1. Introduction

1.1. Exclusion from refugee protection

Conflicts and violent political repression cause forced displacement.\(^1\) Forcibly displaced persons cross borders and move to neighbouring and more distant countries, in search of refuge. States on the receiving end may have obligations under international law to protect displaced persons in need. The principal legal instrument setting out international protection obligations is the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Article 1A(2) determines a ‘refugee’ is someone who is outside the country of his nationality and not willing or able to claim the protection of that country due to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” Article 14(1) of the Universal Declaration of Human Rights states that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” While about a third of the forcibly displaced persons in 2015 qualified as refugees, the number of persons making individual applications for an asylum or refugee status is only 3 percent of the total number of forcibly displaced persons.\(^2\) Nonetheless, the absolute number of individuals applying for asylum in Europe, for instance, in 2016 still amounted to about 1.26 million; hence, the number of asylum seekers that reaches Europe is substantial.\(^3\)

---

1 The United Nations High Commissioner for Refugees (UNHCR, 2016) reported that by 2016, global forced displacement had reached record-high numbers, with 65.3 individuals forcibly displaced worldwide – a 75 percent increase compared to 1996 – as a result of persecution, conflict, generalized violence (i.e. violence that not only affects targeted individuals or groups but also those “who have no stake in an armed conflict or socio-economic-political order”); see V. Türk, ‘Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalized Violence’, 2011, available online at <http://www.unhcr.org/4d3703839.html> (last visited 19 July 2017), pp. 4-5) or human rights violations. The number of forcibly displaced persons relative to the world population has increased from 6 per 1.000 persons between 1999 and 2011 to 9 per 1.000 at the end of 2015 (UNHCR, 2016, p. 6).

2 This low proportion could be explained from the fact that not all asylum seekers reach a country where a functioning asylum determination mechanism is in place, or a country where they want to apply for asylum. The total of 65.3 million forcibly displaced persons worldwide includes 16.1 million persons who are refugees under UNHCR’s mandate, 5.2 million Palestinian refugees registered by the United Nations Relief and Works Agency for Palestine refugees in the near east (UNRWA), 40.8 million internally displaced persons and 3.2 million persons awaiting a decision on their asylum application. According to UNHCR (2016, p. 37), the number of new (‘first instance’) asylum applications reached a record-high number of 2.0 million in 2015.

3 Eurostat, ‘Asylum and first time asylum applicants – annual aggregated data (rounded)’, available online at <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&language=en&pc=tps00191>. The number of asylum applications differs considerably per country, however. In 2016, Germany received most first time applications (745.155), followed by Italy (122.960) and France (84.270), while the Baltic states and Slovakia received tens up to a few hundred applications in total. Article 2(h) of Qualification Directive 2011/95/EU defines first time applicants as persons who lodged an application for asylum for the first time in a given EU member state, irrespective of whether they have applied for asylum earlier in another EU member state.
Among those seeking asylum are also individuals who are unwanted by the host state because of their (alleged) past or possible future criminal conduct. Three categories of these ‘undesirable’ asylum seekers can be distinguished: those who have allegedly committed crimes before arriving in the host state; those who had their residence status revoked for having committed crimes in the host state; and those who were not granted a status or had their status revoked because they are considered to pose a current or future threat to national security. This study focuses on the first category of unwanted asylum seekers: those who are allegedly guilty of serious crimes prior to their arrival in the state of refuge. 4

It is generally held that this latter group of individuals should not benefit from refugee protection. 5 Article 1F of the Refugee Convention 6 determines

“[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

4 How the other two categories of undesirable aliens are being dealt with by host states will, however, be addressed in Chapter 3.

5 This becomes clear from the fact that provisions to that effect are included in the major legal instruments setting out obligations relating to refugee protection; see infra note 6.

On the basis of Article 1F, individuals shall therefore be excluded from refugee protection,7 in relation to ‘international crimes’ under 1F(a), other serious crimes (including ‘common’ crimes such as murder and assault) under 1F(b), and acts contrary to the purposes and principles of the UN under 1F(c).

It is often said, with reference to the travaux préparatoires, that the drafters of the Refugee Convention had two objectives in mind with this ‘exclusion clause’ (Fitzpatrick, 2000; United Nations High Commissioner for Refugees (UNHCR), 2003a; Gilbert, 2003).9 A first objective was to ensure that persons suspected of committing serious crimes would not benefit from refugee protection. The gravity of the acts would deem them inherently ‘undeserving’ of such protection. A second objective was to ensure that such persons did not escape prosecution (Gilbert, 2003: 428).10 However, in the four decades following the adoption of the Refugee Convention, there was little attention for, and use being made of, the exclusion clause of Article 1F. This changed suddenly and significantly halfway the 1990s. In academic literature, this sudden change is attributed to different developments that occurred roughly around the same time.

A first – and for the purposes of this study particularly relevant – development to which this sudden interest in the exclusion clause is attributed (e.g. by Beyani, Fitzpatrick, Kälin & Zard, 2000; UNHCR, 2003b; Bond, 2012), is the emergence and

7 The study will thus not concern itself with Article 33(2) of the Refugee Convention, the exception to the prohibition of expulsion or return for “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”. The main difference between Article 1F and Article 33(2) is that the former is part of the refugee definition, while the latter concerns the treatment of certain individuals who have been recognised as refugees; hence, the latter is not a ground for exclusion from refugee protection. Where it is said that the former serves to protect the ‘integrity of the asylum system’, the latter serves to protect the community of the host state (UNHCR, 2009: 8).

8 The term ‘international crimes’ is often used to refer to the crimes that are subject to the jurisdiction of the International Criminal Court, as listed in Article 5 of the Rome Statute: the crime of genocide; crimes against humanity; war crimes; and the crime of aggression.

9 In this thesis, the term ‘exclusion’ refers solely to Article 1F; the exclusion grounds in Articles 1D (which concerns persons who already receive protection or assistance from UN organs or agencies other than UNHCR, such as the UNRWA) and 1E (which concerns persons who have been recognized as having the same rights and obligations as nationals of the state of residence) of the Refugee Convention are not addressed, because these forms of exclusion concern people who are not in need of the protection of the Refugee Convention, rather than people who may be in need of such protection but to whom it is not afforded because of alleged criminal behaviour.

10 Hathaway & Foster (2014: 525) argue that the most fundamental concern of the drafters, however, was that “if state parties were expected to admit serious criminals as refugees, they would simply not be willing to be bound to the Convention”. They argue the fundamental purpose of Article 1F is to protect the integrity or credibility of the system of refugee protection, a view also held by inter alia the Court of Justice of the European Union (CJEU) in the B. and D. judgment (Joined Cases C-57/109 & C-101/09, Bundesrepublik Deutschland v. B and D, 9 November 2010).
aftermath of the crises in the Great Lakes and the former Yugoslavia in the 1990s. \(^{11}\) In both of these crises the international community’s initial inaction eventually led to a strong international legal response, with the establishment of the two \textit{ad hoc} criminal tribunals (International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)). \(^{12}\) The establishment of these tribunals has propelled the development of the field of international criminal law and the establishment of a permanent International Criminal Court (ICC). By adopting the Rome Statute that established this permanent court, a large number of states affirmed that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” and showed themselves “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. \(^{13}\) International criminal justice has not remained confined to the international level, as in subsequent years individual states increasingly started acting to hold perpetrators of international crimes criminally accountable (Handmaker, 2003; Rikhof, 2009; 2012). Because of these different developments at both the international and national levels, there is increased awareness of the possibility that perpetrators of international crimes are among migrants arriving from conflict areas.

Secondly, the arrival of ‘spontaneous’ asylum seekers from conflict regions increased substantially in the 1990s. \(^{14}\) With the arrival of these “new asylum seekers” in Western countries, Western governments generally became more hesitant to accept their entitlement to the benefits traditionally associated with the ‘refugee’-label (Martin, …

\(^{11}\) Gilbert (2014) argues that it is not so much that the nature of conflicts changed in the 1990s, but rather that the “horrors of war” became more visible in the media and widely known, which also meant states were increasingly expected to respond.

\(^{12}\) UN Security Council Resolution 827 of 25 May 1993 established the ICTY, Resolution 955 of 8 November 1994 established the ICTR.

\(^{13}\) See the fourth and fifth preambular paragraphs of the Rome Statute. Through a declaration by state leaders put out at the UN High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels in 2012, state leaders again committed themselves to “ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law…”; General Assembly resolution 67/1 of 24 September 2012.

\(^{14}\) “During the 1990s, the number of applications submitted [in 37, mostly industrialized, countries in Europe, North America, Australia, New Zealand and Japan] reached 6.1 million, an almost three-fold increase compared to the previous decade, when some 2.3 million applications were lodged. In 1992, a peak was reached when some 856,000 applications were submitted, whereas the lowest number of applications during the past two decades was recorded in 1983 (115,000). Since 1996, the number of asylum applications has increased to reach some 652,000 in 1999 […]” (UNHCR, 2001: vii). UNHCR statistics show that the total number of asylum applications to 15 European Union countries increased from a total of 278,200 between 1970-1979, to 1,552,500 between 1980-1989 and 4,033,300 between 1990-1999 (Hatton, 2004: 10).
Increasing mobility has led to awareness on the part of host states that their societies are, in the words of Hathaway and Harvey (2001: 257), “vulnerable to the fallout of an increasingly brutal and chaotic world”.

Several authors link the increased attention for Article 1F more specifically to increasing security concerns in the states of refuge (e.g. Hathaway & Harvey, 2001; Dauvergne, 2007; Saul, 2008; Gilbert, 2014), in particular in relation to terrorism. After the terrorist attacks in the United States on 11 September 2001, the UN Security Council called upon member states to deny a safe haven to those who commit terrorist acts, and the UN has done the same on several other occasions (Gilbert, 2003: 429; Singer, 2015: 1). With an increasing focus on security, Article 1F became a means within the existing range of legal instruments to be applied to address these concerns.

It follows from the above that, analogous to the different reasons for the increasing interest in Article 1F, the exclusion clause is being used 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 question is: who should take up this task? The Refugee Convention does not assign responsibility to any actor in particular.

---

15 Martin (1988) quotes former UN High Commissioner for Refugees Poul Hartling, who observed in 1984 with respect to the changing nature and scale of the population of asylum seekers and states’ responses to these developments: “[W]e live in an age when asylum-seekers are no longer only border crossers, but arrive by sea and by air in increasingly large numbers in countries far away from their homelands, in Europe, in North America and elsewhere. Their very presence and the problems resulting from the dimensions of this new phenomenon are exploited by xenophobic tendencies in public opinion. I well understand the dilemma facing many host countries, but I fear that these difficulties might tempt some Governments to consider adopting restrictive practices and deterrent measures which in my view should never be resorted to in dealing with refugees.”

16 Through its resolution 1373 of 28 September 2001 the UN Security Council called upon member states to “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens” and “[e]nsure […] that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts”.

17 While concerns for the national public order or security are understandable in light of the alleged nature of the conduct excluded asylum seekers are generally associated with, it is subject to debate whether applying Article 1F actually is the appropriate measure to address such concerns. Some authors have argued that it is Article 33(2) that serves to address those concerns; see e.g. Hathaway & Harvey (2001: 259) and the discussion in Chapter 6. Moreover, it is arguably questionable what the ‘war on terror’ that was initiated after 9/11 has to do with refugees, as the attackers were no refugees. Hathaway & Harvey (2001: 258) point out how something similar happened a few years earlier: “One of the truly ironic results of the Oklahoma City bombing of 1995, a terrorist act with no foreign connections, was that it led to the enactment of unprecedented restrictions on the admission of noncitizens to the United States. As President Clinton conceded when signing the anti-terrorist legislation into law, ‘[t]his bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism’.”

18 Nor does it refer to an obligation to prosecute (Larsaeus, 2004: 76-77).
States of refuge have a crucial role to play in this respect. First of all, because international criminal courts and tribunals by definition have a limited jurisdiction and focus. The jurisdiction of the ad hoc tribunals ICTY and ICTR and other international criminal tribunals is limited to specific periods, areas and conflict situations. The ICC’s jurisdiction is limited to crimes committed after the coming into force of the ICC Statute on 1 July 2002 (Article 11 Rome Statute) and can only be invoked in states party to the Court or by resolution of the UN Security Council (Article 13 Rome Statute). Moreover, the jurisdiction of the ICC is complementary to national jurisdictions, meaning the main responsibility to prosecute international crimes rests with states. Besides limited jurisdiction, both the ad hoc tribunals and the ICC also lacked or lack the means to prosecute large numbers of suspects and have consequently focused on the ‘most responsible’ suspects.

Secondly, domestic criminal justice systems in post-conflict states are generally not willing or capable of prosecuting these cases. In the aftermath of conflict, governance infrastructures including the domestic criminal justice system are often in ruins and bringing perpetrators of international crimes to justice may not be the most urgent priority. Willingness to prosecute these perpetrators may also depend on whether or not the alleged perpetrators are (still) part of the ruling government. Thirdly, excluded asylum seekers often remain in the states of refuge that have excluded them because they cannot return or be expelled. In short, if it were not for states of refuge, the ‘ impunity gap’ could not be narrowed or closed.

19 The tenth preambular paragraph to the Rome Statute establishing the ICC and Article 1 of the Statute, establishes that the ICC “shall be complementary to national criminal jurisdictions”. This is worked out in Article 17 of the Statute, which determines that a case is inadmissible if a state that has jurisdiction over it, has been unwilling or unable to carry out an investigation or prosecution, or a decision not to prosecute resulted from unwillingness or inability of the state. On the complementarity of the ICC, see e.g. Schabas (2008).

20 As a result of these limitations, the ICTY has in more than twenty years of existence e.g. indicted only 161 persons, the ICTR 90 (Smeulers, Hola & Van den Berg, 2013). The ICC has since 2002 indicted 42 individuals and convicted 9 (5 of whom not for international crimes, but for offences against the administration of justice in the ‘Bemba et al.’ case; see <https://www.icc-cpi.int/Pages/defendants-wip.aspx>).

21 Excluded individuals can be ‘unreturnable’ for a variety of reasons, as will be explained in Chapter 3.

22 The term ‘impunity gap’ is often used to describe the gap between the limited number of perpetrators that are convicted before international courts, and the much larger actual number of crimes and perpetrators that remain unpunished and are assumed to be the responsibility of national states in conformity with the complementarity principle (see Aptel, 2012; Ambos & Stegmiller, 2013; Moffett, 2015). In an early policy paper, the Office of the Prosecutor (OTP) of the ICC remarked: “The strategy of focussing [sic] on those who bear the greatest responsibility for crimes within the jurisdiction of the Court will leave an impunity gap unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used.” ICC OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 7 (available online at <https://www.icc-cpi.int/nr/rdonlyres/1fa7e4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf>).
Depending on the crimes an asylum seeker is believed to have committed, states of refuge may have an obligation under international treaties and customary international law to extradite or prosecute these individuals. In this context, the principle of *aut dedere aut judicare* is often cited: the obligation to extradite or prosecute.\(^{24}\) Extradition can take the form of extradition to the country of origin or to a third country, or transfer to an international criminal tribunal; prosecution in this context refers to *domestic* prosecution in the state of refuge. Besides this obligation stemming from international law, there may also be other – domestic – reasons for states of refuge to promote the criminal prosecution of the crimes under Article 1F through extradition or domestic prosecution.\(^{25}\) One reason could be that states do not want to become a ‘safe haven’ for war criminals.\(^{26}\) Another reason may be that Article 1F concerns the most serious crimes, crimes for which impunity should not be tolerated, as was noted above.

Notwithstanding the above, it is however also very well possible that states of refuge in practice do not subject 1F-excluded asylum seekers to any criminal investigation and/or do not consider rendition to an international or national court, but instead choose to expel these asylum seekers, relocate them, or grant them a status other than on the basis of international protection.

Considering that one of the initial aims of the exclusion clause was to prevent perpetrators of serious crimes from escaping criminal prosecution, and given the international dedication to the aim of ending impunity for these crimes, it is important to know to what extent states of refuge in practice contribute to these aims. What are states of refuge required to do with people who allegedly have ‘blood on their hands’ residing on their territory and claiming asylum, 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 continue to be relevant, as the situation arising from the conflict in Syria has made clear in more recent years: while there was a substantial increase in the number of asylum seekers arriving from Syria, no international forum for criminal prosecutions in relation to

\(^{24}\) The scope and limits of this obligation are elaborated upon below.

\(^{25}\) As Rikhof (2012: 464) notes, international law permits states to “go beyond the duty to undertake prosecutions” and a number of states in Europe have initiated criminal cases on the basis of universal jurisdiction, including cases “not regulated by international law but common crimes” (ibid.).

\(^{26}\) Gilbert (2003) argues: “The true fear that finds voice in Article 1F is not that refugee status might be besmirched if it were to be applied to those falling within Article 1F, it is that the receiving State will be a safe haven”. Several countries explicitly refer to the ‘no safe haven’ notion, including Canada (Rikhof, 2001; 2004), the UK (Singer, 2015: 161) and the Netherlands (see Kamerstukken II 2007/08, 31200 VI, no. 160, 9 June 2008).
Syria had been established, while the ICC’s hands were also tied with respect to the situation.27

1.2. Objectives, case selection and research questions

The purpose of this study is to empirically study the role that states of refuge play in the administration of criminal justice to alleged perpetrators of serious crimes who flee from the territory where these crimes have been committed and are excluded from refugee protection on the basis of Article 1F Refugee Convention.28 The study will focus on the Netherlands. In relation to the questions raised above, the Netherlands is particularly interesting and relevant. It is a country with a relatively high number of 1F exclusions, dedicated – as will become clear – to the development and implementation of international criminal law on the domestic level. Based on the findings in the Netherlands, possible broader implications of the findings will be assessed, with the aim of contributing to ongoing discussions on policy- and decision making in relation to Article 1F and the criminal prosecution of international crimes. The central research question that will be answered in this study 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 reasons why the Netherlands offers a good case study for answering the central research question are briefly expanded on here. First of all, it is a state that since the 1990s has consistently been receiving a considerable number of asylum applications,29 but has also been very proactive in applying Article 1F since 1F gained renewed attention halfway the 1990s.30

27 Syria is no state party to the ICC, nor has accepted its jurisdiction, which means that the only way the ICC could obtain jurisdiction would be through a UNSC referral. So far, Security Council members, most notably Russia, have blocked referral of the Syria situation to the ICC. See Mark Kersten, ‘Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?’ Justice in Conflict blogpost, 17 October 2016, available online at <https://justiceinconflict.org/2016/10/17/calls-to-prosecute-war-crimes-in-syria-are-growing-is-international-justice-possible/>.

28 The approach chosen here is an empirical one, rather than a legal one. This means that the study is not comprehensive or complete in its discussion of relevant case law or the development of legal principles.

29 Eurostat data show that over the period 2008-2016, the Netherlands received about 3.84 percent of all first time asylum applicants in the EU28 (see <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00191>), which means it ranks as the ninth of the twenty-eight countries. The population of the Netherlands as a percentage of the total population of the EU28 in the same period was slightly lower at 3.3 percent (see <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00005&plugin=1>). The number of first time asylum applicants is much higher, also relatively, in e.g. Germany, Sweden and France.

30 According to the most recent figures, from the first invocation of Article 1F in 1992 until 1 January 2017, Article 1F has been invoked against 1,000 individuals; see Kamerstukken II 2017/18, 34775 VI, no. 94, 5 March 2018, p. 7. This means that on average, about 38 individuals have been excluded every year. Especially in the early days, the Netherlands together with Canada had an exceptionally “rigorous” 1F policy (Gilbert, 2014).
Secondly, the Netherlands has a good data infrastructure for research. Much information on the application of Article 1F in the Netherlands is publicly available.\(^{31}\) In its annual reports to parliament on the efforts with respect to international crimes undertaken by the police, the prosecution service and the immigration service, the responsible Minister provides detailed information and numbers on the number of cases excluded by the immigration service and cases under investigation or prosecuted.\(^{32}\) These communications stem from the strong demand from parliament to be informed about these cases, because of the sensitivity connected to the residence in the Netherlands of unwanted and possibly dangerous individuals, but they also underline the degree of priority that is given to the 1F exclusion and criminal prosecution of international crimes by the Dutch government. Such availability of information on the application of Article 1F, and subsequent prosecutorial steps, in the public domain is not self-evident in other countries.\(^{33}\) Apart from publicly available information, the relative openness of the Dutch government about these cases becomes clear from the fact it is generally willing to grant researchers access to data. In the context of the current study, access to the immigration files of all cases in which a decision to invoke Article 1F was taken between 2000 and 2010 in the Netherlands was indeed obtained.\(^{34}\)

A third reason why the Netherlands offers a good case is that it offers an opportunity to analyse the efforts of a state of refuge to criminally prosecute 1F-excluded asylum seekers, because the Netherlands has gone to great lengths to promote the criminal prosecution of these individuals and equip its justice system to process international crimes cases. This is inextricably linked to the creation of the international criminal tribunals; first the \textit{ad hoc} UN tribunals for Rwanda and Yugoslavia, and later the permanent ICC. As Rikhof (2009) notes, the coming into force of the Rome Statute pushed a review and change of domestic legislation in relation to international crimes in many countries; the Netherlands is no exception.\(^{35}\) Moreover, as host of

\(^{31}\) The fact that a documentary maker was allowed to film the work of the specialized 1F unit for a year is telling. The documentary was broadcast in April 2017 <https://www.npo.nl/2doc/10-04-2017/KN_1688926>.

\(^{32}\) See e.g. Kamerstukken II 2016/17, 34550 VI, nr. 105, 8 March 2017.

\(^{33}\) Bolhuis & Van Wijk (2015b: 20), for instance, found that in a country like Sweden 1F cases were not centrally registered which makes it difficult to produce accurate statistics. Even if this kind of statistics are registered, it may be difficult to access them. As Singer (2017: 10) notes, the availability of data in the UK is also quite different from the Netherlands. Singer has been able to get some information through Freedom of Information (FoI) requests, but she also notes that this was a time-consuming process.

\(^{34}\) This dataset will be elaborated in §1.3.

\(^{35}\) In the Netherlands, this process led to the introduction of the International Crimes Act (\textit{Wet Internationale Misdrijven}, WIM), which came into force on 1 October 2003.
the ICC and other international criminal tribunals and self-proclaimed ‘legal capital of the world’; the Dutch government sees a “special role and responsibility” for itself in the prevention of impunity for persons who are guilty of international crimes.

This study is not the first on criminal prosecution of individuals excluded under Article 1F. Because of the increasing interest in refugee exclusion in general, academic interest in exclusion from refugee protection and criminal prosecution as a follow-up to exclusion, has also increased. While the willingness on the part of states of refuge to extradite or prosecute excluded asylum seekers may have increased over the last years (Broomhall, 2001; Rikhof, 2009; 2012), several studies suggest that this is fraught with difficulties (e.g. Fitzpatrick, 2000; Broomhall, 2001; Larsaeus, 2004; Speckmann, 2011; Rikhof, 2012). Different factors emerge from the literature that can explain why this is the case. These factors relate to the scope and nature of the legal obligations that states have, and to legal and practical challenges and obstacles to criminal prosecution of crimes that fall under 1F.

Firstly, the exact scope and nature of the obligation to extradite or prosecute (aut dedere aut judicare) in relation to 1F crimes are unclear and, consequently, it is unclear what is expected from states of refuge in this respect. There seems to be a consensus that an obligation that is explicitly part of different international treaties or accepted as a principle of customary international law exists for certain crimes, in particular the international crimes that fall under Article 1F(a). For war crimes that constitute ‘grave breaches’, and for torture, conventional international law imposes an obligation to extradite or prosecute (Larsaeus, 2004: 81; Rikhof, 2012: 461), and the same is true in relation to other crimes of ‘serious international concern’ such as terrorism. As Article 1 of the 1948 Genocide Convention requires state parties to undertake action to “prevent and punish” the crime, an obligation arguably exists with respect to genocide (Speckmann, 2011; Gilbert, 2017). With respect to crimes against humanity, there is a consensus that an obligation to prosecute only exists for the authorities in

36 The ICTY, the Special Tribunal for Lebanon (STL) and the Special Court for Sierra Leone (SCSL; in the Charles Taylor case) were or are based in The Netherlands.

37 Kamerstukken II 2009/10, 32475, no. 3, published on 14 September 2010. See also Speckmann (2011). The Dutch Minister of Justice said earlier: “The Netherlands has chosen to lead the way internationally in the criminal investigation and prosecution of international crimes” [translation by author]. Kamerstukken II 2008/09, 31200 VI, no. 193, 9 September 2008.

38 With respect to serious non-political crimes under 1F(b), such as manslaughter or robbery, no obligation to extradite or prosecute exists.

39 See Final Report of the Working Group on the Obligation to Extradite or Prosecute (aut dedere, aut judicare), UN Doc. A/CN.4/L.844, 5 June 2014. Treaties in relation to other crimes such as torture, hijacking, hostage-taking and drug-trafficking also entail an obligation to extradite or prosecute, or mandate universal jurisdiction (Speckmann, 2011).
the country where the crimes occurred (territorial jurisdiction); however, it seems to
be undisputed that if there is no obligatory universal jurisdiction for these crimes,
there certainly is permissive universal jurisdiction (Broomhall, 2001: 404; Rikhof,
2012: 464; Lafontaine, 2014: 95). Hence, while the obligation to extradite or prosecute
may be limited to some of the crimes that fall within the scope of Article 1F, willing
states arguably can assume universal jurisdiction beyond this obligation, for a broader
category of crimes than grave breaches, torture and genocide. It is unclear, however,
whether they actually do so (Larsæus, 2004: 85-86; Speckmann, 2011).

Secondly, various legal challenges and obstacles may complicate criminal
prosecution. First of all, legal complications may result from the difference between
the thresholds employed in the exclusion clause on the one hand, and in criminal
law on the other hand. Article 1F presupposes ‘serious reasons for considering’; a
standard that is much lower than standards employed in criminal law (Fitzpatrick,
2000; Speckmann, 2011; Dauvergne, 2013). 40 This means that there is a significant
gap between the evidence needed for an exclusion decision and the evidence needed
for a criminal conviction, and hence that additional evidence needs to be gathered
to prosecute and convict an excluded asylum seeker. This suggests that the number
of exclusion cases that actually leads to criminal prosecution may be much more
limited than the total number of exclusion cases.

In relation to extradition, one legal obstacle is that apart from the question whether the
state making the extradition request has jurisdiction, there also has to be an extradition
relationship as a basis for extradition, in the form of a bilateral or multilateral treaty
to which both the requesting and the requested state are a party. Furthermore, only
the country where the crime has been committed can request extradition (Fitzpatrick,
2000; Rikhof, 2012). Lastly, concerns relating to due process and human rights may be
an obstacle to extradition (Speckmann, 2011; Gilbert, 2017).

In relation to domestic criminal prosecution, an important challenge is jurisdiction. As
the alleged crimes that form the basis for a 1F exclusion decision have been committed
outside the state of refuge, traditional forms of territorial jurisdiction are insufficient as
a basis for criminal prosecution. The principle of universal jurisdiction may solve this
problem, but like the obligation to extradite or prosecute, universal jurisdiction does

40 According to Dauvergne (2013: 80), “criminal law has the highest standard of proof in our legal system and
refugee law has the lowest”.

41 They relate to a broad range of issues, such as impartiality of judges, access to legal representation, but also
whether or not the death sentence can be imposed or detention conditions. Chapter 4 will discuss these in
more detail.
not exist for all of the crimes that fall under the scope of Article 1F. It applies only to the most serious crimes. Which crimes exactly are to be seen as the most serious is subject to debate (Larsaeus, 2004). Traditionally they include genocide, war crimes, crimes against humanity, torture and piracy (Rikhof, 2012). This means that when the exclusion on the basis of Article 1F relates to e.g. serious non-political crimes under Article 1F(b), prosecution in the state of refuge is not possible. Extradition can also only take place to a state that has jurisdiction to prosecute the crime.42

Besides legal challenges, different kinds of practical complications to the criminal prosecution of excluded asylum seekers emerge from academic literature. In relation to extradition, Fitzpatrick (2000) notes that besides the legal preconditions, a state seeking prosecution of a certain individual who happens to be excluded in another state, has to be aware of the individual’s whereabouts. In relation to domestic criminal prosecution on the basis of universal jurisdiction, different authors stress the challenges inherent to criminal investigations that focus on crimes committed outside the territory of the prosecuting state, most notably the costs of the investigation and logistical difficulties connected to evidence collection (Fitzpatrick, 2000; Broomhall, 2001; Rikhof, 2012; Bond, 2012; Dauvergne, 2013). The fact that criminal investigations into international crimes rely heavily upon witness testimony presents several challenges. As Rikhof (2012: 468) points out, being able to collect evidence from witnesses requires access to them and hence cooperation with the country where they are located, but also appreciation of cultural differences and the fact that – usually – much time has passed between the crimes and the hearings.

The abovementioned legal and practical challenges and obstacles may also be among the factors that will be taken into account by criminal prosecutors who enjoy prosecutorial discretion,43 in deciding whether or not to pursue a criminal case (Rikhof, 2012). While since the 1990s there has been a growing number of universal jurisdiction prosecutions (Rikhof, 2012; 2017),44 on the basis of the challenges presented above, the prospect of criminal prosecution as a follow-up to exclusion under Article 1F is not promising.


43 See §2.1.2.

44 As Rikhof (2017: 102) notes: “In Europe, between 1994 and 2017, 13 countries initiated criminal prosecutions for crimes committed elsewhere, resulting in 58 indictments, in which 51 persons were convicted (with one person in two countries) and six were acquitted (including one on appeal) in 46 cases (since some cases involved multiple accused). In North America, two countries – Canada and the United States – completed four criminal trials for such crimes: three in Canada (with one acquittal) and one in the United States.” These figures, however, do not only concern individuals excluded on the basis of Article 1F, or universal jurisdiction cases, but also cases against nationals of the country that initiated the proceedings.
The current study will add to the existing body of literature by looking at a state of refuge that has been particularly proactive in the application of Article 1F and committed to promoting the criminal prosecution of 1F-excluded individuals. It assesses how the abovementioned challenges emerge in practice and to what extent they can be overcome, in order to gain an understanding of the role states of refuge can, but also cannot play.

It does so by 1) mapping and analysing the population of 1F-excluded asylum seekers in the Netherlands, in order to assess the potential for criminal prosecution for the entire group; and 2) mapping and analysing the efforts undertaken by the Netherlands to promote the criminal prosecution of 1F-excluded asylum seekers. The study relies on an extensive dataset consisting of all files of cases where Article 1F was applied between 2000 and 2010 in the Netherlands. The availability of these data make it possible, for the first time, to give an overview of a complete population of 1F-excluded asylum seekers in a given country. This can offer new insights into the potential for prosecuting 1F-excluded asylum seekers. In order to assess the potential for criminal prosecution in the population, however, it is also necessary to understand the policy in the Netherlands in relation to this group.

The foregoing leads to the following sub questions:

- 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?\(^{45}\)
- 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?

\(^{45}\) ‘Outside the Netherlands’ should in this context be understood to include the criminal prosecution of an individual excluded in and transferred by the Netherlands, to an international criminal tribunal or court that is de facto situated in the Netherlands, such as the ICC (although this situation has so far not occurred).
1.3. Methodology

In order to answer the research questions formulated above, this study takes a mixed-methods approach. The different methods are elaborated below, followed by an overview of the methods that have been used to answer each of the respective research questions and what period is covered.

1.3.1. File analysis

It was mentioned already that relatively much information about 1F cases in the Netherlands is publicly available. As rich as the available information may be compared to other countries, however, it is not enough for a thorough analysis of the possibilities for a state of refuge to prosecute 1F-excluded asylum seekers. This requires more insight into the actual cases. For this reason, access has been obtained to a rich and complete dataset, consisting of all refugee status determination decisions taken between 2000 and 2010 by the Dutch Immigration and Naturalisation Service (Immigratie- en Naturalisatiedienst, hereafter: IND) where Article 1F has – at a certain point in the refugee status determination process – been considered or actually invoked. When access was granted to the administrative system of the IND containing all immigration files, the IND provided a list of 1.498 file numbers of asylum seekers who, according to its administrative system, were associated with Article 1F and had had their asylum requests processed between January 2000 and November 2010. This list included individuals with a total of 67 nationalities; 720 of them had the Afghan nationality. On the basis of these file numbers, the corresponding digitized copies of the files in IND’s administrative system could be accessed. Among these files, the files of individuals who had received a 1F decision (‘beschikking’) that was definitive in the sense that it was not revoked or had not (yet) been successfully appealed at the moment of data collection (November 2010–February 2011) were identified. 745 definitive decisions were identified, of which 448 related to Afghans and 297 to non-Afghans. Considering the heavy workload and anticipated homogeneity of the Afghan group, which will be explained in Chapter 3, it was decided to take a systematic sample ($n = 61$) of the Afghan files. The 297 non-Afghan and 61 Afghan files (358 files in total) were scored and analysed with the help of three research assistants. The remaining 753 files were dismissed from the analysis for various reasons. The majority concerned relatives of 1F-excluded persons (442 cases). In 139 cases a 1F decision by the IND had been overruled in court or revoked in anticipation of a court decision. In 160 cases the IND had not (or not yet) come to a decision to exclude, or files were inaccurately labelled as ‘possible 1F files’ since no 1F lead whatsoever could be found. Finally, a limited number of 12 files

46 Access to these files was obtained from the Ministry of Justice.
were – owing to the fact that we analysed digitized copies – incomplete or (partially) inaccessible and for that reason left aside. The foregoing is presented schematically in Figure 1.1.

Four different categories of variables have been scored: 1) personal characteristics of the individual (current/former nationality, country and year of birth, sex, year of asylum application, last known legal representative, travel route); 2) legal characteristics of the case (status of procedure, outcome of decision, whether or not there was a prohibition of *refoulement* in place under Article 3 of the European Convention of Human Rights (ECHR) or whether Article 8 ECHR blocked removal,\(^{47}\) which of the different limbs of Article 1F (a, b and/or c) applied); 3) characteristics relating to the alleged behaviour (period, country and situation in country where alleged crime(s) occurred, membership of organisation, type of organisation, role or rank within the organisation, way of entry into and exit out of organisation, the level of participation in the alleged crime(s)); and 4) the sources used to substantiate the 1F decision (personal statements and documents presented by the applicant, witness statements, reports by governmental and non-governmental organisations or media, evidence of the membership of/rank within an organisation and (other) evidence of involvement in the alleged crime(s)).\(^ {48}\)

Files of 1F-excluded asylum seekers typically contain hundreds of pages of documents, ranging from extensive reports of the different asylum hearings and correspondence with or from legal representatives, to country reports from the Ministry of Foreign Affairs and non-governmental organizations (NGOs) and court files. The fact that information most relevant to the study was not always clearly listed in IND’s registration system often made scrolling through the large number of documents necessary. Coupled with the complexity of the files and the limitations of the registration system, this made determining the (then) current status of a decision both time-consuming and at times difficult. Throughout this study, whenever information from the file analysis is used, reference will be made to the file codes used for internal communication such as ‘(J6)’ or ‘(C5)’.\(^ {49}\)

\(^{47}\) I.e. cases where forced removal to the country of origin is not allowed because of a real risk of serious harm to the individual, or because of the right to family life. See Chapter 3.

\(^{48}\) The scoring list can be found in appendix 1.

\(^{49}\) These denominations have no value other than for the researchers’ recording purposes.
297 Files of non-Afghan nationals

61 Systematic sample of files of Afghan nationals

448 Files of Afghan nationals

387 Files of Afghan nationals outside sample

1.498 File numbers of cases associated with 1F in administrative system IND

745 Files containing definitive decision

358 cases analysed in total

442 Relatives of 1F-excluded individuals

442 Files of non-Afghan nationals

139 Overruled in court/revoked in anticipation court decision

160 No decision (yet) or association with 1F unclear

12 Incomplete or inaccessible files

753 Files dismissed from analysis

358 cases analysed in total
1.3.2. Review of literature, case law, policy documents, reports and other material
Besides the file analysis, a review of academic literature, case law and policy documents was conducted. As has already been mentioned, a significant body of literature has developed on the topic of 1F exclusion. This literature has been collected mainly through digital ‘snowballing’ by making use of different search engines, including Web of Science, and Google Scholar. Where relevant, use has been made of case law produced by Dutch and other national administrative and criminal courts, as well as international criminal tribunals, the International Court of Justice, the Court of Justice of the European Union and the European Court of Human Rights. References to case law originate from different sources and literature, but were also collected by making use of search engines and databases such as Rechtspraak, Migratieweb, Refworld, Rechtsorde, and search engine alerts. Besides academic literature and case law, use has been made of national legislation and policy documents on 1F exclusion. The policy documents include communications from Ministries, the annual reporting letters on international crimes prosecutions from the responsible Ministry to Dutch parliament, reports of parliamentary debates et cetera. These documents have also been collected by making use of search engines such as Rechtsorde, Officiële bekendmakingen, and search engine alerts. Finally, information including research reports, advisory reports and media reporting has been collected from NGO websites, search engines and databases such as LexisNexis Academic, Refworld and Google, and media outlets.

1.3.3. Interviews
In the context of this study, interviews were held with different experts. Chapter 4 will draw from interviews with two experts on transitional justice in Rwanda: the Vice Rector Academic Affairs and Research at the Institute for Legal Practice and Development (ILPD) in Nyanza, Rwanda in the period May 2011-December 2013 and a Senior Policy Advisor Rule of Law at the Dutch Ministry of Foreign Affairs, previously Vice Rector Academic Affairs and Research at the ILPD in the period 2008-2010. Chapter 5 will draw from interviews with 4 representatives of the Dutch Immigration

50 See <https://www.webofknowledge.com/> (last visited 4 October 2017).
51 See <https://scholar.google.nl/> (last visited 4 October 2017).
52 See <https://www.rechtspraak.nl/> (last visited 4 October 2017).
53 See <http://www.migratieweb.nl/> (last visited 4 October 2017).
54 See <http://www.refworld.org/> (last visited 4 October 2017).
55 See <https://www.rechtsorde.nl/> (last visited 4 October 2017).
56 See <https://zoek.officielebekendmakingen.nl/> (last visited 4 October 2017).
57 See <https://academic.unicode.org/> (last visited 4 October 2017).
and Naturalisation Service IND, 2 representatives of the National Prosecution Office’s Department for International Crimes and 2 investigators from the police’s War Crimes Unit. Chapter 2 will draw from the study by Bolhuis and Van Wijk (2015b) into the information exchange between immigration, law enforcement and prosecution services in 6 European countries, commissioned by the Norwegian immigration service (Utlendingsdirektoratet, UDI). In the context of that study, between January and November 2015, 43 interviews with 64 respondents have been conducted. Of these respondents 18 represented immigration authorities, 21 represented law enforcement and prosecution services, 15 represented ministries. The remaining 11 respondents represented different intergovernmental and non-governmental organisations or were academics. The method for all these interviews was the same. The interviews were semi-structured and lasted from 30 minutes up to two hours. Interviews were typically not taped, but conducted by two interviewers, one of whom took notes. Reports of these interviews were sent to respondents with the request to correct or clarify any inaccuracies.

1.3.4. Research questions: methods and period covered
The different research questions have been answered using the data collected through the different methods described, and covering different periods. The question of how the application of Article 1F relates to other modes for exclusion of (allegedly) criminal immigrants and how Article 1F is being applied in the Netherlands, is answered primarily using Dutch legislation and policy documents, covering the period up until October 2017. The question what the population of individuals excluded under Article 1F looks like has been answered primarily on the basis of the file analysis, which covers the period January 2000 to November 2010. This has been complemented with figures and other information from the annual reporting letters on Dutch international crimes prosecutions from the responsible Ministry to Dutch parliament, which cover the period 1992 to 2017. The questions to what extent and in what ways the Netherlands has facilitated and/or promoted criminal prosecution of individuals excluded under Article 1F outside the Netherlands has been answered using information from the international crimes prosecutions reporting letters, case law, academic literature and media reporting up until July 2014. Furthermore, information was used from interviews with 2 experts on transitional justice in Rwanda conducted in April and May 2014 and information on the Dutch 1F population from the file analysis (covering the period January 2000 to November 2010). The question to what extent and in what ways the Netherlands has prosecuted individuals excluded under Article 1F within the Netherlands has been answered using information from the international crimes

58 A complete overview of the exact affiliations can be found in Bolhuis and Van Wijk (2015b: 75-76).
prosecutions reporting letters, case law, academic literature and media reporting up until July 2014. Finally, the question what happens to those individuals excluded under Article 1F who are not criminally prosecuted but remain in the Netherlands has been answered using legislation, policy documents, case law, academic literature, research and advisory reports, information from the file analysis, and media reports, up until October 2016.

1.4. Outline of the study

Chapter 2 will set the stage by discussing how the Dutch policy came about and what its key points are; how the Dutch policy relates to 1F policies in other European states, and how these states cooperate with respect to criminal prosecution of crimes that fall within the scope of Article 1F. Chapter 3 sets out the legal framework and discusses which policy measures the Dutch government takes to deal with individuals excluded under Article 1F and other undesirable and unreturnable migrants, in particular in relation to access to permits, return, relocation, and prosecution. Chapter 4 focuses on the challenges connected to facilitating or promoting the prosecution of individuals excluded under Article 1F(a) outside the Netherlands. Chapter 5 discusses the challenges that come to the fore from efforts undertaken by the Netherlands to domestically prosecute individuals excluded under 1F(a). Chapter 6 discusses a particular group of excluded asylum seekers who cannot be prosecuted on the basis of universal jurisdiction, namely those excluded under Article 1F(b).59 Chapter 7 answers the different research questions and assesses the broader implications of the findings in this study.

The different chapters are based on five earlier publications that have been published in the period 2014 to 2017. Chapter 2 draws from a research report by Bolhuis and Van Wijk (2015b), published in November 2015. Chapter 3 is based on an article published in Refugee Survey Quarterly on 1 March 2017. Chapter 4 is based on a contribution to the Journal of International Criminal Justice, published on 1 December 2014. Chapter 5 is based on an article published in the European Journal of Criminology on 1 March

59 For the purposes of this study, the third limb of Article 1F, 1F(c), will not be addressed separately. Article 1F(c) is considered to overlap with 1F(a) and (b) and should, according to the UNHCR, be applied restrictively because of the lack of clarity in relation to its broad scope (see e.g. UNHCR, 1992 para. 162; UNHCR, 1996, paras. 60-63; UNHCR 2003a). In its 2003 guidelines on the application of Article 1F, UNHCR noted: “Indeed, it is rarely applied and, in many cases, Article 1F(a) or 1F(b) are anyway likely to apply. Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence.” For this reason, in some states, including Belgium and France (Kapferer, 2000) and the Netherlands (see §5.3 and §6.4), 1F(c) is considered not to be sufficient in itself to serve as an independent ground for invoking Article 1F. In relation to terrorism cases, Article 1F(c) has in more recent years been relied upon more often (UNHCR, 2009, p. 14). This has been the case for instance in the United Kingdom, although the UK Supreme Court has now endorsed the restrictive approach recommended by UNHCR (see Singer, 2015: 120-122).
2015. Finally, Chapter 6 is based on an article published in the Journal of Refugee Studies on 1 March 2016. The moment of publication needs to be taken into account in reading the mentioned chapters; when reference is made to ‘recent’ developments, this concerns the period preceding publication. The content of these publications has not been changed, except for minor textual corrections, e.g. for reasons of consistency in the terminology used. Where updates on important changes since the moment of publication have been added in footnotes, this is explicitly mentioned.