Summary

Conflict and violent political repression cause forced displacement. Those who are displaced by such situations can seek asylum elsewhere, if they manage to escape the situation. However, among people seeking asylum are also individuals who are responsible for the very crimes that cause or contribute to forced displacement.

Article 1F is the ‘exclusion clause’ of the Refugee Convention: individuals applying for asylum can be excluded from refugee protection when there are serious reasons for considering they have committed certain serious crimes, such as war crimes, crimes against humanity and other serious crimes. This exclusion clause is seen to fulfil different functions: excluding undeserving individuals from refugee protection, promoting criminal prosecution for perpetrators of serious crimes, and protecting the community of the host state.

While host states may have obligations under international law to protect displaced persons in need, they do not want to be a safe haven for war criminals.

Moreover, in recent years many states have shown themselves dedicated to ending impunity for the serious crimes that occur in situations of conflict and violent political repression, often referred to as international crimes. A large ‘impunity gap’ remains for these crimes: the number of individuals prosecuted for international crimes by international or national courts is very small, which means that most perpetrators of international crimes remain unpunished.

As the exclusion clause is applied to people who are believed to be guilty of international and other serious crimes, proactively applying this clause possibly is a key element in narrowing this impunity gap.

However, criminal prosecution of excluded asylum seekers does not follow automatically from the application of Article 1F itself. It requires active follow-up by a capable and willing actor. International courts have limited jurisdiction and focus. Domestic criminal justice systems in post-conflict states are often not capable of prosecuting these cases. In addition, excluded individuals often cannot return or be expelled and thus remain in the states that have excluded them. For these reasons, these host states arguably have a crucial role to play in the prosecution of excluded asylum seekers. In fact, if it were not for host states, the ‘impunity gap’ could not be narrowed.
It is therefore important to know how states hosting excluded asylum seekers (can) contribute to this aim. To what extent are these states willing to bring people residing on their territory who allegedly have ‘blood on their hands’ to justice, and what can and do they actually do to promote accountability for these alleged perpetrators? What is realistically possible in this respect?

This is an empirical study of the role that host states in practice play in criminally prosecuting alleged perpetrators of serious crimes applying for asylum. It is a case study of the Netherlands, a country with a relatively high number of 1F exclusions and strongly committed to ending impunity for international crimes. The central research question is: 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?

The study relies on a mixed-methods approach to answer this question. These methods include an analysis of asylum files in Dutch exclusion cases, a review of academic literature, case law and policy documents, and interviews with experts.

Results

The study concludes that the policies of the Dutch government with respect to 1F exclusion and the criminal prosecution of international crimes have resulted in a large number of excluded asylum seekers compared to other countries of refuge, and different efforts to promote their criminal prosecution.

Societal unrest relating to asylum applications by alleged leaders of the former Afghan communist regime led to the early adoption, in 1997, of a 1F-policy with three guiding principles: Article 1F is to be interpreted restrictively, the opportunities to apply Article 1F must be maximally utilized, and further consequences are to be connected to any exclusion on the basis of 1F. The ‘further consequences’ are that the individual is declared persona non grata, which 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.
Taken together, these different, oftentimes unique aspects of the Dutch (post) exclusion policy reflect the government’s insistence on the conviction that the Netherlands should not be a ‘safe haven’ for asylum seekers who are believed to be guilty of serious crimes. This ‘no safe haven’ policy has driven up the number of 1F-exclusions in the Netherlands. From 1992 to 2017, a thousand asylum seekers have been excluded. Internationally, this is an exceptionally high number and this high number is evidence of the Netherlands’ active, and relatively strict, 1F policy.

The Netherlands as a state of refuge can play a role in bringing these alleged perpetrators to 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). The principle of universal jurisdiction provides that any state can exercise criminal jurisdiction regardless of whether there was a territorial or nationality link between that state, and the crime, perpetrator or victim. The analysis of the case files shows that the vast majority of cases concern international crimes under 1F(a). For these crimes, universal jurisdiction often exists, which means that prosecution in the Netherlands is – in principle – possible.

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 also by actively creating favourable circumstances that would make extradition possible. Especially in Rwanda, the Netherlands has strengthened the criminal justice sector 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. However, states hosting possibly extraditable suspects can only influence the conditions for successful extradition to a limited extent. Moreover, the case of Rwanda is arguably exceptional. In Rwanda, there was a strong, intrinsically motivated, dedication to prosecute perpetrators of international crimes. In many other post-conflict states, such dedication – which is crucial – is lacking. This makes it even more challenging to meet extradition law requirements and take away human rights concerns, for instance concerning the possible imposition of the death penalty, general conditions in detention and prison facilities and the right to a fair trial. Although the Dutch efforts with respect to (facilitating) extradition have been relatively successful, only four 1F-excluded individuals have been extradited or transferred, representing about 0,4 percent of the total number of a thousand 1F-excluded individuals in the Netherlands.
The Dutch government has also 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. The Dutch 1F policy furthermore entails a standard assessment of the opportunities for prosecution in exclusion cases by the public prosecutor. However, domestic prosecution of excluded asylum seekers by states of refuge is complicated by many legal and practical challenges. They include lack of jurisdiction; difficulties of conducting investigations at the crime scene and finding witnesses, due to passage of time and lack of access to or cooperation with the country where crimes were committed; the fact that many of the individuals are rather ‘insignificant’, low-level and thus unknown individuals; and the high demand in terms of resources and capacity that this type of investigations and prosecutions entail. In addition, challenges specific to the context of 1F exclusion are the large gap between the threshold for 1F exclusion and the threshold for criminal convictions, and the reliability of the information underlying 1F decisions. Despite a strong commitment to advancing the criminal prosecution of excluded individuals domestically, since 1992, these efforts have resulted in the criminal prosecution of only five excluded individuals, representing about 0,5 percent of the total number of 1F-excluded individuals in the Netherlands, four of whom have been convicted.

If less than 1 percent of the excluded asylum seekers is either extradited or domestically prosecuted, what happens to the others? In the Netherlands – unlike in many other European countries – excluded asylum seekers receive an entry ban or are declared persona non grata which means that they have no legal right to stay and have to leave the country immediately. Because of the entry ban, they are considered by definition to pose a permanent threat to public order and any access to other forms of residence permits is explicitly blocked. A substantial part of the excluded asylum seekers, however, cannot be removed, for various legal or practical reasons, for instance because they are at risk of inhuman or degrading treatment after return or do not have identity documents. Being ‘unremovable’ does not take away the obligation to leave the Netherlands. For as long as they are unremovable, these individuals are destined to live a life in ‘legal limbo’ and are faced with serious economic, social, and psychological challenges. The number of individuals in this situation in the Netherlands is considerable, and by the year 2017, some of them have been in legal limbo for twenty years.

**Strengths and limitations**

Like every study, this study too has its methodological strengths and limitations. Strengths are its in-depth focus on a state which has excluded a relatively large
number of asylum seekers and has gone to great lengths to promote their criminal prosecution; the wealth of information available on the case of the Netherlands; and the use of the multi-method approach.

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. However, other states are likely to be confronted with the same legal and practical challenges and complications. In fact, considering the wealth of information and the large 1F population and the efforts of the Dutch government aimed at promoting criminal accountability of this group, the Netherlands arguably offers the best available case for answering the research questions posed in this study.

The fact that the data collection only covered exclusion cases until the year 2010 could also be seen as a limitation of this study; since then, new 1F cases concerning different nationalities have occurred. Indeed, the effects of the Arab Spring and the ensuing ‘refugee crisis’ in Europe have considerably changed the composition of the asylum influx. 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, publicly available information does not suggest that the number of criminal prosecutions of excluded asylum seekers has increased.

Discussion

In dealing with asylum seekers, states have an obligation to exclude those immigrants who are believed to have committed serious crimes. This obligation is based on the idea that international protection should not be available for these ‘undeserving’ individuals and should not be abused to escape criminal prosecution. States have also committed to ambitious aspirations, such as ‘ending impunity for the most serious crimes of concern to the international community as a whole’ and ‘letting justice take its course as much as possible’. These states are faced with high expectations to prevent unentitled, undeserving and dangerous individuals from obtaining asylum. As a result, the attention for and use of the exclusion clause has increased.

This study concludes that despite strong commitment from the Dutch government 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 excluded asylum seeker 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 excluded asylum seekers is not promising.

In practice, the ambitious aspirations are thus far from achieved. Moreover, the ‘no safe haven’ policy has considerable side-effects for the host state itself, for other states, and for the individuals concerned. 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 from politics and society. These individuals will most likely either remain in the state of refuge, or disappear from the radar and relocate elsewhere in Europe. The durable presence of those who stay – a group of unwanted but unremovable undocumented individuals without proper means of subsistence – may have questionable effects on domestic security. The ‘relocation’ of others to other European states may offer a pragmatic solution to a deadlock situation for the individual and the country of refuge, but undermines the functions that Article 1F is believed to have. European states have no coherent way of dealing with these cases and seem to do what they can in order to get these cases off their plates, which may in fact contribute to perpetrators of international crimes finding a safe haven and escaping prosecution.

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 presumed to have, and the ability of states of refuge – which are crucial actors in this respect – to support his function.

What does this mean 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?

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 1F 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. In addition, the study outlines several
opportunities to improve the chances of success in the future, most importantly by strengthening cooperation and information exchange between willing states.

What does it mean for the application of the exclusion clause? The objectives that 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. Nonetheless, some of the challenges identified in this study could be overcome by changing or modifying national policies, which will possibly bring down the number of unremovable and unprosecuted excluded asylum seekers, or limit side-effects.

However, 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 the threshold for holding someone criminally accountable, the majority of excluded individuals will simply never be convicted. 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.

**Directions for future research**

The findings of this study point to different directions for future research. Firstly, it would be valuable to study the cases that have emerged in recent years in other states than the Netherlands. 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 that stronger international cooperation between national law enforcement and prosecution services, and between national immigration services, may have 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. Finally, further research is needed into durable solutions to address the problem of durably unremovable excluded individuals. Considering the undesirable long term effects in those cases, there is a clear need for evidence-based solutions for this pernicious issue.