

# AVIPA

**ACTORS OF PROTECTION AND THE APPLICATION  
OF THE INTERNAL PROTECTION ALTERNATIVE**

**NATIONAL REPORT**

**THE NETHERLANDS**



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## I. Acknowledgments

This report is based on research performed by Mr Frank Broekhof and Mr Geert Lamers.

## II. Glossary

ACMA: Advisory Committee on Migration Affairs (Adviescommissie Vreemdelingenzaken)

AP: Actors of Protection.

DCR: Dutch Council for Refugees (*VluchtelingenWerk Nederland*)

INS: Immigration and Naturalisation Service (*Immigratie en Naturalisatiedienst*)

IPA: Internal Protection Alternative

QD 2004: Qualification Directive (2004/83/EC)

QD 2011: Recast Qualification Directive (2011/95/EU)

## III. Background: The National Asylum System

Except for subsection a., this background section represents a synopsis of information from the November 2013 AIDA Netherlands report and the October 2010 ECRE/ELENA legal aid study.

### ***a. Applicable Law.***

Through a 30 September 2013 amendment, Articles 3.37c and 3.37d of the Aliens Instructions 2000 transposed Articles 7 and 8 of the 2011 Qualification Directive almost verbatim. A corresponding update amended paragraph C2/6.1 of the Aliens Circular 2000 in the context of its 1 June 2013 recast. The rules for actors of protection (AP) and the internal protection alternative (IPA) expressed in the previous update, of 1 April 2013, were less detailed than their predecessors. The State Secretary for Security and Justice has stated that neither of these revisions changed the legal meaning of the circular.<sup>1</sup>

The Netherlands elected to transpose Article 8(3) of the 2004 Directive. Article 7(3) of the Directive has not been transposed.

Under the new Aliens Circular 2000, a 'protection alternative' is either a 'flight alternative', i.e. pertaining to threats of persecution that would lead to asylum based on refugee status, or a 'relocation alternative' in cases of protection against torture and inhuman or degrading treatment or punishment (Articles 2 and 3 ECHR and Article 15 Qualification Directive), and against the risk of trauma due to confrontation with unpunished offenders.<sup>2</sup>

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<sup>1</sup> WBV 2012/25.

<sup>2</sup> Article 29 Aliens Act 2000, sub 1 under c. '*who cannot, for pressing reasons of a humanitarian nature connected with the reasons for his departure from the country of origin, reasonably be expected, in the opinion of the Minister, to return to his country of origin*'.

## ***b. Institutional Setup***

The ***Aliens Police*** and the ***Royal Military Police*** (at borders) register and supervise the presence or arrival of third-country nationals.

The ***Advisory Committee on Migration Affairs*** (ACMA) is an independent expert committee established to provide research and advice to the government and parliament.

The ***Immigration and Naturalisation service*** (INS) registers asylum claims and examines them at first instance. The INS is within the responsibilities of the State Secretary for Security and Justice.

The ***Ministry of Foreign Affairs*** produces country reports used as country of origin information (COI) during determinations.

Eleven ***District Courts*** hear appeals against INS decisions.

The ***Council of State*** can hear higher appeals from either the applicant or the INS against District Court rulings.

## ***c. The Procedure***

People arriving at the external Schengen border who claim asylum are normally refused entry to the Netherlands and detained. Their claims are registered at the Schiphol Application Centre. Other applicants are referred to the Central Reception Centre in Ter Apel, then to a short-term reception centre in one of four regions. A rest and preparation period of at least six days ensues, during which the INS verifies the applicant's identity and carries out preliminary administrative proceedings including a EURODAC check, and the applicant learns about the procedure, meets with legal counsel, and otherwise prepares for the application. The applicant may choose to undergo a medical examination to assess medical or psychological problems that could interfere with the ability to take part in the asylum process.

The regular asylum procedure lasts eight working days. The first day is for the formal registration of the claim and an initial interview focused on identity, nationality and travel route. The second interview, dealing with the reasons for seeking asylum, takes place on the third day. On the second and fourth days the applicant meets with counsel to review and, if appropriate, comment on or correct the prior day's interview report, and prepare for the next day.

If by the fifth day it is clear the application cannot be resolved in the normal time frame then it is transferred to the extended procedure, where the INS has six months to resolve the case, which can be extended once for a further six months. About 40% of cases are forwarded to the extended procedure. For the rest the applications, an intended decision is indicated on the fifth day. If the intention is to reject the application, the applicant may submit arguments

on day six, which the INS will consider before rendering its final decision on the seventh or eighth day.

There are no accelerated procedures in the Netherlands. The border authorities register arrivals at ports and airports, and applicants arriving at external borders are normally detained, but otherwise there is no significant procedural difference when claims are made at the border.

#### ***d. Appeals***

Applicants may appeal denials of protection by the INS to the District Court. That court can revisit findings of fact as well as the application of law. Facts are evaluated as they exist at the time of the appeal. The court recognises the expertise of the INS in asylum determination, and does not substitute its own judgment for that of the INS in assessing the credibility of the applicant's statements. If it overturns a case, normally a District Court will remand it to the INS for re-determination. In no cases in the sample selected for this study did a court render a final decision. Further appeal to the Administrative Jurisdiction Division of the Council of State, which has a specialised chamber for asylum cases, is possible on factual findings as well as points of law. If the Council grants the appeal, it quashes the judgment of the District Court and may then reinstate the original INS decision, or order either the District Court or the INS to re-examine the application.

#### ***e. Representation and Legal Aid***

Free legal assistance is available to all asylum applicants. All applicants are assigned a lawyer upon arrival at the application centre. The state-funded Legal Aid Board schedules lawyers to be present at the centre. If applicants prefer to choose a different lawyer (for example in a second application), the board will pay the costs, as long as the lawyer is officially recognised as an asylum lawyer. In principle, the same lawyer handles the case from registration through to final disposition, including any appeals. Within the 8-day regular procedure, the applicant files a view regarding the indicated intended decision on the sixth day. In unusual cases where a lawyer may consider there is no valid ground to contest the intended decision, the applicant may go to the aid board to have a different lawyer do so.

During the 6-day rest and preparation period, applicants have access to additional legal advice from the Dutch Council for Refugees (DCR). This consists of information about their rights and duties and the asylum process, as well as counselling. Once the process begins, DCR remains available for further consultation on issues that may arise concerning the individual case. DCR representatives may attend interviews at the request of the applicant or their lawyer.

One obstacle to legal representation is the limited amount of time lawyers are allocated to prepare and present a case. In the first instance phase of the 8-day procedure, lawyers are paid for 8 hours. In 2013, legal aid payments for unsuccessful repeated claims were reduced.

## **IV. Methodology**

Research for this report consisted of extensive desk research, supplemented by input from stakeholders in NGOs and government agencies, as well as a review of INS decisions and court cases. The cases studied represent the leading Council of State jurisprudence and illustrative recent District Court cases. Those cases and INS decisions have been selected in order to present a set of cases that approximately reflects the national asylum case load while still providing a complete overview of how the concepts of actors of protection and the IPA are applied in the Dutch asylum system.

### ***a. Desk Research and Stakeholder Discussions***

Dutch asylum law and policy are closely followed and widely commented on. The project researchers regularly study new literature, laws, commentary and reports as they are published. This project began with a systematic review of recent legal developments and their apparent effects (the applicable Aliens Circular was revised twice during the project, and the effects of the most recent changes are not yet clear) and of publications pertaining specifically to the use of actors of protection and the IPA in the Netherlands. Discussions with experts from the DRC and the INS lent additional insight into policy priorities as well as trends in practice.

### ***b. Case Sample***

District Court and Council of State decisions are publicly available, but INS determinations and files are confidential. Therefore the parts of this report dealing with INS procedures and policies are based on a combination of publicly available policy circulars, assessments of lawyers and other stakeholders familiar with the asylum process, and discussions contained in court appeals.

All recent Council of State decisions from 2012-13 concerning actors of protection or the IPA were reviewed in detail, along with a few older (2010-11) policy-defining cases. Several hundred District Court cases from 2011-13 were assessed, with the emphasis on more recent cases, supplemented by a few older cases to illustrate issues that have not arisen more recently such as clan protection in Somalia. From the available District Court cases a small sample was chosen for in-depth study.

In all, 60 District Court and 21 Council of State decisions provided the main source of information regarding the interpretation of actors of protection and the IPA. Most of them are cited in the following sections of this report. Reflecting the national asylum case load, nearly half of the Council of State judgments concerned applicants from Afghanistan, Iraq or Somalia. The District Court decisions were selected to include as many countries of origin as possible where the AP or IPA concepts have been considered in appeals. Approximately one third of the cases concerned applicants with special needs, most of them victims of torture, with single parents, physically disabled and LGBT applicants included as well.

Country of Origin	Total	Instance			Gender		Outcome	
		IND	District Court	C.S.	Female	Male	Positive	Negative
Afghanistan	6		4	2		6	3	3
Algeria	2		1	1	2			2
Armenia	2		2		1	1	1	1
Azerbaijan	1		1			1	1	
Bangladesh	1		1			1		1
Burkina Faso	1		1			1		1
China	2	1	1		2			2
Colombia	1		1			1		1
Côte d'Ivoire	3		3		2	1	1	2
DRC	9		8	1	2	7	4	5
Egypt	4	1	3		2	2	3	1
Georgia	1			1		1		1
Guinea	3		2	1	2	1	1	2
India	1		1			1		1
Iraq	5	1	1	3	3	2		5
Iran	1		1		1		1	
Kazakhstan	1			1		1		1
Kosovo	1			1	1			1
Mauritania	1		1			1	1	
Mongolia	2		1	1	2			2
Nepal	2		1	1		2	1	1
Nicaragua	1		1		1			1
Nigeria	4		2	2	4			4
Pakistan	1		1			1	1	
Russian	2	1	1		2			2
Serbia	1			1	1			1
Sierra Leone	4		4			4	2	2
Somalia	17		14	3	5	12	14	3
Togo	1		1		1		1	
Turkey	2		1	1	1	1	1	1
Ukraine	1			1		1		1
Uganda	1		1		1			1
<b>TOTAL</b>	<b>85</b>	<b>4</b>	<b>60</b>	<b>21</b>	<b>36</b>	<b>49</b>	<b>36</b>	<b>49</b>

## V. National Overview

### a. Actors of Protection

#### i. The Nature of Protection

Under both the previous and the recast versions of the Aliens Circular 2000, and based on Article 3.37c of the Aliens Instructions 2000, the INS assesses the availability of protection after determining that the applicant has a well-founded fear of persecution or serious harm in their home country.<sup>3</sup> The availability of protection is evaluated as of the time of the assessment, not the time of the applicant's flight. There is no difference in policy in assessing actors of protection in cases based on refugee status versus those relating to subsidiary protection.

#### 1. Prevention of Persecution or Serious Harm

Article 3.37c(2) of the Aliens Instructions 2000 transposes Article 7(2) of the Qualification Directive almost literally. Protection must be effective, but according to the Council of State the fact "*that the level of effectiveness is not established does not mean that in fact no protection can be provided*".<sup>4</sup> According to the Aliens Instructions 2000, protection is generally provided when the actor of protection take reasonable steps to prevent the persecution or serious harm, including through the establishment of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm.<sup>5</sup> The Aliens Circular 2000 provides that protection is non-temporary if there are no concrete indications that effective protection will end in the foreseeable future.<sup>6</sup> Case law indicates that short term protection is sufficient.<sup>7</sup>

The interpretation of an "*effective legal system*" starts from the premise that no system can completely or permanently guarantee protection. Under an effective legal system, "*reasonable measures*" should be in place to protect people in the applicant's position.<sup>8</sup>

In appeals, the state often argues that protection is available because the criminal law in the country of origin forbids acts of the type feared. In most but not all cases, courts accept this argument.<sup>9</sup> In 2008, the Council of State ruled that lack of an effective legal system does not in itself preclude finding that an actor of protection can provide effective protection.<sup>10</sup> Police refusal to record a crime or arrest the offenders, and the failure of higher authorities to intervene, led the District Court of Arnhem to conclude that no effective legal system was

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<sup>3</sup> Aliens Circular 2000 (30/09/2013, currently in force), paragraph C2/6.1, Aliens Circular 2000 (in force until April 2013), paragraph C4/2.2.1 (both referencing Article 3.37c of the Aliens Instructions, transposing Article 7 of the Qualification Directive).

<sup>4</sup> See for example Council of State 201105823/1/V2 Mongolia (MON43FNSNO).

<sup>5</sup> Aliens Instructions 2000 (current), paragraph 3.37c.

<sup>6</sup> Aliens Circular 2000 (current), paragraph C2/6.1.

<sup>7</sup> Council of State 201108446/1/V1 (Iraq) (IRQ07FNSNO): shelter for woman fearing violence in the KRG (Kurdistan Regional Government).

<sup>8</sup> Aliens' Instructions 2000, referenced in paragraph C/4.2.2.2 Aliens Circular 2000 (old).

<sup>9</sup> District Court of Arnhem AWB 13/20115 Algeria (ALG04FNSTO). But see District Court of Groningen AWB 11/28814 Iran, where the State Secretary argued unsuccessfully that the applicant, a victim of domestic violence, could invoke the Iranian criminal act for effective protection. The Council of State in case 201110754/1/V2 rejected the minister's appeal. So, mere prohibition of the threat in the criminal law does not mean the system is effective.

<sup>10</sup> Council of State 200708107/1 Nigeria. Because non-state actors are capable of providing protection without operating an effective legal system, operating such a system is not absolutely required to establish that protection exists.



operating in Pakistan.<sup>11</sup> When a woman asserts that protection is not available against domestic violence, the State Secretary must supplement its initial examination of the legal system with an assessment of her individual situation, and issue a reasoned decision.<sup>12</sup> The willingness and ability of the authorities to prosecute play an important role.<sup>13</sup> The implementation of anti-trafficking laws<sup>14</sup> and the presence of police stations are also considered.<sup>15</sup> When the threat stems from (local) authorities anti-corruption enforcement is often cited.<sup>16</sup>

Paragraph C4/2.2.2 of the Aliens Circular 2000 follows Recital (27) of the 2011 Qualification Directive in that if the authorities are the source of danger then protection in the area of origin is “*in principle*” not possible. Exceptions include the situation where the applicant fears harm from individuals within the state authority but could seek protection from a supervising authority, or when the threat stems from local authorities and central authorities can be expected to be able and willing to offer protection. Courts often rule that higher authorities could provide effective protection if the threat stems from local authorities.<sup>17</sup>

Practice in the Netherlands regarding unaccompanied minors reflects the standard indicated by Recital (27) of the 2011 Qualification Directive regarding the availability of care and custodial arrangements, albeit in the general context of return rather than specifically applied to the IPA. The District Court of Den Bosch ruled that the State Secretary must ensure that adequate reception is available in the home country if an unaccompanied minor is to return there.<sup>18</sup> Under INS policy, adequate reception must provide living circumstances comparable to those available to minors in a similar position to the applicant. The INS assumes this condition is met when a parent or another family member can provide adequate reception; a spouse in a traditional marriage is present; reception in a private institution is available and acceptable to local standards; country guidance indicates that the authorities take care of reception; or general information shows that reception is available and sufficient.<sup>19</sup> A reception location is adequate when it offers to local standards at least shelter for minors up to the age of 18, or until they can be placed with their own family or guardian; food, hygiene and clothes; access to education; and medical care.<sup>20</sup>

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<sup>11</sup> District Court of Arnhem AWB 11/4124 Pakistan (PAK39MRENO).

<sup>12</sup> See General Administrative Law Act, paragraph 3(2).

<sup>13</sup> See for example the letter of the State Secretary for Security and Justice of 15 January 2013 on the Country Guidance Note on Pakistan. “*The Pakistani authorities omit in many cases to provide protection to Ahmadis and Christians against religious violence. The authorities also omitted in many case to prosecute the offenders. For this reason a climate of inviolability was being maintained for the offenders.*”

<sup>14</sup> District Court of Assen AWB 13/1411 (25/06/2013) Burkina Faso (BUR36MNSVT).

<sup>15</sup> Council of State 201201084/1/V1 (18/06/2013) Nepal. But see District Court of Arnhem AWB 11/32480 (20/09/2013) Nepal (NEP12MRENO): the construction of police stations did not mean the applicant could be effectively protected against the Youth Communist League.

<sup>16</sup> For example Council of State 201105922/1/V2 (21/03/2013) Kazakhstan, also anti-corruption campaigns can play a role in determining that a State takes reasonable steps.

<sup>17</sup> See leading case Council of State 201105119/1/V2 (21/09/2011) Russia, about the existence of three bodies to file a complaint and rise of cases against the misuse of power. Especially in this case of applicants of Armenia ethnicity and the discrimination against this group in Russia.

<sup>18</sup> District Court of Den Bosch AWB 13/10622 Yemen.

<sup>19</sup> Aliens Circular 2000 B8/6.1 Ad. 5. Unaccompanied minors who have no available reception and who were less than 15 years old when they first applied for asylum receive a residence permit. *Ibid.* B8/6.1.

<sup>20</sup> Aliens Circular 2000 B8/6.1 Ad. 5 ad. d-f.

## 2. Access to Protection

An effective legal system is not strictly necessary, but the possibility to complain to the authorities is an important factor for determining if a state actor could provide protection. The Council of State ruled in December 2013 that because the family had asked Afghan soldiers to protect them and the soldiers had agreed, “it could not be said that” protection was unavailable in this case, even though the country report indicated that the authorities generally could not provide protection.<sup>21</sup> For local authorities, criteria such as the possibility to report a crime show whether the applicant has access to protection. Although there is no formal requirement, in practice the personal characteristics of the applicant are taken into account.

Recently the Secretary of State decided that it is not expected from LGBT asylum seekers to request protection from their authorities. A relocation alternative will on the other hand still be examined.

In a leading Council of State decision,<sup>22</sup> an applicant from Nepal submitted a letter from the police in Bami stating that his home was too far from the police station for 24 hour protection. The court ruled that the letter showed the police generally provide protection and “*that the request for protection is not dangerous or useless in advance*”. Inability to determine the level of effectiveness does not establish that no protection is available. The fact that the applicant chose to leave Nepal rather than relocate closer to the station means the applicant did not establish “*that the Nepal authorities are not able or willing to provide protection*”.

### ii. Actors of Protection

#### 1. General Criteria

Dutch courts interpret “*generally provided*” broadly. For example, in the case of a female hairdresser from Iraq,<sup>23</sup> the Council of State cited Foreign Ministry country reports finding that in general the central authorities are not able to protect civilians in certain regions due to extensive influence of militias, including infiltration of the police. Although it was not known whether security forces in southern Iraq could protect civilians, the Council found that recent offensives against militias had resulted in security forces controlling the region and therefore it was not clear that the authorities were unable to provide protection.<sup>24</sup>

This appears to conflict with another line of Council of State jurisprudence, under which the INS should first use country reports and reports from international organisations to establish whether the home country can provide protection in general. Only after the state affirmatively finds that the country can provide protection in general must the applicant either “*make it plausible*” that in their case it would have been dangerous or useless to seek protection, or

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<sup>21</sup> Council of State 201306331/1 (31/12/2013) Afghanistan (AFG82MNSNO): they requested protection from their son-in-law after an attack on their daughter; the soldiers could not immediately act because his location was unknown.

<sup>22</sup> Council of State 201201084/1/V1 (18/06/2013) Nepal (NEP37MNSNO).

<sup>23</sup> Council of State 200909548/1/V2 (30/05/2011) Iraq (IRQ33FNSNO).

<sup>24</sup> Citing country reports of June 2008 and May 2009, covering respectively the periods from February until June 2008 and July 2008 until April 2009.

show that they requested protection but the authorities were unable or unwilling to provide it.<sup>25</sup>

The Council of State has also interpreted temporary protection in shelters for women fearing honour killing<sup>26</sup> and the possibility for victims of domestic violence to obtain advice on their rights and the existence of shelters,<sup>27</sup> as demonstrating that protection is generally available.<sup>28</sup> Willingness and ability is usually considered in deciding whether protection is in general available, but not in examining the applicant's individual circumstances.

## **2. State Actors of Protection**

### ***i. Criteria for a State to be an Actor of Protection.***

Statements of Dutch policy following the Arab Spring help to illustrate the criteria by which a state may be deemed a suitable actor of protection. Areas of concern in Libya include the functioning of the police and supervisory bodies such as the public prosecutor, and whether reported crimes are taken under consideration. According to a June 2012 Foreign Ministry country report concerning Christians in Egypt, factors to determine whether the new government could provide protection include the willingness to investigate sectarian violence, measures taken since the regime change, and the consideration and handling of reported crimes by the higher authorities.<sup>29</sup> In a June 2013 letter, the State Secretary stated that based on an individual determination, if an applicant showed they were under threat by local authorities in Syria, they would not be expected to request protection from national authorities, and that an IPA would not be applied for Syria.<sup>30</sup> If the risk of persecution stems from opposition forces in control of part of the country, then eligibility for protection depends to a large extent on how active the applicant is in supporting the Syrian regime.<sup>31</sup>

### ***ii. Situations where a State cannot be an AP***

According to the Country Specific Guidance an applicant from Libya who establishes a reasonable fear of persecution or serious harm is not expected to seek protection from their own authorities. Libya is the only country for which this rule applies in general; it applies also to applicants from southern and central Somalia, and to particular groups from several other countries.<sup>32</sup> The INS has found that Egyptian authorities do not qualify as actors of protection

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<sup>25</sup> Council of State 200708107/1 (05/08/2008)

<sup>26</sup> Council of State 201108446/1 (19/09/2012), Iraq (KRG) (IRQ07FNSNO). This decision was issued before the transposition of the 2011 Qualification Directive's "non-temporary" criterion.

<sup>27</sup> Council of State 201205299/1 (06/08/2013) Kosovo (KOS34FNSTO).

<sup>28</sup> See also District Court of Haarlem AWB 12/10739 (18/09/2012) Azerbaijan (AZE35MRENO). Although granting the applicant's appeal, the court cited the possibility to invoke the protection of higher authorities, the ombudsman and the ECHR as demonstrative of generally available protection.

<sup>29</sup> <http://www.rijksoverheid.nl/documenten-en-publicaties/ambtsberichten/2012/06/25/egypte-2012-06-22-thematisch-ambtsbericht.html>

<sup>30</sup> House of Representatives, session year 2012-2013, 19 637, nr. 1679 (answering questions relating to UNHCR's call to resettle Syrian refugees).

<sup>31</sup> Besides some Dublin cases the vast majority of Syrian applicants are however granted subsidiary protection based on a risk of treatment contrary to Article 3 ECHR.

<sup>32</sup> These include Burundi, the DRC, Eritrea, Guinea, Ivory Coast, Nepal, Nigeria, Pakistan, Sierra Leone, Somalia, Sri Lanka and Sudan.

for Christians.<sup>33</sup> Authorities in Jamaica have been determined unable to protect homosexuals; a complaint is useless or dangerous.<sup>34</sup> This also applies to any country where there are criminal laws aimed at LGBT persons. Russian authorities have been found not to qualify as protection actors for victims of domestic violence, because they do not respond to complaints.<sup>35</sup> In Nepal, authorities have been deemed unable to protect against armed groups such as the Young Communist League.<sup>36</sup> The possibility to obtain protection from higher authorities in Azerbaijan against persecution by local authorities was questioned, due to indications in the country report that European Court of Human Rights (ECtHR) judgments are not followed, the ombudsman is ineffective, and the police do not always respond to complaints.<sup>37</sup> The Council of State affirmed that Iranian authorities cannot protect victims of domestic violence, or victims of incest, for whom approaching the authorities could be dangerous.<sup>38</sup> The INS considers that neither state authorities nor international organisations in Iraq are able to protect Christians or other religious minorities against persecution.<sup>39</sup>

### 3. Types of Non-State Actors of Protection

The INS rarely invokes non-state actors of protection. None of the jurisprudence reviewed for this study interpreted “*controlling the state or a substantial part of the territory*”. According to a June 2012 ruling of the District Court of Dordrecht, it is insufficient for the INS to merely mention institutions that could protect the applicant (in this case the tribe, clan, ISAF or private security guards). The INS should establish that these or other institutions could actually protect the applicant (against the Haqqani network) and why it would be reasonable to expect this applicant in his particular circumstances to remain in Afghanistan and request protection.<sup>40</sup>

#### *i. International Organisations and Forces*

The INS considers at least the UN and NATO to be international organisations within the meaning of Article 7(1) of the Qualification Directive.<sup>41</sup> The Council of State found in January 2013 that an employee of the UN Office on Drugs and Crime in Afghanistan, in addition to trying harder to contact the Afghan police, could have requested protection with the aid of his employer.<sup>42</sup> In several cases from 2004 and 2005, the INS raised the possibility that KFOR and UNMIK could provide protection, but the courts rejected this argument.<sup>43</sup> In a judgment

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<sup>33</sup> Letter from the Minister for Immigration, Integration and Asylum to the Second Chamber of the Dutch parliament, kst-19637-1564, 11 July 2012.

<sup>34</sup> District Court, 02.10.2012, AWB 12/13095.

<sup>35</sup> AWB 11/25621.

<sup>36</sup> District Court Arnhem, 20.09.2012, AWB 11/32480 (NEP12MRENO).

<sup>37</sup> District Court Haarlem, 18.09.2012, AWB 12/10739 (AZE35MRENO).

<sup>38</sup> District Court Groningen, 28.09.2011, AWB 11/28808 (IRN40FRETO) and confirmed by the Council of State 201110754/1/v2.

<sup>39</sup> WBV 2013/24, December 2013.

<sup>40</sup> District Court of Dordrecht (15/06/2012), AWB 11/41454 (the applicant was abducted, shown a murder and warned the same would happen to him if he contacted the police). The court was particularly sceptical as to “*why an applicant who fears a real risk of treatment in breach of Article 3 ECHR can be expected to request protection from private security guards*”.

<sup>41</sup> Aliens Circular 2000, p. 10.

<sup>42</sup> Council of State (21/01/2013) 201113400/1/V4,

<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2013:BY9623>. The applicant requested protection from the Afghan police, who provided a telephone number to contact in an emergency. When the police did not answer his call, the applicant failed to personally notify them or to seek his employer's help in obtaining protection.

<sup>43</sup> See e.g., District Court the Hague, 03.11.2005, AWB 04/32096 (Kosovo).

of 18 February 2014, the Council of State rejected the government's argument that the applicants did not require refugee protection because the ICC would protect them.

## **ii. Clans or Tribes**

No decisions of District Courts or the Council of State indicate whether clans or tribes can be considered actors of protection on their own. According to the Country Specific Guidance on Iraq,<sup>44</sup> applicants who fear blood feud or similar problems with other families, clans or tribes can seek protection from their own family, clan or tribe.<sup>45</sup> In deciding that the INS had insufficiently justified its position that Mandaeans should be considered vulnerable to, rather than the more serious classification of at risk of, systematic exposure to treatment contrary to Article 3 ECHR, the District Court of the Hague took into consideration that Mandaeans cannot rely on the protection of clans or authorities against the acts of violence.<sup>46</sup> The Council of State does not consider women in Somalia as a group to be at risk of inhuman treatment because their clans, including minority clans, can provide protection.<sup>47</sup>

## **iii. Other Parties or Organisations**

In a 2009 case, the state argued that Sunni vigilantes could be considered actors of protection. The District Court ruled that the state had not fulfilled its burden of showing whether protection is generally provided, and that COI explicitly indicated that vigilantes, the police and American forces could not provide the necessary protection.<sup>48</sup>

### **b. The Internal Protection Alternative**

The INS assesses the IPA in all cases, if a well-founded fear of persecution or serious harm is demonstrated.<sup>49</sup> Under paragraph C2/6.1 of the Aliens Circular 2000, the INS should presume an IPA is available when 1) there is no real risk of persecution or serious harm in the area, 2) the applicant can safely and legally reach it, and 3) can settle and reasonably be expected to stay there.

The area should be safe against both the original threat of persecution or harm, and any other such threats. If the risk is limited to part of the country and is non-personal, due to generalised violence in the sense of Article 15(c) of the Qualification Directive, applicants are expected to relocate. The protection and living standards in the relocation area need not be of the same quality as would be offered in the Netherlands, or as in the area the applicant fled. The applicant should be able to live normally according to local standards with no disadvantage to "*essential rights with respect to the other population in that area*". Living

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<sup>44</sup> C7.13.5.1. Aliens Circular 2000.

<sup>45</sup> It must be noted that the Netherlands have transposed the recast qualification directive (Article 7), which now excludes tribes and clans as possible actors of protection.

<sup>46</sup> District Court of the Hague (AWB 11/3372), Judgment of 29 June 2012. The court referred to the UNHCR Eligibility Guidelines Iraq of 31 May 2012 which stated that the Mandaeans live in small communities, are pacifists and not protected by militias.

<sup>47</sup> Council of State 201011992/1.

<sup>48</sup> District Court of Zwolle (16/01/2013) AWB 08/43618

<sup>49</sup> Aliens Circular 2000 (current), paragraph C2/6.1.

conditions should not be so poor as to constitute a humanitarian emergency.

In November 2012, the Council of State ruled that the state sufficiently supported its application of the IPA to a Somali applicant from Mogadishu.<sup>50</sup> The threat was not individual, so the applicant could escape by relocation. Travel to southern or central Somalia was relatively safe, although with some restrictions, and many people travelled in this region even in al-Shabaab controlled areas.<sup>51</sup> Notwithstanding the severe humanitarian situation in Somalia, circumstances outside Mogadishu were not so bad as to violate Article 3 ECHR. The applicant had relatives in a village in the region, and did not belong to a minority clan. In Somalia, safety for persons within areas controlled by their own clans is relatively good. The applicant could therefore be expected to live in southern or central Somalia under normal circumstances by local standards.

#### **i. Assessment of the IPA**

The IPA is assessed largely based on country reports produced by the Foreign Ministry. Based on the information in the reports and other reliable public sources of information, the State Secretary indicates whether an IPA exists in a particular country either generally or in individual cases. When the IPA is considered, a protection region is generally identified.

##### **1. Safety in the Region**

Generally in cases involving women, an important factor is the level of influence of the non-state persecution actor in the proposed relocation area. The country reports usually provide detailed information about the position of women, including for example if it is possible to escape domestic violence. In establishing whether a region is safe for women fearing female genital mutilation (FGM), the evidence accepted is whether there is a real risk of FGM there.<sup>52</sup> The Council of State ruled in July 2011 that a woman and daughter who fled Nigeria fearing FGM did not demonstrate that they could not have found protection for the daughter by moving to another part of the country.<sup>53</sup> The standard is the possibility to build a new life elsewhere.

If there is a risk of trafficking, the INS considers whether the country of origin has implemented anti-trafficking laws. The National Agency for Prohibition of Traffic in Persons (NAPTIP) plays an important role in determining that victims of trafficking are provided protection in Nigeria. Aided by investigation agencies in Europe, NAPTIP shelters victims and works for the enforcement and oversight of anti-trafficking legislation. The INS and courts consider that NAPTIP provides sufficient protection taking into account aspects such

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<sup>50</sup> Council of State 201112530/1.

<sup>51</sup> In August 2011, the District Court of Dordrecht made an opposite ruling regarding the accessibility of a proposed IPA region. In that court's view, the fact that many people travel on that the route does not mean it is safe. The state's argument that all known information, including the applicant's statements, had been taken into consideration and the respective interests balanced in finding that travel to the relocation area carries a reasonable risk was not convincing because it was not clear to the court how the state weighted the evidence. District Court, 28.06.2011, AWB 11/11748; Wijzigingsbesluiten Vreemdelingencirculaire (WBV) 2010/118.

<sup>52</sup> District Court Rotterdam, 13/3380, Judgment of 07 March 2013 (Nigeria).

<sup>53</sup> Council of State, 1.07.2011, 201012568/1/V1 (1 July 2011). Although according to the country report FGM is widespread (about 36.5% of women) and practiced with impunity in their home region of Lagos, even where forbidden, its prevalence is declining and the fact that FGM is a tradition in the family does not by itself establish that they cannot avoid it.

as the provision of shelters, reintegration programmes, and micro-credit to help start a business.<sup>54</sup>

## 2. Securing Human and Social Rights

According to the District Court of Amsterdam, when examining southern and central Somalia as a relocation alternative, the assessment of whether a humanitarian emergency exists must go beyond verifying the absence of a risk of treatment contrary to Article 3 European Convention on Human Rights (ECHR).<sup>55</sup> The District Court of Zwolle ruled in June 2013 in a subsequent proceeding that the food crisis in DRC could form a new fact or changed circumstance.<sup>56</sup> Citing a UNICEF report that estimated one million children suffered from severe acute malnutrition in the country, neither specifying nor excluding Kinshasa, the court ruled that the possibility of a humanitarian emergency precluded applying the IPA to a woman with a very young child.

### *i. General Circumstances*

Factors considered in evaluating “*general circumstances*” in the proposed IPA region include the security situation, the ethnic composition, and the power of the feared persecutor there. Systematic discrimination might prevent an IPA, but a degree of ordinary discrimination does not.<sup>57</sup> The most important question in cases of IPA for women fearing persecution by non-state actors is whether sufficient reception infrastructure is available in the area, or whether a woman can independently survive there, taking economic factors into account.

The inability of Somali authorities to absorb any more displaced persons and the weakening of clan structures of protection created an unacceptable risk to essential rights.<sup>58</sup> Essential rights include basic needs such as water and food.<sup>59</sup> A reasonable risk of having to stay in a displaced persons’ camp in central or southern Somalia can justify finding that the applicant cannot relocate and live there.<sup>60</sup> Living standards in a displaced persons’ camp in Somalia, such as Afgooye corridor, were not normal by local standards, particularly considering the on-going drought and subsequent migration to Mogadishu, an area of armed conflict.<sup>61</sup>

### *ii. Personal Circumstances*

Factors considered in relation to the “*personal circumstances*” of the applicant in evaluating whether it is reasonable to expect them to stay in a region can include language, family or other connections, health,<sup>62</sup> education,<sup>63</sup> age,<sup>64</sup> ability to adapt to militant authorities,<sup>65</sup> and

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<sup>54</sup> For example: District Court Roermond, 13/15313, Judgment of 10 July 2013 (Nigeria)

<sup>55</sup> District Court s’Gravenhage, AWB 10/26023 of 11 February 2011.

<sup>56</sup> District Court the Hague, 10.06.2013, AWB 13/467 (DRC21FRESP), referencing UNICEF Humanitarian Action Update, Democratic Republic of Congo, 4 August 2012 (further estimating that the rate of global acute malnutrition exceeds 15%).

<sup>57</sup> District Court Utrecht, 12/25187, Judgment of 30 August 2012 (DRC) (DRC10MNSPDTCO). Despite the court’s finding that discrimination was not systemic, one year later the State Secretary stopped all relocation of Tutsis to Kinshasa due to insufficient information about their treatment there.

<sup>58</sup> District Court Dordrecht, 11/11748, Judgment of 28 June 2011 (Somalia) (SOM51FRENO).

<sup>59</sup> District Court of Amsterdam, 11/6867, Judgment of 18 July 2011 (Somalia) (SOM49MRENO).

<sup>60</sup> District Court Almelo, 11/4806, Judgment of 21 July 2011 (Somalia) (SOM50FRENO).

<sup>61</sup> District Court Zutphen, 11/13701, Judgment of 09 May 2011 (Somalia) (SOM27MRENO).

<sup>62</sup> Council of State; 200104464/1, Judgment of 8 November 2001 (Iraq): Health could be a factor when it is certain that a person

economic factors.<sup>66</sup> Many of these are assessed only rarely. One case examined for this study mentioned language, the court stating that a change of language would only be taken under consideration for young people who had spent a long time in the Netherlands and whose language abilities would render them vulnerable if they returned to Somalia and relocated to Somaliland.<sup>67</sup> Close family links are taken into account with respect to Somalia; otherwise this usually only arises concerning single women.<sup>68</sup> The District Court of Zutphen ruled in a repeated application that UNHCR's call to refrain from applying the IPA to persons from Kivu unless "*they have strong and close links there*" was a new circumstance showing there is no general IPA, and the state must carry out an individualised IPA assessment.<sup>69</sup> The Council of State overruled this decision, stating that the UNHCR report did not substantiate its conclusion.<sup>70</sup> The District Court of Utrecht ruled it was "*not clear*" that a Tutsi applicant from South Kivu whose leg had been amputated and who had no family or acquaintances in Kinshasa "*could not*" independently maintain himself there under normal circumstances by local standards.<sup>71</sup>

Special needs are usually taken into account in determining whether it is reasonable for an applicant to stay in the IPA region. "*There is no relocation alternative in Somalia for particularly vulnerable groups such as single women, unaccompanied minors and non-Somali minorities.*"<sup>72</sup> Also regarding other countries these characteristics are taken into account. In a 2010 judgment, the Council of State approved the use of the IPA for an LGBT applicant, because societal attitudes and the availability of civil and social rights for LGBT people might vary across different regions of Ukraine.<sup>73</sup>

### **iii. "Stay/Settle"**

The test of whether an applicant "*can reasonably be expected to stay*" in a region can include a wide range of factors. It is more than an inquiry into the risk of treatment contrary to Article 3 ECHR.<sup>74</sup> In 2003, the Council of State ruled that in IPA cases, the INS has to establish that the protection in the area of relocation is durable.<sup>75</sup>

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cannot obtain necessary medicines in the relocation area.

<sup>63</sup> District Court Zwolle, 11/12873, Judgment of 10 May 2011 (Guinea) (GUI54FRESP). In the court's view it is easier for a well-educated applicant to adapt to a new location.

<sup>64</sup> District Court The Hague, 98/6704, Judgment of 15 May 2001 (Iraq).

<sup>65</sup> District Court Zwolle, 11/40135, Judgment of 27 April 2012 (Somalia). The court considered whether the applicant could be expected to "*play the game*" of Al-Shabaab.

<sup>66</sup> District Court Den Haag, 12/36920, Judgment of 18 December 2012 (Egypt) (EGY29FRENO). The court ruled that, even if the state had sufficiently motivated its assertion that other areas of Cairo were safe for Copts, it should also have taken into account the high cost of living in the areas proposed.

<sup>67</sup> District Court Amsterdam, 08/17492, Judgment of 25 March 2010 (Somalia) (SOM52MNSNO). The applicant was middle-aged.

<sup>68</sup> In 2013 the courts took under consideration the UNHCR view that expecting an applicant to relocate to a safer part of the DRC is inappropriate "*unless they have strong and close links*" to the area. See e.g., District Court Haarlem, 12/24593, Judgment of 20 March 2013 (DRC).

<sup>69</sup> District Court Zutphen, 13.02.2013, AWB 11/41606 (citing, inter alia, paragraph 34 of the 2003 UNHCR guidelines on the IPA and paragraph 141 of *Salah Sheekh v. The Netherlands*) (DRC16MRENO). The state had argued that the standpoint of UNHCR is general and not substantiated, and did not state that applicants are in danger upon return.

<sup>70</sup> Council of State, 201302248/1, Judgment of 18 December 2013 (DRC) (DRC17MNSNO): the Council also ruled that the applicant's Tutsi ethnicity was not a new circumstance, as it should have been raised earlier.

<sup>71</sup> District Court Utrecht, 30.08.2012, AWB 12/25187 (DRC10MNSPDTO). There were also indications that the applicant had been working despite his disability and discrimination. The applicant had argued that his case should have been assessed under the extended procedure.

<sup>72</sup> <http://www.rijksbegroting.nl/algemeen/gerefeerd/1/7/0/kst170590.html>.

<sup>73</sup> Council of State, 2010005517/1, Judgment of 31 August 2010 (Ukraine) (UKR23MNSLG).

<sup>74</sup> District Court Arnhem, 10/23999, Judgment of 23 June 2011 (Somalia) (SOM48FRENO).

<sup>75</sup> Council of State, 200301759/1, Judgment of 02 June 2003 (Nigeria).



The general situation in the country and the applicant's personal circumstances are weighed.<sup>76</sup> In addition to stability, factors that play a role in examining the general situation are the availability of food, hygiene and health care, and the possibility of clan protection. The latter factor is also sometimes considered as a personal circumstance.

Cases reviewed for this study showed no clear pattern of types of personal circumstances considered. For example, employment prospects or other economic factors might be considered, if they reflect disadvantage relative to the other population in the area. Economic factors tend to be weighed most frequently in cases concerning single women.

### **3. Access**

The Foreign Ministry should verify that applicants can safely and legally gain admittance to the proposed relocation area. In 2011, after some debate, it was concluded that applicants from Mogadishu, where generalised violence in the sense of Article 15(c) of the Qualification Directive was taking place, did not have a relocation alternative in southern or central Somalia, because they would have to travel through areas of generalised violence.

Under the previous Aliens Circular 2000, a short term obstacle such as a need for travel documents or temporary closure of an airport does not bar the IPA.<sup>77</sup> There is no jurisprudence on this topic. The rule should be interpreted restrictively and a primary condition is that the obstacle should be temporary.<sup>78</sup> Restricting the application of this principle to temporary obstacles indicates a view toward expulsion. Therefore no alternative status is provided.

#### **ii. Application of the IPA**

##### **1. Procedure**

The INS applies the IPA in the main asylum proceeding during the normal 8-day procedure or the extended regular procedure. The IPA is applied to both refugee status and subsidiary protection, without distinction.<sup>79</sup>

Under the Aliens Circular 2000, the IPA is assessed as a possible exception, only after the applicant has demonstrated a protection need.<sup>80</sup> The jurisprudence of the Council of State also supports this approach.<sup>81</sup> However in several decisions the INS has used the IPA as a subsidiary argument to deny a protection claim.<sup>82</sup> This is often combined with AP as a

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<sup>76</sup> See e.g., District Court Almelo, 10/7048, Judgment of 10 February 2011 (Sierra Leone) (SIE47MRENO).

<sup>77</sup> Aliens Circular 2000 (old), paragraph C2.3.2.

<sup>78</sup> Amendment to the Aliens Law 2000 for the implementation of the 2004 Qualification Directive, p. 6.

<sup>79</sup> Articles C4/2.3.1 and C4/2.3.2 Aliens Circular 2000 (until April 2013). Courts often refer to flight- and relocation alternative as one term, as do some country specific policies (e.g. Pakistan) of the Ministry for Security and Justice, even though in Dutch law 'flight' applies only to refugee claims while 'relocation' relates to subsidiary protection. See e.g., Awb 08/18425.

<sup>80</sup> Aliens Circular 2000 (until April 2013), paragraph C4/2.3.1; Aliens Circular 2000 (current), paragraph C2/6.1.

<sup>81</sup> Council of State, 08.10.2012, 201106621/1 (GEO09MFNSNO).

<sup>82</sup> See e.g., District Court Haarlem, 19.06.2012, AWB 12/37869 (SRL11MNSNO); District Court Arnhem, 20.09.2012, AWB 11/32480 (NEP12MRENO).

primary argument. It is not clear that this approach allows the applicant to respond to all potential grounds for denial of a claim.<sup>83</sup>

## 2. Policy

### *i. Type of Protection Claim*

According to paragraph C/2.3.2 of the old (i.e. pre-recast) Aliens Circular 2000, the IPA in principal will not be invoked where the threat comes from the national authorities or an organisation under their control. It may exceptionally apply where the central authority only exercises power over a limited territory, or where the threat arises from local authorities and central authorities can provide protection elsewhere, or when a third party can provide protection. Courts often inquire into the extent of infiltration of the local authorities or an affiliated organisation in the government, or other means to exercise power in the relocation area.<sup>84</sup> For all countries except Colombia where an Article 15(c) Qualification Directive situation has been indicated a relocation alternative is deemed to exist.<sup>85</sup>

### *ii. IPA Applied to Groups*

The IPA is normally considered on an individual basis. However, for certain groups a blanket policy applies.<sup>86</sup> This policy is annexed to country reports and is generally more specific and up to date. A Country Specific Policy can establish a presumption that an IPA exists, which the applicant must then overcome. Alternatively, if a policy says there is generally no IPA, the applicant will not be subject to the IPA. Personal circumstances should be taken into account even if a policy applies.<sup>87</sup>

The IPA is currently applied to:

- ethnic Armenians from Azerbaijan, based on an IPA in Armenia or Nagorno-Karabakh, and ethnic Azerbaijanis from Nagorno-Karabakh, based on an IPA in Azerbaijan,<sup>88</sup>
- applicants from areas of generalised violence in the DRC, for whom Kinshasa is indicated as an IPA;
- applicants from Nigeria or Sierra Leone who fear FGM or persecution by militant groups or secret societies,<sup>89</sup> or Sharia-based criminal prosecution in northern Nigeria.

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<sup>83</sup> District Court Roermond, 7.08.2013, AWB 12/8135 (COI05FRETO).

<sup>84</sup> District Court Amsterdam, 23.12.2011, AWB 11/3815; and District Court s-Gravenhage, 5.2.2009, AWB 08/18425.

<sup>85</sup> Somalia, the Democratic Republic of the Congo and Sudan.

<sup>86</sup> Aliens Circular 2000 (until April 2013), paragraph C4/2.3.3 (the INS may assess the IPA on an individual basis or by national or ethnic groups); Aliens Circular 2000, paragraph C2/6.1(a) ("If the threat stems from an extraordinary situation" of generalised violence that is limited to one area and not individually targeted, applicants are presumed able to relocate to a safer part of the country.) See also the country policies for the DRC and Sudan. In the discussion leading to the recast Qualification Directive, the Netherlands proposed adding language to permit authorities to forego examining applications from people fleeing local generalised violence, if protection could be provided in another part of the country, but the Commission's proposal did not include this point. House of Representatives, Migration Policy, session year 2011-2012, 30573, nr. 96, 29 February 2012.

<sup>87</sup> Aliens Circular 2000 (until April 2013), paragraph C4/2.3.2.

<sup>88</sup> Aliens Circular 2000, paragraph C7/5.4.4.

<sup>89</sup> An IPA is determined case by case. For Nigeria, it depends on the extent to which a woman can build up a new life. A social network, including family or religious or social support institutions, is an important aspect. Sierra Leone does not apply the IPA to minors fearing FGM or persecution by secret societies unless they are supported by a family or guardian or previously escaped the threat through relocation within the country.

The IPA is excluded for:

- applicants from the DRC who fear persecution on an individual basis;
- women from Eritrea who have demonstrated a risk of FGM;
- applicants from Somalia, unless they had stayed six months under reasonable circumstances by local standards in Puntland (except North Galkayo) since 1991, Somaliland since 1997, Sool or Sanaag. The INS anticipates the applicant's clan will provide protection;
- women from Somalia fearing FGM or other sexual violence; and
- applicants from Sudan except for protection from generalised violence.

In 2013 jurisprudence, Kinshasa is frequently indicated as a relocation alternative for applicants from Kivu. Currently no IPA is applied for Iraq and Colombia.

### **c. Assessment of Facts and Circumstances**

In all cases reviewed for this study, the INS decision maker asked, during the interview, why the applicant did not seek protection from their national authorities. A lesser number of interviews included a question about why the applicant had not sought safety in a different part of the home country. An applicant who belongs to a 'group at risk' (indicated in a country specific policy) can "*with limited indications*" demonstrate a fear of persecution. The requirement of individualisation remains applicable.<sup>90</sup>

#### **i. Actors of Protection**

The Aliens Circular 2000 instructs the INS to consider at least the applicant's statements; whether they sought protection from their national authorities; and country information based on reports of the Foreign Ministry and international organisations, when assessing whether "*the authorities in the country of origin are willing or able to provide effective protection*".<sup>91</sup> If country information demonstrates "*that protection cannot easily be obtained, the applicant has to make it plausible [aannemelijk] that protection in his case cannot be obtained at all*".<sup>92</sup> According to the Council of State, if country information shows that protection is generally impossible, or that to request it is useless or even dangerous,<sup>93</sup> then the applicant does not

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<sup>90</sup> Aliens Circular 2000 (current), paragraph C2/3.2 (neither the circular nor the policy provide further interpretive guidance).

<sup>91</sup> Aliens Circular 2000 (current), paragraph C2/6.1. According to the circular, the authorities in the country of origin should be able or willing to provide protection. The legislation on which the circular is based, however, uses the wording of the Qualification Directive that those authorities should be willing and able to protect. Aliens Instructions 2000, Article 3.37c.

<sup>92</sup> Aliens Circular 2000, paragraph C2/6.1. Country information alone may however suffice to allow the applicant to demonstrate that protection is not available.

<sup>93</sup> This usually derives from Country Reports and Country Specific Guidance Notes. The INS does not expect an applicant from southern or central Somalia to have turned to the authorities for protection (Guidance Note on Somalia WBV 2013/14). The Country Report described security as very bad, with anarchy in the region. Other important indicators are widespread corruption, the absence of police officers and an inaccessible judicial system. In Mogadishu, "*citizens are not able to turn to the police for protection – the police have no vehicles, police officers are underpaid or not paid at all – the civilians are in most cases protected by fellow clan members or carry their own weapons*".

need to establish that no protection is available, unless their statements indicate that the authorities offered or were prepared to offer protection.<sup>94</sup>

Usually if the general information indicates that it would be difficult to obtain protection, the duty on the applicant to demonstrate that they did not have a way to obtain protection is reduced. If an assessment of country information shows protection is generally available, the applicant has the burden to show that for them to request protection would be useless or dangerous. Otherwise, only by having unsuccessfully requested protection could they show that the authorities “*are not willing or able to offer protection*”.<sup>95</sup> Because of the practice of evaluating the availability of protection only after a risk of persecution is established, whether or not an applicant attempted to secure protection from their national authorities has no bearing on any finding of credibility regarding their well-founded fear.

## ii. The Internal Protection Alternative

The Council of State has ruled that if the state asserts the IPA, it bears the responsibility of gathering the necessary evidence and balancing the interests involved.<sup>96</sup> Once the state shows, based on country of origin evidence, that there is an IPA, it falls to the applicant to demonstrate that in their particular circumstances there is no IPA. An applicant with recognised special needs faces a lower burden of proof, but must still establish the facts necessary to support the application through credible testimony or other reliable source materials.<sup>97</sup> The Netherlands proposed the reference eventually incorporated in Article 8(2) of the recast Qualification Directive to the rules of Article 4, to clarify “*that the applicant has a positive duty for making his flight-story, including aspects of protection alternatives, reasonable,*”<sup>98</sup> thus applying the same principle of evidence to the IPA as to actors of protection.<sup>99</sup>

If the applicant has spent time in another part of their home country, this can be used as evidence that an IPA is available. The Council of State ruled an Iraqi family fearing honour killing had a relocation alternative, because they spent 6 years in another part of Iraq without threats from the family of the mother, and the father could find a job and provide shelter.<sup>100</sup> The District Court of Middelburg ruled there was an IPA in Kinshasa for an applicant from North Kivu because he moved there at the age of 2 and remained for 20 years before fleeing to the Netherlands, he did not belong to the Tutsi minority, and his wife still lived in Kinshasa.<sup>101</sup> The District Court of Rotterdam ruled that the Minister could take into account

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<sup>94</sup> Council of State, 201004889/1 (16 May 2011).

<sup>95</sup> Council of State, 201101753/1/V2 (28 March 2012), paragraph 2.2.1 (ALG19FNSNO). The Council used the Aliens Circular language “*ready [willing] or able*” rather than the Aliens Instructions and Qualification Directive “*willing and able*” construct.

<sup>96</sup> Council of State, 201111174/1/V2 (SOM20MRENO). The applicant had established a risk of treatment violating Article 3 ECHR if returned to Mogadishu, where there was a situation of generalised violence in the sense of Article 15(c) of the Qualification Directive as well. Under Article 3(2) of the Administrative Law Act, “*When preparing a decision an administrative authority shall collect the necessary information concerning the relevant facts and the interests to be considered.*” In two cases in 2010 and 2011, the Council of State did not require the state, which had based its assessment of the IPA solely on the country reports, to carry out a balancing of interests. Council of State 201005517 (UKR23MNSLG) and 201010327/1 (SER24FNSNO).

<sup>97</sup> INS working instruction 2013/14, 26 June 2013: ‘Vulnerable minorities’.

<sup>98</sup> House of Representatives, Migration Policy, session year 2011-2012, 30573, nr. 96, 29 February 2012.

<sup>99</sup> For a discussion of the coherence of the jurisprudence of the Council of State on this point with international norms, see Geert Lamers, *Het binnenlands vlucht- en vestigingsalternatief: Nederlandse beleidsregels en internationale normen*, Asiel & Migrantenrecht, 2011, p.166-175.

<sup>100</sup> Council of State, 14.01.2013, 201113226/1 (IRQ13FMNSNO).

<sup>101</sup> District Court Middelburg, 29.08.2013, AWB 13/20687 (DRC14MNSNO).

that the applicant had stayed in other parts of Egypt (Cairo and Alexandria) in deciding he had an accessible relocation alternative.<sup>102</sup>

#### **d. Decision Quality**

### **i. Country of Origin Information**

#### **1. Sources of up-to-date COI**

The INS should apply “*precise and up-to-date country information from relevant sources*” to determine if an IPA exists.<sup>103</sup> The COI used in Foreign Ministry country reports is generally up to date. Courts use these reports as their primary source of country information, making them difficult for the applicant to refute. The courts take note when country reports cite reports of international organisations such as Amnesty International and Human Rights Watch, but tend to follow the conclusions of the Foreign Ministry as well as citing the jurisprudence of the ECHR which uses a wider range of sources. Reports from UN agencies are primarily taken into account (UNHCR, UNICEF, messages from UN Secretary). Dutch courts consider these sources objective and relevant.

Courts primarily take into account country reports about whether the protection region can meet the particular living needs of the applicant. Evidence such as a food crisis,<sup>104</sup> drought,<sup>105</sup> the presence of fellow clan/tribe members,<sup>106</sup> former stay in another part of the country,<sup>107</sup> and the security situation give indications about their living needs.

In principle the applicant has access to the same reports as the state in obtaining and adducing evidence. The Dutch Council for Refugees can be contacted to obtain relevant sources of COI. Costs of contra-expertise are problematic.<sup>108</sup>

A passage in the July 2012 report on the DRC that also appeared in the December 2010 report, citing the same source, was not recent enough, according to the District Court of Middelburg.<sup>109</sup> The District Court of Roermond remanded a case, requiring recent information on the general situation in Mauritania and whether the authorities can provide effective protection for victims of slavery.<sup>110</sup> Citing a lack of recent reliable information about the situation of Tutsis in the DRC, in particular in Kinshasa for applicants from the eastern part of the country, the State Secretary declared in July 2013 that a relocation alternative for Tutsis from the eastern DRC was no longer appropriate.<sup>111</sup> However the Council of State ruled in December 2013 that Kinshasa can be considered an IPA.

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<sup>102</sup> District Court Rotterdam, 13.07.2012, AWB 12/20231 (EGY15MNSNO).

<sup>103</sup> Aliens Circular 2000 C2/6.1.c. This is also implicitly required by paragraph 3(2) of the Administrative Law Act.

<sup>104</sup> District Court Zwolle, 10.06.2013, AWB 13/467 (DRC21FRESP).

<sup>105</sup> District Court Zutphen, 9.05.2011, AWB 11/13071 (SOM27MRENO).

<sup>106</sup> District Court Zwolle, 13.02.2013, AWB 13/471 (DRC28FRETO), the court took into account that only 20 Tutsis, all high-ranking military officers or politicians, lived in Kinshasa, out of a population of 7 million, indicating that Kinshasa might not be safe for most Tutsis.

<sup>107</sup> Council of State, 14.01.2013, 201113226/1 (IRQ13FMNSNO).

<sup>108</sup> ACMA; Expertise getoetst; de rol van deskundigenadvisering in de asielpcedure.

<sup>109</sup> District Court Middelburg, AWB 12/39040 (DRC).

<sup>110</sup> District Court the Hague, 11.03.2013, AWB 12/2596 (MAU26MRENO).

<sup>111</sup> Staatscourant nr. 19603, 9 July 2013: <https://zoek.officielebekendmakingen.nl/stcrt-2013-19603.html>

## 2. Specific to the Region

The INS and the courts evaluate COI separately for the country and for the proposed relocation region. The reports of the Danish Immigration Service are a leading source for southern and central Somalia.<sup>112</sup> UK Home Office reports on Somalia are frequently cited as well. In discussing the IPA, the Foreign Ministry's country reports on Afghanistan, Iraq and Somalia refer only to the position of UNHCR.

## 3. Challenging COI or Introducing Alternative COI

Applicants cannot directly contest the findings of a country report. They can however challenge its accuracy by submitting more recent or more detailed information. An applicant from North Kivu submitted a UNHCR statement of November 2012 to refute the state's assertion that an IPA was possible in Kinshasa.<sup>113</sup> The report was more recent than the country report, and indicated a worsening security situation that could have consequences for the expulsion of people from North and South Kivu to other areas of the DRC. On this basis, the District Court of Middelburg granted a provisional measure. When, for lack of a recent country report, the state supported its assertion that Egyptian authorities could provide protection against FGM by reference to a newspaper article reporting a criminal charge, the District Court of The Hague found in favour of the applicant, who had submitted a UNICEF report indicating that 91% of females in Egypt undergo FGM.<sup>114</sup>

## 4. Proposals to Modify the Use of COI

The Advisory Commission of Alien Affairs has criticised the country reports as lacking transparency and given undue deference by the courts and recommended the establishment of an independent commission for country information.<sup>115</sup> The Ministry of Security and Justice did not adopt this recommendation, citing the separation in the Dutch system between the provision of country of origin information and the policy on aliens, and stating that the Foreign Ministry is an appropriate expert.<sup>116</sup> The ministry further stated that country reports had become more transparent since the previous report of the commission,<sup>117</sup> involving organisations such as UNHCR, the Dutch Council for Refugees and COC,<sup>118</sup> as well as lawyers, in their production.

In April 2013, the House of Representatives requested that the government exert its efforts for a leading European Country Report and to make the EASO electronic COI archives accessible to applicants' representatives.<sup>119</sup> The Ministry of Security and Justice supported

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<sup>112</sup> See for example: Danish Immigration Service: '[Update on the security and human rights issues in South-Central Somalia, including in Mogadishu](#)', 1/2013; and 'A war in waiting, Somalia's Disintegration into Mini-States'.

<sup>113</sup> District Court Middelburg, AWB 12/39040 (DRC), referencing the "*UNHCR position on returnees to North Kivu, South Kivu and adjacent areas in the DRC affected by on-going conflict and violence in the region*" of 15 November 2012.

<sup>114</sup> District Court of The Hague (26/01/2011), 10/3809, (Egypt) (EGY46FRENO).

<sup>115</sup> ACVZ, Expertise getoetst - de rol van deskundigenadviesing in de asielpcedure, Den Haag, July 2012; ACVZ-advies [Transparant en Toetsbaar. Een advies over landeninformatie in het vreemdelingenbeleid](#), Den Haag, 2006.

<sup>116</sup> However, the Ministry of Security and Justice can submit research questions to the Foreign Ministry.

<sup>117</sup> ACVZ, [Transparant en Toetsbaar. Een advies over landeninformatie in het vreemdelingenbeleid](#), Den Haag, 2006.

<sup>118</sup> Organization responsible for the interest of LGBTI: <http://www.coc.nl>.

<sup>119</sup> Motions no. 1637 and 1638. KST 19637 nr. 1702 Brief staatssecr. over uitvoering moties-Sjoerdsma over landeninformatie asielzoekers.

these motions.<sup>120</sup>

## ii. Templates, Guidance and Training

There are no specific guidelines for caseworkers or decision makers on how to interpret AP or IPA. The Alien Circular 2000 and the Country Specific Guidance Notes are extensive on these topics. According to an INS stakeholder, caseworkers receive training through for example the EAC training on evidence assessment and the EASO module 'Inclusion'.

Asylum decisions sometimes invoke UNHCR guidelines. Courts do not consider them to be as decisive as the Foreign Ministry country reports. If used, they are mostly considered by courts at first instance. Only one case examined for this study cited the July 2003 UNHCR guidelines on the IPA.<sup>121</sup> UNCHR reports and eligibility guidelines are more frequently used, but not on a regular basis.

## VI. National Recommendations

These recommendations are considered particularly relevant to the Dutch context, and are complementary to the general recommendations provided in the APAIPA comparative report.

- The availability of protection for the applicant must be demonstrated in practice, not merely in law or in principle. The effect of that practice must be shown in relation to the particular person concerned or similarly situated persons, not merely in general terms. It should be demonstrated that the particular applicant can effectively be protected by a specific actor of protection and will have access to protection and that the protection is not temporary.
- The criterion that protection must be “non-temporary” should be interpreted to mean that it must be established that the factors which formed the basis of the refugee’s fear of persecution have been permanently eradicated, and that there are no further well-founded fears of being exposed to acts of persecution or a risk of serious harm.
- When assessing whether the applicant has an internal protection alternative, the decision maker must consider all factors and circumstances particular to the applicant.
- When considering an IPA in the regular procedure one should take into account the careful examination that is needed for a rejection on this ground. The extended regular asylum procedure may well be more suitable.

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<sup>120</sup> See: [http://www.parlementairemonitor.nl/9353000/1/j4nvgs5kjg27kof\\_j9vvi5epmj1ey0/vjbgcckc2fno/f=/kst196371702.pdf](http://www.parlementairemonitor.nl/9353000/1/j4nvgs5kjg27kof_j9vvi5epmj1ey0/vjbgcckc2fno/f=/kst196371702.pdf)

<sup>121</sup> District Court of Zutphen, AWB 11/41606 (DRC16MRENO).



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