or not they should seek asylum in certain countries.\textsuperscript{20} No matter how many 1F-excluded individuals are \textit{de facto} prosecuted, a strict 1F policy and focus on subsequent prosecutions may already suffice to discourage perpetrators to search for a ‘safe haven’ in a given country. Whether or not such an effect really exists, however, is difficult to assess, and would require empirical research on the decision-making process of perpetrators trying to find a safe haven.

Where the ‘Dutch approach’ of applying a strict 1F policy and subsequently trying to promote the criminal prosecution of 1F-excluded individuals is not promising as a tool to close the impunity gap and may only theoretically discourage perpetrators from finding a safe haven, it should be noted that such a policy also has considerable side-effects for the state of refuge. As this study demonstrates, it results in a considerable number of excluded individuals whose guilt or responsibility will never be properly determined in a criminal trial, who cannot be removed and end up in a ‘legal limbo’. If this legal limbo lasts for many years, this makes the exclusion policy vulnerable to criticism and resistance. On the one hand, the durable presence of a group of unwanted but unremovable individuals leads to criticism and close scrutiny from politicians, who demand regular updates on the size of this group and the efforts to remove them. On the other hand, human rights advocates and other interest groups may criticise the hopeless situation of the unremovable 1F-excluded individuals and the lack of ‘closure’

\textsuperscript{20} In this regard, also see Rikhof (2017: 112) who argues: ‘[...] it is to be expected that even a modest level of prosecutions could very well have a deterrent effect, perhaps not on the commission of international crimes, but at least on the choice of perpetrators fleeing their crimes to enter, remain or seek asylum in a country that prosecutes such international crimes.’
in these cases. Illustrative in this regard, as discussed in chapter 3, is the longstanding debate in the Netherlands on how to deal with excluded individuals from Afghanistan, some of whom have been unremovable for up to twenty years.21

In the Netherlands, such criticism is arguably even more vocal than in other countries, as the applicability of Article 1F is extended to all other forms of legal residence, which strips the 1F-excluded individuals of any right to a residence permit. This expansion is understandable from the ‘no safe haven’-perspective, but does raise the question how such an expansion relates to the original intentions of the drafters of the Refugee Convention, who (merely) wanted to prevent abuse of the system of refugee protection. Moreover, a strong emphasis on removal and barring access to any other form of legal residence – a broad conception of the ‘no safe haven’ mantra – arguably undermines the function of promoting criminal accountability.22

As was noted before, the difficult circumstances and the inconsistencies in exclusion and post-exclusion policies in Europe have the effect of tossing around excluded individuals like ‘hot potatoes’. They also have the effect of excluded asylum seekers using creative strategies to ‘relocate’ themselves in other European states that are unaware of the previous exclusion and/or take less of a strict approach to Article 1F.23 The fact that these individuals still manage to find ways to legally reside in Europe can be seen as problematic. Unwanted and possibly dangerous individuals continue to live in Europe and are likely to escape criminal accountability, because their background is likely to remain unknown to the authorities as long as they do not apply for asylum but obtain residence on other grounds (Bolhuis & Van Wijk, 2015b). Furthermore, by making staying in one state of refuge so unattractive that excluded asylum seekers feel forced to move on, that state in fact counts on other states to ‘solve’ the limbo situation it has created. At the same time, from a national perspective it can be argued that the use of this ‘Europe route’ offers a pragmatic solution for a ‘deadlocked’ situation: an alleged war criminal, who cannot be deported, has left the country, without complex legal procedures and without violating any international obligations. This option could however enable actual perpetrators of international crimes to find a safe haven and escape prosecution, which from a more universal perspective is undesirable.

21 In this context, also see Yakut-Bahtiyar (2015).
22 As Gilbert and Rüsch (2014: 1093) note: “Governments are drafting policies in isolation that focus only on their specific needs – usually involving a simple removal of the individual from that state – such that protection offered through international human rights law and non-impunity are both ignored and remain unaddressed.”
23 In Germany, Sweden and Norway, for instance, excluded individuals can obtain temporary or permanent residence statuses, e.g. on the basis of family reunification; see RLI/CICJ (2016).
This study shows how strong prioritisation of promoting criminal accountability of excluded individuals does not result in the conviction of a substantial number of excluded individuals. At the same time, it is questionable whether a strong insistence on the ‘no safe haven’ rationale increases domestic security if it results in the durable presence of a group of unwanted but unremovable undocumented individuals without proper means of subsistence whose guilt remains undetermined. The findings of this study do not tell to what extent the application of Article 1F serves the function of protecting the integrity and credibility of the international protection regime. Arguably, however, the integrity and credibility of the asylum system can also be undermined by a too strict application of the exclusion clause.

Different perspectives that may coincide but may also be incompatible underlie the application of the exclusion clause: the national and the universal perspective, the migration, the human rights and the prosecution perspective. The functions and objectives that the exclusion clause can serve are not clearly defined or universally agreed upon, nor are they made explicit by states of refuge that apply the exclusion clause. This leads to fundamental questions. For example, is a 1F policy a success if many individuals are excluded, subsequently deported, but never prosecuted? From a narrow, national perspective of providing ‘no safe haven’ to alleged perpetrators of serious crimes, one might argue it is. Yet, from the universal perspective of preventing perpetrators from escaping prosecution it arguably is not as countries of origin are often not able or willing to engage in prosecution. Or is the policy a success if it results in a considerable number of excluded individuals who cannot be removed and can neither be prosecuted? From a narrow, national policy makers’ perspective it arguably is not, in particular if it leads to heavy resistance, social unrest and criticism within the state of refuge. Yet, from the universal perspective of protecting the integrity of refugee protection it arguably is not necessarily problematic.

The lack of explicit goals, makes 1F policies susceptible to criticism. The purposes of exclusion and the expectations from states of refuge post-exclusion therefore require further clarification.
7.5. Implications for policy and practice

The findings of this study highlight the challenges in relation to the function of promoting criminal accountability for perpetrators of serious crimes that the exclusion clause is assumed to have, and the ability of states of refuge – which are crucial actors in this respect – to support his function. In this section, it will be assessed what this means 1) for the contribution states of refuge can make to the aspiration of closing the ‘impunity gap’ for the most serious crimes and the role of the exclusion clause in that context, and 2) for the application of the exclusion clause.

Implications for the criminal prosecution of excluded individuals and the ‘fight against impunity’

In the European context, the European Commission has stressed that “despite the serious obstacles [...] criminal prosecution by the international community, both at global level as well as Member States level, of those persons having committed crimes against humanity, war crimes or terrorist attacks, and excluded from protection regimes, is an appropriate response”. If states do see a role for themselves to contribute to the fight against impunity for international crimes, it is important that those tasked with criminal prosecution acknowledge the limited value of files and do not dismiss other sources. Universal jurisdiction prosecutions present tremendous challenges and warrant strong evidence and well-resourced and well-equipped criminal justice actors. They also require lasting investment in the capacity of these actors, also in times when other priorities such as the threat of terrorism demand attention. Still, only very occasionally will the case of an excluded individual offer a good prospect for criminal prosecution.

As this study demonstrates, any suggestion that exclusion of asylum seekers will naturally be followed by criminal prosecution in many cases is illusive. Efforts to prosecute 1F-excluded individuals may at best narrow the ‘impunity gap’ that exists for perpetrators of international crimes, but it is an illusion that these efforts can close this gap. However, there are several opportunities to improve the chances of success in the future. The lack of harmonization of 1F policies, and the insufficient information exchange and lack of cooperation on 1F exclusion between national law enforcement and prosecution agencies, and between national immigration authorities, means opportunities for prosecution are possibly missed (Bolhuis & Van Wijk, 2015b). As elaborated in Chapter 2, several initiatives have been taken to increase the cooperation

---

on the governmental level, between national law enforcement and prosecution agencies on the international level (the EU Genocide Network, the extension of the Europol mandate to include genocide, crimes against humanity and war crimes, and the negotiation of an international mutual legal assistance treaty) and also between national immigration services (the establishment of an exclusion network). Successful criminal prosecution of international crimes is often dependent on close cooperation between states of refuge and states where the crimes occurred, but also other states of refuge. Furthermore, information from exclusion cases and more generally from immigration cases in one state, may be relevant to criminal cases in other states, because they may for instance hint to witnesses. In addition, cooperation is not limited to the governmental level, as different promising initiatives that have been taken to promote universal jurisdiction prosecutions in relation to Syria show. One of these is the collection of evidence against members of the Syrian regime by the Commission for International Justice and Accountability (CIJA). Spokesperson Bill Wiley told the New Yorker that “the commission has also identified a number of ‘quite serious perpetrators, drawn from the security-intelligence services,’ who have entered Europe. ‘The CIJA is very much committed to assisting domestic authorities with prosecutions.’”25 States of refuge can financially support initiatives like this.26 Finally, it has been suggested that Western states can support criminal prosecution in areas where perpetrators have fled, including the refugee camps in Lebanon, Jordan and Turkey27 – similar to how the Dutch government has supported criminal prosecutions in Rwanda. These initiatives may be beneficial to the criminal prosecution of excluded individuals and therefore states of refuge can support those to contribute to closing the impunity gap.

Implications for the application of the exclusion clause
The UNHCR (2003b: 3) has stressed that “as with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and should be used with great caution.” The developments that have been described above suggest a tendency in an opposite direction, where states lean towards an expansion of the use and function of Article 1F. In addition, as discussed above, the objectives that

---


26 In addition, they can possibly benefit from a collection of fifty-five thousand photographs of bodies of detainees, that have been smuggled out of Syria by a former military-police photographer – the ‘Caesar-files’ (supra note 25) – or the work done by the International, Impartial and Independent Mechanism (IIIM) on international crimes committed in the Syrian Arab Republic, established in December 2016 (see Kamerstukken II 2017/18, 34775 VI, no. 7, 10 October 2017).

the exclusion clause should serve are not clearly defined or universally agreed upon, which makes it difficult to assess whether an exclusion policy is ‘successful’. In any case, in order for any of the supposed purposes to be reached in a meaningful way, any narrow national focus needs to be abandoned and a harmonized, consistent European approach is needed.\(^{28}\)

Nonetheless, some of the abovementioned challenges could be overcome by changing or modifying national policies. An obvious first option is to increase the number of removals or returns. This will, however, be far from easy. States such as the Netherlands (see Chapter 3) and the UK (see Singer, 2017) already have a strong focus on removal and in actual practice deportation of excluded asylum seekers simply proves to be very challenging. Another option would be to provide unremovable excluded individuals with incentives to return voluntarily to their country of origin or elsewhere, for instance by making IOM reintegration packages also available to excluded individuals. Although it is unlikely that large numbers of ‘unremovable’ 1F-excluded individuals will suddenly return, it might be an effective incentive in some cases. Furthermore, states of refuge could more actively search for third states willing to consider relocation or more actively engage in setting up ‘diplomatic assurances’ with third states. Again, it is unrealistic to expect this will lead to the departure of large numbers of excluded asylum seekers. A disadvantage of increasing removals or returns is that it probably reduces the likeliness that excluded individuals will be criminally prosecuted.\(^{29}\)

Apart from trying to increase the number of removals, a second option is to bring down the number of excluded individuals by increasing the threshold for exclusion. Assessing inclusion before exclusion would be one way to reduce the number of exclusions. Another way would be to restrict exclusion to the most serious cases or cases in which there are clear indications of direct personal involvement, or to take into account the seriousness of the case or the degree of personal involvement. The UNHCR (2003b: 7) urges in its guidelines on the application of Article 1F that the

\(^{28}\) See also Holvoet (2014: 1048), who argues that “the existence of divergent interpretations of the same law or different conclusions in similar factual situations creates uncertainty and unpredictability”; and could result in “forum shopping”, which “could encourage courts to adapt their decisions to certain policy goals, to the detriment of an objective approach to justice”; and Li (2017) who advocates a harmonizing interpretation of the exclusion clauses. It is questionable, however, whether European states are prepared to accept a harmonized approach. As RLI/CICJ (2016: 5) concludes, “Arguably [EU member states] prefer retaining full discretionary powers in dealing with [irregular migrants], rather than being subjected to a harmonized approach”.

\(^{29}\) Lafontaine (2014: 98) notes “[…] deportations and removals are quite unsatisfactory as they offer a mild version of justice: there is no proper accountability of the alleged perpetrator, no satisfaction or reparation to the victims and very little truth telling associated with the processes”. With respect to deportation, a Canadian war crimes official remarked to Stover, Peskin and Koenig (2016: 224) that “the big dilemma […] is what to do with people found to be war criminals in [national] refugee systems [when] you can’t guarantee trial if you deport them.”
exclusion clauses must be applied “in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion”. With respect to the ‘categorical exclusion’ of designated groups, inter alia the UNHCR has stressed that exclusion should be based on individual assessments.  

A third option is to more closely monitor the group of unremovable individuals. This could be done by imposing strict conditions, such as forcing the individuals to reside at a designated location or imposing a reporting duty (as is done in Denmark and the UK; Bolhuis & Van Wijk, 2015b). However, such measures have far-reaching consequences for the individuals concerned and heavily infringe their human rights. It is questionable whether this is justified by the basis for their exclusion from asylum: an assessment that there are serious reasons for considering that they are guilty of serious crimes, but not a proper, definitive determination of their guilt. Another option would be to give them a provisional legal status, a temporary leave to stay, to which conditions can be connected in order to keep excluded individuals in sight, but which would allow the individuals to continue their lives to some extent by making it possible to work or enjoy education, without granting the full array of rights connected to refugee status.

While through these measures the number of unremovable and unprosecuted excluded asylum seekers may be brought down, or side-effects may be limited, the number of successful criminal prosecutions of 1F-excluded individuals is unlikely to increase substantially. This study demonstrated that precisely because of this reason, Article 1F should first and foremost be considered to be an immigration tool that serves to warrant the integrity and credibility of the international protection regime. For the discussion on the interrelationship between exclusion and prosecution, it would be helpful if state authorities and commentators came to acknowledge that 1F-excluded individuals on the one hand, and convicted (war) criminals on the other, are just different categories.  

Excluding an asylum seeker follows from an assessment, made in the context of an immigration procedure, that there are ‘serious reasons for considering’ that someone has committed serious crimes. For someone to be convicted for international crimes, guilt has to be established ‘beyond reasonable doubt’ by a criminal court. The two should not be mixed up. Even if the number of excluded individuals goes down, and even if the number that is prosecuted will double, triple or quadruple, as long as the threshold to exclude is set considerably lower than

30 See e.g. UNHCR (2009: 7); Letter of the UNHCR Deputy Regional Representative dated 9 July 2009, available online at <https://zoek.officielebekendmakingen.nl/blg-34204.pdf> (last visited 28 September 2017).

31 The fact that many of those convicted for international crimes on the basis of universal jurisdiction had obtained legal residence or even the nationality of the state where the prosecution took place, as noted earlier, indeed confirms that the immigration process and criminal prosecutions need to be seen as separate.
the threshold for holding someone criminally accountable, the majority of excluded individuals will simply never be convicted.

7.6. Directions for future research

The findings of this study point to different directions for future research. Firstly, this study is limited to the Netherlands. While it was already noted that it can be expected that other states of refuge encounter similar problems with the prosecution of 1F-excluded individuals, it would still be valuable to study the cases that have emerged in recent years in other states of refuge. The population is likely to differ in different states of refuge, at least in respect of their state of origin. As of yet, little is publicly known about the composition of the population of 1F-excluded individuals in other states of refuge. Secondly, future research could look into the effects stronger international cooperation between national law enforcement and prosecution services, and between national immigration services, has on the number of successful criminal prosecutions of 1F-excluded individuals.

Thirdly, future research could focus on gaining insight into the movement of excluded individuals within Europe. This study presented some figures on the number of unremovable excluded individuals. These figures make clear that the decrease of the caseload of the Dutch Departure and Repatriation Service is larger than the number of forced and independent departures. This means that a considerable part of the unremovable excluded individuals leaves with an ‘unknown destination.’ The fact that they have disappeared from the radar makes it difficult to track them down, especially as the individuals have no interest in drawing attention to themselves. Furthermore, it was already mentioned that their ‘relocation’ offers a pragmatic solution to a deadlock situation, so it is also questionable what the interest of the concerned governments would be in drawing attention to these cases. On the other hand, this ‘relocation’ to other European countries undermines the functions that Article 1F is supposed to have. In any case, without enhanced information exchange between European immigration services, such a research would be difficult to carry out.

Finally, further research is needed into durable solutions to address the problem of durably unremovable excluded individuals. In the Netherlands, a “durability and proportionality” assessment is available, but so far only in ten cases this has led to the granting of a residence permit to an excluded asylum seeker who was unremovable. The Dutch section of the International Commission of Jurists suggested already in 2008 that the government should examine the possibilities for a temporary residence permit for unremovable excluded individuals (NJCM, 2008). In the context of the research project by the Refugee Law Initiative/Center
for International Criminal Justice on ‘undesirable and unreturnable’ migrants (RLI/CICJ, 2016), the option of creating a balancing test has been discussed: in case an unremovable but undesirable migrant has demonstrably not been in the position to return for a number years, a judge could weigh the interests of the state to prolong the status of undesirability (level of acute security threat, seriousness of the alleged crimes, mode of complicity, level of responsibility) against the individual’s interests of having the status of undesirability lifted (social, psychological, physical impact of a protracted limbo situation). The feasibility of, and preparedness of states of refuge to implement, such a ‘balancing test’ for durably unremovable excluded individuals could be further explored. Considering the undesirable long term effects in those cases, there is a clear need for evidence-based solutions for this pernicious issue.