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English translation of the Recommendations on article 1F of the Advisory Commission on Aliens, the Netherlands, dated 2001, sent by the Dutch delegation to the Eurasil Secretariat in 2002.

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Note to the reader

Over the last ten years much more attention has been focused on the application of article 1(F) of the Geneva Refugee Convention. Within the Immigration and Naturalisation Service an article 1(F) Unit has been set up, to which the Regional Directorates of this Service have been referring more and more cases.

In recent years the State Secretary for Justice (SvJ) has referred an increasing number of individual cases to the Advisory Commission on Aliens with the request to issue a recommendation on the decision to be taken on appeal. While dealing with these cases, it has been found that the application of article 1(F) is a complicated issue which raises a number of questions, not only in the area of asylum law and general administrative law, but also in the area of international humanitarian law and international criminal law to which (complete) answers have not as yet been found.

The Commission felt that it would be useful, based on the experience it has acquired in handling individual cases, to express its opinion in more general terms on the application of article 1(F). The present general policy recommendation is the result of this process. The Commission hopes that this recommendation will make a contribution to the ongoing debate on the application of article 1(F) and the consequences of its application for the aliens concerned.

The present recommendation is in three parts. The first part concerns a number of practical policy recommendations with regard to the application of article 1(F). We then present a brief outline of the considerations which led the Commission to these recommendations. Finally, we present a more in-depth analysis of article 1(F) which is intended for those who face this issue in their everyday work. First and foremost, we discuss the development, content, application and scope of this provision (chapter 1). We then examine the consequences which the applicability of article 1(F) has in practice or which in the opinion of the Commission it should have for aliens with regard to the following:

- the decision on their applications for admission (chapter 2);
- their independent departure or deportation (chapter 3);
- their entitlement to benefits (chapter 4);
- the decision on an application of their family member or members for admission (chapter 5).

The Hague, January 2001.

Mr. T.J.P. van Os van den Abeelen
President ACV

Recommendations

The *Adviescommissie voor vreemdelingenzaken* (Advisory Commission on Aliens) has decided to issue the following recommendations on the basis of its findings concerning the application of article 1(F) of the Refugee Convention.

- 1) The practice of the Secretary of State for Justice that assessment according to article 1(F) comes before the assessment of refugee status should be seen as legally correct and should be continued.
- 2) The practice up till now that category (c) of article 1(F) is not relied upon as the only category does not sit well with the imperative wording of article 1(F). The SvJ is therefore invited to consider abandoning this practice.
- 3) When assessing whether an alien can be held responsible for acts referred to in article 1(F), the 'personal and knowing participation test' offers a good guideline. It is recommended that this test be used consistently in investigation and decision practice.
- 4) When assessing whether there is 'personal participation' with regard to an act referred to in article 1(F), in cases where the alien did not *inter alia* carry out this act himself and/or give the order to do so, the criterion 'direct facilitation' is used. This criterion entails that without the action or omission of the alien the 1(F) act could have been carried out less easily or could not in all likelihood have been carried out in the same manner if someone had not played the part of the alien. The presumption of 'knowing participation' requires that the person who directly facilitated the act referred to in article 1(F) knew or should have known that there was a real chance that the act concerned would be carried out *inter alia* through his action or omission. It is recommended that this test be used consistently in investigation and decision practice.
- 5) There is reason to rely *prima facie* on article 1(F) in respect of the following categories of persons, which implies that it is up to the alien to disprove the presupposition 'personal and knowing participation':
 - a) individuals who have worked for an organisation with a limited, brutal purpose;
 - b) the political leaders of a regime that systematically carries out acts mentioned in article 1(F);
 - c) leaders of other organisations that systematically carry out acts mentioned in article 1(F).
- 6) Among other things, in the light of recommendation 5, the SvJ is invited to consider whether it is desirable to draw up a public list of (a) organisations with a limited, brutal purpose, and (b) regimes which systematically carry out acts mentioned in article 1(F).
- 7) With regard to child soldiers, care must be taken when assessing whether there is 'knowing participation' and, more particularly, the question whether the alien had any real option not to commit the offence.
- 8) When assessing a plea, particular care must be taken with the test for the proportionality criterion and the criterion of the presence of *culpa in causa*¹.
- 9) The policy that 1(F) aliens are not eligible for any legal residency is as such to be regarded as legally correct and should be continued. However, it is advisable when taking decisions within the sphere of the residence permit to give attention more than is presently the case in an identifiable manner to the question as to whether there are special circumstances which on the basis of the inherent exemption competence urge a further weighing of interests, insofar as such circumstances have been alleged by the alien.

¹ There is *culpa in causa* if through his own doing an individual has got himself into a situation in which he has no other choice than to commit or refrain from a certain act.

- 10) In principle and for the sake of the credibility of the policy pursued on this issue, we cannot forebear from a reassessment of all the cases of admitted aliens to whom article 1(F) may apply. Where there is at present insufficient capacity for this (and the Commission has strong indications that there is indeed such a shortfall), additional resources should be made available.
- 11) It is recommended that the asylum procedure should maximise the possibility of a 1(F) alien being recognised as such at an early stage and guarantee that legal residency can be withdrawn at any time if article 1(F) applies to the holder thereof. In this regard, it is advisable to have aliens sign a declaration of antecedence which explicitly relates, *inter alia*, to article 1(F). Furthermore, it is important that during the second interview as complete a picture as possible be obtained of all relevant 1(F) aspects which, as far as the Commission can ascertain, is not being done enough at present.
- 12) The policy set out in the *Tussentijdse Bericht Vreemdelingencirculaire* (TBV - Interim Alien Circular) 2000/26, which states that asylum-seekers to whom article 1(F) appears to apply during the first interview (intake) at Schiphol should be refused entry and the measure under article 7a of the *Vreemdelingenwet* (Vw - Law on Aliens) should be imposed, ought to be continued. For the sake of the credibility of this policy, it is essential that in such cases the question of asylum should be decided vigorously.
- 13) The (non-)admission policy pursued in respect of 1(F) aliens retains its credibility only if the decision to refuse admission is followed up by consistent application of the repatriation policy, which therefore calls for particular attention and efforts.
- 14) The deportation of a 1(F) alien can be ruled out only if this is prevented by article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and/or the Convention against Torture and/or article 25 of the Law on Aliens. In all other cases, including cases in which the 1(F) alien belongs to a category of aliens who themselves are eligible for a conditional residence permit (*voorwaardelijke vergunning tot verblijf* - vvtv), attempts should be made consistently to carry out deportation if the alien does not leave independently. Where there is at present insufficient capacity for this, additional resources should be made available.
- 15) It is recommended that aliens to whom article 1(F), introduction and part (a), applies should be declared undesirable under article 21 of the Law on Aliens. If deportation or independent departure is not possible, the *ongewenstverklaring* (declaration of undesirability) can be suspended until the alien can leave.
- 16) A rejected non-deportable 1(F) alien resides legally in the Netherlands on the basis of article 1b, introduction and part 5, of the Law on Aliens, assuming that the non-deportability is stipulated in the decision. The SvJ is invited to consider whether it is desirable that this category of 1(F) aliens can receive more benefits than the minimum humanitarian safety net as mentioned in article 8b, second paragraph, of the Law on Aliens. Under the Law on Aliens 2000, this situation will arise only in respect of 1(F) aliens who for health reasons cannot be deported.
- 17) Family members of 1(F) aliens are by definition not eligible for derivative refugee status. The policy that they are also ineligible for a residence permit other than for cogent reasons of a humanitarian nature or for a conditional residence permit is not unreasonable and can be continued, insofar as this concerns applications which were submitted on or after 27 February 1998, the date of publication of TBV 1998/3. However, it is advisable in the decision-making process more than is presently the case to address the question in an identifiable manner whether there is family-related persecution or whether - in the context of the residence permit - there are special circumstances which on the grounds of the inherent exemption competence urge a further weighing of interests, insofar as such circumstances are alleged on behalf of the family members.
- 18) In the view of the Commission, five years after the submission of the first admission application it is no longer possible to continue to refuse to admit family members who, in the light of their family relationship with the 1(F) alien, are still eligible for this, it being understood that this period can be shortened on the grounds of special circumstances. The SvJ is invited to consider amending the policy in this field accordingly.

Summary

Article 1(F) of the Geneva Refugee Convention reads as follows²:

"The 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."

In the view of the Commission, the SvJ is correctly implementing the policy that assessment according to article 1(F) should take place before the question as to whether an individual is a Convention refugee is answered. In the light of the imperative wording of article 1(F), refugee status in the meaning of the Convention cannot by definition be recognised if article 1(F) applies. Applicability of article 1(F) should therefore be considered as a preliminary question as to the applicability of (the other provisions of) the Convention. If article 1(F) applies, entitlement to Convention refugee status should not be examined.

The four Red Cross Geneva Conventions state that certain offences committed during international armed conflicts constitute war crimes ('grave breaches'). It is generally now accepted that universal jurisdiction applies to individuals who are responsible for violations of common article 3 of the Red Cross Conventions and Additional Protocol II to the Conventions during an internal armed conflict.

In order for a crime to be considered as a crime against humanity, the crime in question must be part of a policy of persecution or discrimination that is carried out in a widespread or systematic manner. The crime need not have been committed during an armed conflict to constitute a crime against humanity.

For the applicability of article 1(F), introduction and part (b), it is essential to define the meaning of the term 'political crime'. Absolute political crimes are directed against the State and are of a purely political nature. Crimes which are committed in order to be able to commit an absolute political crime and are directly connected therewith are also regarded as political crimes. A relative political crime is *per se* a common-law offence which - perhaps *inter alia* - is perpetrated to achieve political ends. In order to be able to decide whether a crime is predominantly political, the so-called predominance test is generally applied, which, among other things, includes the criteria of effectiveness, proportionality and subsidiarity. Offences which are committed for personal gain or for strictly personal reasons are not in principle political offences.

Public official who in an official capacity commit war crimes or crimes against humanity do not fall only under category (a) of article 1(F) but by definition also under category (b). These categories of crimes cannot be regarded as political crimes, as they are not acceptable as a means of achieving ends (political or otherwise).

The independent meaning of category (c) of article 1(F) is very limited. However, the fact remains that the SvJ, in the light of the imperative wording of article 1(F), is required to use the (c) ground in the above cases as the sole ground for exclusion.

In the view of the Commission, acts which are explicitly regarded by the International Court of Justice or by the General Assembly of the United Nations as contrary to the purposes of the United Nations and crimes which are punishable under international law and to which universal jurisdiction applies fall under category (c).

² There is no authentic Dutch text of the Refugee Convention. For this reason, the English text is quoted in the Dutch text of this document.

There is no justification for the view that article 1(F), introduction and part (c), applies only to acts carried out in the exercise of a government function. The determining factor should be the nature of the act and not the capacity in which this act is carried out.

The question as to whether an individual can be held responsible for a crime can be assessed on the basis of the so-called 'personal and knowing participation test'.

The presumption of 'knowing participation' requires the presence of '*mens rea*', i.e. that the alien knew that the crime in question was committed and that he could choose whether or not to commit the crime.

'Personal participation' means that the alien personally took part in the crime. This in any case applies if the alien committed the crime himself or gave the order to do so. Furthermore, 'personal participation' applies if the alien directly facilitated the crime, which means that without the action or omission of the alien the crime could have been committed less easily or that the crime would in all likelihood not have been committed in the same way if someone had not played the part of the alien.

Mere membership of an organisation which commits crimes from time to time cannot lead to exclusion from international protection as a refugee, simply because there was not 'knowing participation', let alone 'personal participation'. In the case of child soldiers, particular attention must be given to the question as to whether '*mens rea*' was present.

Furthermore, mere membership of an organisation with a limited, brutal purpose, which applies if the Commission of crimes constitutes the main or very important activity of said organisation, cannot *a priori* lead to exclusion, as it is not automatically the case that there was 'personal participation' in the case of each operative. However, there are usually grounds to reverse the burden of proof according to paragraph 43 or 47 of *The Exclusion Clauses: Guidelines on their Application (The Exclusion Clauses)* of the United Nations High Commissioner for Refugees (UNHCR). In the view of the Commission, article 1(F) can *prima facie* be relied on against the political leaders of a repressive regime and the leaders of military or terrorist organisations which systematically carry out acts mentioned in article 1(F). In all these cases, it is up to the alien to put forward a reasonable argument that in his case there was not 'personal and knowing participation'.

The fact that the crime was carried out on someone's orders does not exculpate the alien. Article 33, first paragraph, of the Rome Statute in fact contains an exception to this principle, but it is not conceivable that this article can be invoked in respect of 1(F) acts, given that these should generally be regarded as 'manifestly unlawful'. The capacity of the perpetrator, i.e. the commission of an offence as a public official, does not constitute grounds for exemption from punishment. Military necessity, coercion and self-defence are admissible subject to strict conditions as grounds for exemption from punishment. However, the proportionality criterion and the criterion of presence of *culpa in causa* will usually not be met.

In the Netherlands, the policy is applied that aliens to whom article 1(F) is applied are never eligible for any legal residency. In the view of the Commission, 1(F) aliens are never eligible for recognition and/or admission as refugees or for a conditional residence permit. In view of the existence of an exemption competence inherent to the policy rules, it cannot be said *a priori* that a situation can never occur in which a residence permit should be granted contrary to the policy implemented in this field.

If following the admission of an alien it is found that article 1(F) applies to him, it should at all times be considered whether the legal residency can be withdrawn. As a ground for withdrawal the supply of inaccurate information cannot therefore be relied upon against a 1(F) alien if he has related everything which is important for the assessment of his application or if he has made such declarations that the SvJ, by not investigating such declarations more thoroughly, has forfeited the right to withdraw legal residency. This will apply only in the most exceptional cases. Also, further insight can lead to the conclusion that the alien has supplied inaccurate information.

Under the forthcoming Law on Aliens (Law on Aliens 2000), legal residency can be withdrawn for reasons of public interest. This is by definition the case for 1(F) aliens. To ensure credible use of the grounds for withdrawal, this law must be applied consistently.

To increase the chance of early detection of 1(F) aspects and to ensure that the residence permit of any 1(F) aliens who are admitted can be withdrawn, an antecedent declaration can be used which is designed, among other things, with article 1(F) in mind. During the first and, in particular, the second interview, in such cases particular care must be taken with the 1(F) aspects.

Summary

It is essential for the credibility of the policy applied in respect of 1(F) aliens that non-admission be followed by consistent application of the repatriation policy. The starting point should be that the alien himself has primary responsibility for his departure from the Netherlands, failing which he can be deported.

If a 1(F) alien is not admitted, independent departure and/or deportation can be forborne only in the case of a medical emergency situation and/or applicability of article 3 of the ECHR or article 3 of the Convention against Torture, which provisions have absolute effect. The scope of article 3 of the ECHR is, on the one hand, greater than that of article 3 of the Convention against Torture, as there can be violation of the abovementioned provision only if this is connected with government actions or acquiescence. However, from another standpoint, the latter provision is broader in scope, as the general situation in the country of origin must be taken more into consideration than within the framework of article 3 of the ECHR. The fact that a 1(F) alien belongs to a category of aliens who in principle are eligible for a conditional residence permit does not in the view of the Commission rule out the possibility of repatriation.

A 1(F) alien whose case is 'under review' is entitled to benefits. A rejected 1(F) alien who on the basis of article 25 of the Law on Aliens or on the basis of the abovementioned articles 3 is not deportable has legal residency in the Netherlands in the meaning of article 1b, introduction and part 5, of the Law on Aliens - assuming that the obstacles to deportation are stipulated in the refusal - and can claim the benefits to which he is expressly entitled. If the rejected 1(F) alien can be deported, he can claim only a minimum level of benefits, including essential medical care.

Under the Law on Aliens 2000, there will be a change in this situation, as aliens who on the basis of the abovementioned articles 3 are not deportable do not have legal residency in the meaning of the Law on Aliens 2000. Under the Law on Aliens 2000, rejected 1(F) aliens - unless article 62 of the Law on Aliens 2000 (corresponding to article 25 of the Law on Aliens) applies to them - are therefore eligible only for benefits corresponding to a minimum humanitarian safety net.

Family members of a 1(F) alien are by definition not eligible for a derivative refugee status. The SvJ applies the policy that they are not eligible for a residence permit other than for cogent reasons of a humanitarian nature or for a conditional residence permit. The Commission believes that this policy, which in its view can be applied to applications which were submitted on or after 27 February 1998, is acceptable on the whole. However, it should be borne in mind that application of this policy can have far-reaching adverse consequences for family members, so that in the context of residence permits it should be considered whether the inherent exemption competence should be used, insofar as the family members have alleged special circumstances.

If a family member in spite of his/her relationship with a 1(F) alien is still eligible for legal residency five years after the submission of the first application for admission, in the view of the Commission this should still be granted to him/her. In special circumstances, the period of five years can be shortened. Under the Law on Aliens 2000, this situation will not change substantively.

Chapter 1

Historical background, content, application and scope of article 1(F) of the Refugee Convention

1.1 *Historical background*

After World War II, the Economic and Social Council of the United Nations set up the Ad Hoc Committee on Statelessness and Related Problems. Its task was to put together a draft Refugee Convention.

The trial of a number of World War II war criminals was still fresh in people's minds, and there was agreement among States that such criminals are unworthy of international protection as refugees. Furthermore, the States wanted to be able to refuse admission to criminals who constitute a danger to public order and security. This is reflected in article 14, (first and) second paragraph, of the 1948 Universal Declaration of Human Rights:

"(...) the right to seek and to enjoy in other countries asylum from persecution (...) may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

In February 1950 the abovementioned Committee, with reference to article 14, second paragraph, of the Universal Declaration of Human Rights - insofar as it has bearing in this context - proposed the following provision:

"No contracting State shall apply the benefits of this Convention to any person who in its opinion has committed a crime specified in Article VI of the London Charter of the International Military Tribunal or any other act contrary to the purposes and principles of the Charter of the United Nations."

The objection was raised that this provision was too vague and prone to misuse. As a result, the following text was proposed:

"The provisions of the present Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime specified in Article VI of the London Charter of the International Military Tribunal; or (b) he falls under the provision of Article 14, paragraph 2, of the Universal Declaration of Human Rights."

The representative of the Federal Republic of Germany objected to the explicit mention of the London Charter on the grounds that not all war criminals fall within the definitions of the agreement, while all war criminals must be excluded from international protection. Hence the existing text of article 1(F), introduction and part (a), of the Refugee Convention came into being.

The British delegation pointed out that article 14, second paragraph, of the Universal Declaration of Human Rights appears to relate to individuals who have fled from criminal prosecution to another country on account of non-political crimes and that the intention cannot be to exclude individuals from protection who have already been admitted as refugees and subsequently commit a crime in the country of refuge. In response, the Belgian representative proposed the following wording of category (b):

"(...) that he has committed a serious crime under common law outside the receiving country before being admitted to it as a refugee."

This proposal was accepted and - in somewhat clearer wording - incorporated as article 1(F), introduction and part (b), of the Refugee Convention.

The last part of the original draft provision - "acts contrary to the purposes and principles of the United Nations" - was incorporated as article 1(F), introduction and part (c), of the Convention.

Article 1(F) of the Refugee Convention therefore reads as follows:

"The 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."

The purpose of article 1(F) is to exclude individuals from international protection as refugees because there are serious reasons for considering that they have committed crimes which are so serious that they are unworthy of protection. Article 1(F) offers the Contracting Parties the possibility of protecting themselves from criminals who constitute a danger for their security.

1.2 Article 1(F) in relation to article 1(A)

There has been some discussion surrounding the question whether it should first and foremost be assessed whether an alien meets the definition of refugee set out in article 1(A) of the Convention or if this should be assessed directly according to article 1(F), in which case the assessment will be only according to article 1(A) if article 1(F) is not applicable.

The SvJ, in the letter of 28 November 1997 to the President of the *Tweede Kamer der Staten-Generaal* (Lower House of the Dutch Parliament) (reference: TK 1997-1998, 19.637, number 295), expressed *inter alia* the opinion that assessment according to article 1(F) precedes assessment according to article 1(A). The Commission agrees with this opinion, whereby the following has been taken into consideration.

On the basis of article 1(A), it should be investigated whether the alien has reason to fear persecution. This investigation is not carried out if article 1(F) is applicable, as the introduction to article 1(F) states that the provisions of the Convention 'shall not apply' if article 1(F) is applicable. There can be no room for interpretation by the Contracting Parties in this regard of the application of article 1(F), so that in the event of applicability of article 1(F) by definition no refugee status can be assigned in the meaning of the Convention. This cannot be reconciled with the fact that an investigation is carried out to determine whether the alien meets the definition of article 1(A). In addition, on the basis of article 14, second paragraph, of the Universal Declaration of Human Rights, to which provision reference is often made in the *travaux préparatoires* of the Refugee Convention, on the right to seek and to enjoy asylum, no appeal can be made in the case of criminal prosecution for non-political crimes or acts contrary to the purposes and principles of the United Nations. In the light of the text in italics, an assessment of Convention refugee status is no longer appropriate if article 1(F) is applicable. Furthermore, it is important that article 1(F) speaks of 'any person' and not 'any alien', all the more reason for considering that status determination is not necessary for the application of article 1(F).

The above considerations lead the Commission to the conclusion that an assessment must be made on the basis of article 1(F) before any assessment is made as to whether an alien is a Convention refugee. The opinion of, among others, Amnesty International (*NAV* 1998, number 2, annex 1) that an assessment should first be made on the basis of article 1(A), because if it is found that Convention refugee status cannot be granted, an assessment need no longer be made on the basis of article 1(F), is therefore not shared by the Commission.

It is generally accepted in the jurisprudence that the SvJ assesses directly on the basis of article 1(F). In a decision of 8 April 1991, the Legal Section of the Council of State (RV 1991, 5) considered that, in the light of the serious nature of the conduct mentioned in article 1(F), first and foremost it must be ascertained whether the Convention is applicable. In a decision of 27 April 1999, the *Arrondissementsrechtbank* (Circuit Court) of The Hague, sitting in Haarlem (AWB 98/3609), considered that the SvJ is free to assess directly according to article 1(F).

1.3 Article 1(F), introduction and part (a)

1.3.1 International instruments

For applicability of category (a) of article 1(F), the categories mentioned therein must be crimes described in the international instruments which have been drawn up to establish provisions with regard to such crimes.

The most important international instruments in this connection are:

- (1945) the London Charter, defining the Statutes of the International Military Tribunal (also referred to as the Nuremberg Tribunal);
- (1948) the Genocide Convention;
- (1949) the four Red Cross Geneva Conventions concerning the protection of victims of armed conflicts;
- (1977) the Additional Protocols 1 and 2 to the four Red Cross Geneva Conventions;
- (1984) the Convention against Torture;

- (1987) the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
[the Rome Statute of the International Criminal Court, which has not yet entered into force.]

1.3.2 Crimes against peace

Article VI, introduction and part (a), of the London Charter defines a crime against peace as "planning, preparation, initiation or waging of a war of aggression in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

1.3.3 War crimes

Article VI, introduction and part (b), of the London Charter defines war crimes as "violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

The four Red Cross Geneva Conventions of 1949 and the Additional Protocols of 1977 contain detailed provisions in the field of international humanitarian law. The 'grave breaches' in these Conventions constitute war crimes. Since the entry into force of these provisions on 'grave breaches', violations of international humanitarian law have been considered as crimes under international law. It is stated in articles 49-51 of the first Geneva Convention, articles 50-52 of the second Convention, articles 129-131 of the third Convention and articles 146-148 of the fourth Convention that the Contracting Parties are under an obligation either to hand over or to prosecute under criminal law (*aut dedere aut iudicare*) individuals who are suspected of committing a 'grave breach', as mentioned in these Conventions. The four Red Cross Geneva Conventions thus confirm universal jurisdiction in the matter of the 'grave breaches' mentioned therein.

An important limitation of the Red Cross Conventions is that the 'grave breaches' mentioned therein can be committed only during an international armed conflict, i.e. an armed conflict between two or more States. In Additional Protocol II, which is applicable to internal armed conflicts, there is no provision in which it is stated that violation of one or more of the provisions set out in the Protocol constitutes a war crime. Nor does violation of so-called common article 3 - described in more detail below - of the four Red Cross Geneva Conventions, which up till now has been accepted as applicable to international and internal armed conflicts³, constitute a 'grave breach', and it does not therefore constitute a war crime.

As appears from the text of common article 3, the party to the conflict is held responsible in the event of a violation and not the individual(s) who is/are personally responsible for the crime. Nonetheless, it is now generally accepted that universal criminal jurisdiction applies to individuals who are responsible for violations of the abovementioned common article 3 and/or Additional Protocol II. By virtue of the worldwide support and endorsement which the Geneva Conventions of 1949 have received, although common article 3 did not have this status at the time of the establishing of these Conventions, it now has in any case acquired the status of international law. This is indicated by the decision of 27 June 1986 of the International Court of Justice in the case of Nicaragua (military and paramilitary activities in and against Nicaragua). Furthermore, the Yugoslavia Tribunal, in its decision of 10 August 1995 in the case of Tadic (IT-94-I-T), stated that violations of international humanitarian law during an armed conflict constitute war crimes, irrespective of whether the armed conflict is international or internal. Moreover, it is important that violations of the abovementioned common article 3 committed during an internal armed conflict, according to article 8, first paragraph, in conjunction with

³ Avril McDonald, Introduction to international humanitarian law and the qualification of armed conflicts, in: Peter J. van Krieken (editor), *Refugee Law in Context: The Exclusion Clause*, 1999, pp. 82-85.

second paragraph, introduction and part (c), of the Rome Statute for the International Criminal Court, constitute war crimes. The fact that the Rome Statute has not yet entered into force does not alter the fact that this Statute should be considered as an important source of the current status of international humanitarian law. The foregoing leads to the conclusion that violation of common article 3 now constitutes a war crime.

Common article 3 prohibits at all times the following acts in respect of "persons taking no active part in the hostilities":

- "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

1.3.4 Crimes against humanity

Article VI, introduction and part (c), of the London Charter defines crimes against humanity as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

For a crime to be considered as a crime against humanity, the act in question must form part of a policy of persecution or discrimination directed against the civil population and carried out in a large-scale and/or systematic manner. Inhumane treatment of an individual constitutes a crime against humanity if this treatment is part of a series of acts having the same political, racial, religious or cultural motives.

In order to be considered as crimes against humanity, it is not essential that such violations have been committed in the context of an armed conflict. This is indicated in article 1, introduction and part (b), of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity laid down on 26 November 1968⁴. This opinion was subsequently consolidated, as can be seen from the *Fourth Report on the Draft Code of Crimes Against the Peace and Security of Mankind* (UN document A/CN.4/398) issued by the authoritative International Law Commission (ILC) in 1986, in which different acts are qualified as crimes against humanity which do not have any connection with armed conflicts. The Special Rapporteur of the ILC confirms that "Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any conflict." In paragraph 35 of *The Exclusion Clauses*, the UNHCR, referring to the abovementioned Convention of 26 November 1968 and the abovementioned Draft Code of the ILC, subscribed to the view that crimes against humanity can also be committed in a time of peace or in a 'non-war context'. Furthermore, the Convention of 26 November 1968 is mentioned in annex VI of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Handbook)* of the UNHCR, which annex contains a list of 'international instruments relating to article 1F(a) of the 1951 Convention'.

The abovementioned article 1, introduction and part (b), can be considered as codified international law, because the principles which underpin the Convention concerned rest on international law. It is thus the general practice of States that crimes against humanity are forbidden at all times. Furthermore, crimes against humanity are part

⁴ This article states - as far as it has bearing in this context - that: "No statutory limitation shall apply to (...) crimes against humanity *whether committed in time of war or in time of peace* (cursivering aangebracht) as they are defined in the Charter of the International Military Tribunal, Nürnberg, (...) even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

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of the *ius cogens*, rules of imperative binding international law which can be set aside only by setting a new rule of international law having the opposite effect. The aforementioned article 1, introduction and part (b), is thus universally applicable, regardless of whether a State has ratified the Convention concerned.

1.4 Article 1(F), introduction and part (b)

1.4.1 Non-political crimes

Within the framework of article 1(F), introduction and part (b), it is first and foremost important to ascertain whether a crime is political or non-political.

The SvJ indicated in the abovementioned letter of 28 November 1997 to the TK (Lower Chamber of the Dutch Parliament) that in this connection it follows in the first instance the European Convention on the Suppression of Terrorism of 27 January 1977. Article 1 of this Convention reads as follows: "For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

- (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
- (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
- (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence."

The Commission wishes to point out in this regard that crimes other than those mentioned in the abovementioned article 1 can also be considered as non-political. Serious crimes such as armed robbery, rape, trade in hard drugs and (large-scale) trade in soft drugs can in principle be considered as non-political crimes in the meaning of article 1(F), introduction and part (b).

In the letter of 28 November 1997, the SvJ also pointed out that recent developments in the fight against terrorism within the various international fora should be taken into account, for example the International Convention on the Suppression of Terrorist Bombing of 1998 (annex to Resolution 52/164 of 9 January 1998 of the General Assembly of the United Nations).

In the view of the Commission, the term 'non-political crime' should be construed as follows.

Political crimes can be divided into absolute and relative political crimes.

Absolute political crimes are directed against the State and are purely political. Examples include high treason and the disruption of elections. Crimes which are committed in order to be able to commit the political crime and are therefore immediately and directly connected therewith are also considered as political crimes. Examples include the purchase of a weapon and the shooting of bodyguards with a view to assassinating a head of state. An absolute political crime cannot be included under category (b) of article 1(F). This does not take away the fact that *mutatis mutandis* this type of crime should be considered as contrary to the purposes or principles of the United Nations (see paragraph 1.5).

A relative political offence is *per se* a common-law offence which - perhaps *inter alia* - is committed to achieve political ends. In order to be able to decide whether a crime is predominantly political and should be considered for this reason as a political crime, the Federal Court of Switzerland devised the authoritative predominance test.

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In this test, the political element of the crime is weighed against the common-law element thereof. The crime is considered to be a political crime if:

- the political element of the crime is connected with a power struggle or the deposing of a dictatorship; and
- the crime is directly connected with political ends; and
- the crime is effective in achieving the ends; and
- no other peaceful means are available to achieve the ends (subsidiarity); and
- the crime is proportionate to the ends (proportionality).

Paragraph 152 of the *Handbook* also specifies a number of criteria to determine whether a crime is a political crime. These criteria substantively more or less correspond to the different parts of the predominance test.

In the view of the Commission, public officials who in an official capacity commit war crimes or crimes against humanity do not fall only under category (a) of article 1(F) but by definition also under category (b).

In this connection, the Commission refers to the article *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders* by Manuel R. García-Mora (*Michigan Law Review*, 1964, volume 62, number 6, pp. 927-960). This article explains in detail why crimes against humanity can never be considered as political crimes, even if they are committed by a public official. The reasoning of García-Mora can briefly be summarised as follows. A public official who commits crimes against humanity cannot reasonably claim that he was not aware of the punishable nature of his actions, given that such crimes 'outrage the concepts of justice'. Even if it is committed to achieve political ends, a crime against humanity committed by a public official cannot be considered as a political crime, as not all means are justified by the ends (political or otherwise). A crime against humanity is characterised by the unprecedented brutality and senselessness thereof and the added suffering caused to the victims. In view of this far-reaching disproportionality, a crime against humanity committed by or at the instigation of a public official can never be construed or accepted as a 'normal' political act to achieve any political ends whatsoever. The Commission considers that this reasoning also applies to war crimes.

In the view of the Commission, the reasoning of García-Mora is convincing. This reasoning has not lost any of its meaning since 1964, as appears from, *inter alia*, the Convention against Torture. According to article 8, in conjunction with article 1, of this Convention, public officials who are suspected of responsibility for torture can be extradited. The possibility of extradition implies that torture by public officials is not considered as a political crime under the Convention against Torture, as it is generally accepted under international law that those suspected of political crimes are not extradited. Furthermore, it cannot be ignored that public officials who are suspected of responsibility for crimes against humanity according to article 7, in conjunction with article 27, of the Rome Statute for the International Criminal Court will fall under the jurisdiction of the International Criminal Court. The fact that suspects can be handed over to the International Criminal Court indicates in view of the foregoing that crimes against humanity are also not considered as political crimes under the Rome Statute. It cannot therefore be assumed that war crimes and crimes against humanity committed by public officials are absolute or relative political offences. In fact it is quite the contrary. Nor can it be maintained with regard to war crimes and/or crimes against humanity committed by rebel groups or terrorist organisations that such crimes are political crimes, given that they cannot be considered as proportionate.

1.4.2 Serious offences

Furthermore and in particular, article 1(F), introduction and part (b), has bearing on serious crimes which can be classified under article 1(F), introduction and part (a).

Paragraph 51 of the abovementioned UNHCR publication *The Exclusion Clauses* contains a non-exhaustive summary of the factors which play a part in determining the seriousness of a crime: "(...) the nature of the act, the extent of its effects, and the motive of the perpetrator". The UNHCR points out in this regard that international protection as a refugee should be withheld only from individuals who are obviously unworthy of such protection on the grounds of the crimes committed by them.

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On the basis of its own knowledge, the Commission is aware that cases in which an asylum-seeker himself declares that he committed a serious non-political crime outside the Netherlands are not always subject to the tentative 1(F) cases of the Immigration and Naturalisation Service (IND), which applies in particular to violent crimes and trade in hard drugs. In order to promote clear-cut settlement of such cases and in the light of the sometimes complicated issues which can thereby arise, in the view of the Commission it is advisable to have such cases handled at all times by the abovementioned draft.

1.5 Article 1(F), introduction and part (c)

1.5.1 Independent meaning

The Commission wishes to point out first and foremost that category (c) of article 1(F) has in practice only very limited independent meaning, as virtually all acts contrary to the purposes and principles of the United Nations can be classified under category (a) and/or (b) of article 1(F). Conversely, a crime that falls under (a) and/or (b) also generally falls under category (c).

In its letter of 28 September 1997 to the TK, the SvJ indicated that the (c) ground will not be used for the time being as the sole ground for exclusion, because the terms of (a) and (b) offer sufficient tentative grounds for exclusion in the cases in which exclusion appears to be the favoured option. In the view of the Commission, independent application of article 1(F), introduction and part (c), should not be excluded *a priori*, as it cannot be ruled out that cases will occur in which the alien can be classified only under (c). Furthermore, the wording of article 1(F) is imperative, so that in the view of the Commission the SvJ is under an obligation to use the (c) ground in such cases as the sole ground for exclusion.

1.5.2 Purposes and principles of the United Nations

The purposes of the United Nations are summarised in the preamble and article 1 of the United Nations Charter and are as follows:

- peace and security;
- friendly relations;
- economic and social progress;
- respect for human rights;
- development of international law;
- centre for consultations.

The principles of the United Nations are summarised in article 2 of the Charter and are as follows:

- sovereign equality;
- good faith;
- peaceful settlement of disputes;
- no threat or use of force;
- commitment to give assistance;
- ensuring that states which are not Members of the United Nations act in accordance with these principles;
- respect for domestic jurisdiction.

1.5.3 Scope

The very general wording of article 1(F), introduction and part (c), offers little precise indication when it comes to determining the scope of this ground for exclusion.

In France, serious human rights violations are considered as acts as mentioned under (c).

Therefore, article 1(F), introduction and part (c), was relied on - in the last instance by the Conseil d'État - against Duvalier (Junior), who as President of Haiti had been at the head of various bodies that had carried out

serious human rights violations. In this regard, it is taken into account that respect for human rights is explicitly mentioned in the Charter as a purpose of the United Nations.

In June 1998, the Canadian Supreme Court (in the Pushpanathan case) considered the following situations to be contrary to the purposes and principles of the United Nations: a situation of serious and systematic human rights violations which constitute a situation of persecution in a non-war situation and a situation of forced disappearance, torture, terrorist acts, hostage-taking or apartheid. The first-mentioned situation is classified under (c) with an appeal to the *travaux préparatoires* of the Convention. The other situations are classified under (c) on the basis of an explicit declaration or ruling of a body of the United Nations, such as the General Assembly or the International Court of Justice, in which such acts are considered to be contrary to the purposes and principles of the United Nations.

In the literature, the following examples, *inter alia*, are given of acts contrary to the purposes and principles of the United Nations: discrimination and torture (Grahl Madsen); hostage-taking, apartheid and the maintaining of colonial regimes (Goodwin-Gill); discrimination and crimes against peace and security (Hathaway).

In the view of the Commission, the following (categories of) acts fall in any case under article 1(F), introduction and part (c):

- 1) acts which are explicitly mentioned by the International Court of Justice and the General Assembly of the United Nations as being contrary to the purposes of the United Nations. These include, *inter alia*, apartheid, hostage-taking, terrorism, torture and forced disappearance;
- 2) crimes which are punishable under international law and for which universal jurisdiction applies, such as war crimes, crimes against humanity, crimes against peace and genocide, as such crimes are clearly contrary to one or more of the purposes and/or principles of the United Nations.

1.5.4 'Non-State actors'

No clear answer has been given to the question whether individuals who are not acting on behalf of a Member State of the United Nations can commit crimes which are contrary to its purposes and principles.

In France, the generally held view is that only individuals who are acting on behalf of a Member State of the United Nations can commit acts which are contrary to the purposes and principles of the United Nations. The (c) ground of article 1(F) is not considered to be applicable to others, because the Charter was signed and ratified by governments. However, in 1997 a French court relied on the (c) ground against an asylum-seeker from Georgia who had collaborated in an attempted coup against the "legitimate and democratic" government of Shevardnadze.

In Canada, in the abovementioned Pushpanathan case it was ruled that non-public officials can fall under the (c) ground of article 1(F). It was pointed out that it could be more difficult for a "non-State actor" to carry out such acts, but that the possibility should not be ruled out *a priori*.

Up until 1975, the view was taken in German jurisprudence that individuals can carry out acts mentioned in article 1(F), introduction and part (c). However, since 1975 the principle has been adopted that the purposes and principles of the United Nations relate to international and not to individual relations. For example, the hijacking of a Czech civil airliner that landed in Germany in 1972 was not classified under the (c) ground, because this hijacking had not threatened peace and security between the former Czechoslovakia and the Federal Republic of Germany.

Paragraph 163 of the *Handbook* states the following: "The purposes and principles of the United Nations (...) enumerate fundamental principles that should govern the conduct of their members (...). From this it could be inferred that an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles."

In the view of the Commission, Canadian jurisprudence should be followed. Account must be taken of the fact that article 1(F) excludes individuals from protection if they have carried out certain acts. The determining factor should therefore be whether an individual can be held responsible for the acts mentioned under (c) and not (*inter alia*) in what capacity he carried out such acts. This does not take away the fact that individuals who have acted

contrary to the purposes and principles of the United Nations, as stated, but not in a government capacity, can generally (also) be classified under category (a) and/or (b).

1.6 Individual responsibility

1.6.1 The 'personal and knowing participation test'

The applicability of article 1(F) depends on the extent to which the alien can be held responsible for the acts which were carried out. What is the meaning of the term 'committed' in the introduction to article 1(F)?

In its letter of 28 November 1997 to the TK, the SvJ referred to the 'personal and knowing participation test' used in Canada. In its decision of 7 February 1992 in the case of Ramirez (A-686-90), the Canadian Supreme Court explained this test in more detail. In the view of the Commission, this test can be used as the starting point to answer the question whether an alien can be held responsible for a crime. The test is twofold: there must be 'personal participation' and 'knowing participation'.

The presumption of 'knowing participation' requires the presence of '*mens rea*', i.e. that the alien knew that the crime in question was committed. In this regard, it is important to determine whether he willingly became a member of the (government) organisation which carried out acts mentioned in article 1(F). According to the International Military Tribunal, the criterion for criminal responsibility is "the perpetrator's ability to choose with respect to the act of which he is accused". In the case of forced membership, which can happen, for example, in the case of child soldiers (see subparagraph 1.6.4), particular care must be taken when it comes to assessing the presence of '*mens rea*'. Furthermore, the duration of membership is important. The longer the membership, the more there will be '*mens rea*'. Also, it must be ascertained whether the alien protested against the crimes and/or refused to take part therein. The circumstances of the individual case are of great importance in this regard.

'Personal participation' means that the alien personally took part in the commission of the crime. The Canadian Supreme Court (in the Ramirez case) referred in this regard, *inter alia*, to Hathaway, *The Law of Refugee Status* (1991, p. 218): "The last question to be addressed is the degree of involvement required to justify criminal responsibility. While mere presence at the scenes of a crime may not be actionable, exclusion is warranted when the evidence establishes that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution (...)"

If the alien personally committed the crime or gave the order to do so (see subparagraph 1.6.3), he can without hesitation be held responsible for this crime. More complicated are cases in which the alien in any way contributed - directly or indirectly - to the commission of the crime. In the view of the Commission, in these cases the following criterion can be applied: If the alien directly facilitated the crime, there is 'personal participation'. Direct facilitation means that without the action or omission of the alien the crime could have been carried out less easily or at least could in all likelihood not have been carried out in the same manner if someone had not fulfilled the role of the alien. This criterion is derived from the decision of the Yugoslavia Tribunal in the abovementioned Tadic case, in which, *inter alia*, the following is considered (paragraph 692): "(...) the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during or after that incident. He will also be responsible for all that naturally results from the commission of the act in question." In paragraph 688, the Court considered that "While there is no definition of 'substantially', it is clear (...) that the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. (...) the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed. (...) Even (...) where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions." The phrases "He will also be responsible for all that naturally results from the commission of the act in question" and "(...) that they generally had knowledge of the likely effect of their

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actions" refer to the criterion of 'knowing participation': for applicability of article 1(F), it is essential that the person who directly facilitated the crime knew or should have known that there was a real possibility that a crime would have been committed *inter alia* through his action or omission.

There is 'personal and knowing participation', for example, in the case of:

- a guard who keeps watch during torture (Ramirez);
- an operative of the security service who takes statements from persons who are tortured or before they are sent to a department where torture takes place, while the operative in question is aware or should be aware of this;
- an operative of a terrorist organisation which does not carry out terrorist attacks itself, but recruits members and/or trains them in the ideology of the organisation;
- the arrest of persons while there is a good chance that the detainees will be sent directly to a department where torture takes place, while the person who carries out the arrest is aware or should be aware of this.

1.6.2 Nature of the organisation for which the alien worked

In the Ramirez ruling, the Canadian Supreme Court drew a distinction between the membership of an organisation which from time to time commits crimes as mentioned in article 1(F) and the membership of an organisation with a limited, brutal purpose.

The Supreme Court is of the opinion that mere membership of an organisation which from time to time commits crimes cannot lead to exclusion from international protection as a refugee. The Commission subscribes to this view, as it can no longer be said that each operative has knowledge of the crimes committed from time to time by the organisation ('knowing participation'), let alone that each operative personally participated therein ('personal participation').

An organisation is said to have a limited, brutal purpose, for example, if the organisation has as its prime objective the acquisition of information and whose operatives systematically torture people to extract information from them (for example the Iraqi Mukhabarat) and in the case of organisations which seek to achieve political or non-political ends by committing terrorist attacks (for example the group of Abu Nidal). It can be deduced from the Ramirez ruling that in the view of the Supreme Court mere membership of an organisation with a limited, brutal purpose can constitute 'personal and knowing participation': "It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts. (...) At bottom, complicity rests in such cases (...) on the existence of a shared common purpose and the knowledge that all of the parties in question have of it."

In the view of the Commission, it can in any case be said that an organisation has a limited, brutal purpose if the commission of crimes against peace, war crimes, crimes against humanity and/or terrorist attacks on persons constitutes the most important or a very important activity of said organisation. In the view of the Commission, membership of an organisation with a limited, brutal purpose will very quickly if not automatically lead to 'knowing participation', as the commission of crimes constitutes the most important or a very important activity of the organisation. However, it is the opinion of the Commission that the criterion of 'personal participation' might be met relatively quickly but not automatically. The Commission has already pointed out above that it uses the criterion of direct facilitation when determining personal responsibility for crimes. It is unreasonable to assume *a priori* that each operative of an organisation with a limited, brutal purpose has at least directly facilitated the crimes committed by other operatives of that organisation. In particular with regard to people in auxiliary posts such as typists or cleaners, it would be wrong to speak of automatic direct facilitation. Indeed, it is very conceivable that the crimes would have taken place in the same manner or that the commission thereof would not have been made more difficult if the auxiliary tasks in question had not been performed by anyone. Also with regard to operatives in an organisation with a limited, brutal purpose, it should therefore be ascertained what their personal tasks/work entailed.

Paragraph 43 of *The Exclusion Clauses* can generally be applied to aliens who have worked for an organisation with a limited, brutal purpose: "Voluntary continued membership of a part of a government engaged in criminal activities may constitute grounds for exclusion where the member cannot rebut the presumptions of knowledge

and personal implication. (...)". Furthermore, reference can be made to paragraph 47 of the same publication, where with reference to the Ramirez decision it is stated that: "(...) the purposes, activities and methods of some groups or terrorist organizations are of a particular violent and notorious nature. Where membership of such groups is voluntary, the fact of membership may be impossible to dissociate from the commission of terrorist crimes. Membership may, in such cases, amount to the personal and knowing participation or acquiescence amounting to complicity, in the crimes in question." In the view of the Commission, paragraphs 43 and 47 of *The Exclusion Clauses* and the Ramirez decision concern primarily the distribution of the burden of proof: if the alien was a member of an organisation with a limited, brutal purpose, in principle it can be said that, in view of the nature of the organisation for which he worked, it is up to the alien to put forward a reasonable case that there is no 'personal and knowing participation'.

The Commission invites the SvJ to consider whether it is desirable to draw up a public list of organisations with a limited, brutal purpose. If the alien was a member of an organisation which appears on this list, 'knowing participation' can in principle be assumed. Furthermore, as we have mentioned, the criterion of 'personal participation' can be met relatively quickly, it being understood that the position of the alien within the organisation should be carefully examined.

1.6.3 Individual responsibility at executive level

In the view of the Commission, in the case of the high-ranking officials of a regime or organisation that carries out crimes against peace, war crimes or crimes against humanity, the criterion of 'personal and knowing participation' quickly applies, as by virtue of their high-ranking position such individuals bear particular responsibility for the deeds (or misdeeds) of the regime or organisation. The Commission draws a distinction between three categories of executives:

- 1) the head of state and/or the head of the government, ministers and deputy ministers of a repressive regime;
- 2) high-ranking officials of military or terrorist organisations or of political organisations which also have a military and/or terrorist wing and maintain links therewith, while the latter wing carries out crimes against peace, war crimes or crimes against humanity;
- 3) other individuals in executive posts.

In the view of the Commission, article 1(F) can apply *prima facie* to the category of executives mentioned under 1 above. By assuming and exercising their executive post, they accepted (ultimate) collective political responsibility for the aims of the regime and the methods used by the regime to achieve these aims, as (along with others or otherwise) they initiated and/or agreed to and/or carried out the said repressive aims and methods. The foregoing applies likewise to public officials within a repressive regime who otherwise occupied a crucial policy-making position at the highest level, such as members of the Revolutionary Council under the former communist regime in Afghanistan.

The Commission invites the SvJ to consider whether it is desirable to draw up a public list of repressive regimes. If the alien was head of state, head of the government, minister or deputy minister in such a regime or otherwise occupied a crucial policy-making position at the highest level, article 1(F) can *prima facie* apply to him, unless the alien can furnish proof to the contrary. Strict requirements should be set with regard to this proof, in view of the post which the alien occupied.

With regard to the second category, the Commission considers that leading members of military or terrorist organisations, in view of their post, bear (ultimate) responsibility for crimes which have been committed by the members of the organisation.

If the organisation has a political and a military and/or terrorist wing - such as the ETA in Spain and the PUK and the KDP in (Northern) Iraq - and the alien had a leading position in the political wing of this organisation, he can in principle be held responsible for the crimes which the military and/or terrorist wing committed during his period in office, given that he accepted (ultimate) responsibility for these crimes and knowingly had a leading position in an organisation which is inextricably linked with a military and/or terrorist wing which carries out crimes.

The situation is different if the political wing and the military and/or terrorist wing of the organisation have broken off all relations.

Of course, leading members of the military and/or terrorist wing of an organisation which has a political wing should in such cases likewise be held responsible for the categories of crimes mentioned in article 1(F).

In the view of the Commission, article 1(F) can thus *prima facie* also apply to the category of executives mentioned under 2, unless the alien can furnish proof to the contrary.

In the view of the Commission, individual responsibility can be assumed in the case of other executives, such as senior public officials, if there is 'command responsibility'.³ This doctrine includes the following constituent elements:

- a) the person in question was the leader of those who carried out the violation; and
- b) the person in question knew or should have known that the violation had been carried out or would be carried out (comparable to 'knowing participation'); and
- c) the person in question did not take the necessary and reasonable measures which were within his power to prevent the violation or to punish the subordinate.

The sentence "should have known" (see under (b)) implies an objective standard of knowledge: the executive need not have actual knowledge of the violations of international humanitarian law, but must have been in a position to have sufficient relevant information of a general nature to obtain this knowledge. In this regard, it is important that it is the responsibility of an executive to inquire about the events which take place under his responsibility.

For the sake of clarity, the Commission wishes to point out that the *prima facie* application of article 1(F) to the categories of executives described under 1 and 2 means in fact that, unless otherwise proved, it is assumed that in their case there is 'command responsibility'.

In the view of the Commission, it is not required that the person formally occupy an executive post. Even someone who *de facto* takes the lead in carrying out crimes should be held responsible. The *de facto* leader must have been personally responsible for the perpetrator, because the latter was *de facto* - directly or through a line of command - under his command.

1.6.4 Child soldiers

The grounds for exclusion of article 1(F) are based on individual responsibility for the commission of crimes. The presence of '*mens rea*' is a condition for the presumption of this responsibility. This means that the alien was able to make a moral choice whether or not to carry out the crime. In the case of child soldiers, the presence of '*mens rea*' cannot automatically be assumed. Children often cannot anticipate the consequences of their acts as well as adults might. In the view of the Commission, it is impossible in this connection to lay down any general rules. However, it can nonetheless be assumed that in the case of aliens under 18 years of age their age must be taken (more) into consideration when it comes to assessing the applicability of article 1(F). Furthermore, it should not be forgotten that child soldiers are often recruited with (the threat of) violence, in which case it cannot be said that they joined willingly.

All the facts and circumstances of the individual case should always be taken into consideration. These facts and circumstances include, *inter alia*:

- age at the time of joining;
- whether or not he volunteered to join;
- the consequences of refusing to join.

³ Applying article 1(F) *prima facie* to the categories of leaders mentioned under 1 and 2 implies that, unless otherwise proved, it is assumed that they had 'command responsibility'.

Historical background, content, application and scope of article 1(F) of the Refugee Convention

In the view of the Commission, in the case of child soldiers in this context the doctrine of subjective *force majeure* can serve as the basic assumption. An under-age person cannot reasonably be expected to put up resistance to the pressure which he was under to join (e.g. if the threat was made that his mother's arms and legs would be broken, assuming that he could have taken this threat seriously);

- the duration of service as a child soldier;
- the possibility to escape (earlier) and/or to avoid personal participation in crimes;
- forced use of drugs and/or medication;
- promotion for 'good work'.

1.6.5 Pleas

In the context of legal residency procedures, it is regularly contended that the 1(F) alien in question cannot be held responsible for the crimes carried out. The most common pleas put forward are briefly discussed below.

a) Order issued by a leader

This plea can hardly ever be admitted. Already in article VIII of the London Charter of 1945 it is stated that: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment (...)".

However, article 33, first paragraph, of the Rome Statute for the International Criminal Court states that an order issued by a leader constitutes a ground for exemption from prosecution if: "(a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful."⁶ The second paragraph of the article reads as follows: "For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

In the view of the Commission, a crime against peace or a war crime, to the extent that the crime in question does not already constitute a crime against humanity and for this reason falls under the second paragraph of article 33, can practically always be considered as "manifestly unlawful".

b) The act was carried out in an official capacity

This defence can never be admitted. Already in article VII of the London Charter of 1945 it is stated that: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Since then, this generally shared view has been confirmed: article 27 of the Rome Statute for the International Criminal Court explicitly states that official capacity is not a ground for exemption from prosecution.

c) Military necessity

When assessing this plea, it is important to determine whether:

- the means which were employed were the most logical or the most reasonable; and
- alternative means were available to achieve the ends (subsidiarity); and
- the seriousness of the crime was proportionate to the political ends; and
- there was a close and direct link between the crime and the stated political ends.

In the view of the Commission, it is inconceivable or highly unlikely that a crime that can be classified under article 1(F), introduction and part (a), meets the criteria of subsidiarity and proportionality. This applies in any case to torture and/or extrajudicial executions of opposers (alleged or otherwise). After all, once such opposers have been put out of action, imprisonment is sufficient to keep them out of action. There is therefore no reason why it should be necessary to torture these prisoners and/or carry out an extrajudicial execution.

⁶ The legal opinion set out in article VIII of the London Charter is now also generally accepted in the literature. Article 33 of the Rome Statute has therefore been critically received by different jurists: the acceptance under - albeit strict - conditions of "Befehl ist Befehl" as grounds for exemption from punishment can be considered as a clear step backwards in the development of international law.

d) Coercion

For an appeal on the basis of coercion to be admitted, the following conditions should be met:

- the crime was committed to avert an immediate, serious and irreparable danger; and
- no other action could reasonably have been expected of the perpetrator; and
- the act was not disproportionate: the suffering caused by the action or omission is not greater than the suffering that would have resulted had the action or omission not taken place.

In the view of the Commission, it can be said that there was a situation of coercion only in the case of a one-off incident, as it must be assumed that it is generally possible to escape before a new situation of coercion arises. If the perpetrator nonetheless takes the risk of finding himself once again in a situation of coercion, there is *culpa in causa* and he cannot successfully appeal on the basis of coercion. There is also in principle *culpa in causa* if the perpetrator volunteers to join an organisation with a limited, brutal purpose, as it can generally be assumed that he can anticipate that he could get into a situation or situations in which he could not avoid committing crimes. It is conceivable that *culpa in causa* may also apply to an individual who serves as a volunteer in time of war while he knew or could have known that the army in question carries out war crimes and/or crimes against humanity.

e) Self-defence

This defence can be successfully used only if:

- there was a serious threat of death or serious physical harm to a person or another person; and
- the act was necessary and reasonable to avert this threat; and
- the suffering caused was not greater than the suffering averted.

There could also be *culpa in causa* in this context.

Chapter 2

The position with regard to legal residency of aliens to whom article 1(F) of the Refugee Convention is applied

2.1 Introduction

In the Netherlands the policy is that aliens to whom article 1(F) is applied are not eligible for any legal residency. This chapter will examine this policy in more detail. We will then discuss to what extent it is possible to withdraw legal residency from an alien if following his admission it is found that article 1(F) applies to him. Finally, we will discuss certain aspects of the asylum procedure which merit particular attention within the framework of article 1(F).

2.2 Position of the UNHCR

In paragraph 7 of its publication *The Exclusion Clauses* the UNHCR adopts the following position:

"While a State's decision to exclude removes the individual from the protection of the Convention, that State is not compelled to follow a particular course of action upon making such a determination (unless other provisions of international law call for the extradition or prosecution of the individual). States retain the sovereign right to grant other status and conditions of residence to those who have been excluded. Moreover, the individual may still be protected against *refoulement* by the application of other international instruments (...)"

The UNHCR therefore takes the view that individuals to whom article 1(F) applies (hereinafter referred to as 1(F) aliens) cannot be refugees in the meaning of the Convention and that the assigning of other statuses to 1(F) aliens falls within the scope of the national policy on aliens.

2.3 Policy of the Secretary of State for Justice and jurisprudence

In its letter of 28 November 1997, the SvJ informed the TK that the policy followed is that 1(F) aliens are not eligible for any legal residency. According to the SvJ, given the particular nature of the crimes committed by the 1(F) alien, more importance is attached to the public order aspect than to the interest of the 1(F) alien with regard to their admission to the Netherlands.

2.4 Position of the Commission

2.4.1 Admission as a refugee

The original English text of article 1(F) - insofar as it has bearing in this context - reads as follows: "The provisions of this Convention *shall not apply* (italics ours) to any person with respect to whom there are serious reasons for considering that: (...)"

In the light of the text in italics, it is generally accepted that in case of applicability of article 1(F) the rest of the Refugee Convention is not applicable. There is no room for interpretation for the Contracting Parties in this regard of the application of article 1(F), so that in case of applicability of article 1(F) refugee status cannot be granted in the meaning of the Convention.

No clear answer is given in the literature to the question as to whether 'alien' in the current Law on Aliens - more specifically, article 15, first paragraph of the Law on Aliens - has exactly the same meaning as 'refugee' in the Refugee Convention. In the view of the Commission, there is no reason, let alone obligation, to recognise and admit 1(F) aliens as refugees contrary to the purpose of the Convention on the basis of the Law on Aliens. Insofar as the SvJ has discretion to recognise and admit individuals as refugees on the basis of the Law on Aliens whereas the Convention does not apply to them, it should not be forgotten that the SvJ has repeatedly declared that it is unwilling to recognise and admit 1(F) aliens as refugees. The Commission believes that this principle is reasonable and, furthermore, sees no grounds for believing that cases are conceivable in which 1(F) aliens can - let alone should - be considered as refugees in the meaning of article 15, first paragraph, of the Law on Aliens.

For the sake of completeness, it must be pointed out that, if this were not the case, the alien in question would - and should - be refused admission on the grounds of article 15, second paragraph, of the Law on Aliens. Under the new law on aliens (Law on Aliens 2000), aliens to whom article 1(F) of the Convention is applicable can no longer be eligible for admission as refugees. Article 27, first paragraph, introduction and part (a), of the Law on Aliens 2000 states that a Convention refugee can be eligible for the asylum residence permit for a limited period. 1(F) aliens by definition cannot be granted Convention refugee status, as considered above. Furthermore, the asylum residence permit for a limited period is refused if there are serious public interest grounds (article 29, third paragraph, of the Law on Aliens 2000).

2.4.2 Residence permits

In the current decision practice, 1(F) aliens are refused a residence permit on the grounds of a standard reply in which reference is made to the policy followed in such cases. In the view of the Commission, this practice is at odds with article 4:84 of the General Administrative Law (Awb). On the basis of this provision, it must be examined and assessed in decisions whether there are special circumstances that provide for an exception to the policy followed in this area, insofar as an appeal has been made on the basis of alleged special circumstances. The decision and the minutes of the second interview must show that attention has been given to the question as to whether there are such circumstances.

The issue in practice is whether there could conceivably be circumstances which would mean that a 1(F) alien should be granted a residence permit. Given the existence of the inherent exemption competence, this question cannot *a priori* be answered in the negative. An appeal to the exceptional nature of the policy is not sufficient *per se*, given that special circumstances can arise (also) on the side of the alien which require further discussion.

The Commission will now discuss certain aspects that might urge a further weighing of interests.

a) Deportation is not possible (see also chapter 3).

According to established jurisprudence, a residence permit can automatically be withheld from 1(F) aliens who are not deportable. According to the Commission's estimate, the number of cases of non-deportable 1(F) aliens is such that non-deportability cannot be considered as a special circumstance. Rather, it should be assumed that allowance is already made for the possibility of non-deportability in the policy followed in this area, as can be deduced from the jurisprudence on this issue.

In this context, it should be pointed out that the abovementioned jurisprudence concerns 1(F) aliens who are going through their first procedure. It is possible that a rejected 1(F) alien cannot be deported for many years. The question arises whether there comes a time when it is no longer possible to continue to deny admission because that would be inhuman. In this regard, it should be borne in mind that the *Rechtseenheidskamer* (Legal Uniformity Division - REK) has on several occasions stated that leaving an individual for a long time without any entitlement to residence without deportation is an undesirable situation which should be limited to exceptional cases. In the view of the Commission, no general rules can be laid down for this situation, but it should be determined in each individual case whether public interest in the event of refused admission should still take precedence over the personal interest of the alien to be admitted to the Netherlands. In this assessment it should be taken into account whether the 1(F) alien can receive a minimum humanitarian safety net of benefits, a question which in the view of the Commission should be answered in the affirmative (see subparagraph 4.2.1) and whether the 1(F) alien has family members or relatives in the Netherlands who receive housing and income. In the opinion of the Commission, in view of the importance from a public-interest standpoint of non-admittance it is hardly conceivable that a situation might occur in which the decision should be taken to admit the 1(F) alien, but nor can it be ruled out *a priori* that such a situation will not occur.

b) There is a medical/humanitarian emergency situation.

If the asylum statement of the 1(F) alien (for the time being) does not suggest that deportation is not an option, but that there is a medical/humanitarian emergency situation, on the grounds of a trauma or otherwise, deportation may be contrary to article 3 of the ECHR and/or article 25 of the Law on Aliens. The latter article, according to established jurisprudence, may not be applied so as not to have to take a decision on admission. In

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such cases, deportation will (for the time being) not be carried out, while 1(F) aliens will continue to receive the (most) essential medical care in the Netherlands as long as the decision has not been taken to deport them (see also paragraph 4.2). The fact that they do not have legal residency does not change the situation, given that, as we have mentioned, non-deportability of the 1(F) alien is not *per se* grounds for admission.

c) The alien lives with his family in the Netherlands (see also chapter 5).

Assuming that an application has been made for first admission, article 8 of the ECHR cannot lead to admission. This applies all the more if the 1(F) alien is not deportable, as in that case he can *de facto* (for the time being) live with his family in the Netherlands.

If a 1(F) alien is admitted erroneously, withdrawal of his legal residency does not interfere with the right to respect for his family life. In this case, the alien, assuming withdrawal with retroactive effect, is deemed never to have been in possession of legal residency. The Commission refers in this regard to the REK decision of 25 September 1997 (AWB 97/5074), which gives the same interpretation.

The Commission concludes that, although a situation may be conceivable in which a 1(F) alien should be given a residence permit, given the exemption competence inherent to policy rules the possibility that such a highly exceptional situation may occur cannot be ruled out *a priori*. In any case, the reason why the inherent exemption competence is not used should be given in refusal decisions, insofar as there is reason to do so.

2.4.3 Conditional residence permits

As a conditional residence permit is granted on the basis of category, whereby no attention can be given to the circumstances of the individual case, the only question to be decided is whether category-based exclusion of 1(F) aliens is justified. In the light of the rationale of the policy, in the view of the Commission it cannot be said that this is not the case. The decision as to whether in the individual case there are special circumstances which constitute grounds for admission should be assessed in the context of the residence permit.

2.5 *Vreemdelingenwet 2000 (Law on Aliens 2000)*

Under the Law on Aliens 2000, asylum-seekers may be eligible in the first instance only for the asylum residence permit for a limited period, as mentioned in article 27 of the Law on Aliens 2000. The grounds for admission of article 27, first paragraph, of the Law on Aliens 2000 are more or less the same - cf. with regard to ground (a) of article 27, first paragraph, of the Law on Aliens 2000, the final paragraph of subparagraph 2.4.1 - as the existing grounds for admission, so that the assessment of the claims for admission of 1(F) aliens will not change substantively. We therefore refer to paragraph 2.4.

2.6 *Withdrawal of statuses*

2.6.1 Effect of the Law on Aliens

Article 15, third paragraph, in conjunction with article 14, first paragraph, of the Law on Aliens contains an exhaustive summary of the grounds for withdrawal of the admission as refugee. The ground for withdrawal which is relevant in this context is the provision of inaccurate information (article 15, third paragraph, in conjunction with article 14, first paragraph, introduction and part (a), of the Law on Aliens).

Experience shows that in the case of 1(F) aliens it is extremely rare that they have been given a final prison sentence for an offence which carries a prison sentence of at least three years (the (c) ground of article 14, first paragraph, of the Law on Aliens). Despite this, (the unconditional part of) the prison sentence should exceed the period mentioned in the so-called sliding scale for the residence permit to be withdrawn.

Article 12 of the Law on Aliens contains an exhaustive summary of the grounds for withdrawal of a (conditional) residence permit and, as is generally accepted, grounds for refusing to grant an extension of the period of

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validity of a (conditional) residence permit. The ground for withdrawal which is relevant within the framework of article 1(F) is the provision of inaccurate information (article 12, introduction and part (a), of the Law on Aliens).

Breach of the peace or public order (article 12, introduction and part (c), of the Law on Aliens) is not applicable in general as a ground for withdrawal in the case of 1(F) aliens. For withdrawal on this ground, according to the applicable policy rules (chapter A4, subsection 4.3.2.2, of the 1994 *Vreemdelingencirculaire* - Circular on Aliens - Vc), the alien must have been finally sentenced for a crime which carries a prison sentence of at least three years, which seldom occurs in the case of 1(F) aliens, as we have mentioned. The sliding scale referred to above also applies in this case.

2.6.2 Effect of the *Vreemdelingenwet 2000* (Law on Aliens 2000)

The asylum residence permit for a limited period can, on the basis of article 30, first paragraph, introduction and part (a), of the Law on Aliens 2000, be withdrawn or an extension of the period of validity thereof can be refused if the alien has given inaccurate information or has withheld information, insofar as such information would have led to refusal of the application for the granting of the permit or an extension of the period of validity thereof. Article 33, introduction and part (a), of the Law on Aliens 2000 contains the same provision with regard to the asylum residence permit for an unlimited period.

Article 30, introduction and part (e), of the Law on Aliens 2000 states that the asylum residence permit for a limited period can be withdrawn if there are serious reasons of public interest, other than those mentioned under sections (a) to (d). Article 33, introduction and part (e), of the Law on Aliens 2000 contains the same provision with regard to the asylum residence permit for an unlimited period.

The normal residence permit for a limited period can be withdrawn on the grounds of article 17 in conjunction with article 16, first paragraph, introduction and part (c), of the Law on Aliens 2000 or an extension of the period of validity thereof can be refused if the alien has given inaccurate information or has withheld information. Breach of the peace or public order (article 16, first paragraph, introduction and part (e), of the Law on Aliens 2000) is for the reason given in subparagraph 2.6.1 only extremely rarely applicable as grounds for withdrawal in the case of 1(F) aliens. Article 17 in conjunction with article 16, first paragraph, introduction and part (h), of the Law on Aliens 2000 states that the normal residence permit for a limited period can be withdrawn or an extension of the period of validity thereof can be refused if there are reasons to do so on the basis of public interest other than those mentioned under sections (a) to (g).

Grounds (c) and (h) of article 16, first paragraph, of the Law on Aliens 2000 is also mentioned in article 20, introduction and parts (b) and (e) respectively, of the Law on Aliens 2000 as grounds for withdrawal with regard to the normal residence permit for an unlimited period.

2.6.3 The provision of inaccurate information

The determining factor for the applicability of this ground for withdrawal - under the Law on Aliens and under the Law on Aliens 2000 - is not whether the alien has knowingly given inaccurate information, but whether the decision should be taken to admit him in the knowledge of the correct information.

The decision as to whether inaccurate information was given should be taken on the basis of the circumstances of the individual case. The basic principle is that it is up to the alien to put forward a case that he is eligible for admission, whereby he must necessarily provide information for the decision to be made on his application (article 4:2, second paragraph, of the Awb). It can be expected that the alien should answer the questions asked by the contact official truthfully and he should not in this context withhold any relevant information. In this connection, it should not be forgotten that at the end of a second interview the alien is asked whether he has related everything which might be important for the assessment of his application. An alien who is responsible for acts mentioned in article 1(F) should reasonably understand that this is important for the assessment of his asylum application and that it can therefore be expected of him that, *inter alia* on the basis of article 4:2, second paragraph, of the Awb, he should testify to any 1(F) acts in reply to the abovementioned standard question. It can

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therefore be said that a 1(F) alien who answers the abovementioned question in the negative or testifies in reply to this question but makes no mention of relevant 1(F) aspects is giving inaccurate information. In this context, it is important that the minutes of the second interview should at all times state explicitly that the abovementioned standard question was asked, which at the present time is not always the case. Indeed, only the alien's answer to the question is usually recorded in the report.

In connection with the foregoing, it is important that (possible) 1(F) aliens regularly take the line that they are under no obligation to make statements because they could be used in the event of criminal prosecutions against them. In the view of the Commission, a distinction should be drawn between a criminal investigation, within the framework of which a suspect has the right to remain silent (article 29 of the *Wetboek van Strafrecht* (Code of Criminal Procedure)), and an administrative procedure, in which the principle is that the individual who wants the regulatory body to take a decision provides the information which is necessary to be able to reach a carefully considered decision. This principle is reflected, *inter alia*, in article 4:2, second paragraph, of the Awb and in article 8:31 of the Awb. The question whether in an administrative procedure statements made by the alien can be used in any criminal prosecutions against him is left to the discretion of the criminal judge and therefore does not concern the SvJ. The fact that the alien may be criminally prosecuted does not yet mean that the right to remain silent in criminal prosecution and the related obligation to caution a suspect will also apply in legal residency procedures in the case of (possible) 1(F) aliens. Within the framework of this procedure, it is not assessed whether the alien can and should be held responsible under criminal law (the alien within the framework of the administrative procedure is not also a suspect in the criminal prosecution sense), but whether article 1(F) applies to him. Insofar as an alien refuses to answer questions within the framework of a legal residency procedure, the SvJ can also draw the conclusions which it deems appropriate.

On the one hand, there is the obligation of the alien to give the necessary information. On the other hand, there is the SvJ's duty of investigation (article 3:2 of the Awb), which is fulfilled during the second interview. If the alien makes statements which point in the direction of possible applicability of article 1(F), it is up to the contact official to further question the alien on these issues. If this is not done and the decision-making official does not make further inquiries, it is *per se* conceivable that the SvJ has forfeited the right to retract a favourable decision. In this regard, a comparative assessment should be made of the extent to which the SvJ has violated the obligation to investigate and the extent to which the alien at his own initiative has failed to give information, for example in reply to the abovementioned standard question. In this comparative assessment, it should be considered that public interest in the event of the non-admission of aliens to whom article 1(F) is applicable has very serious consequences. The duty of the alien to give information should also be given much importance.

In the comparative assessment of, on the one hand, the obligation of the alien to provide information and, on the other hand, the obligation of the Dutch government to investigate, progressive insight plays an important role. For example, a number of former officers of the Khadimat-e Atal'at-e Dowlati (KhAD) and/or the Wazarat-e Amani-ate Dowlati (WAD), the Afghan security service, were admitted to the Netherlands as refugees. They declared that they had always worked in the logistics department and had neither directly nor indirectly been involved in human rights violations. However, the general country report of 29 February 2000 of the Minister of Foreign Affairs on the security services in communist Afghanistan (reference: DPC-AM adm.no. 663896) revealed that it is impossible for a KhAD/WAD officer to have worked only in the logistics department, but that he also must have worked in at least one of the macabre departments of the KhAD/WAD. Seen in the light of this country report, it is clear that the KhAD/WAD officer had given incorrect information. In such cases, the question arises who bears the most blame, the alien who gave incorrect information or the SvJ, which was not very thorough in gathering general information on the KhAD/WAD. In the example given, the admission as refugee can be withdrawn, because the alien declared untruthfully that (a) he had always worked in the logistics department, and that (b) he had not been involved in human rights violations. If the alien had told the truth, the applicability of article 1(F) would have come to light. The fact that the SvJ could have been more thorough in its research into the KhAD/WAD in general does not take away the fact that the alien gave incorrect information. If the contact official does not inquire or does not inquire enough into the precise work carried out by an alien within a given organisation, while it is known that this organisation has a bad reputation in the field of (respect for) human rights, it is clearer that if the SvJ decides on the application without any further investigation, it has not adequately fulfilled its obligation to investigate. However, it is not very likely that this failure might impede

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the withdrawal of legal residency, as the alien should reasonably have understood that he was anything but the type of person that the Refugee Convention is designed to protect. On the contrary, he belongs in general to a group of individuals against whom the Convention seeks to offer protection. From this point of view, it can be expected of him that within the framework of the original asylum procedure, when asked whether there were any relevant facts or circumstances that had not been mentioned, he should have volunteered these elements himself.

To summarise the foregoing, the Commission holds the view that the provision of incorrect information cannot be relied on against a 1(F) alien only if he has related everything that is important for the assessment of his application or if he has made such declarations that the SvJ, by not investigating these further, has forfeited the right to retract the decision to admit him. This can occur only in extremely exceptional cases. Also, progressive insight can lead to the conclusion that incorrect information was given.

2.6.4 The withholding of information

As we have mentioned, the Law on Aliens 2000 offers the possibility of withdrawing legal residency or denying an extension of the period of validity thereof if the alien has withheld information. In the view of the Commission, this possibility - insofar as this has bearing in this context - has less practical meaning than may appear to be the case at first sight. As we have mentioned, an alien is asked at the end of each second interview whether he has related everything that is important for the assessment of his asylum application. If in reply to this question a 1(F) alien makes no mention of 1(F) aspects, he is not only withholding information, but he is also giving inaccurate information, because he states, in this case inaccurately, that he has related everything that is important for the assessment of his application.

2.6.5 (Important) grounds/reasons of public interest

Under the Law on Aliens 2000, furthermore, it will be possible to withdraw legal residency or refuse an extension of the period of validity of the same on grounds or for reasons of public interest, which grounds/reasons must be "important" in the case of the asylum residence permit. In the view of the Commission, an important general interest is by definition served with the refusal to grant continued admission to 1(F) aliens. It should be borne in mind that in their case there are serious reasons for considering that they are guilty of crimes which are among the worst imaginable violations of public order. In addition, it must be remembered that continuing to admit 1(F) aliens seriously undermines the credibility of the Netherlands in its relations with other States. Additionally, at the time of its membership of the Security Council the Netherlands supported Security Council Resolution S/RES/1269 of 19 October 1999, in which all States are called upon to take measures to prevent asylum seekers who bear responsibility for terrorism from being admitted. Furthermore, continuing to admit 1(F) aliens sends out completely the wrong signal to victims and perpetrators of acts covered by article 1(F). It must seem unacceptable to victims of, for example, a regime that carries out crimes against humanity that after they flee to the Netherlands they discover that those from whom they have fled continue to seek protection from the Dutch authorities, while the perpetrators of the acts mentioned in article 1(F) should not be given the impression that the Netherlands is willing to continue to admit them in spite of their responsibility for such acts.

In view of the nature of the acts described in article 1(F), the Commission holds the view that it is right in all respects that the SvJ has in recent years repeatedly stressed that individuals to whom article 1(F) applies cannot be admitted to the Netherlands. In response to the abovementioned country report of 29 February 2000, the SvJ stated in a letter to the TK that cases in which former KhAD/WAD operatives are admitted as refugees will be subject to reassessment. In a letter of 2 July 1999 to the *Vaste Kamercommissie voor Justitie* (Standing Committee on Justice) and during the General Consultation on 9 July 2000, the SvJ promised in a general sense that cases involving 1(F) aspects in which it has been decided to admit the individual will once again be assessed.

From this point of view, the Commission has a number of objections to the current line adopted by the SvJ. The Commission has knowledge from its own sources that Afghan cases in which a status has been granted to a possible 1(F) alien are not being reinvestigated, unless the alien begins another procedure or a third party

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informs the SvJ of such 1(F) aspects. In the light of the principles involved in the case and the pledges made by the SvJ to the TK, in the view of the Commission all cases of possible 1(F) aliens to whom a status has been granted must be reassessed. Where there is at present insufficient capacity for this (and the Commission has strong indications that there is indeed such a shortfall), additional resources should be made available. In this regard, it should be borne in mind that continuation of the current practice is at odds with the equality principle and smacks of arbitrariness, which could in future be problematic for the application of the (serious) ground for withdrawal based on grounds/reasons of public interest - and possibly also other grounds for withdrawal.

2.7 Organisation of the asylum procedure

In the view of the Commission, it is recommended that the asylum procedure be organised in such a way that maximises the possibility of a 1(F) alien being recognised as such at the earliest possible stage. Furthermore, the Commission holds the view that it is important that measures be taken to guarantee that legal residency can be withdrawn at any time if it is found that article 1(F) applies to the holder thereof.

An efficient and relatively simple means of achieving these objectives, in particular the latter objective, is to have the alien sign an antecedent declaration which relates explicitly, *inter alia*, to article 1(F). This declaration can be incorporated in the current antecedent declaration, which, for example, might read as follows: "(...) declares that he has never been sentenced for a crime and has never committed a crime. Furthermore, he declares that he has not been responsible for one or more of the following categories of acts: a crime against humanity, a war crime or a crime against peace." The Commission holds the view that it is very conceivable that this declaration could also be submitted to aliens who seek admission on normal grounds.

The Commission considers that it is not desirable that category (b) of article 1(F) be included verbatim in the antecedent declaration, as otherwise there could be some discussion over the question as to how serious a crime is and whether or not it is a political crime. In the view of the Commission, the (c) ground of article 1(F) is too vague to be included in the declaration.

If the alien signs the antecedent declaration and it is subsequently found that article 1(F) is applicable, in the view of the Commission the provision of inaccurate information can at all times be held against him, unless only category (c) of article 1(F) is applicable to him.

If the alien does not sign the antecedent declaration, he should be asked the reason for this during the first interview. If the alien signs the declaration and subsequently mentions a 'suspect' organisation in the course of the description of his work, for example a notorious army division or secret service, he should be reminded during the first interview of the antecedent declaration and he should be asked whether he maintains that declaration. If the alien remains vague about his work, he should undergo further questioning. For the rest, in the view of the Commission the regulations concerning and the nature of the first interview prevent any more 'in-depth' investigation of the 1(F) aspects. The Commission holds the view that it is neither possible nor desirable to make any changes to this procedure.

If this is suggested by the first interview (not signing the antecedent declaration and/or work for a suspect organisation and/or vague declarations), a second interview should preferably be arranged, during which, following verification of the minutes of the first interview, first and foremost a thorough examination should be made of the 1(F) aspects. The second interview should, as is currently the case, be conducted by a specialised contact official. In the view of the Commission, the following matters should at all times be asked about during the second interview: the alien's justification for the 1(F) acts and/or for a certain career choice, the voluntary nature or otherwise of the acts/work, the alien's knowledge of the methods of the organisation and related organisations, the alien's personal tasks and responsibilities within the organisation, the consequences of his work (cf. 'direct facilitation' mentioned in subparagraph 1.6.1), the alien's reasons for (eventually) discontinuing the acts/work and his reasons for not doing so earlier, possible attempts to avoid doing the work and/or possible critical distance with regard to the methods of other individuals involved. Experience shows that this type of 1(F) interview is seldom organised to obtain a chronological overview of the alien's work. Such an overview is useful

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- if not essential - to reach a carefully considered decision, but in the view of the Commission information on the above aspects, which in more than one case are mentioned very briefly or not at all in the minutes of the interview, can as a rule not be neglected if we are to have a balanced judgement of the applicability of article 1(F).

In a decision of 1 August 2000 (AWB 00/6096), the Circuit Court of The Hague, sitting in Haarlem, agreed with the line adopted by the SvJ to the effect that an alien who has landed at Schiphol will be refused entry and the measure under article 7a of the Law on Aliens will be imposed if during the first interview in the *grenshospitium* (border prison) the possible applicability of article 1(F) comes to light. In the view of the court, as in other cases in which the measure under article 7a of the Law on Aliens is applied, the principle can be adopted that a decision should be taken within four weeks concerning the application for admission, a period which can be shorter or longer depending on the circumstances of the case. Meanwhile, the abovementioned line has been enshrined in TBV 2000/26 of 15 December 2000 (reference: 5034929/00/IND), which is designed to apply article 7a of the Law on Aliens if it is clear that article 1(F) applies.

In the view of the Commission, this line should be encouraged, as it may act as a deterrent to 1(F) aliens. The effectiveness of TBV 2000/26 stands or falls on the issue whether the SvJ will succeed in taking firm decisions in such cases on the asylum issue. The Commission invites the SvJ to take this into consideration when setting priorities and allocating and, where necessary, providing additional capacity.

Chapter 3

Independent departure and deportation of aliens to whom article 1(F) of the Refugee Convention is applied⁷

3.1 Introduction

An irrevocable decision to refuse admission has as a consequence that the alien in question should leave the Netherlands independently, failing which he can be deported. In a letter of 25 June 1999, the SvJ sent the Repatriation Policy memorandum to the TK (TK 1998-1999, 26.646, number 1). The SvJ points out in this that for the credibility of the policy on aliens it is essential that the repatriation policy be implemented as consistently as possible. The Commission subscribed to this view, particularly also as regards 1(F) aliens. The grounds for refusing to admit such aliens (see paragraph 2.3 and subparagraph 2.6.5) suffer a serious loss of credibility if after the decision to refuse admission is made irrevocable the repatriation policy is not implemented consistently.

3.2 Independent departure

3.2.1 General

Article 15d, second paragraph, of the Law on Aliens states that a decision to the effect that an application for admission is not granted implies that the alien should leave the Netherlands within a period specified by the SvJ.

In a decision of 7 October 1997 (AWB 97/6853, *JV* 1997, 16), the REK declared that the legislator has given responsibility for leaving the Netherlands in the first place to the alien himself. The principle is (also) adopted in the abovementioned Repatriation Policy memorandum that an alien should leave at his own initiative once his procedure has been exhausted. Forced repatriation (deportation) should be used only as a last resort.

The SvJ offers facilities to promote the independent departure of aliens, *inter alia* in the form of return programmes. Furthermore, the SvJ seeks to achieve a situation in which the alien realises that any further extension of his stay in the Netherlands is not really an option.

The SvJ wishes to point out that the implementation of the repatriation policy can be hindered by obstacles of a policy-related or technical nature. Policy-related obstacles stand in the way of the procedure if there is insufficient information concerning the situation in the land of origin or return to the country of origin would be unreasonably harsh given the general situation there. Technical obstacles include, for example, situations where the alien has or can obtain no travel documents.

3.2.2 Independent departure of 1(F) aliens

Furthermore, an alien to whom it has been found in a carefully conducted procedure that article 1(F) applies and whose (extended) admission to the Netherlands is therefore denied is under an obligation to leave the Netherlands independently. It can be assumed that an alien who intends to leave the Netherlands independently, either to the country of origin or to another (third) country will make the necessary efforts to do so and will if desired receive the necessary help from the Dutch government.

If there are any policy-related obstacles which are such that aliens from a certain country or region cannot be expected to return there, a departure delay policy is followed, which means that the departure obligation is suspended or a conditional residence permit policy is implemented.

⁷ Chapters 3 and 4 are not automatically applicable to community citizens and aliens who fall under the Association Agreement. However, these categories of aliens, insofar as article 1(F) is applicable to them, generally constitute a current threat to public order, in which case their status as community citizens or beneficiaries on the basis of an Association Agreement ends under the law. In that case, chapters 3 and 4 are also fully applicable to them.

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In the view of the Commission, the independent departure obligation should continue to be imposed at all times on an alien to whom article 1(F) has been applied and he should not be granted any postponement of the obligation to leave the country. It should be borne in mind that in the case of such aliens there are serious reasons for considering that they are guilty of crimes which are among the worst imaginable violations of public order. No such aliens should therefore be permitted under any circumstances to reside in the Netherlands. It should in this context be taken into consideration that if a departure delay policy is implemented in respect of the country of origin of the 1(F) alien, this does not take away the fact that, given the importance for the Dutch Government to maintain public order, it can and should in any case be demanded of the 1(F) alien that he should seek to obtain admission to a third country.

If a conditional residence permit policy is implemented in respect of the country or region of origin of the 1(F) alien, in the view of the Commission this does not impede his return, as by its nature a category-based conditional residence permit policy is implemented on the basis of the bad general situation. As regards aliens to whom article 1(F) is applied, in the view of the Commission article 3 of the ECHR and article 3, first paragraph, of the Convention against Torture should be the 'minimum standard'. The fact that the Dutch Government, in spite of the absence of a real risk of violation of the abovementioned articles, from a humanitarian standpoint does not expect aliens who belong to a conditional residence permit category to return to their country or region of origin cannot, in the view of the Commission, lead to acceptance of the *de facto* residence of 1(F) aliens, taking into consideration the seriousness of the complaints made against such aliens and the importance for public interest of their departure from the Netherlands.

As regards possible technical obstacles impeding return, it should be pointed out that aliens, and particularly 1(F) aliens, can in the view of the Commission be expected to do everything in their power to remove such obstacles.

In its letter of 28 November 1997 to the TK, the SvJ indicated that it will use its authority to declare as undesirable aliens to whom article 1(F) is applied under article 21 of the Law on Aliens. However, the SvJ - to the knowledge of the Commission - has not to date used this power. In order to bring the alien to a realisation that staying in the Netherlands is not or is no longer really an option, the Commission recommends that the SvJ in such cases make effective use of its powers to declare 1(F) aliens undesirable on the basis of article 21, first paragraph, introduction and part (e), of the Law on Aliens in the interest of the international relations of the Netherlands, so that their residence in the Netherlands constitutes an offence as mentioned in article 197 of the Code of Criminal Procedure⁸. Furthermore, it is recommended that the policy rule be incorporated in the new *Vreemdelingen-circulaire* (Circular on Aliens) that an alien to whom article 1(F), introduction and part (a), has been applied is also declared to be undesirable. If nonetheless the alien does not leave the Netherlands, he runs the risk of a prison sentence, a risk that may encourage him to decide to leave the Netherlands. The declaration of undesirability - and the punishable nature of his stay in the Netherlands - should be suspended only if and as long as the alien cannot be deported on the basis of the abovementioned articles 3 to the country of origin and it is likely that he cannot obtain alternative residence in another country.

⁸ In the view of the Commission, a large measure of circumspection is required when declaring as undesirable an alien who has not been (finally) unconditionally sentenced to prison because of a crime but "only" on the basis of serious reasons for assuming that he has committed a crime. In the view of the Commission, a declaration of undesirability for a crime which has not yet resulted in a final unconditional prison sentence should therefore be made only in respect of aliens to whom article 1(F), introduction and part (a), is applicable. A declaration of undesirability is justified in these cases because of the very exceptional nature and seriousness of the crime. Application of article 21 of the Law on Aliens in other cases could, for example, lead to a situation in which an asylum-seeker who is suspected of committing a serious hard drugs offence before his arrival in the Netherlands is declared undesirable, whereas an asylum-seeker who is suspected of a serious hard drugs offence in the Netherlands is not. The Commission holds the view that such a distinction is not justified and believes that the declaration of undesirability without a prison sentence, with the exception of the cases involving the applicability of article 1(F), introduction and part (a), is therefore not desirable.

3.3 Deportation

3.3.1 Convention provisions and jurisprudence

International law contains various provisions which are important for the repatriation policy.

First and foremost, given the terms of article 23 of the Schengen Implementation Agreement (SIA), aliens should as a general rule be deported to a country outside the Schengen area where it is guaranteed that the alien will be admitted.

Furthermore, article 33, first paragraph, of the Refugee Convention contains an absolute ban on direct and indirect *refoulement*. However, if article 1(F) is applicable, the alien in question cannot appeal to the provisions of the Convention and cannot therefore appeal to the ban on *refoulement* of article 33, first paragraph.

However, the non-applicability of the abovementioned ban on *refoulement* does not mean that a 1(F) alien can simply be deported. Article 3, first paragraph, of the Convention against Torture and article 3 of the ECHR contain a ban on direct and indirect *refoulement*. These provisions are absolute, and no derogation can be made to their applicability on the basis of the conduct of the alien or the danger that he represents for the host State. As regards the ban on direct *refoulement*, reference can be made to the decision of the European Court of Human Rights of 2 May 1997 (RV 1997, 70) in the case of D./United Kingdom and the decision of the Anti-Torture Committee of 28 April 1997 (number 39/1996, RV 1997, 21) in the case of Paez/Sweden. The criteria used by the European Court of Human Rights to evaluate the risk of indirect *refoulement* are not completely transparent. However, it can be deduced from the jurisprudence that expulsion to a country that is not party to the Refugee Convention and the ECHR is not permitted in the opinion of the Court. The Anti-Torture Committee declared explicitly in its decision of 16 November 1998 (number 88/1997, JV 1999, 72) in the case of K./Sweden that expulsion to a third country, i.e. a country other than the country where the alien runs a real risk of torture, is permitted only if indirect *refoulement* has been ruled out.

It can be said that the nature of the acts which constitute a violation of article 3, first paragraph, of the Convention against Torture are also acts against which article 3 of the ECHR is intended to offer protection. For successful appeal on the basis of the abovementioned articles, the alien should attest that if he were to return to his country of origin he would run a real risk of treatment in violation of one or both of the provisions.

However, this does not mean that if article 3, first paragraph of the Convention against Torture prohibits deportation, the alien is also protected in all cases from *refoulement* by article 3 of the ECHR and vice-versa.

Torture is defined in article 1, first paragraph, of the Convention against Torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (...) when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*" (italics ours). The fact that the Anti-Torture Committee gives a broad interpretation to the term "public official" in the sense that this can also apply to leaders of clans and such like - see, for example, the decision of 15 May 1999 (number 20/1998) in the case of Elmi/Australia - does not take away the fact that the definition of torture in this provision is less broad in scope than article 3 of the ECHR. Indeed, for the applicability of article 3 of the ECHR it is not essential that a public official be involved in the prohibited act. Furthermore, article 3 prohibits deportation not only to a country where the alien runs a real risk of being subjected to a certain *treatment*, which is a broader concept than torture, but also to a country where the situation - quite apart from any human treatment - is such that the alien runs a real risk of finding himself in inhumane conditions.

However, from another standpoint, article 3, first paragraph, of the Convention against Torture offers more protection than article 3 of the ECHR, because the European Court of Human Rights uses a more stringent risk criterion than the Anti-Torture Committee. It can be deduced from article 3, second paragraph, of the Convention against Torture that the asylum statement should be assessed within the context of the possible bad general (human rights) situation in the country of origin (see, for example, Anti-Torture Committee 27 April 1994 (number 13/1993, RV 1994, 16) in the case of Mutombo/Switzerland), while the European Court of Human

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Rights lends less importance to the general (human rights) situation in the country of origin and takes the view that the individual circumstances which the alien puts forward are of crucial importance (see, for example, European Court of Human Rights, 30 October 1991 (number A.215, *RV* 1991, 19) in the case of *Vilvarajah*).

3.3.2 Dutch regulations and jurisprudence

Article 22, first paragraph, of the Law on Aliens states that aliens who have not been permitted to reside in the Netherlands according to one of the provisions of articles 8-10 can be deported (cf. article 61, first paragraph, in conjunction with article 8 of the Law on Aliens 2000).

In the abovementioned decision of 7 October 1997, the REK stated that the SvJ is not under an obligation but has the power to deport an alien by force if he has not left the Netherlands by the set deadline. Furthermore, the REK pointed out in this decision that the decision to deport should not in principle be unjustifiably set aside, but that legal precedent offers no justification for the adage "Not deporting means admitting".

The legislator and the court have therefore given the SvJ considerable policy discretion to decide whether or not to use its power to deport aliens. According to the Repatriation Policy memorandum, deportation should be used only as a last resort. The memorandum does not specify in which cases and when the SvJ will use its power to deport aliens.

Of course, obstacles of a policy-related or technical nature may also arise that prevent deportation.

3.3.3 Deportation of 1(F) aliens

In the view of the Commission, the efforts undertaken by the Dutch Government to maintain its credibility in its relations with other States does not mean that the Netherlands should be held to take steps to find a country (possibly a third country) where the admission of a 1(F) alien is guaranteed. This practice would fail to recognise the fact that aliens, and especially 1(F) aliens, are at all times themselves primarily responsible for their departure. It can therefore be demanded of the alien himself that he do everything in his power to leave the Netherlands.

If an alien to whom article 1(F) is applied claims that upon return to his country of origin he runs a real risk of being subjected to a treatment against which article 3 of the ECHR and/or article 3, first paragraph, of the Convention against Torture is/are designed to offer protection, in the view of the Commission the SvJ should, given the absolute ban on *refoulement* which is laid down in the abovementioned provisions, at all times carry out an assessment of the veracity of this claim. This assessment is all the more advisable as, in the view of the Commission, fewer 1(F) aliens than at present in the decision practice of the SvJ are entitled to an appeal on the basis of the abovementioned articles 3. Thus, according to the general country report of the Minister of Foreign Affairs on Afghanistan, only very prominent Communists still run any risk of receiving the wrong kind of personal attention from the Taliban, while most of the intelligence service of the Taliban is made up of former KhAD/WAD operatives. In view of this, there is at least some reason for considering *a priori* that KhAD/WAD operatives run a real risk of undergoing a treatment mentioned in articles 3 if they return to Afghanistan.

In these cases, the SvJ can request that the Minister of Foreign Affairs make further inquiries and/or if possible 'monitor' the alien after his return to his country of origin.

3.4 Conclusion

In the view of the Commission, the SvJ should take all measures to expedite the independent return of 1(F) aliens from the Netherlands, such as the declaration of undesirability.

Furthermore, it is recommended that the SvJ use all available means to carry out the deportation of 1(F) aliens if necessary. In this context, it is important that a critical assessment be made as to whether the abovementioned articles 3 prevent deportation, if necessary through further inquiries by the Minister of Foreign Affairs.

More generally, it is important that the Netherlands does not offer or ceases to offer refuge to aliens to whom article 1(F) is applicable. As we have mentioned, the credibility of the policy of non-admission of 1(F) aliens and the related general interests (see subparagraph 2.6.5) would be seriously undermined if the repatriation policy is not consistently and effectively applied in respect of rejected 1(F) aliens. This category of aliens should be allowed to remain in the Netherlands only if and as long as independent departure or deportation is not an option.

Chapter 4

The provision of benefits to aliens to whom article 1(F) of the Refugee Convention is applied

4.1 Legal framework

With the entry into force of the *Koppelingswet* law, the claim of an alien to benefits was made dependent on the legitimacy of his residency.

Article 1b of the Law on Aliens states - insofar as this has bearing in this context - that aliens in the Netherlands can enjoy legal residency only:

- "1. on the basis of a decision to grant admission (...);
2. on the basis of a decision to grant conditional admission;
3. pending the decision on an application for admission, including extended admission, while pursuant to this law or on the basis of a decision pursuant to this law or on the basis of a judgment deportation of the applicant should be delayed until a decision has been made on the application;
4. (...)
5. if there are obstacles that prevent deportation which are provided for by a decision pursuant to this law".

4.2 The nature of residence and the related benefits

In the light of chapter 2, the terms of subparagraphs 1 and 2 of the abovementioned article need no further discussion. As long as no decision has been taken on the application and no definitive ruling has been made concerning the application of article 1(F), the alien may claim benefits (subparagraph 3).

4.2.1 1(F) aliens who are not deportable

Article 1b, introduction and part 5, of the Law on Aliens relates to individuals who on the basis of article 25 of the Law on Aliens are not deportable. Furthermore, the SvJ has stated in the TK that technically non-deportable aliens enjoy legal residency in the meaning of this provision.

In the creation of the *Koppelingswet* law there was no discussion of the position of aliens who are not deportable on the basis of article 3, first paragraph, of the Convention against Torture and/or article 3 of the ECHR but are not admitted for reasons connected with public order⁹. In the view of the Commission, an alien to whom article 1(F) has been applied but who is not deported because it has been found on the basis of an assessment that this is prevented by the abovementioned articles 3 (cf. subparagraph 3.3.3, second paragraph) has legal residency on the basis of article 1b, introduction and part 5, of the Law on Aliens, as in that case it has been established by a decision pursuant to the Law on Aliens that there are obstacles which prevent deportation.

Non-deportable 1(F) aliens therefore have entitlement to the benefits which are consistent with the nature of their residence (article 8c, first paragraph, of the Law on Aliens), which means that they can invoke only claims which have been expressly recognised (article 8c, second paragraph, introduction and part (c), of the Law on Aliens).

The foregoing applies *mutatis mutandis* to non-deportable family members of 1(F) aliens to whom a (conditional) residence permit is refused on the basis of TBV 1998/3 of 27 February 1998 (see chapter 5).

⁹ W. Verberk, *Het ABC van de Koppelingswet: Effecten van een geïntegreerd vreemdelingenbeleid* ('The ABC of the *Koppelingswet* law: Effects of an Integrated Policy on Aliens'), in *Migrantenrecht* 1998/5-6, page 7, note 29.

In the view of the Commission, the principle should be applied that the actual stay in the Netherlands of 1(F) aliens should be discouraged as much as possible. Based on this principle, the Commission holds the view that it is advisable to consider further whether it is desirable that a non-deportable 1(F) alien on the basis of article 8c, second paragraph, of the Law on Aliens should be able to claim more provisions than the minimum humanitarian safety net defined in article 8b, second paragraph, of the Law on Aliens.

4.2.2 1(F) aliens who are deportable

On the basis of article 8, first paragraph, sub c, of the *Regeling Verstrekkingen Asielzoekers* 1997, as amended by decision of 6 December 1999 (reference: 798464/99/DVB, *Staatscourant* (Government Gazette) of 8 December 1999, number 237, page 5), the supply of provisions is stopped either if the asylum application is not granted and this decision has become irrevocable or in the case of an alien who is legitimately deportable. Upon expiry of the final deadline for departure after the period of 28 days, the supply of provisions is effectively stopped.

According to the explanation given, it is not important whether the alien is deportable after the expiry of the final deadline for departure. In the view of the Commission, it is not clear whether the regulation can be applied to an alien who is not legally deportable, because expulsion would be in breach of article 3 of the ECHR.

Article 8b, first paragraph, of the Law on Aliens provides for the *koppelingsbeginsel* (link-up principle) and states that aliens who do not enjoy the legal residency mentioned in article 1b cannot claim the allocation of allowances, provisions or benefits through a decision of a regulatory body, while the same applies to the derogations or provisions laid down by law or implementing order.

A derogation may be provided for according to the second paragraph of article 8b of the Law on Aliens if the claim relates to education, the provision of essential medical care, the prevention of violations with regard to national health or the legal aid to be given to an alien. This recognition, having regard to article 8b, third paragraph, of the Law on Aliens gives no entitlement to residence as mentioned in article 1b.

A rejected deportable 1(F) alien does not enjoy legal residency in the meaning of article 1b of the Law on Aliens and can therefore claim only the provisions mentioned in article 8b, second paragraph, of the Law on Aliens.

On the basis of Convention obligations, *inter alia* article 2 of the First Protocol to the ECHR and article 13 of the International Convention on Economic, Social and Cultural Rights, education cannot be denied to children under 18 years of age, leaving aside the question of whether these children are of school age according to the *Leerplichtwet* (Compulsory Education Act). Furthermore, according to the jurisprudence of the European Court of Human Rights it is a corollary to article 6 of the ECHR that entitlement to legal aid is recognised *mutatis mutandis*.

On the basis of national regulations, the government and individual citizens are under an obligation to provide medical care if the health status of the alien or Dutch public health is seriously jeopardised if this care is withheld or delayed. It is also possible to provide medical care which is necessary to save an individual from an acute medical emergency situation. This might include, for example, cases of chronic illness (the Rouvoet amendment, TK 1996-1997, 24.233, number 43).

In spite of the fact that the allocation of provisions does not give entitlement to legal residency in the meaning of article 1b of the Law on Aliens, it is not inconceivable *a priori* that school-attending children of 1(F) aliens to whom (initial) admission has been denied on the basis of TBV 1998/3, *inter alia* on the basis of the ties they have developed with the Netherlands by following education, a residence permit may be granted after some time for cogent reasons of a humanitarian nature (see subparagraph 5.5.2, last paragraph).

Given that the level of provisions defined in article 8b, second paragraph, of the Law on Aliens can be regarded as a minimum humanitarian safety net, in the view of the Commission it is not logical to withhold such provisions from 1(F) aliens, leaving aside the question whether this would be at odds with the abovementioned Convention obligations, article 3 of the ECHR and the principle that everyone who is on the territory of the Netherlands should be treated humanely by the Dutch Government.

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Article 8b of the Law on Aliens has been incorporated verbatim in article 10 of the Law on Aliens 2000.

However, there is no provision corresponding to article 1b, introduction and part 5, of the Law on Aliens. Article 8, introduction and part (j), of the Law on Aliens 2000 states that an alien has legal residency in the Netherlands if there are obstacles preventing deportation as defined in article 62. Article 62 of the Law on Aliens 2000 states that deportation should be delayed as long as it is not sensible to travel in view of the health status of the alien or that of one of his family members. Under the Law on Aliens 2000 (apart from the aforementioned article 62), there is therefore no mention of legal residency on the basis of "(...) obstacles (...) provided for by decision pursuant to this law".

In view of the foregoing, the Law on Aliens 2000, unlike the Law on Aliens, does not offer the possibility of qualifying the residence of non-deportable 1(F) aliens as "legal". It must therefore be assumed that, irrespective of their deportability, 1(F) aliens do not have legal residency in the meaning of article 10 of the Law on Aliens 2000 and are therefore eligible only for the provisions mentioned in article 10, second paragraph, of the Law on Aliens 2000. In the light of the final sentence of subparagraph 4.2.1, the Commission has no objection to this - in any case as far as 1(F) aliens are concerned.

Chapter 5

The position with regard to legal residency of family members of aliens to whom article 1(F) of the Refugee Convention is applied¹⁰

5.1 Introduction

In the Netherlands the policy is that family members of aliens to whom article 1(F) is applied are not eligible for a number of residency rights which other aliens in such cases can claim. This chapter will examine this policy in more detail.

5.2 Position of the UNHCR

The UNHCR expressed the following opinion in paragraphs 12 and 13 of its publication *The Exclusion Clauses*: "The exclusion of an applicant can have implications for family members. Paragraph 185 of the *Handbook* states that the principle of family unity generally operates in favour of dependants, and not against them. In cases where the head of a family is granted refugee status, his or her dependants are normally granted ('derivative') refugee status in accordance with this principle. If a refugee is excluded, derivative refugee status should also be denied to dependants. Dependants and other family members can, however, still establish their own claims to refugee status. Such claims are valid even where the fear of persecution is a result of the relationship to the perpetrator of excludable acts. Family members with valid refugee claims are excludable only if there are serious reasons for considering that they, too, have knowingly participated in excludable acts. Where family members have been recognized as refugees, the excluded applicant/head of family cannot then rely on the principle of family unity to secure protection or assistance as a refugee."

The UNHCR is therefore of the opinion that family members of 1(F) aliens are not eligible for derivative refugee status, but in such cases may well be eligible on independent grounds for admission as refugees. According to paragraph 7 of the UNHCR publication *The Exclusion Clauses*, the Contracting Parties reserve the right to grant statuses other than admission as (Convention) refugees to individuals who are excluded from the protection of the Convention. As the Convention, in the view of the UNHCR, does not rule out the possibility of granting a residence permit to a 1(F) alien, it must be assumed *a fortiori* that the UNHCR does not rule out the possibility of admitting family members of a 1(F) alien on the basis of a residence permit. Whether a residence permit is granted to these family members is a question for the national policy on aliens, as neither the Convention nor any other international agreements contain any provisions on this matter.

5.3 Jurisprudence

On 2 September 1997, the Circuit Court of The Hague, sitting in Haarlem, (AWB 97/1495 and AWB 97/1496), issued a ruling on the appeal entered on behalf of the wife and children of a suspected 1(F) alien - he had not yet exhausted the procedure - against the denial of a residence permit. The main issue was whether, assuming that article 1(F) was applicable to the spouse /father, this constituted sufficient grounds to deny admission to the family members. In the opinion of the court, it is obvious that a distinction should be drawn between, on the one hand, cases in which the family members are denied admission while they have no choice but to reside in the Netherlands because article 3 of the ECHR prohibits deportation to the country of origin and there is no possibility of residence in an alternative (third) country and, on the other hand, cases in which it is possible for the aliens to return to the country of origin or to go to a third country. The court decided that the - at that time unwritten - policy of the SvJ, insofar as on the grounds of this policy the first-mentioned category of family members could be denied a residence permit, is manifestly unreasonable.

¹⁰ 'Family members' is defined as the nuclear family of the 1(F) alien, i.e. his/her spouse or partner and children, insofar as such actually belong to the 1(F) alien's family.

On 11 September 1997, the REK gave a ruling in the case of an alien to whom article 1(F), in the - uncontested - opinion of the *Afdeling bestuursrechtspraak* of the Council of State, was not applicable (AWB 97/4704) and in the cases of their family members (AWB 97/4705 and AWB 97/7407). The REK declared the appeal of the spouse to be unfounded insofar as it was directed against non-admission as a refugee and against the refusal to grant her a residence permit on the basis of article 3 of the ECHR or (other) cogent reasons of a humanitarian nature. The REK declared the appeal to be founded insofar as it was directed against the denial of a residence permit on the basis of the three-year policy, because contraindications for admission on the grounds of that policy - at that time - had to be based on the person of the alien himself.

5.4 *Policy of the Secretary of State for Justice*

In the abovementioned letter of 28 November 1997, the SvJ informed the TK - as far as it has bearing in this context - that the policy is followed that family members of 1(F) aliens can be eligible on independent grounds for admission as refugees, but not for a derivative refugee status, a residence permit based on the passage of time or a conditional residence permit. Given the exceptional nature of the crimes committed by the 1(F) alien, in the view of the SvJ in general the public order aspect takes precedence over the interest of the family members being admitted to the Netherlands.

The letter continues as follows: "However, I am aware that the current provisions on public order in the Circular on Aliens do not provide for the possibility of relying on a contraindication which does not correspond to the personal conduct or characteristics of the alien. Consequently, with your approval I will amend the Circular on Aliens on this point". This amendment to the Circular on Aliens was made by TBV 1998/3 of 27 February 1998 (reference: 676174/98/IND), on the basis of which family members of a 1(F) alien are eligible in such cases on independent grounds for admission as refugees or a residence permit for cogent reasons of a humanitarian nature, but not for a derivative refugee status, a residence permit based on any other ground (including the passage of time) or a conditional residence permit.

5.5 *Position of the Commission*

5.5.1 *Admission as a refugee*

As we have pointed out, the UNHCR and the SvJ hold the view that family members of a 1(F) alien are not eligible for a derivative or policy-related (chapter B7, subsection 17, of the Circular on Aliens - Vc) refugee status. The Commission generally accepts and subscribes to this view.

The UNHCR stresses that family members of a 1(F) alien can be eligible on independent grounds for admission as refugees, even if they have a well-founded fear of persecution on the basis of their relationship with the 1(F) alien (family-related persecution). This view is also generally shared, and the Commission sees no reason to adopt any other opinion. However, it appears to the Commission that the possibility of family-related persecution is not generally mentioned in refusal decisions by the SvJ. In view of the fact that a decision should be based on clearly expressed reasons, the Commission believes that it is advisable that in the event of refusal to grant an application for admission as a refugee, submitted by a family member of a 1(F) alien, the SvJ should state why family-related persecution does not apply.

5.5.2 *Residence permits*

Within the framework of the question as to whether family members of a 1(F) alien can be denied admission on the ground of a family relationship with the 1(F) alien, it should first and foremost be remembered that the REK in its ruling of 11 September 1997 decided that relying on a contraindication which does not correspond to the person of the alien in question has far-reaching consequences, so that it is not logical to use such a contraindication without making a provision for the same in the written policy rule.

The Commission is aware on the basis of its own sources that the SvJ has conformed to this ruling to the extent that family members of an alien to whom article 1(F) is applicable are not denied a residence permit if these family members submitted an application for admission before 28 November 1997, of course insofar as the family members are themselves eligible for a residence permit. In the view of the Commission, it is more appropriate to consider 28 February 1998, the publication date of TBV 1998/3, as the crucial date, whereby the following has been taken into consideration. As the SvJ has decided to follow the REK decision of 11 September 1997, it cannot continue to be contested that it is sufficient merely to announce an amendment to the Circular on

Aliens to continue to deny a residence permit to family members of a 1(F) alien. Quite apart from the fact that the TK on 28 November 1997 had not yet agreed to the intention of the SvJ, expressed in the letter of that date, to amend the Circular on Aliens, in the view of the Commission it is logical to deny a residence permit to family members of 1(F) aliens only if their application for admission was submitted on or after the date on which the announced amendment of the Circular on Aliens was implemented, i.e. 27 February 1998, as it was only from that date on that provision was made for the denial of a residence permit to such family members, which must be seen as the application of a contraindication which does not correspond to the personal conduct or characteristics of the alien in question, by a written policy rule. The fact that TBV 1998/3, according to the introduction thereto, is valid from 28 November 1997 does not lead to a different conclusion, as it would be in violation of legal security to accept that any policy rule which has adverse consequences for aliens could be implemented retroactively.

The foregoing reasoning leads the Commission to the conclusion that family members of aliens to whom article 1(F) is applicable, if they are independently eligible for a residence permit, cannot be denied this permit if they submitted an application before 27 February 1998.

The Commission will now consider the current policy rules.

First and foremost, it must be said that the SvJ set out these policy rules with the express approval of the TK based on the idea that the public order aspect, which is served by the 'smoking out' of 1(F) aliens, given the exceptional nature of the crimes which they are seriously suspected of having committed prevails over the personal interests involved in admitting their family members. Also, the Commission believes that the general interest in not facilitating the stay in the Netherlands of 1(F) aliens is legitimate and has far-reaching consequences. This general interest is undermined by admitting their family members, as in that case 1(F) aliens can make use of the accommodation and benefits allocated to their family members (and at a later stage perhaps independent income). An important point is that admission on the basis of the existing policy rules is denied only to family members who are not refugees themselves, while there is no risk of violation of article 3 of the ECHR and there are no cogent reasons of a humanitarian nature. The Commission wishes to point out that there will also be cogent reasons of a humanitarian nature if the trauma policy forms the basis for admission. This means that the policy of the SvJ, irrespective of the three-year policy, has actual meaning only for applications for a residence permit on normal grounds which, apart from applications for admission for medical treatment, will in the view of the Commission be seldom submitted, and for the conditional residence permit (see subparagraph 5.5.3).

Based on the reasoning set out in the foregoing paragraph, in the view of the Commission it is excessive to conclude that the policy followed on this matter is unreasonable. The fact remains that application of this policy has far-reaching adverse consequences for the family members of 1(F) aliens who, in addition, cannot generally be blamed for the fact that their husband/father has committed 1(F) acts. Consequently, if the family members appeal on the basis of special circumstances, particular care should be taken to ensure that the objective of the policy, i.e. not facilitating the stay of the 1(F) alien, is proportionate to the adverse consequences of the policy for the family members. Upon analysis of the individual cases which have come before the Commission to date, we have found that it is generally sufficient to refer in the decision in the first instance to make only one reference to the policy rule in question, without evaluating whether there is reason to use the inherent exemption competence. As we have mentioned, the Commission is of the opinion that such an assessment should be made in each individual case in which special circumstances are alleged. In this regard, attention should be given to the intended ground for admission of the family members and to the question whether the family members are deportable. If this is not the case, it should be taken into consideration that according to established jurisprudence the long-term stay of aliens without any official status is an undesirable situation which should be limited to exceptional cases. Furthermore, the deportability of the 1(F) alien himself is important. If he is not deportable, the question arises as to the importance of the public interest in denying admission to the family members, as in this case it should not be forgotten that, although the admission of the family members facilitates the actual stay of the 1(F) alien in the Netherlands, non-admission of the family members does not change the fact that the 1(F) alien cannot be deported. The Commission is not convinced in principle that the need to 'smoke out' a 1(F) alien offers in this case sufficient justification for the decision not to admit his family

members. The Commission recommends that the SvJ give particular attention to this aspect when it comes to stating the reason for a decision if a residence permit is denied to the family member of a 1(F) alien.

In cases where the balance of interests is initially to the detriment of the family members of the 1(F) alien, it must be assessed within the framework of any subsequent legal residency procedures whether the public interest in not admitting the family members should still prevail over the personal interests of the family members who may have to stay in the Netherlands for an unlimited period without any official status and without any prospect of deportation. In the view of the Commission, the time comes sooner or later when they can no longer be denied admission if in spite of their relationship with the 1(F) alien they are still eligible for a residence permit. The Commission is of the opinion that five years after the submission of the (first) application for admission it is no longer possible to continue to refuse to admit the family members, it being understood that there can be special circumstances on the basis of which this period should be shortened.

5.5.3 Conditional residence permits

With reference to what has been said in the foregoing paragraph, the Commission is of the opinion that it is not reasonable to deny family members of a 1(F) alien a conditional residence permit if they submitted an application for admission before 27 February 1998. The fact that an amendment to a conditional residence permit policy has immediate effect according to established jurisprudence does not lead to another conclusion. In this regard, it is taken into consideration that the SvJ, according to the letter of 28 November 1997, is of the opinion that there should be no change of policy, but rather that the existing policy should be enshrined in policy rules. Furthermore, the Commission is of the opinion that a change to the conditional residence permit policy on the basis of a change in the general situation in a certain country, to which the abovementioned jurisprudence relates, is quite different from drafting policy rules on public order which, *inter alia*, have consequences for the entitlement to a conditional residence permit, so that it is not logical to consider that this jurisprudence applies to cases such as this.

As a conditional residence permit is granted on the basis of category, whereby no attention can be given to the circumstances of the individual case, the only question to be decided is whether category-based exclusion of family members of 1(F) aliens is justified. In the light of the rationale of the policy (cf. paragraph 5.4 and subparagraph 5.5.2), in the view of the Commission it cannot be said that this is not the case. The decision as to whether in the individual case there are circumstances which constitute grounds for admission should be assessed in the context of the question whether the family members are eligible for a residence permit. The fact that an alien from a conditional residence permit country or region is generally not deportable should be a factor in this balance of interests. If there do not appear to be facts or circumstances which form the basis for the admission of the family members, in the view of the Commission there will be no reason in this case either to grant them a conditional residence permit.

A new situation can occur if the family members remain non-deportable for a long time, as according to established jurisprudence having aliens stay in the country for long periods without any official status and without the prospect of deportation should be limited to exceptional cases. In cases where the alien in spite of his/her family relationship with a 1(F) alien is eligible for a conditional residence permit (article 12b of the Law on Aliens) is granted a residence permit after three years (article 13a of the Law on Aliens) and after five further years after the submission of their (first) application for admission can still claim admission, this individual (as is pointed out in the final paragraph of subparagraph 5.5.2) is in the view of the Commission still eligible for legal residency.

5.6 *Vreemdelingenwet 2000 (Law on Aliens 2000)*

Under the Law on Aliens 2000, asylum-seekers are eligible in such cases only for the asylum residence permit for a limited period, as mentioned in article 27 of the Law on Aliens 2000. The grounds for admission of article 27, first paragraph, of the Law on Aliens 2000 are more or less the same - cf. with regard to ground (a) of article

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27, first paragraph, of the Law on Aliens 2000, the final paragraph of subparagraph 2.4.1 - as the existing grounds for admission, so that the assessment of the claims for admission of 1(F) aliens will not change substantively. We therefore refer to paragraph 5.5.

The family members of a 1(F) alien are eligible for admission under the Law on Aliens 2000 if they themselves are Convention refugees ((a) ground), if deportation violates article 3 of the ECHR ((b) ground) and for (other) cogent reasons of a humanitarian nature ((c) ground). The family members are not eligible for a derivative status ((e) and (f) grounds) or for a residence permit on the basis of the general situation in the country of origin ((d) ground).

List of abbreviations used

Article 1(F) the Protocol	Article 1(F) of the Geneva Refugee Convention of 28 July 1951, as amended by of New York of 31 January 1967
1(F) alien	An individual to whom article 1(F) is applicable
Awb	<i>Algemene wet bestuursrecht</i> (General Administrative Law)
<i>The Exclusion Clauses</i>	<i>The Exclusion Clauses: Guidelines on their Application</i> , UNHCR
ECHR Freedoms	European Convention on the Protection of Human Rights and Fundamental Freedoms
<i>Handbook</i>	<i>Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees</i> , UNHCR
ILC	International Law Commission
JV	<i>Jurisprudence Vreemdelingenrecht</i> (Jurisprudence on Aliens' Rights)
KhAD	Khadimat-e Atal'at-e Dowlati (security service under the Communist regime in Afghanistan)
NAV Law)	<i>Nieuwsbrief Asiel- en Vluchtelingenrecht</i> (Newsletter of Asylum and Refugee Law)
REK	<i>Rechtseenheidskamer</i> (Legal Uniformity Division)
RV	<i>Rechtspraak Vreemdelingenrecht</i> (Case Law on the Law on Aliens)
SUO	Schengen Implementing Convention
SvJ	<i>Staatssecretaris van Justitie</i> (Secretary of State for Justice)
TBV	<i>Tussentijdse Bericht Vreemdelingencirculaire</i> (TBV - Interim Alien Circular)
TK	<i>Tweede Kamer der Staten-Generaal</i> (Lower Chamber of the Dutch Parliament)
UNHCR	United Nations High Commissioner for Refugees
Vc	(the current) <i>Vreemdelingencirculaire</i> (Circular on Aliens of 1994)
vvvtv	<i>voorwaardelijke vergunning tot verblijf</i> (conditional residence permit)
Vw	(the current) <i>Vreemdelingenwet</i> (Law on Aliens)
Vw 2000 April 2001	<i>Vreemdelingenwet 2000</i> (Law on Aliens 2000), pending implementation on 1 April 2001
WAD	Wazarat-e Amani-at-e Dowlati (Ministry of State Security under the Communist regime in Afghanistan, successor to the KhAD)

