

**Commentary on the fourth periodic report submitted by the Kingdom of
the Netherlands on the implementation of the UN Convention Against
Torture and Other Cruel, Inhuman or Degrading Treatment or
Punishment (CAT/C/67/Add.4)**

The Netherlands, 1 June 2006

The Commentary on the fourth periodic report submitted by the Kingdom of the Netherlands on the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/67/Add.4) is an initiative of the Johannes Wier Foundation (JWS) and the Dutch section of the International Commission of Jurists (NJCM) and is submitted on behalf of the following NGOs:

- ACAT Nederland, Actie van Christenen voor de Afschaffing van Martelen en de Doodstraf (Action from Christians for the Abolition of Torture and the Death Penalty)
- Amnesty International, Dutch Section
- Defence for Children International, the Netherlands / ECPAT the Netherlands
- Humanistisch Overleg Mensenrechten, HOM (Humanist Committee on Human Rights)
- International Federation of Health and Human Rights Organisations, IFHHRO
- Johannes Wier Stichting (Human Rights Organisation for and on behalf of doctors, nurses and paramedics)
- Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst, KNMG (Royal Dutch Society for the promotion of Medical Science)
- Nederlands Juristen Comité voor de Mensenrechten, NJCM (Dutch Section of the International Commission of Jurists)
- Pharos Kenniscentrum Vluchtelingen en Gezondheid (Knowledge centre for Refugees and Health)
- Stichting Medisch Advies Kollektief, SMAK (Institution for Medical Advice)
- Vereniging Asieladvocaten en –Juristen Nederland, VAJN (Foundation for Immigration Lawyers)
- Vluchtelingenwerk Nederland (The Dutch Council for Refugees)

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Table of Contents

Introduction	1
Summary of Analysis, Remarks and Questions	2
A. European Part of the Kingdom of the Netherlands	7
1. Information on new measures and developments relating to the implementation of the Convention	7
1.1 Alleged non-restrictiveness of the Dutch asylum policy	7
1.2 The accelerated procedure.....	7
1.3 Burden of proof and undocumented asylum seekers	9
1.4 Marginal Scrutiny.....	10
1.5 New facts and changed circumstances	11
1.6 Medical information in the asylum procedure	13
1.6.1 <i>Rejection of victims of torture or ill-treatment in the accelerated procedure</i> ..	13
1.6.2 <i>Medical advice during the asylum procedure</i>	13
1.6.3 <i>The Istanbul Protocol</i>	14
1.6.4 <i>Medical reports as evidence to support an asylum request</i>	15
1.7 Exclusion from facilities	17
1.8 Aliens' detention	18
1.8.1 <i>Growing number of (rejected) asylum seekers submitted to detention not as a last resort</i>	18
1.8.2 <i>Inadequate conditions in alien detention centres</i>	20
1.8.3 <i>Late judicial review</i>	23
B. The Netherlands Antilles.....	24
2 Detention Facilities	24
2.1 Primary remarks	24
2.2 Police Detention	24
2.3 Prison Detention.....	25
2.3.1 <i>General Conditions</i>	25
2.3.2 <i>Classification and allocation of prisoners</i>	26
2.3.3 <i>Activity and educational programmes</i>	26
2.3.4 <i>Medical conditions</i>	27
2.4 Final remark	28

Introduction

This document contains a commentary on the fourth periodic report of the Netherlands on the implementation of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT/C/67/Add.4), which is scheduled for consideration during the May 2007 session. This report was created with input and effort on the part of a wide variety of organizations and individuals.¹ The NGOs aim to provide the Committee Against Torture (hereinafter: the Committee) with information in order to enable it to make its dialogue with the Netherlands' Government as effective and useful as possible.

Timeframe

The Report of the Kingdom of the Netherlands covers the period between 1999-2002. However, NGOs believe it necessary to provide the Committee with more up to date information. Therefore, this commentary takes into consideration developments that have taken place until April 2006.

Subjects and structure

After publication of the Report off the Dutch Government, NGOs discussed the major themes contained in the report. This led to the identification of topics for our analytical chapters. In order to enhance its effectiveness these chapters focus on points of concern and remarkable developments.

This commentary consists of two parts. The first part deals with the European part of the Kingdom of the Netherlands. These chapters mainly discuss certain aspects of the immigration and refugee policy in the Netherlands, because we believe this topic deserves the Committee's full attention.

The second part of the commentary discusses the detention situation in Curacao. In it's report the Dutch Government only deals with the European part of the Kingdom and Aruba. The Kingdom of the Netherlands as a whole signed and ratified the Convention. In its concluding observations on the third periodic report of the Kingdom of the Netherlands the Committee made several remarks about the situation in the Netherlands Antilles and more specifically on the 'Koraal Specht' prison in Curacao. Therefore, this commentary will follow-up on these concluding observations and discuss the situation in a number of detention centers in Curacao.

¹ They will hereinafter simply be referred to as the NGOs.

Summary of Analysis, Remarks and Questions

European Part of the Kingdom of the Netherlands

Article 3 CAT

Alleged non-restrictiveness of the Dutch asylum policy (§ 1.1)

In its report, the Dutch Government claims that the policy concerning the admittance of refugees is not restrictive. However, NGOs argue that the policy is restrictive and we would therefore welcome exclusion of remarks on the alleged non-restrictiveness of the Dutch asylum policy.

The accelerated procedure (§ 1.2)

Many asylum applications are rejected in the accelerated (48-hour) procedure.² According to NGOs – and many academics and other organizations – the accelerated procedure does not provide enough safeguards against refoulement. Despite this lack of safeguards all cases can be and many are rejected in the AC-procedure. In 2005 an average of 37% of all cases was rejected in the accelerated procedure. In the first four months of 2006 this number was 29 %. Since December 2004 it is possible to grant an asylum permit in the AC-procedure. In the first four months of 2006, this happened in 432 cases.

Because the AC-procedure leads to a risk of violating the non-refoulement principle of article 3 CAT in individual cases, the NGOs would like to invite the Committee to question the Dutch Government on the AC-procedure.

The burden of proof and undocumented asylum seekers (§ 1.3)

As a result of Dutch legislation and case-law a very heavy burden is imposed on asylum seekers to prove their asylum claim. In cases where an asylum seeker lacks proper documentation it is especially difficult to prove such a claim.

NGOs would like to ask the Committee to question the Dutch Government on the burden of proof that is imposed on asylum seekers. NGOs believe this burden of proof can lead to a greater risk of violating the non-refoulement principle of article 3 CAT in individual cases.

² In the accelerated (48-hours) procedure the Immigration Service takes the final decision on the asylum application within 48 hours.

Marginal scrutiny (§ 1.4)

The Dutch courts, in first stage as well as in appeal, only subject the question as to whether or not the asylum seeker runs a real risk of being exposed to torture, inhuman or degrading treatment or punishment when sent back to his home country, to a ‘marginal scrutiny’. This could lead to the rejection of applicants who are in need of international protection and might therefore result in a violation of article 3 CAT in individual cases.

NGOs invite the Committee to question the Dutch Government about the marginal scrutiny test that is applied by the Dutch courts when deciding on the question whether an asylum seeker runs a real risk of being subjected to torture, inhuman and degrading treatment when they are sent back to their home country. This core part of the application should be fully reviewed in at least one instance.

New facts and changed circumstances (§ 1.5)

Dutch legislation and case-law restricts the asylum seeker’s opportunity to bring to light new facts and changed circumstances relevant to the procedure, and hence to the attention of the decision making bodies. This enhances the risk of violating the principle of non-refoulement (Article 3 CAT) in individual cases.

NGOs and academics have criticised the jurisprudence and policy concerning the raising of new facts and circumstances. They are of the opinion that the policy and jurisprudence with regard to the raising of new facts and changed circumstances in asylum procedures can lead to refoulement and violations of article 3 CAT.

Medical information in the asylum procedure (§ 1.6)

Rejection of victims of torture or ill-treatment in the accelerated procedure (§ 1.6.1)

Applicants who are victims of traumatic events before or during their flight, may be interviewed and rejected in the accelerated procedure. This often occurs in practice.

NGOs believe that requests by traumatised asylum seekers should not be dealt with in the AC-procedure, because these traumatised asylum seekers face difficulties substantiating their claims.

Medical advice during the asylum procedure (§ 1.6.2)

According to the Minister of Immigration and Integration, the Medical Service will be asked for advice when it is not clear whether the asylum seeker can be interviewed because of his/her medical situation. However it is not clear how often the Minister asks for medical advice and how often asylum seekers are referred to the normal procedure because of medical problems. Medical reports in order to examine a person’s ability to be interviewed about his asylum motives lack transparency and should be characterized as superficial.

NGOs would like to ask the Committee to question the Dutch government on the use of medical advice during the asylum procedure. NGOs are concerned that the Government does not ask for medical advice as often as it should and when medical advice is requested, NGOs question whether this is done with due care.

The Istanbul Protocol (§ 1.6.3)

The Dutch Government is not willing to adhere to its responsibility for medical examinations in accordance with the Istanbul Protocol. The Medical Assessment section of the Ministry of Justice is in fact only asked for medical advice in order to ascertain whether or not a rejected asylum seeker is fit to travel.

The NGOs believe the Dutch Government does not act in accordance with the standards of the Istanbul Protocol, to which it claimed to take as a reference, when dealing with medical aspects in asylum procedures .

Medical reports as evidence to support an asylum request (§ 1.6.4)

The policy and practice of the Dutch Government is that medical reports do not serve as evidence in asylum cases.

NGOs are concerned with the Dutch policy and practice that medical reports do not serve as supportive medical evidence in the asylum procedure. Therefore, NGOs would like to ask the Committee to question the Dutch Government on this policy.

Article 16 CAT

Exclusion from facilities (§ 1.7)

Under the Dutch Aliens Act, several categories of aliens (including children and elderly people) are excluded from facilities such as housing, money for food and clothing, and medical care.

The NGOs would like to know whether the Committee also considers leaving aliens without facilities a form of inhuman treatment that might lead to a violation of article 16 of the Convention.

Article 11 and 16 CAT

Aliens' detention (§ 1.8)

Growing number of (rejected) asylum seekers submitted to detention not as a last resort (§ 1.8.1)

The number of places for detention of (rejected) asylum seekers increased considerably and is often not used as a last resort. The Dutch Aliens Act provides for two types of aliens detention; detention when an asylum seeker is refused entry to the Netherlands (border detention) and detention with a view to expulsion.

With regard to border detention, NGOs are mainly concerned about the following issues:

- The detention of all asylum seekers, including (unaccompanied) children at 'AC-Schiphol', without any individual assessment of their cases over a period of several days.
- The detention of asylum seekers, including (unaccompanied) children, who are waiting for a first decision on their asylum request, in the 'Grenshospitium' (border detention centre) over a period of several weeks.
- The unlimited detention in the 'Grenshospitium' (border detention centre) of rejected asylum seekers including children as part of a family, regardless if they have appealed against this rejection and sometimes even after the appeal was allowed.

Regarding detention with a view to expulsion the NGOs believe that aliens should only be detained if there is a genuine necessity in the interests of public order or national security. In this context, the NGOs are concerned about the fact that even unaccompanied adolescents and families with children can be put into aliens' detention.

Inadequate conditions in alien detention centres (§ 1.8.2)

Furthermore, NGOs believe that in several centres used for aliens' detention the conditions need improvement.

Late judicial review (§ 1.8.3)

Finally, the NGOs would like to draw the Committee's attention to the fact that the information provided by the Netherlands' Government in its fourth periodic report has been superseded, because in 2004 a change in the system of judicial review of aliens' detention came into effect. According to the NGOs, it takes too long before the aliens' detention is judicially reviewed and are therefore concerned about this change in judicial review.

Netherlands Antilles, Curacao

The NGOs are concerned with the situation in the two Police Detention Establishments covered in this report, due to the poor facilities.

The NGOs request that the Committee questions the Dutch Government on the detention conditions in the Police Detention Establishments – in particular as regards the detention conditions at the **‘Barber Police Establishment’**. Furthermore, the NGOs would like to know what measures the Dutch Government intends to take to improve this situation.

The NGOs would like to ask the Committee to question the Dutch Government on the **detention situation of minors and young adults** in the Netherlands Antilles. *In particular, NGOs would like to know when a proper detention regime and proper detention facilities for minors and young adults will be established in ‘Bon Futuro Prison’ and what they will comprise of.*

The NGOs are of the opinion that a **system of classification and allocation of prisoners** is essential for both the organisation of the regime as well as for the security environment, and therefore wonder why the new regime has not yet been implemented.

The NGOs remark that the re-socialisation programmes at the detention facilities– in particular of minors and young adults - is far from ideal. *The NGOs would like to ask the Committee to question the Dutch Government with regard to the implementation of educational programmes – in particular for minors and young adults.*

The NGOs would like to find out what kind, if any, measures will be taken by the Dutch Government to establish vocational education and working programmes to improve re-socialisation.

NGOs share the concerns of the Committee’s ‘Evaluatieonderzoek Rechtshandhaving’ in that a lack of financial resources endangers even the most essential basic facilities. As regards the medical services and the hygienic environment the NGOs submit that these facilities and conditions should be improved immediately. *Therefore, the NGOs would like to ask the Committee to question the Dutch Government with regard to the financial resources as well as the measures that the Dutch Government will take to improve the situation.*

Lastly, the NGOs would like the Dutch Government to clarify exactly to what extent they consider themselves responsible for the non-adherence of the Netherlands Antilles to the obligations under the Convention Against Torture.

A. European Part of the Kingdom of the Netherlands

1. Information on new measures and developments relating to the implementation of the Convention

Article 3 CAT – Principle of non-refoulement

1.1 Alleged non-restrictiveness of the Dutch asylum policy

According to the Government report, the Netherlands' policy concerning the admittance of aliens is restrictive but policy concerning the admittance of refugees is not restrictive. Remarks to the same effect were included in the Netherlands' periodic reports on the implementation of the Convention on the Elimination of Racial Discrimination (CERD) until 1999. In its commentary on these reports, the NJCM argued that the Netherlands' asylum policy is equally restrictive.³ In recent reports concerning the implementation of the CERD, the Dutch Government no longer included remarks on the presumed non-restrictiveness of the asylum policy. Since a non-restrictive asylum policy cannot exist as an exception to a restrictive aliens' policy, NGOs in the Netherlands would welcome removal of the same remarks from the reports to CAT. The Netherlands' Aliens Act 2000 clearly states that aliens are admitted to the Netherlands only in such exceptional cases as are explicitly mentioned in article 13 of the Aliens Act 2000. Although article 29 of the Aliens Act 2000, due to its phrasing, seems to imply that the asylum policy is non-restrictive, in practice this article is interpreted restrictively.

1.2 The accelerated procedure

In the Netherlands there are two different kinds of asylum procedures, the 'accelerated procedure' (AC-procedure) and the 'normal procedure'. The main difference between the normal and the accelerated procedure is its time-requirement. In the AC-procedure the Immigration and Naturalisation Service (INS) takes the final decision within a maximum of 48 working hours. In the normal procedure the INS may take a maximum of 6 months (which can be prolonged by another 6 months if more information is needed) before it has to take its final decision. As there are no set criteria, all applications can potentially be rejected in the AC-procedure; asylum seekers, such as unaccompanied minors, traumatised people or people from countries with widespread human rights abuses can all be rejected in the accelerated procedure. In 2005 an average of 37% of all cases was rejected in the accelerated procedure. In the first four months of 2006 this number was 29 %. Since December 2004 it is possible to grant an asylum permit in the AC-procedure. In the first four months of 2006, this happened in 432 cases.⁴

³ Commentary on the thirteenth periodic report of the Kingdom of the Netherlands on the implementation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/362/Add.4), NJCM (Dutch section of the ICJ), 11 July 2000, p. 9 <www.njcm.nl>.

⁴ IND Rapportage Vreemdelingenketen (INS Report) January - April 2006, p. 6.

Asylum seekers that are to be rejected in the AC-procedure have only two hours together with their lawyer to correct the report of the first interview (on the identity, nationality, travel route and available documents to support the asylum claim) and to prepare for a second interview which focuses on the asylum claim itself. During the second interview the asylum seeker needs to bring forward all relevant information and raise all relevant issues. After this interview, the INS issues a so-called 'intended decision' (voornemen), together with the report of the interview. The asylum seeker and his/her lawyer then have three hours to check the report and react to the intended decision. It is then up to the INS to decide to reject the asylum application or, in case the INS thinks it not possible to reject the asylum application in the AC-procedure, to refer the asylum seeker to the regular procedure.

The asylum seeker has the right to appeal against a negative decision before the District Court within seven days. The court normally meets within a week after the appeal. The appeal does not automatically suspend the decision, but the asylum seeker may ask the court to allow him/her to remain in the country while awaiting the outcome of the appeal. The applicant is not expelled before the court has made a decision on such a request. However, the applicant does not receive any reception facilities or social support. In the case of a positive decision on either the request to stay in the country or the appeal, the applicant is then referred to the regular procedure. If the appeal is rejected, the applicant can appeal to the Administrative Jurisdiction Division of the Council of State (AJD). All applicants receive legal aid during the accelerated procedure, either from private lawyers or from the lawyers working for 'Legal Aid' ('Stichting Rechtsbijstand Asiel').

The AC-procedure has been strongly criticized by academics, NGOs, national advice boards and international organizations.⁵ UNHCR, for instance, expressed its concerns about the accelerated procedure in "Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations" of July 2003:

'UNHCR is concerned that accelerated procedures in the Netherlands have become the rule and that the stated aim is to have an even higher share of claims examined in an accelerated procedure. From UNHCR's perspective, channeling claims into the accelerated procedure should not be statistics-driven but rather be determined on the merits of the claim.'

The Dutch policy concerning the AC-procedure has some serious consequences for asylum seekers. NGOs and academics have voiced the following points of concern:

- There is not enough time for an asylum seeker to rest, to get information about the procedure and to prepare for the procedure.
- There is not enough time for legal aid (2 hours + 3 hours; see above). The principle of due process is affected by this short time period.
- Lawyers are only on duty for a few hours at the AC's. This, in combination with the pace of the procedure, results in the situation that an asylum seeker gets assistance from different lawyers during the procedure, which makes it difficult for the lawyer to win the asylum seekers trust.

⁵ Concluding Observations of the Committee on the Rights of the Child: The Kingdom of the Netherlands (Netherlands and Aruba), 30 January 2004, CRC/C/15/Add.227; Human Rights Watch "Fleeting refuge, the triumph of efficiency over protection in Dutch asylum policy" of April 2003 <http://www.hrw.org/reports/2003/netherlands0403/> (May 2006).

- There is not enough time for the asylum seeker to tell his story and gather evidence.
- There is not enough time for medical questions in relation to the asylum request. The procedure is therefore at odds with principles underlying the Geneva Refugee Convention⁶ and the views of the CAT. There is not enough time to identify traumas, torture or sexual abuse.
- Claims by vulnerable or traumatized asylum seekers, including unaccompanied and separated children, should always be dealt with in the normal procedure.
- The applicant, who is rejected in the AC-procedure does not get reception facilities, access to medical experts or social support, which makes it particularly difficult to get in contact with his/her lawyer to prepare for the appeal session.

The aforementioned leads to a greater risk of violating the non-refoulement principle of article 3 CAT. Despite the criticism by NGOs, academics and international organizations, the Minister has not made any substantial changes to the AC-procedure.

Question:

Because this AC-procedure leads to a risk of violating the non-refoulement principle of article 3 CAT in individual cases, the NGOs would like to invite the Committee to question the Dutch Government on the AC-procedure.

1.3 Burden of proof and undocumented asylum seekers

Article 31 of the Aliens Act 2000 states that an application for the issue of a residence permit on asylum grounds shall be rejected if the alien has not made a plausible case that his application is based on circumstances which, either in themselves or in connection with other facts, constitute a legal ground for the issue of the permit. According to the case-law of the Administrative Jurisdiction Division of the Council of State (AJD)⁷ it is first and foremost the responsibility of the asylum seeker himself to reveal the reasons for his flight, especially in the second interview (which concerns the flight motives); it is not the duty of the Minister to bring these motives to light by asking questions.

Applicants have to submit documents about their identity, nationality, travel route and their flight motives. If they are deemed not to have provided enough documents the asylum account is required to reflect what is called a ‘positive persuasiveness’. The Minister, however, can already deem the asylum account manifestly unfounded, if the asylum account contains any gaps, vagueness, inexplicable turns or inconsistencies at the level of the relevant details.

A lack of documents will not be held against the applicant if the applicant cannot be blamed for being undocumented. However, in practice undocumented asylum seekers are almost always considered responsible for not submitting (enough) documents.

⁶ These principles are more specifically set out in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, paragraphs 206-212.

⁷ www.raadvanstate.nl.

The AJD has for example ruled that in case the asylum seeker has given his documents to a travel agent, he will be held responsible for not having any documents.⁸

Many organisations, among which the UNHCR, Human Rights Watch, ICJ and its Dutch section, the NJCM and Amnesty International, have expressed their concerns about the burden of proof that rests upon asylum seekers. In paragraphs 196 and 205 of the *UNHCR Handbook on procedures and criteria for determining refugee status 1997*, the UNHCR acknowledges that many asylum seekers are not able to support their statements by documents and in most cases a person fleeing from persecution will have arrived with the barest necessities and even without personal documents.

Especially during the AC-procedure, it is very difficult to obtain documents from the country of origin or elsewhere after arrival in the Netherlands since there is too little time before the decision on the application is taken. (see § 1.2).

Question:

NGOs would like to ask the Committee to question the Dutch Government on the burden of proof that is imposed on asylum seekers. NGOs believe this burden of proof is too heavy and can lead to a greater risk of violating the non-refoulement principle of article 3 CAT in individual cases.

1.4 Marginal Scrutiny

In most European countries, the facts in asylum cases are reviewed fully in at least one instance. In the Netherlands, however, administrative review has been abolished and in (higher) appeal the core part of the judgement (the question whether there is a real risk of torture, inhuman or degrading treatment or punishment) is subject to marginal scrutiny only:

- The Minister's individual opinion on the credibility of the asylum account.⁹
- The position of the Minister as to which documents are necessary for the assessment of the application, and the position of the Minister on the question whether a lack of documents can be attributed to the asylum seeker. If this circumstance arises, this also means that the credibility of the asylum account is subject to an extra marginal review by the court and the AJD.¹⁰
- The Minister's conclusion on the question whether the suspicions, expectations or conclusions of/made by the applicant based on the established facts are made plausible.
- The question whether the authorities have special attention for the applicant.¹¹

The AJD decided that the question whether, judging by the established facts, the applicant is a refugee or runs a real risk of a treatment in violation with article 3 of the European Convention on Human Rights (ECHR) should be subjected to a full judicial review.

However, in a substantial number of cases, the AJD has reviewed marginally whether, in the light of the facts considered credible, there is a well founded fear for persecution or a real risk of violation of article 3 ECHR and article 3 CAT.¹²

⁸ AJD 23 September 2004, no. 200405455/1.

⁹ AJD 27 January 2003, no. 200206297/1.

¹⁰ AJD 31 October 2002, no. 200204638/1, AJD 30 July 2002, no. 200203043/1.

¹¹ AJD 8 oktober 2003, no. 200304077/1.

Many NGOs and academics have criticized the doctrine of marginal scrutiny in asylum cases. The UNHCR¹³ and Human Rights Watch¹⁴ recommend that the courts review both facts and points of law in at least one instance. Spijkerboer and Vermeulen of the Vrije University in Amsterdam¹⁵ argue that article 13 ECHR as interpreted by the European Court of Human Rights, requires a full judicial scrutiny of the determination of the facts and/or the credibility. Therefore the marginal scrutiny in asylum cases in the Netherlands does not meet the requirements of article 13 of the ECHR. In addition, UNHCR¹⁶ considers that the far-reaching limitations of factual review and assessment by the Minister pose a serious threat to the effectiveness of the available remedies.¹⁷ Several Dutch asylum cases in which the marginal scrutiny plays a decisive role have been brought before the European Court of Human Rights. The Court has not yet decided on these cases. One case is supported with an *amicus curiae* brief signed by four organisations.¹⁸

Question:

NGOs invite the Committee to question the Dutch Government on the marginal scrutiny test that is used by the Dutch courts when deciding on the question whether an asylum seeker runs a real risk of being subjected to torture, inhuman and degrading treatment when they are sent back to their home country. This core part of the application should be fully reviewed in at least one instance.

1.5 New facts and changed circumstances

Article 4:6 of the General Administrative Law Act (GALA) gives the Minister the authority to refuse reconsideration of a subsequent application if no new facts or circumstances are raised. The concept 'new facts and changed circumstances' is interpreted very restrictively by the AJD. Facts and circumstances that occurred before the communication of the decision on the first asylum application are not considered new facts or changed circumstances, if they could have been and therefore should have been submitted before the communication of this decision. Only in exceptional cases does the court acknowledge that the facts and circumstances could not be submitted before the communication of the decision on the first asylum application.

When a person is (severely) traumatised he is expected to mention the traumatising events (if only briefly) before the communication of the decision on the first asylum application.¹⁹

¹² AJD 15 September 2005, no. 200502207/1, AJD 25 October 2005, no. 200504250/1, AJD 6 September 2005, no. 200502102/1.

¹³ "Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations", July 2003 <www.unhcr.org>.

¹⁴ "Fleeting refuge, the triumph of efficiency over protection in Dutch asylum policy", April 2003, <http://www.hrw.org/reports/2003/netherlands0403/> (May 2006).

¹⁵ T.P. Spijkerboer and B.P.V. Vermeulen, *Vluchtelingenrecht*, Nijmegen: Ars Aequi Libri 2005.

¹⁶ "Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations", July 2003 <www.unhcr.org>.

¹⁷ We also refer to S. Essakkili, *Marginal judicial review in the Dutch asylum procedure*, Masters thesis VU, Amsterdam 2005.

¹⁸ X. v. the Netherlands (file no. 31252/03). The brief is signed by the Dutch Council for Refugees (VluchtelingenWerk Nederland), The European Council on Refugees and Exiles (ECRE), Dutch section of the International Commission of Jurists (Nederlands Juristencomité voor de Mensenrechten - NJCM) and Legal Aid (Stichting Rechtsbijstand Asiel - SRA).

¹⁹ AJD 28 June 2002, no. 200202610/1.

Documents or evidence that already existed before the communication of the decision on the first asylum application, are not considered new facts if they could have been submitted before this decision. Problems in getting documents from the country of origin, from family members or other persons, are normally not accepted as a valid reason for not submitting the documents earlier.²⁰ (Fax)copies of documents and documents that are not translated, not dated or do not come from an objective source are not accepted as new facts or circumstances.²¹

As mentioned before, article 4:6 GALA gives the Minister the authority to refuse reconsideration of a subsequent application if no new facts or circumstances are raised. The Minister can choose to reconsider a decision even if there are no new facts or circumstances. However, if the minister chooses to consider a subsequent application in substance, the scope of the judicial review is still limited to the question whether new facts or circumstances have arisen in the subsequent application. The Administrative Jurisdiction Division of the Council of State does not allow the scrutinising of the Minister's choice as to whether or not to apply the discretionary provision. Asylum policy mentions circumstances in which the Minister can decide not to apply article 4:6 GALA, even though new facts or circumstances have been raised.

NGOs fear that this legislation and policy might lead to violations of article 3 CAT in individual cases, especially with regard to asylum requests that are rejected in the AC-procedure (because there is very little time to bring forward the asylum account and gather documents to support the account). Several Dutch asylum cases, in which the raising of new facts and changed circumstances plays a crucial role, have been brought before the European Court of Human Rights. The Court has notified the Dutch Government of a few of these cases, while one has been accompanied by an *amicus curiae brief*, signed by six organizations.²² The applicant argued that Article 3 ECHR and article 13 of the Convention has been violated (insofar as new facts and changed circumstances contribute to the arguable claim under Article 3 of the Convention) and that the Dutch court does not take those facts or circumstances into account. At the time this commentary was written the ECHR had not yet decided on the admissibility of this case.

Remark:

NGOs and academics have criticised the jurisprudence and policy concerning the raising of new facts and circumstances. They are all of the opinion that the policy and jurisprudence with regard to the raising of new facts and changed circumstances in asylum procedures could easily lead to violation of article 3 of the Convention.²³

²⁰ AJD 15 March 2005, no. 200500388/1.

²¹ (Fax)copy: AJD 30 December 2004, no. 200409221/1 (not translated); AJD 30 August 2002, no. 200204300/1 (not dated); AJD 16 October 2001, no. 200104321/1 (no objective source); AJD 7 November 2003, no. 200305086/1.

²² The Dutch Council for Refugees (VluchtelingenWerk Nederland), The European Council on Refugees and Exiles (ECRE), Human Rights Watch, Dutch section of the International Commission of Jurists (Nederlands Juristencomité voor de Mensenrechten- NJCM), Legal Aid (Stichting Rechtsbijstand Asiel - SRA) and The Netherlands Bar Association (De Nederlandse Orde van Advocaten - NOvA).

²³ Many times NGOs and academics warned the Dutch authorities that this case law and policy could lead to violation of the principle of non-refoulement and a more frequent appeal to the European Court of Human Rights or other international (treaty monitoring) bodies. We refer to, J. van Rooij, *Asylum Procedures versus Human Rights*, Vrije Universiteit Amsterdam, faculty of Law, April 2004, also published at www.rechten.vu.nl/documenten (May 2006).

1.6 Medical information in the asylum procedure

1.6.1 Rejection of victims of torture or ill-treatment in the accelerated procedure

Applicants who are victims of traumatic events before or during their flight, may be interviewed and rejected in the accelerated procedure.²⁴ In practice, this often happens. Many victims of torture, ill-treatment or sexual abuse (hereinafter they will simply be referred to as traumatised asylum seekers), who request asylum, face difficulties in substantiating their claim for asylum. Many of them are not able to talk about the atrocities they were subjected to. At the same time, there is a general lack of interest in carrying out medical examinations. Therefore NGOs, the Advisory Board on Aliens Affairs, and a special Research Committee on medical aspects of migration policy appointed by the Government ('Landelijke Commissie Medische Aspecten van het Vreemdelingenbeleid') are of the opinion that requests of traumatised asylum seekers should not be processed in the accelerated asylum procedure. However the minister refused to follow the recommendation of the last mentioned committee not to reject the asylum application in the AC-procedure.

Remark:

NGOs believe that requests by traumatised asylum should not be dealt with in the AC-procedure, because these traumatised asylum seekers face difficulties substantiating their claims.

1.6.2 Medical advice during the asylum procedure

According to the Minister, the Medical Service will be asked for advice when it is not clear whether the asylum seeker can be interviewed because of his/her medical situation. However it is not clear how often the Minister asks for medical advice and how often asylum seekers are referred to the normal procedure because of medical problems. Medical reports undertaken to examine a person's ability to be interviewed about his asylum motives lack transparency and are to be characterized as superficial.

In our opinion the Government should take up its responsibility towards asylum seekers with medical problems. However the Government only asks for medical advice in a limited number of situations. In cases which the Minister *does* ask for medical advice, NGOs question whether this is done with due care.

As to current policy, the Minister requests medical advice during or after the asylum procedure mostly with regard to three questions:

- Is it possible to interview the asylum seeker?
- Does the asylum seeker need reception facilities because of his medical situation?
- Is the asylum seeker fit to travel?

²⁴ See the letter and its annex from the NJCM to the Permanent Second Chamber Committee of Justice, 22 June 2004, <www.njcm.nl>.

In her reaction to the report of the special Research Committee on medical aspects of migration policy, the Minister wrote: *when it is not clear whether the asylum seeker can be interviewed because of his/her medical situation, the medical service will be asked for advice. If the medical service comes to the conclusion that the asylum seeker can not be interviewed, the asylum request will not be processed in the accelerated procedure.*²⁵ However it is not clear how often the minister asks for medical advice and how many times asylum seekers are referred to the normal procedure because of medical problems. Medical reports undertaken to examine a person's ability to be interviewed about his asylum motives lack transparency and are to be characterized as superficial. It is not clear what criteria the doctors use to decide whether a person can be interviewed. Nothing is known about the expertise of the nurses and doctors who give the advice. Although we have seen some medical reports, we are not able to clearly establish the precise phrasing of the questions. There seems to be no evaluation as to the effect of a certain medical condition on the quality of the interview, the only focus of the question being whether or not an interview can be done. As there is no review of the implications that a medical condition can have on the quality of the interview, any decision on whether to carry out an interview remains superficial.²⁶ Furthermore, it has come to our attention that medical information from abroad is not taken into consideration.

Question:

NGOs would like to ask the Committee to question the Dutch government on the use of medical advice during the asylum procedure. NGOs are concerned that the Government does not ask for medical advice as often as it should and when medical advice is requested, NGOs question whether this is done carefully.

1.6.3 The Istanbul Protocol

The Istanbul Protocol²⁷ describes in detail how physical evidence of torture should be documented. A complete medical history, including information about prior medical, surgical or psychiatric problems should be obtained (paragraph 167). Subsequent to the acquisition of background information a complete physical examination by a qualified physician should be performed (paragraph 172).

The Dutch Minister of Aliens Affairs and Integration stated the AC-procedure in the Netherlands meets the requirements of the Istanbul Protocol.²⁸ However, NGOs think the standards of the Protocol are not met for the following reasons:

²⁵ Parliamentary documentation, Second Chamber; Kamerstukken II 2003/04, 19 637, nr. 806, p. 8 <www.overheid.nl>.

²⁶ See http://www.torturecare.org.uk/UserFiles/File/publications/Cohe_1.rtf and <http://www.pharos.nl/Act/Docs/TKmei2006.pdf>.

²⁷ Istanbul Protocol, Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, professional training series no. 8/Rev.1, United Nations, New York and Geneva, 2004.

²⁸ Parliamentary Documentation, Second Chamber; Kamerstukken II 2004/05, 19 637, nr. 903, p. 12 <www.overheid.nl>.

- There is no governmental organisation which provides extensive and/or comprehensive medical reports on victims of torture or ill-treatment during the accelerated procedure.²⁹
- The Dutch Government does not take into account the mental impediments an asylum seeker struggles with in order to coherently express himself. In the NGOs' experience, asylum seekers receive negative decisions based on contradictions, gaps and vagueness in their asylum account, even if the person is traumatised.³⁰

Question;

The NGOs believe the Dutch Government does not act in accordance with the standards of the Istanbul Protocol, to which it claimed to take as a reference, when dealing with medical aspects in asylum procedures. The NGOs invite the Committee to ask the Dutch Government on how and when it will implement the Istanbul Protocol.

1.6.4 Medical reports as evidence to support an asylum request

The policy and practice of the Dutch Government is that medical examinations do not serve as evidence in asylum cases.³¹ Therefore, in asylum cases the Medical Assessment Department of the Immigration Service is not asked to examine claims. However the Dutch Government stated otherwise in its information to your Committee. In 1998 it pointed out to the Committee that the Immigration Service asks for medical advice in any case where an asylum seeker claims to be a victim of 'ill-treatment'.³² This statement made by a Dutch representative was remarkably invalid. In fact, Dutch policy could be summarized as not taking into account medical reports in any shape or form. As it is the opinion that by medical reports would not provide 100% reliable evidence, the Dutch Government was not prepared to ask for medical advice from medical experts. Amnesty International requested the Government numerous times to take responsibility for asylum seekers with medical problems. For example, in 1995, an article was written by the chairman of the medical group of Amnesty International urging the Dutch authorities not to persevere in the current policy.³³ In 2003 the Dutch Government reiterated its view expressed in the CAT 91/1997 case, in less strong words: "*If the applicant invokes medical grounds for his refugee claim, a medical advice with the legal value of an expert opinion may be sought from the Medical Assessment Section (BMA) of the Ministry of Justice.*"³⁴

Despite the position taken by the Dutch authorities, non governmental organizations, such as the Medical Examination Group of Amnesty International, psychologists and Stichting Medisch Advies Kollektief, prepare medical reports. The Medical Examination Group of the Dutch section of Amnesty International receives 120-150 requests for medical examination a year. In about 50-60 cases a medical investigation is carried out.

²⁹ The same can be said about the regular procedure.

³⁰ We would like to refer to Paragraph 141 and 142 of the Istanbul Protocol.

³¹ In no way whatsoever a medical examination will be made in which '*an interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment*', is made (see Istanbul Protocol, Annex 1, 'Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment of punishment', under 6 (b), iv. p. 60).

³² See CAT 91/1997 paragraph 4.15.

³³ V. de Jong, "De waarde van de psychiatrische diagnostiek", *NAV* (5) 1995, p. 428-435.

³⁴ CAT Communication 191/2001, 19 May 2003, CAT/C/30/D/191/2001,

Although these reports are based on careful examination and on the Guidelines of the Istanbul Protocol, they do not have the legal value of an expert opinion. They are often put aside as useless for the decision making process.

Although the work of the Medical Examination Group of Amnesty International has been mentioned in Dutch regulations (Aliens Circular C1/3.2.4.2), it has not been made clear to what extent these medical reports are taken into account. The regulations require that all Amnesty International medical reports are forwarded to the Medical Assessment Department of the Ministry of Justice, but in many cases this is not done. In cases that such medical reports are indeed forwarded to the Medical Assessment Department – which is part of the Immigration Authorities – they are only asked to give a short comment on the medical report made up by the Amnesty International Medical Examination Group. A short comment does not by means qualify as expert medical advice.

Whether the AI medical report is submitted to the Medical Assessment Department or not, the Immigration Authorities are of the opinion that medical reports are useless for the decision-making process. The two quotes below are often found in decisions in cases in which Amnesty International has carried out a medical examination:

1) *“The Immigration Authorities have the opinion that medical aspects in general do not play a role when it comes to decision making, since medically spoken one cannot be totally certain about the cause of medical symptoms and/or scars. Also in the present case the medical report of Amnesty International does not prove the stated causal link between the said detention and ill-treatment on the one hand, and the asylum seeker’s physical symptoms on the other hand.”*

Commentary by Amnesty International (also made known to the Immigration Authorities):
“The Immigration Authorities wrongfully assume that in asylum cases 100 % proof must be obtained. We oppose the opinion that evidence which does not give 100 % proof must be put aside and cannot be of any assistance in finding the truth.”

2) *“The medical report of Amnesty International does not give proof of the stated causal link between medical results and the alleged torture. After all, in the medical report of Amnesty International it is assumed that the asylum seeker statements are true.”*

Commentary by Amnesty International (also made known to the Immigration Authorities):
“The medical examination carried out by Amnesty’s Medical Examination Group exists of an interview with the asylum seeker about the ill-treatment/torture that he/she says to be a victim of; a physical examination; a psychiatric examination, additional (medical) information and research, discussion and conclusion. The physical and the psychiatric examination are carried out objectively and impartially according to the Medical Examination Group Protocol (which is based on the Istanbul Protocol). The doctor investigates scars, physical and psychological symptoms, and carefully observes the asylum seeker in (a.o.) way of presentation, way of making contact, psychomotility. Independently, the doctor draws a conclusion with regard to the question whether the medical results can be linked to the alleged ill-treatment/torture.

Dutch courts tend not to pay much regard to medical reports either. It is very difficult, if not impossible, to submit a medical report before the first negative decision, if the decision is made in the AC-procedure (48 hours). Medical reports that are submitted after the first negative decision has been taken will not readily be taken into account by the courts. The leading case is the decision of the Administrative Jurisdiction Division of the Council of State of 16 May 2002: an asylum seeker can be expected to make a reference in first instance, poor as it may be, to the trauma he experienced. We refer to the former paragraph on ‘New facts and circumstances’ (§ 1.5).

Question:

NGOs are concerned with the Dutch policy and practice that medical reports do not serve as supportive medical evidence in the asylum procedure. Therefore, NGOs would like to ask the Committee to question the Dutch Government on this policy.

Article 16 CAT

1.7 Exclusion from facilities

Under Dutch aliens’ law, several categories of aliens are excluded from facilities such as housing, money for food and clothing, and medical care. These aliens are forced to live in the streets. The exclusion from facilities is not influenced by the fact that children or elderly persons are involved. These categories include;

- 1) aliens whose request for asylum is rejected (facilities end automatically within 28 days after the final decision by a competent court),
- 2) aliens that submit a second request for asylum³⁵ or a request for a permit to stay on other grounds, for instance medical grounds (there is no right to facilities in these situations although aliens that have a procedure running are in the Netherlands with Government permission in most cases)³⁶ and
- 3) asylumseekers whose application is rejected in the accelerated procedure of 48 hours (while awaiting the final decision in court no facilities are available to them).

The Government of course has the authority to decide whether or not to give a certain alien a permit to stay and to expel those it does not want to admit, as long as the principle of non-refoulement is complied with. However, in the period during which expulsion is not (yet) effectuated or the alien is awaiting the outcome of a procedure for a permit to stay, facilities should be granted. In those cases, the aliens involved are under the jurisdiction of the Netherlands. This means the Government should apply the standards as set out by the various human rights treaties ratified by the Netherlands, including the right to an adequate standard of living as protected by article 11 Covenant on Economic, Social and Cultural Rights and article 27 of the Convention on the Rights of the Child (CRC).³⁷ Not to grant them facilities or to end facilities before actually expelling them might amount to inhuman treatment as prohibited under article 16 of the Convention.

³⁵ Since 1 January 2006 an exception is made for those who submit a second request for asylum and are not rejected in the 48 procedure in the first; Parliamentary Documentation, Second Chamber, Kamerstukken II 2005/06, 19 637, nr. 991.

³⁶ An exception may be made in only a few cases, inter alia, where the alien is not fit to travel for medical reasons (article 64 of the Aliens Act 2000).

³⁷ In its concluding observations the Committee on the Rights of the Child actually recommended that even when awaiting expulsion, children should receive adequate housing; Concluding observations concerning the second periodic report of the Netherlands, CRC/C/15/Add. 227, 30 January 2004, par. 54d.

Question:

The NGOs would like to ask the Committee to question the Dutch Government on the policy and practice of leaving aliens without facilities, because NGOs consider this a form of inhuman treatment that might lead to a violation of article 16 of the Convention in individual cases.

Article 11 and article 16 CAT

1.8 Aliens' detention

1.8.1 Growing number of (rejected) asylum seekers submitted to detention not as a last resort

The number of places in detention centres available for detaining aliens including rejected asylum seekers increased considerably in recent years in the Netherlands. The number was 1628 in 2003, and 1953 in 2004. The Ministry of Justice prognoses an increase to 2791 in 2005 and similar figures for the years until 2010.³⁸

The Dutch Aliens Act 2000 contains two main sections regarding detaining aliens.³⁹

- a An alien who has been refused entry into the Netherlands may be detained ("border detention"; article 6),
- b. An alien may under certain conditions be detained with a view to expulsion (article 59).

a. Border detention

In practice, detention after refusing entry into the country is indiscriminately applied without taking into consideration the circumstances of the individual case. If the alien applies for asylum at the border, arriving from outside the Schengen area, he is referred to the 'Schiphol' Application Centre (AC) where his asylum request is submitted to a (first) assessment (see § 1.2). During his stay in 'AC-Schiphol', the asylum seeker is deprived of his liberty regardless of his individual circumstances, including whether he is an unaccompanied minor or an underage member of a family.

If the asylum request is rejected at 'AC-Schiphol' in the accelerated procedure, generally the asylum seeker will be transferred to the 'Grenshospitium' (= border detention centre) while awaiting his departure from the Netherlands. If the rejected asylum seeker has lodged an appeal against this rejection he is also detained in the 'Grenshospitium' awaiting further developments. Even if the appeal is allowed, sometimes the detention measure is not lifted during the time the new asylum request is considered by the Immigration Service.

Dutch law does not provide for any legal time limits to border detention. The detention of rejected asylum seekers in the 'Grenshospitium' may last for months, depending on the possibilities of expulsion and return or transfer to another country according to the rules of the Dublin II - Convention. There are cases in which the period of detention exceeds one year. This is clearly unacceptable.

³⁸ Parliamentary documentation, Second Chamber; Kamerstukken II 2004/05, 29 800 hoofdstuk VI, nr. 2, p. 102, and Kamerstukken II 2005/06, 30 300 hoofdstuk VI, nr. 2, p. 110 <<http://parlando.sdu.nl>>.

³⁹ We will not discuss article 58 Aliens Act 2000, because it is not or only rarely applied in practice.

Not only rejected asylum seekers are referred to the ‘Grenshospitium’; in cases in which the Immigration Service has not yet taken a decision. Asylum seekers, *including families with children*, may be sent to the ‘Grenshospitium’ pending a decision in their asylum procedure, if such a decision is expected within six weeks. This option is often used if the Immigration Service is awaiting the results of an enquiry concerning e.g. nationality, language background or age. In addition, unaccompanied asylum seekers in ‘AC-Schiphol’ who indicate that they are underage are often sent to the ‘Grenshospitium’ while their request is still under examination, in case the immigration service launches a medical inquiry to establish their age.

In 2005 a rough estimate of 700-750 of the about 1600-1650 asylum seekers applying in ‘AC-Schiphol’ were sent to the ‘Grenshospitium’, either because their request had been rejected (probably between 400 and 450 persons) or pending the Immigration Service's assessment of their application (around 300 persons).⁴⁰

Remark:

NGOs are concerned about the following issues:

- *The detention of all asylum seekers, including (unaccompanied) children at ‘AC-Schiphol’, without any individual assessment of their cases during several days.*
- *The detention in the ‘Grenshospitium’ (border detention centre) of asylum seekers including (unaccompanied) children over the period of several weeks, awaiting a first decision on their asylum request,*
- *The unlimited detention in the ‘Grenshospitium’ (border detention centre) of rejected asylum seekers including children as part of a family, regardless if they have appealed against this rejection and sometimes even after the appeal was allowed.*

b. Detention with a view to expulsion

Article 59, paragraph 1 of the Aliens Act 2000 lays down as a precondition that detention with a view to expulsion is only allowed if it is necessary in the interests of public order or national security. The AJD has ruled that this condition is even fulfilled if e.g. a failed asylum seeker hasn't left on his own accord declaring that he would like to continue to stay in the Netherlands.⁴¹ In addition, paragraph 2 of article 59 Aliens Act 2000 provides that the aforementioned precondition is deemed to be fulfilled if the necessary travel documents are (shortly) available and the detention does not exceed a period of four weeks (article 59, paragraph 4 Aliens Act 2000).

NGOs feel that aliens who are to be expelled should only be detained if there is a genuine necessity in the interests of public order or national security, e.g. because there are clear indications that the person concerned would abscond.

Academic research shows that detention based on article 59, paragraph 1 Aliens Act can last long, on occasions even exceeding one year, sometimes with very few prospects of expulsion.⁴²

⁴⁰ The estimations are based on findings by the Dutch Council for Refugees.

⁴¹ AJD 28 April 2005, *JV* 2005, 238 (Jurisprudentie Vreemdelingenrecht 2005, no. 238).

⁴² Schoordijk-Instituut (Universiteit van Tilburg): *Terugkeermogelijkheden van vreemdelingen in vreemdelingenbewaring*, 2004.

Cases have been reported that even 16 and 17 year old separated adolescents were subjected to aliens detention based on section 59 Aliens Act. In general this concerns adolescents who are found to stay illegally in the Netherlands.

In addition, rejected asylum seekers with children are also sometimes submitted to detention with a view to expulsion. The authorities then leave it to the parents to decide either to stay together in the detention centre or to have the children placed out of the detention centre under custody. In this way these families are forced to choose between the children's rights to liberty on one hand and to family unity on the other hand (Cf. art. 9 and art. 37 ICRC). Therefore, NGOs feel that offering such a choice is not an adequate solution.

Finally we would like to refer to remarks made by both the Committee on the Rights of the Child and the Parliamentary Assembly of the Council of Europe.

- In its Concluding Observations concerning the Netherlands of 2004,⁴³ the Committee on the Rights of the Child recommended that the Netherlands: "ensure that detention of children whose refugee application has been rejected is used only as a last resort, and that all children awaiting expulsion receive adequate education and housing."⁴⁴

- In Resolution 1483 the Parliamentary Assembly called on the Netherlands to "avoid in all circumstances detaining children, the elderly, people suffering from trauma or mental illness and people with disabilities."⁴⁵

Remark:

The NGOs believe that aliens should only be detained if there is a genuine necessity in the interests of public order or national security. In this context, the NGOs are concerned about the fact that even unaccompanied adolescents and families with children can be put in alien detention.

1.8.2 Inadequate conditions in alien detention centres

NGOs believe that in several centres used for aliens' detention the conditions need improvement:

- a. Grenshospitium ('Border detention centre')
- b. Uitzetcentra ('Expulsion centres')
- c. Huizen van Bewaring ('Custody centres')
- d. Justitiële jeugdinrichtingen ('Judicial Institutions for Juveniles')

a. The 'Grenshospitium' has a total capacity of about 238 places.⁴⁶ The location of the 'Grenshospitium' has been liable to change and the 'Grenshospitium' is often spread over multiple locations. In the opinion of the NGOs, the conditions in the buildings that are used are inadequate, especially for children, because of the following aspects:

⁴³ CRC/C/15/Add. 227.

⁴⁴ Paragraph 54.

⁴⁵ Committee on the Rights of the Child, Concluding Observations adopted 26 January 2004 (published 30 January 2004) CRC/C/15/add.227, paragraph 15.11 <www.ohchr.org>.

⁴⁶ Parliamentary documentation, Second Chamber; Kamerstukken II 2005/06, 30 300 hoofdstuk VI, nr. 2, p. 110 <<http://parlando.sdu.nl>>.

- The conditions in the building are prison-like.
- There are far-reaching restrictions to the freedom of movement: between 9.30 pm and 7.00 am the detainees have to stay in their own cell. The access to fresh air in day time is not always unlimited. For example: in 2006 at the branch ‘Tafelbergweg’ in Amsterdam, detainees could only go outside at fixed times (depending on the shift they were in) during about three hours every day.
- There is no full education scheme arranged for the children.
- The atmosphere in the building is very tense.
- The personnel is not adequately educated to work with children.
- There is a lack of privacy. Single detainees have to share their cell with another detainee. Incoming letters are opened, visits are supervised.⁴⁷

b. There are two ‘Uitzetcentra’ – with an anticipated total capacity of 744 in 2007⁴⁸ - one at ‘Zestienhoven’ Airport near Rotterdam and one near ‘Schiphol’ Airport. The ‘Uitzetcentrum’ at ‘Schiphol’ Airport was temporarily replaced by a division of the prison facilities in Zeist, after a fire in the building of this ‘Uitzetcentrum’, which occurred in 2005.

The ‘Uitzetcentra’ are meant for aliens, including failed asylum seekers, who are expected to be expelled within four weeks time. Therefore they are especially suitable for aliens who are detained under article 59, paragraph 2 Aliens Act 2000 (see above). However the ‘Uitzetcentra’ are not exclusively used for these short term detentions (i.e. less than four weeks). Families with children can also be placed in the ‘Uitzetcentra’.

In our view conditions in the ‘Uitzetcentra’ are inadequate. In the ‘Uitzetcentrum’ at ‘Zestienhoven’ Airport we observe the same shortcomings as with the ‘Grenshospitium’ (see above under a) with a few differences and additional shortcomings:⁴⁹

- Conditions are prison-like.
- As far as restrictions to the freedom of movement are concerned: In the ‘Uitzetcentrum’ Rotterdam, detainees have to stay in their own cell between 5 p.m (single aliens) / 9 p.m (families) and 8 a.m.
- As far as the lack of privacy is concerned: There are also cells for one person.
- There are restrictions in contacts with the outside world. The number of visits may be restricted to once a week.
- Cells are small, maybe 5 m² surface in cells for one person and 12 m² in cells for two persons
- There is not sufficient day light and not enough natural air supply.
- The level of provisions and facilities is not adequate, because it has been incorrectly assumed that aliens do not stay longer than four weeks.

⁴⁷ This review is based on findings of the team of the Dutch Refugee Council that operates in this branch of the Grenshospitium.

⁴⁸ Parliamentary documentation, Second Chamber; Kamerstukken II 2005/06, 30 300 hoofdstuk VI, nr. 2, p. 110 <<http://parlando.sdu.nl>>.

⁴⁹ Based on a visit by the Dutch section of Defence for Children International in December 2004 (See report visit and a response from the Director of this centre on <http://www.defenceforchildren.nl/ariadne/loader.php/dci/nieuws/UitzetcentrumBezoekDCI/> ; and a visit by the NJCM in 2005 to the Uitzetcentrum at Zestienhoven Airport; and a report of the Ministerial inspection on the application of sanctions from August 2005 (Inspectie voor de Sanctietoepassing: Ouders met minderjarigen in vreemdelingenbewaring, on www.inspectiesanctietoepassing.nl).

- Care for severely mentally ill persons is often restricted to placement in an isolation ward. The same ward is more generally used as a punishment. Staff does not always treat mentally ill persons different than subjects who are placed there for non-medical reasons.
- If a family consists of more than four people, family members are put in different cells.
- There are no serious possibilities for children to have education.
- Personnel is not equipped to support the children in these centres.

c. There are a few ‘Huizen van Bewaring’, with totally a rough estimate of 1779 places, which are used for aliens detention of adults based on section 59 Aliens Act (sometimes in addition to penitentiary detention). In the circumstances in these centres there is some variety, but they have a few objectionable features in common:

- Conditions are prison-like.
- There are far-reaching restrictions to the freedom of movement: there are restrictions on the time of the day detainees can leave their cell and on the time of the day they have access to fresh air.
- There are restrictions in contacts with the outside world. The number of visits and the time for telephone calls may be limited.
- There is a lack of privacy. Single detainees have to share their cell with one or more other detainees. Incoming and outgoing letters may be opened, visits may be supervised, and telephone calls may be recorded.
- There is a lack of meaningful activities. Where in regular detention both education, labour and sports activities are available those activities are not undertaken in alien’s detention centres.
- There are no serious possibilities for children to have education.
- Personnel is not equipped to support the children in these centres.

Under this category there are also two boats situated in Rotterdam and one in Zaanstad that is used for aliens’ detention under section 59. More detention boats are expected in Krimpen aan den IJssel and Dordrecht. The conditions on these two boats are especially unsatisfactory. Two supervisory committees have examined the boats in Rotterdam and created reports.

d. If separated adolescents are subjected to aliens’ detention under article 59 Aliens Act they are imprisoned in “Justitiële jeugdinrichtingen”. These premises are also used for penitential detention of juveniles. Two striking objectionable features are:

- Adolescents under aliens’ detention are placed in the same branch as juvenile offenders who are placed under supervision.
- Personnel is not equipped for guiding adolescents under aliens detention. This also hampers a proper functioning of the legal aid because of the role the personnel plays in calling in the lawyer.⁵⁰

⁵⁰ Based on information from SAMAH (Foundation Unaccompanied Minor Refugees Humanitas) in Amsterdam.

1.8.3 Late judicial review

On 1st of September 2004 a change in the system of judicial review of aliens' detention (article 94 of the Aliens Act 2000) became effective. As a result the description in the fourth periodic report submitted by the authorities⁵¹ of the Netherlands has been superseded.

As to current law, only after 28 days, the Immigration Service will notify the district court of the aliens detention (regardless if article 6 or article 59 Aliens Act 2000 is applied), if at that moment the detainee has not yet appealed against the decision on his own accord. This notification is viewed as an appeal. The court session will take place no later than fourteen days after the notification or the appeal has been received. Next, the court will reach a decision within another seven days.

Both the Immigration Service and the detained person can appeal against this decision of the court to the Administrative Justice Division of the Council of State.

Since September 2004 there is no longer an *ex proprio motu* periodic review of the continuing detention by the district court. A detained person can appeal (again) to the District Court against the prolongation of the detention, however, at any time. Second and further decisions of the District Court on aliens' detention are not open to appeal at the AJD.

The NGOs consider the change in article 94 Aliens Act 2000 as a serious and unacceptable decline in the level of legal protection against unlawful aliens' detention. In the opinion of the NGOs the new system does not guarantee that the court decides speedily on the lawfulness of the detention (cf. article 5, paragraph 4 ECHR). An alien may have to wait 21 days (14 plus 7) from the moment of his appeal until the court's decision. If an alien does not lodge an appeal by himself it may last seven weeks until the court decides on his detention from the moment he was taken into custody.

Remark:

The NGOs would like to draw the Committee's attention to the fact that the information provided by the Netherlands' Government in its fourth periodic report has been superseded. The NGOs are concerned about the change in the system of judicial review of aliens' detention that came into effect in 2004. According to the NGOs, it takes too long before the aliens' detention is judicially reviewed.

⁵¹ Fourth Periodic Report of the Kingdom of the Netherlands (AVT04/BZ74507), Part One, chapter II, Article 3, Detention of aliens pending deportation.

B. The Netherlands Antilles

2 Detention Facilities

2.1 Primary remarks

Despite the fact that detention facilities in the Netherlands Antilles have already often been subjected to the review of both Regional and International Supervisory Committees, relevant authorities do not act in accordance with the law of the Netherlands Antilles, nor do they execute the measures or recommendations made by these Committees. The NGOs would again like to draw the Committee's attention on the treatment of detainees in the Netherlands Antilles. The NGOs would particularly like to draw the Committee's attention to the situation of minors and young adults in detention.

2.2 Police Detention

The NGOs focused on two police establishments: The Police Detention Unit at 'Bon Futuro Prison' (formerly 'Koraal Specht') and the Barber Police Department, both in Curaçao.

The Police Detention Unit at 'Bon Futuro Prison' was established on the 2nd of February 2002, after the 'Rio Canario' Police Detention Facility was taken out of service as a consequence of unacceptable detention conditions. The Police Detention Unit at 'Bon Futuro Prison' offers an official capacity of 38 places. The material conditions offered to the detainees cannot be considered ideal, but they are satisfactory in comparison with the detention conditions at Barber Police Department. Due to a shortage of cells in the Police Detention Unit at 'Bon Futuro' Prison the cells at 'Barber' Police Department were taken into service for detention in custody as well.

Presently 6 to 8 multi-occupancy cells are in use in the Barber Police Establishment offering an official capacity of 12 to 16 detainees.⁵² At the time of writing, each cell accommodated 2 detainees, which means that the Barber Police Establishment did not exceed the total capacity. Nevertheless, NGOs are extremely concerned with the detention conditions at Barber Police Establishment, due to the following reasons;

- The sanitary facilities are poor and in an advanced state of dilapidation. The water supply system is locked and detainees have to call the attending staff to unlock the water supply system for drinking water. It often occurs that detainees suffer from thirst because the cells are not equipped with call bells and the staff is not present within the cell complex.
- According to detainees they receive one sandwich twice a day and French fries with meat from the nearest take-away in the evening.
- Not all detainees are always provided with mattresses.
- The ventilation in the cell complex is poor: a putrid smell permeates the whole detention area.

Despite these unacceptable and inhuman conditions of detention, the relevant authorities of the Netherlands Antilles as well as the Dutch Government still refrain from taking measures.

⁵² March 2006.

The judiciary of the Netherlands Antilles holds the view that the conditions of the detention centre at Barber are inappropriate for detention. Therefore, the national judges agreed amongst each other to suspend custody of each detainee who is not transferred to 'Bon Futuro' within 4 days time. The NGOs are of the opinion that Barber Police Establishment is inappropriate for any detention regardless of its duration, and should be closed immediately.

Question:

The NGOs would like to ask the Committee to question the Dutch Government on the detention conditions in the abovementioned Police Detention Establishments – in particular with regards to the detention conditions at the Barber Police Establishment. Furthermore, the NGOs would like to press the Dutch Government to clarify what it intends to do to improve this situation.

2.3 Prison Detention

2.3.1 General Conditions

The 'Bon Futuro' Prison (formerly 'Koraal Specht') is the largest prison in the Netherlands Antilles. It comprises of 326 cells, offering an official capacity of 561 places. In addition there is a psychiatric and forensic observation centre (FOBA) with 23 places and an extra security unit with 9 places. Presently, the 'Bon Futuro' Prison is extending its capacity for female detainees with 40 – 60 places.

The NGOs focused on the 'Bon Futuro' Prison because it suffers from a number of very serious shortcomings. In the view of the NGOs, these shortcomings pose a major threat to the basic rights of prisoners.

It appears that the regime at 'Bon Futuro' Prison does not entail a classification and allocation procedure. Each unit accommodates a mixture of remand and convicted inmates, short and long term sentenced prisoners, first offenders and recidivists. Furthermore, adults and juveniles are placed together, because 'Bon Futuro' Prison does not offer a special unit or detention regime for minors (between 12 and 18 years), or a special unit or detention regime for young adults (between 18 and 25 years). As a consequence, minors and young adults are often placed in the psychiatric and forensic observation centre (FOBA) where they do not belong, since these children do not suffer from a psychiatric disorder nor do they pose any sort of threat. It seems to be the intention of the Ministry of Justice to use half of the newly established female unit for minor detainees as well, but the Ministry of Justice did not acknowledge that as an issue of public policy.

As regards certain material conditions, the NGOS would like to remark that these continue to be of much concern. The Committee for the Prevention of Torture (CPT), after all its visits, considered the conditions of detention in the (formerly) 'Koraal Specht' Prison to be unacceptable in terms of material aspects. In 1994 the delegation observed that the cells were infested by hosts of cockroaches and similar insects, and the prisoners claimed that at night the cells were invaded by rats.⁵³ In 1999 these inhumane conditions persisted.⁵⁴

⁵³ CPT/Inf (1996) 1, paragraph 72.

⁵⁴ CPT/Inf (2000) 9, paragraph 28.

In 2002 the CPT concluded that the issue of hygienic conditions still had to be addressed, because cockroach infestation and the presence of rats were still problems in some units, even if the scale of the problem was less significant than in the past.⁵⁵ At the time of this writing, the situation has not improved.⁵⁶

Question:

The NGOs would like to ask the Committee to question the Dutch Government on the detention situation of minors and young adults in the Netherlands Antilles. In particular, NGOs would like to know when a proper detention regime and proper detention facilities for minors and young adults will be established in ‘Bon Futuro’ Prison and what they will comprise of.

2.3.2 Classification and allocation of prisoners

The ‘Wackenhut’ Corrections Corporation (WCC) – an American based company – has been appointed to lead the vast construction/renovation programme at ‘Bon Futuro’ Prison and holds senior management and training positions in the establishment. Although already back in 2001, the WCC developed a new and proper classification and allocation procedure (based on objective factors such as age and legal status) and a system for purposeful activities and education (basic and high school level, correspondence courses, substance abuse awareness, life skills and arts), both of which have not yet been implemented.⁵⁷

Question:

The NGOs are of the opinion that a system of classification and allocation of prisoners is quintessential for both the organisation of the regime, as well as for the security environment and would like to inquire why the new regime has not yet been implemented.

2.3.3 Activity and educational programmes

Activity and educational programmes are very limited in ‘Bon Futuro’ Prison. The NGOs are particularly concerned about the availability of education of the detained minors. The ‘Bon Futuro’ Prison offers neither proper vocational educational facilities, nor proper basic education facilities.

Question:

The NGOs would like to remark that the current state of the re-socialisation program – in particular of minors and young adults - is far from ideal. The NGOs would like to ask the Committee to question the Dutch Government about the implementation of educational programmes – in particular for minors and young adults.

⁵⁵ CPT/Inf (2002) 30, paragraph 35.

⁵⁶ Report “Commissie Evaluatieonderzoek Rechtshandhaving”, 2006, p. 334.

⁵⁷ This American based company has been leading the vast construction/renovation programme at ‘Bon Futuro’ Prison, as well as holding senior management and training functions in the establishment.

In February 2002, the CPT's delegation visited the 'Bon Futuro' Prison and was impressed by the efforts that the 'Bon Futuro' Prison had made concerning educational activities, responsibility for which had been entrusted to a local partner, an institute for education and training, Feffy.⁵⁸ Regarding this issue the NGOs would like to refer to the report of the Committee "Evaluatieonderzoek Rechtshandhaving", which stated that vocational education and other re-socialisation activities disappeared as the result of the established WWC programme.⁵⁹ The NGOs would like to remark that the WWC programme was in fact never implemented. Consequently, there is a lack of vocational education and working programmes, which means that there are almost no re-socialisation opportunities for detainees - in particular there are none for minors and young adults. Furthermore, the NGOs would like to remark that detainees that are engaged with working activities such as maintenance, cleaning and kitchen work are extremely underpaid (Naf 1,- for general work and Naf 2,- for specialized work).⁶⁰

Question:

The NGOs would like the Dutch Government to clarify if and what kind of measures will be taken to establish vocational education and working programmes to improve re-socialisation.

2.3.4 Medical conditions

The medical conditions of prisoners must be seriously considered, and call for immediate attention. The infirmary with a capacity of six beds is far too small for a prison population of nearly 600; in this current situation, one bed is allocated per one hundred prisoners. Moreover, there is a general lack of basic medical resources. Doctors stated that under the present conditions, they could not take responsibility for the prisoners' care anymore.⁶¹ Some doctors have already refused to treat prisoners as a result of the lack of resources.⁶² The NGOs are of the opinion that this situation has obvious detrimental consequences regarding both the quality of health care for prisoners and the health of prisoners.

Question:

NGOs share the concerns of the Committee "Evaluatieonderzoek Rechtshandhaving" that a lack of financial resources endangers even the most essential basic facilities. As regards the medical services and the hygienic environment the NGOs are of the opinion that these facilities and conditions should be improved immediately. Therefore, the NGOs would like to ask the Committee to question the Dutch Government with regard to the financial resources as well as the measures that the Dutch Government will take to improve the situation.

⁵⁸ CPT/Inf (2002) 30, paragraph 42.

⁵⁹ Report "Commissie Evaluatieonderzoek Rechtshandhaving", 2006, p. 336.

⁶⁰ Naf 1,- is about € 0,50.

⁶¹ Both the head nurse and the doctor had written letters to the relevant authorities, including the Health and Justice Ministries, on 4 November and 7 December 2001.

⁶² Report "Commissie Evaluatieonderzoek Rechtshandhaving", 2006, p. 334.

2.4 *Final remark*

By not instituting proper facilities and institutions for detainees, in particular with regards to detained minors, the Government of the Netherlands Antilles is in breach of a whole array of national as well as international human rights treaties and documents, such as the Convention on the Rights of the Child and the Standard Minimum Rules for the Treatment of Prisoners. The Netherlands Antilles is part of the Kingdom of the Netherlands, and therefore falls under both the direct and indirect responsibility of the Dutch Government.

Question:

Lastly, the NGOs would like the Dutch Government to clarify exactly to what extent they consider themselves responsible for the non-adherence of the Netherlands Antilles to the obligations under the Convention Against Torture.