

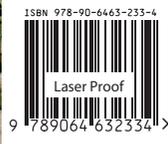
Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights to be respected and protected. Its vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights.

Amnesty International  
Dutch section  
P.O. Box 1968  
1000 BZ Amsterdam  
the Netherlands

Amnesty International  
International Secretariat  
Peter Benenson House  
1 Easton Street  
London WC1X 0DW  
United Kingdom

P +31 20 626 4436  
F +31 20 6240889  
E [amnesty@amnesty.nl](mailto:amnesty@amnesty.nl)  
I [www.amnesty.org](http://www.amnesty.org)

**AMNESTY  
INTERNATIONAL** 



# THE NETHERLANDS: THE DETENTION OF IRREGULAR MIGRANTS AND ASYLUM-SEEKERS

**AMNESTY  
INTERNATIONAL** 

**THE NETHERLANDS:  
THE DETENTION OF  
IRREGULAR MIGRANTS  
AND ASYLUM-SEEKERS**

Amnesty International

AI Index: EUR 35/02/2008

June 2008

Cover photo:

*The detention boat Bibby Kalmar in Dordrecht came into service in May 2007. Located next to the local prison, up to 491 irregular migrants can be detained on the Kalmar.*

© Rob Huibers / Hollandse Hoogte

Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights to be respected and protected. Its vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights.

Amnesty International  
Dutch section  
P.O. Box 1968  
1000 BZ Amsterdam  
the Netherlands

Amnesty International  
International Secretariat  
Peter Benenson House  
1 Easton Street  
London WC1X 0DW  
United Kingdom

P +31 20 626 4436  
F +31 20 6240889  
E [amnesty@amnesty.nl](mailto:amnesty@amnesty.nl)  
I [www.amnesty.org](http://www.amnesty.org)

**AMNESTY  
INTERNATIONAL**



# CONTENTS

<b>EXECUTIVE SUMMARY</b>	<b>5</b>
<b>1 INTRODUCTION</b>	<b>8</b>
1.1 Methodology	9
<b>2 “COMBATTING” IRREGULAR MIGRATION IN THE NETHERLANDS</b>	<b>10</b>
2.1 Irregular migration in the Netherlands in a global context	10
2.2 The number of irregular migrants and asylum-seekers in the Netherlands	10
2.3 Dutch legislative and policy measures against irregular migration	11
<b>3 THE DETENTION OF IRREGULAR MIGRANTS AND ASYLUM-SEEKERS</b>	<b>13</b>
3.1 Immigration detention under international human rights law	13
3.2 Immigration detention in the Netherlands	15
3.3 Immigration detention under Dutch law	17
3.4 <i>Habeas corpus</i> : problems with judicial review	18
3.5 Detention regimes	19
3.6 Duration of immigration detention	23
3.7 Alternatives to immigration detention	25
<b>4 THE USE OF EXCLUSION ORDERS</b>	<b>27</b>
4.1 Article 1F of the Refugee Convention: punishment without prosecution?	29
4.2 Irregular migration and crime	32
<b>5 ALLEGATIONS OF ILL-TREATMENT AND THE EXCESSIVE USE OF FORCE</b>	<b>34</b>
5.1 Isolation in detention	36
5.2 The excessive use of force	38
5.3 Investigation and review of allegations of ill-treatment	40
<b>6 DETAINING VULNERABLE MIGRANTS AND ASYLUM-SEEKERS</b>	<b>43</b>
6.1 Traumatized irregular migrants and asylum-seekers	43
6.2 Victims of human trafficking	45
6.3 Detaining children and their families	46
6.4 Exposed to war: the case of detained rejected Iraqi asylum-seekers	48
<b>7 CONCLUSIONS</b>	<b>51</b>
<b>8 RECOMMENDATIONS</b>	<b>53</b>
<b>ANNEX I: REGULARIZATION AND AMNESTY MEASURES</b>	<b>57</b>
<b>ENDNOTES</b>	<b>58</b>
<b>GLOSSARY</b>	<b>74</b>



# EXECUTIVE SUMMARY

Each year some 20,000 irregular migrants and asylum-seekers are detained in the Netherlands, where the use and duration of detention and other restrictive administrative measures is increasing. This report examines how far these measures have led to a deterioration in the human rights situation of irregular migrants and asylum-seekers. It also underlines Amnesty International's growing concern over the control and security oriented approach by governments worldwide, in an effort to "combat" irregular migration, at the cost of migrants' human rights.

The report examines how far Dutch immigration policy conforms with international human rights law, which considers that immigration detention should be an extreme measure of last resort. It looks at the effect on vulnerable groups of increasingly restrictive measures, and considers whether Dutch law and practice allow for sufficient and effective accountability, transparency and accessibility for irregular migrants and asylum-seekers to seek redress and enjoy the protection of their human rights, despite their irregular status.

Amnesty International is concerned about recent measures that increasingly tend to criminalize irregular migration, firstly by forcing people to the margins of society where they become vulnerable to criminals who exploit them, and where they may become drawn into criminal activities in order to survive. Secondly, the increasing influence of criminal law into the area of immigration policy stigmatizes irregular migrants as "criminals", generating stereotyped and xenophobic images and attitudes towards migrants and asylum-seekers in general.

Amnesty International was alarmed to encounter allegations of ill-treatment, particularly given the lack of prompt and full independent investigations into such allegations. This is creating conditions in which abuses can be perpetrated with impunity. Amnesty International welcomes recent moves by the Dutch government to reduce the detention of migrant children and their families and to expand protection for victims of human trafficking. However, the organization is concerned about the number of irregular migrants and asylum-seekers in detention, the duration of their detention, and the fact that other vulnerable groups, such as unaccompanied minors and torture victims continue to be detained. As such, immigration detention has effectively become a tool of deterrence and punishment, which conflicts with international human rights standards.

This report concludes that elements of Dutch policies and practices constitute human rights violations. A lack of publicly available statistical data on various aspects of immigration detention prevents adequate parliamentary and judicial scrutiny of whether Dutch policies on irregular migration are effective and proportionate to the goal they aim to achieve and are therefore justified.

Amnesty International considers that criminal-based detention regimes unnecessarily restrict the human rights of irregular migrants and asylum-seekers by limiting their internal movement, their privacy by putting up to six persons in one cell, access to meaningful daily activities, leisure, visiting hours and communication with the outside world.

**Amnesty International makes a series of recommendations to the Dutch government, including the following:**

**With regard to irregular migration in general**

- The Dutch government should develop a rights based, all-inclusive approach to irregular migration in which measures to "combat" irregular migration and crimes such as human trafficking and other human rights violations and abuses are balanced with increased protection for victims of such crimes and abuses.

**With regard to the presumption against detention**

- There should be a statutory presumption in law, policy and practice against the administrative detention of migrants. Immigration detention should be used only if, in each individual case, it is demonstrated that it is a necessary and proportionate measure in conformity with international law.

## EXECUTIVE SUMMARY

- Alternative non-custodial measures, such as reporting requirements, should always be explicitly considered before resorting to the immigration detention of migrants. The use of existing alternatives should be increased.
- There should be a statutory prohibition on the immigration detention of vulnerable persons such as unaccompanied minors, victims of torture and human trafficking, pregnant women, those, with a serious medical condition, people with a mental illness, disabled or the elderly people.

### **With regard to the use of administrative detention of irregular migrants and asylum-seekers**

- The decision to detain should always be based on a detailed and individualized assessment, including the personal history of, and the risk of absconding presented by, the individual concerned. Such assessment should consider the necessity and appropriateness of detention, including whether it is proportionate to the objective to be achieved. Any form of immigration detention should always be as short as possible.

### **With regard to effective remedies against detention**

- Any detention decision should be automatically and regularly reviewed as to its lawfulness, necessity and appropriateness, by means of a prompt, oral hearing by a court or similar competent independent and impartial body, accompanied by the appropriate provision of legal assistance.

### **With regard to detention conditions**

- To develop, as a matter of urgency, a more open regime appropriate to the legal situation of irregular migrants, which should be applied in similar ways in centres that share this regime, to avoid arbitrary treatment.
- Any form of immigration detention should be implemented in centres with adequate facilities, adjusted to the nature of the detention and in conformity with the CPT standards.
- Detained individuals should be granted unrestricted access to legal counsel and interpreters.
- There should be lenient visiting hours for family members and friends.
- Detained individuals should have access to adequate medical care. The Netherlands Health Care Inspectorate (IGZ) should supervise and investigate the quality and accessibility of health care in immigration detention facilities. The IGZ should conduct on-site inspections and take enforcement measures when standards are not met.

### **With regard to ill-treatment, excessive use of force**

- Any allegations of ill-treatment, excessive use of force, racism or any other abuses in immigration detention should be investigated promptly, thoroughly and impartially by an independent body. The methods and findings of such investigations should be made public. When there are indications of a criminal offence, the director of the facility should refer the case to the Public Prosecution Service (Openbaar Ministerie) without delay. If the director of the facility fails to refer the case, the Supervisory Committee should refer the case directly to Public Prosecution Service. Officials suspected of committing ill-treatment should be suspended from active duty during the investigation. Those suspected of being responsible for ill-treatment and other serious human rights violations should be prosecuted according to international standards of fair trial. Victims should be accorded appropriate compensation.

## EXECUTIVE SUMMARY

### **With regard to other administrative measures against irregular migrants**

- The use of exclusion orders should be avoided and should never be imposed in cases where an irregular migrant cannot be returned to their country of origin. Any use of exclusion orders should be limited to irregular migrants who pose an actual and serious threat to public order or national security, and in no case should it lead to a violation of the Netherlands' non-refoulement obligations.

### **With regard to asylum-seekers**

- Provide traumatized asylum-seekers and victims of human rights violations with the necessary time and means to prepare their asylum applications.

### **With regard to victims of human trafficking**

- Under no circumstances should victims of human trafficking be penalized for their illegal entry into the Netherlands or be administratively detained while awaiting their expulsion. Neither should victims of human trafficking be prosecuted for crimes committed where they have been compelled to do so.

For the full list of recommendations to the Dutch government please turn to page 53.

# 1 INTRODUCTION

*No one shall be subjected to arbitrary arrest, detention or exile.*

Universal Declaration of Human Rights (1948), Article 9 paragraph 1

In the night of 26 - 27 October 2005 a fire broke out in one of the cells of the Expulsion Centre (*Uitzetcentrum*) for irregular migrants and rejected asylum-seekers at Schiphol Oost, near Amsterdam. The “Schiphol fire” killed 11 persons and wounded 15 other people who were in the detention facility.<sup>1</sup> These dramatic events profoundly changed the lives of dozens of migrants and asylum-seekers who survived the fire, as well as the lives of the relatives of those who were killed, and of many others involved during and after the fire.

The Dutch government’s initial uncompromising position towards the surviving detainees in the aftermath of the fire caused a public and political outcry. Most of the survivors— some of them severely traumatized – continued to be detained in order to be expelled. Under political and public pressure, the Dutch government eventually agreed to temporarily halt the expulsions of the survivors of the fire during the investigation by the independent Dutch Safety Board (DSB) into the cause of the fire. However, despite this promise, several individuals were expelled before they could be interviewed by the DSB and before the results of the investigation were made public.<sup>2</sup>

## **Oscar**

*Having survived the Schiphol fire, Oscar (32) was expelled to Nigeria one month later, in November 2005. During the fire he suffered injuries to his neck, shoulders and chest, when he fell from his bed in his cell in panic after realizing that the detention centre was on fire.*

*After receiving first aid at the scene, he was taken to another detention centre, where he continued to be detained and received further treatment for his injuries. Oscar’s medical report stated that he was “stressed and anxious as a result of the fire and due to past torture trauma in his country of origin”.*

*Despite his injuries, just one day after the fire, on 28 October 2005, Oscar was presented to the diplomatic authorities of his country to arrange a laissez-passer for his expulsion. Since the expulsion date had not yet been fixed, on 21 November 2005 the district court considered his appearance to be merely preparatory and therefore not in violation of the government’s promise to halt the expulsion of survivors of the fire.<sup>3</sup> As such, the government was not considered to be acting in violation of its pledge to refrain temporarily from expelling survivors of the Schiphol fire.*

*However, three days later Oscar was expelled. In the appeal before the district court on 3 January 2006, the court upheld the expulsion, based on the – incorrect – assumption that a parliamentary motion calling for a medical examination by the State Medical Service (*Bureau Medische Advisering, BMA*) of the survivors before their expulsion, had not been adopted. The court ignored medical statements faxed by Oscar to his lawyer indicating that he was hospitalized upon arrival in his country. Oscar reportedly spent several weeks in hospital before being discharged.*

*Amnesty International considered the medical records to be genuine. In response to Amnesty International’s questions to the Dutch government, the latter confirmed the expulsion,<sup>4</sup> but argued that a doctor had reportedly concluded that no special medical care was necessary.<sup>5</sup>*

## INTRODUCTION

*In August 2006, 39 survivors of the Schiphol fire who were in need of medical treatment were granted residence permits on humanitarian grounds. People who had already been expelled were excluded from this policy.<sup>6</sup>*

The media coverage and public and political debates turned the Schiphol fire into a symbol of the authorities' indifference towards the rights of irregular migrants and asylum-seekers. It also sparked a more general concern about various aspects of the detention of irregular migrants and asylum-seekers in the Netherlands. Following the Schiphol fire, Amnesty International received an increasing number of reports on the detention regime and even allegations of ill-treatment in immigration detention. The variety of sources sending such information, such as lawyers, non-governmental organizations (NGOs), irregular migrants and asylum-seekers and their families and friends, prompted increased scrutiny by Amnesty International of the administrative detention of irregular migrants and asylum-seekers (immigration detention).

This report is the outcome of a research project describing the trends and developments regarding the effects of the increased use and duration of detention and other restrictive administrative measures against irregular migrants and asylum-seekers in the Netherlands.<sup>7</sup> The report examines how far these measures have led to a deterioration in the human rights situation of irregular migrants and asylum-seekers, and is one in a series of reports examining immigration detention practices in different countries. It underlines Amnesty International's growing concern over the control and security oriented approach by governments worldwide at the cost of migrants and asylum-seekers' human rights, in an effort to "combat" irregular migration.<sup>8</sup>

The report examines how far the Dutch immigration policy conforms with international human rights law, which considers immigration detention to be an extreme measure of last resort. The report examines recent developments in increasingly restrictive measures and their effects on vulnerable groups. Amnesty International considers whether Dutch law and practice allow for sufficient and effective accountability, transparency and accessibility for irregular migrants and asylum-seekers to seek redress and enjoy the protection of their human rights, despite their irregular status.

### 1.1 Methodology

Information for this report was gathered from a variety of sources, such as law practitioners, Non-Governmental Organizations (NGOs) working with irregular migrants and asylum-seekers, academics, government officials, and from interviews with irregular migrants and asylum-seekers themselves. It also draws on international and Dutch literature on jurisprudence and developments in migrants' rights, as well as official statistics, legislation and policy documents on irregular migration in the Netherlands. Amnesty International studied over 50 individual cases of irregular migrants and asylum-seekers who were detained in the Netherlands under the Aliens Act 2000 (*Vreemdelingenwet 2000*). The report describes the human rights situation of individuals who face detention either to prevent them from entering the Netherlands or to forcibly expel them to their countries of origin. This group consists of both (rejected) asylum-seekers and migrants who have not formally reported themselves to the Dutch authorities or who have overstayed their visas. Most case studies were followed up by personal interviews with the migrants and asylum-seekers concerned. To protect their identities, the names of the individuals in case studies have been changed. All featured cases are on file with Amnesty International.

In the course of its research, Amnesty International visited the following detention centres for irregular migrants and (rejected) asylum-seekers:<sup>9</sup> the Expulsion Centre (*Uitzetcentrum*) in Zestienhoven, the detention boat *Stockholm* in Rotterdam, the detention boat *Kalmar* in Dordrecht, the detention platforms *Australis* and *Borealis* in Zaandam and the detention centre in Alphen aan de Rijn. The research includes developments up to May 2008.

## 2 “COMBATTING” IRREGULAR MIGRATION IN THE NETHERLANDS

### 2.1 Irregular migration in the Netherlands in a global context

The current restrictive immigration policy in the Netherlands is a response to international developments and their local impact, which have put migration, including irregular migration, high on the national political agenda. This policy underlies a recent rise in restrictive administrative measures – including the detention of irregular migrants and asylum-seekers – and migrants and asylum-seekers being left at risk of destitution.

The scale and complexity of irregular migration and its impact on host countries, as well as on the human rights of migrants and asylum-seekers, poses challenges but also opportunities for these countries. This has pushed migration to the top of political agendas worldwide. The process of globalization in recent decades has not only led to an increased exchange of information, services and technology, but has also allowed people worldwide to migrate more easily from one country to another for a variety of reasons, such as conflict, poverty and natural disasters.<sup>10</sup>

However, most migration still takes place within regions of origin; a fraction of the global population migrates to another continent.<sup>11</sup> Nevertheless, countries like the Netherlands are receiving thousands of refugees and migrants every year.

The increased number of asylum applications in Europe during the 1990s, caused among other factors by the conflict in the former Yugoslavia, was a trigger for European states to step up their border controls and visa restrictions and prioritize “temporary protection” over finding “durable solutions”.<sup>12</sup> The 11 September 2001 attacks on New York generated a global, control-oriented focus on the issue by effectively linking migration and security as two inseparable concepts.<sup>13</sup> At the UN High Level Dialogue on International Migration and Development in 2006, concern was expressed:

*about the increase in irregular migration and the exploitation and abuse of migrants in an irregular situation... Some ... noted that restrictive migration policies contributed to increased irregular migration and argued for an increase in legal avenues for migration and for the regularization of migrants in an irregular situation.*

Both asylum-seekers and migrants are increasingly forced to make use of irregular migration methods offered by criminal networks which profit from people smuggling and trafficking.<sup>14</sup> The High Level Dialogue stressed that:

*security and control measures alone would not eliminate irregular migration. ...measures to control irregular migration should not prevent persons fleeing persecution and other vulnerable populations from seeking international protection.*<sup>15</sup>

### 2.2 The number of irregular migrants and asylum-seekers in the Netherlands

Statistics on irregular migrants in the Netherlands are inherently difficult to gather.<sup>16</sup> Various studies over recent years have come up with different estimates. The latest statistics date from 2006 and put the number of irregular migrants between April 2005 and April 2006 at between 75,000 and 185,000 people,<sup>17</sup> including European and non-European irregular migrants and also including rejected asylum-seekers. This number is lower than earlier estimates, which put the total number of irregular migrants in the Netherlands in the period 1997-2003 at between 125,000 and 225,000.<sup>18</sup>

Equally, the number of asylum applications in the Netherlands has dropped significantly over the past few years, including the number of repeated asylum applications. While in 2000 over 43,000 asylum applications were filed, in 2007, the number of applications reached slightly over 9,700 – the lowest since 1988.<sup>19</sup> About one third of the applications are repeated ones. The recognition rates of asylum applications have increased over the past few years, from 30 per cent in 2004 to some 50 per cent in

2006. In 2007, around 45 per cent of applications were granted.<sup>20</sup>

The number of irregular migrants and rejected asylum-seekers voluntarily leaving the Netherlands showed a decrease from more than 13,000 in 2004 to an estimated 5,000 in 2007. The number of individuals who are forcibly returned rose from 9,200 in 2004 to an estimated 14,000 in 2007. The majority of irregular migrants and rejected asylum-seekers however, are registered as “administrative returnees” if they are not found to be living at the address they have given. In such cases, when the authorities are no longer aware of the individuals’ whereabouts, they are assumed to have left the country, which is not necessarily true. The total number of “administrative returnees” in the Netherlands has remained relatively stable at around 41,000 over recent years.<sup>21</sup>

Though the Netherlands has a high number of removals compared to other European Union (EU) countries,<sup>22</sup> more than half of the irregular migrants and rejected asylum-seekers cannot be expelled and are often left destitute after having been detained. An extensive study of some 400 cases in 2002-2003 showed that the number of effective expulsions following the detention of irregular migrants and rejected asylum-seekers is around 35 per cent and decreasing,<sup>23</sup> while between 2002 and 2003 the time spent in detention increased to an average of 80 days.<sup>24</sup> Recent figures from the new Return and Departure Service (*Dienst Terugkeer & Vertrek*) show no increase in these numbers, confirming these statistics.<sup>25</sup>

### 2.3 Dutch legislative and policy measures against irregular migration

Current efforts to address irregular migration are increasingly placed in a political and legal context where migrants are depicted as an “enemy” and discussions on the issue are peppered with “war” vocabulary.<sup>26</sup> Consecutive governments, including the current one, have maintained restrictive immigration policies.<sup>27</sup> In response to research by the UN High Commissioner for Refugees (UNHCR) and the Dutch Council for Refugees on the lengthy border detention of asylum-seekers the State Secretary of Justice responded: “It is my policy to detain aliens [under Article 6] until they meet their obligation to return.”<sup>28</sup>

The firm stance against irregular migration dates back to 1991, following the report of the governmental Commission Zeevalking on irregular work practices. The results of the Commission are seen as the start of significantly tougher policies towards irregular migration.<sup>29</sup> Since then, various legislative and policy measures aimed at decreasing irregular migration in the Netherlands have been put in place.<sup>30</sup>

Both the Identification Act (*Wet op de Identificatieplicht*)<sup>31</sup> and the Prevention of Marriages of Convenience Act (*Wet voorkoming schijnhuwelijken*)<sup>32</sup> of 1994 made it more difficult for irregular migrants to regularize their stay without proper documentation. In 1998 the Linking Act (*De Koppelingswet*)<sup>33</sup> further narrowed the possible means of survival for irregular migrants by linking databases containing information on legal residence to a variety of databases with information on claimants of social benefits. Since then, irregular migrants have been excluded from such benefits, apart from schooling for children up to the age of 18, legal aid and emergency medical assistance.

The 1999 Undocumented Aliens Act (*Wet ongedocumenteerden*) introduced a strict documentation review during the asylum application.<sup>34</sup> A lack of the documents required by an asylum-seeker, undermines the credibility of any statements they make during the asylum application. Although an asylum application may not be rejected merely on the basis of an “attributable absence of documents”,<sup>35</sup> Amnesty International repeatedly criticized<sup>36</sup> the threshold for “proving” a well-founded fear of persecution by people who had fled situations where proper documentation is often hard to come by.<sup>37</sup>

The current Aliens Act 2000, which came into force on 1 April 2001, includes several new provisions for immigration authorities to carry out house searches for irregular migrants and also broadened the scope for stopping people in the street to ask for their identity and nationality.<sup>38</sup> An evaluation in 2004 of the use of these powers under the Aliens Act 2000 by an independent committee of experts at the request of the Justice Department, made clear that the new powers were increasingly

## “COMBATTING” IRREGULAR MIGRATION IN THE NETHERLANDS

used as tools to “combat” irregular migration; the number of migrants who were stopped almost doubled from around 12,000 in 1998 to nearly 23,000 in 2004.<sup>39</sup>

Other legislative measures, included the amendment on 1 January 2005 of the Identification Act by the Extended Identification Act (*Wet op de Uitgebreide Identificatieplicht*), making it *obligatory* for every person over the age of 14 to carry identification.<sup>40</sup>

Policy wise, the Dutch government published its 2003 Policy Memorandum on Return (*Terugkeernota*),<sup>41</sup> followed by the 2004 Policy Memorandum on Illegal Migrants (*Illegalennota*).<sup>42</sup> The first Memorandum focused in particular on the lack of cooperation by both migrants and rejected asylum-seekers and their countries in relation to the difficulties of return.<sup>43</sup> To stimulate the migrant’s own responsibility to return, a variety of restrictive and control-oriented measures were introduced in six areas.<sup>44</sup> Underlying the new approach is the government’s position that every country has an international obligation to take back its own nationals, expressed in the motto: “Who wants to return, can return.”<sup>45</sup>

The second Memorandum elaborated on the government’s plans to deal with the effects of irregular migration inside the country, emphasizing increased investigatory and penalizing measures. Human trafficking, illegal working and illegal residence in overcrowded housing were identified as three main areas of concern along with the rise of crimes committed by people in order to survive.

Amnesty International welcomes the acknowledgement in the latter Memorandum of the vulnerable position of irregular migrants and asylum-seekers in society, but notes with concern that the emphasis in the Memoranda are very much “perpetrator and control-oriented”. Much less attention is given to policy measures enhancing the human rights of migrants and asylum-seekers and to protecting and supporting possible victims of crimes against migrants and asylum-seekers, such as human trafficking.

Amnesty International is worried that a primarily control-oriented approach to irregular migration – without proper guarantees to safeguard the human rights of irregular migrants and asylum-seekers– will lead to their further marginalization and make them more vulnerable to abuse and more susceptible to committing crimes in order to survive. A number of individuals and organizations interviewed share Amnesty International’s concern.<sup>46</sup>

### 3 THE DETENTION OF IRREGULAR MIGRANTS AND ASYLUM-SEEKERS

*Infractions of immigration laws and regulations should not be considered criminal offences under national legislation. The Special Rapporteur would like to stress that irregular migrants are not criminals per se and they should not be treated as such. Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature. Governments should consider the possibility of progressively abolishing all forms of administrative detention*

Gabriela Rodríguez Pizarro, former UN Special Rapporteur on the Human Rights of Migrants<sup>47</sup>

#### 3.1 Immigration detention under international human rights law

The Netherlands is a State Party to most of the major international and regional human rights instruments in which the presumption against detention is enshrined or which are otherwise relevant to immigration detention. For a comprehensive overview of human rights standards we refer to Amnesty International's research guide, *Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees*.<sup>48</sup>

This paragraph lists the main human rights instruments, notably the International Covenant on Civil and Political Rights (ICCPR, 1966),<sup>49</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966),<sup>50</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950),<sup>51</sup> the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987),<sup>52</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984),<sup>53</sup> The Convention on the Rights of the Child (CRC, 1989),<sup>54</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1981)<sup>55</sup> and the Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965).<sup>56</sup>

In the area of refugee law, the Netherlands is a State Party to the Convention relating to the Status of Refugees (1951) and its Protocol (1967),<sup>57</sup> and is also bound by various EU asylum directives within the Common European Asylum System (CEAS) of the European Union.<sup>58</sup> The Netherlands is not yet a Party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC, 1990) which came into force on 1 July 2003.<sup>59</sup> Recently, the Dutch government reiterated its position that it has no intention of becoming a State Party to the MWC.<sup>60</sup> Amnesty International regrets the Dutch government's unwillingness to ratify one of the seven core international human rights treaties, and believes that it casts serious doubts on its commitment to the protection of the human rights for all persons, including migrants.<sup>61</sup> Amnesty International calls upon the Dutch government – as it does upon all European countries – to change its position by signing and ratifying the MWC.

In addition to the above international instruments, various declarations, resolutions and principles have been adopted to further develop more detailed guidelines on immigration detention. Although these do not have the legal power of treaties, they have the persuasive force of having been negotiated by governments over many years, and of having been adopted by political bodies such as the UN General Assembly, usually by consensus, and are useful guidance in interpreting the binding content of treaty provisions. Non-treaty standards sometimes reaffirm principles that are already considered to be legally binding on all states under customary international law.

Such instruments include among others: the Committee for the Prevention of Torture (CPT) Standards, The UN Standard Minimum Rules for the Treatment of Prisoners (1977), the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Council of Europe's (CoE) Twenty Guidelines on Forced Return (2005),<sup>62</sup> the European Prison Rules (2006); and for juvenile detainees the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) and the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). In addition, there are the General Comments and case law by treaty governing bodies such as the Human Rights Committee.<sup>63</sup>

General international human rights standards describing the presumption against detention include:

- **International Covenant on Civil and Political Rights (1966), Article 9 paragraph 1:**  
Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
- **European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 5 paragraph 1 under f:**  
Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- **Convention relating to the Status of Refugees (1951), Article 31 paragraph 2:**  
The Contracting States shall not apply to the movements of such refugees' restrictions other than those that are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.
- **UNHCR ExCom Conclusion No 7 (XXVIII) – 1977, Expulsion, Paragraph (e)**  
[The Executive Committee] [r]ecommended that an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged.

International human rights standards relevant to vulnerable groups such as migrant children, refugees and victims of human trafficking include:

- **UN Convention on the Rights of the Child**
  - **Article 3 paragraph 1:**  
In all actions concerning children, ... the best interests of the child shall be a primary consideration.
  - **Article 22 paragraph 2:**  
...In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.
  - **Article 37:**  
States Parties shall ensure that: ... (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.
- **UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), Rule 2:**  
Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.
- **UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers, 1999**  
**Guideline 7: Detention of Vulnerable Persons**  
Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories listed:
  - Unaccompanied elderly persons.

- Torture or trauma victims.
- Persons with a mental or physical disability.

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication counselling etc. should it become necessary.

- **United Nations Guidelines on Human Rights and Human Trafficking, Guideline 2, paragraph 6:**  
Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.
- **CoE Convention on Action against Trafficking in Human Beings (No 197), Article 12 paragraphs 1 and 7:**  
Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery ... taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.

On the conditions under which detention may be ordered see for example:

- **CoE Twenty Guidelines on Forced Return. Guideline 6. Conditions under which detention may be ordered**
1. A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.
  2. The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies; he/she should be given the immediate possibility of contacting a lawyer, a doctor, and a person of his/her own choice to inform that person about his/her situation.

### 3.2 Immigration detention in the Netherlands

In the past few years, statements indicating a tougher stance against irregular migrants and rejected asylum-seekers have been followed by a significant increase in the number of detention facilities and cells. This brought the total number of cells from 200 places in 1989 to more than 3,000 in 2007,<sup>64</sup> which caused some researchers to speak of a “cell explosion”.<sup>65</sup> More than half of the capacity is located on detention boats, which have been used since 2004.

Immigration detention in this context is the administrative detention of irregular migrants and asylum-seekers, either to prevent them from entering the territory or in order to facilitate their expulsion. The principal difference between regular (remand) detention and immigration detention is that asylum-seekers and irregular migrants are not detained as a disciplinary or punitive measure. Whereas incarceration upon conviction of a crime is imposed for a defined period of time, immigration detention can be prolonged, and in the Netherlands there is no statutory limitation on its duration.

The detention of irregular migrants and asylum-seekers, often in combination with other administrative measures such as exclusion orders,<sup>66</sup> has developed into one of the principal tools for “combating” irregular migration in the Netherlands.<sup>67</sup> Every year over 20,000 irregular migrants and asylum-seekers are detained in the Netherlands.<sup>68</sup>

Following the arrest of an irregular migrant, immigration detention usually starts with a brief period of detention at a police station.<sup>69</sup> As soon as the identity or irregular status of the person concerned becomes clear, or after the formal investigative period has expired, he or she must be released or taken into custody at an immigration detention centre.

### **Detention as a deterrent**

Amnesty International is very concerned about the increased use of detention as a tool to “combat” irregular migration. This falls short of international human rights law which contains a clear presumption against immigration detention. All migrants, refugees and asylum-seekers, irrespective of their legal status, have the right to liberty and to freedom from arbitrary detention.

In the case of asylum-seekers, the Dutch government’s reasoning for detaining them is that this is done to guarantee a fair and speedy determination of asylum claims. However, there is no evidence to support the premise that, in general, detention is necessarily conducive to a fair and speedy asylum procedure. Moreover, current state practice shows that such detentions are in reality applied to facilitate immigration or return policies.

Amnesty International is opposed to the detention of refugees and asylum-seekers apart from in the most exceptional circumstances as prescribed by international law and standards. Detention is only lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective to be achieved, that it is on grounds prescribed by law, and that it is for one of the specified reasons which international and regional standards recognize as legitimate grounds for detaining asylum-seekers, such as an objective risk of absconding by the person in question. **Any person detained should be provided with a prompt and effective remedy before an independent judicial body to challenge the decision to detain them.**<sup>70</sup>

According to the UN Human Rights Committee, the meaning of “arbitrary” is to be given a broad application, which goes beyond mere unlawfulness to encompass “inappropriateness, injustice and lack of predictability”. This was confirmed in its landmark decision *A v Australia*, where the Committee concluded that Australia’s policy of mandatory detention of asylum-seekers who arrived without documentation infringed Article 9 of the ICCPR. Detention was considered arbitrary because no consideration had been given to the necessity of detaining the individual in this particular case, and the detention lasted for many years in very bad conditions:<sup>71</sup>

*The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.*<sup>72</sup>

Unfortunately, immigration detention is widely used in an increasing number of cases internationally. In this context, Amnesty

International is gravely concerned that the recent decision by the Grand Chamber of the European Court of Human Rights in *Saadi v United Kingdom* may give states broad discretion to detain irregular migrants and asylum-seekers<sup>73</sup> by allowing efficiency arguments to overrule safeguards against arbitrary detention. The organization shares the concerns of the six dissenting judges:

*As regards detention generally, the requirements of necessity and proportionality oblige the State to furnish relevant and sufficient grounds for the measure taken and to consider other less coercive measures, and also to give reasons why those measures are deemed insufficient to safeguard the private or public interests underlying the deprivation of liberty. Mere administrative expediency or convenience will not suffice. We fail to see what value or higher interest can justify the notion that these fundamental guarantees of individual liberty in a State governed by the rule of law cannot or should not apply to the detention of asylum-seekers.*

### 3.3 Immigration detention under Dutch law

The legal basis for immigration detention in the Netherlands is laid down in the Aliens Act 2000 (*Vreemdelingenwet 2000*), which entered into force on 1 April 2001.<sup>74</sup> More detailed elaborations of the Act are laid down, amongst others, in the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*), comprising both procedural and material governmental decisions to implement the Act, and the Aliens Circular 2000 (*Vreemdelingen-circulaire 2000*) – comprising policy decisions and changes.

The Act allows, on the one hand, for the detention of irregular migrants and asylum-seekers at the border in order to prevent them from formally entering the territory (Article 6 Aliens Act 2000) and, on the other hand, for the detention of irregular migrants who are discovered after having entered the territory, rejected asylum-seekers and migrants who have overstayed their visas (Article 59 Aliens Act 2000). Most individuals are detained on the basis of Article 59 of the Aliens Act 2000.<sup>75</sup>

Border detention is mostly imposed in combination with a formal entry refusal.<sup>76</sup> Based on Article 3 of the Aliens Act 2000 and Article 13 of the Schengen Border Code,<sup>77</sup> a person who does not fulfil the visa criteria and who arrives by ship or by aeroplane can be refused formal entry at the border. To prevent this person from gaining access to the state beyond the border point, he or she can be detained. Since this measure forms part of the border protection regime – with the aim of preventing illegal entry – it is not deemed to be imposed “with a view to the expulsion” of the migrant in question, as is the case with the other form of immigration detention. Formal entry refusal is a legal fiction, because the people are already physically present within the territory of the state and are subject to its jurisdiction.

In September 2007, UNHCR-funded research by the Dutch Council for Refugees showed that, in practice, asylum-seekers at Schiphol Airport are routinely subjected to border detention during and immediately following the accelerated asylum-determination procedure at the Schiphol Application Centre.<sup>78</sup> In the case of further investigation being necessary beyond the 48-hours accelerated procedure and in certain other circumstances,<sup>79</sup> asylum-seekers may face continuous border detention. However, the exact nature and type of investigation – allowing for the prolonged detention – were often unclear.

The research also revealed that detention lasted an average of 100 days, with exceptional cases of people being detained for up to a year. The average detention period for the so-called “Dublin claimants” was 86 days. The Dublin Regulation<sup>80</sup> is an agreement between the EU member states which ensures that an application for asylum in an EU country is handled by one single country. The Regulation establishes criteria to determine which member state is responsible

for examining the claim, but also for return after the claim has been denied. During the detention period, while the other member state is requested to take the asylum-seeker back, their asylum application is not investigated. Amnesty International expresses concern about the duration of this form of detention and the possibility that traumatic experiences will remain unnoticed during this period of time.

### **Wazo**

*The asylum application of Wazo (29) was rejected in the accelerated asylum-determination procedure at Schiphol Airport. During the procedure, and following the rejection of Wazo's application, he was detained under Article 6 of the Aliens Act 2000.*

*Wazo, however, insisted that his asylum application was rejected on false grounds and as a result filed a new application after he had gathered additional information substantiating his claim. His efforts led to greater success. In September 2007 Wazo was officially recognized as a Convention Refugee after spending some 10 months in detention.*

In contrast with asylum-seekers confronted with an entry refusal, who are provided with an appointed lawyer,<sup>81</sup> no such mechanism exists for individuals who are refused entry but who do not file an asylum application. They may face detention for several weeks before having effective access to a lawyer. In a case witnessed by Amnesty International in the district court of Amsterdam, an irregular migrant was reportedly detained for over two weeks before being granted access to a lawyer.<sup>82</sup> Amnesty International urges the Dutch government to ensure that every irregular migrant – regardless of his or her status or point of entry – is granted unrestricted access without delay to a lawyer in order to be able to challenge his or her detention.

The majority of individuals placed in immigration detention are arrested upon discovery during surveillance or supervisory activities such as a criminal investigation, traffic control or an investigation into illegal labour activities. Individuals may be arrested when there are facts or circumstances which “on the basis of objective criteria, [raise] a reasonable suspicion that such a person is irregularly resident or in order to prevent illegal presence of persons after they have crossed the border.”<sup>83</sup> Such “objective facts and circumstances” can include sufficiently concrete (anonymous) tip-offs about irregular migrants and rejected asylum-seekers.<sup>84</sup>

### **3.4 Habeas corpus: problems with judicial review**

Immediately following their detention, individuals have the right to appeal their case before a district court. When it came into force in 2001, the Aliens Act 2000 contained provisions that sped up the judicial review process considerably so that a district court had to be notified within three days of the detention. The case was then dealt with in court within three weeks. In addition, initially the Aliens Act 2000 instructed the court to review the detention automatically every four weeks.

As a result of the increased attention given to irregular migration and the more frequent use of detention, the number of *habeas corpus* cases coming before the district courts increased from some 15,000 in 2002 to more than 27,500 in 2006. The year 2007 shows a decrease due to the many cases revoked as a result of a general amnesty. After the State Secretary of Justice announced that there would be a general amnesty, the detention of persons who *prima facie* qualified

for the general amnesty was lifted pending the actual proclamation of the general amnesty.

However, due to the backlog of cases, on 1 September 2004 the new provisions reverted to the situation that had existed under the Aliens Act 1994.<sup>85</sup> The first automatic notification to a district court had to take place within 28 days after detention.<sup>86</sup> Subsequent appeals were no longer dealt with automatically but had to be initiated by the migrant or his or her lawyer. Amnesty International regrets these changes in the Aliens Act 2000 and points to the vulnerability of irregular migrants and (rejected) asylum-seekers who are not alerted to the possibility that they may appeal or whose lawyer fails to provide effective legal assistance.<sup>87</sup>

Whereas the first judicial review looks at the lawfulness of the grounds for detention – whether detention of the irregular migrant was justified by “public order considerations”<sup>88</sup> – subsequent appeals against immigration detention review the lawfulness of continued detention. If the authorities are actively engaged in activities “with a view to the expulsion” of the persons concerned within a reasonable time, or when that person actively obstructs or frustrates this process, a continuation of the detention is usually granted.<sup>89</sup> Only the first appeal is subject to a higher appeal with the Council of State.<sup>90</sup>

Detention may be lifted if it is considered unreasonably burdensome. Although the Aliens Act 2000 does not explicitly contain the duty to perform a balance of interests investigation when ordering detention, during the discussion of the draft Act the State Secretary for Justice stated that, before applying detention, the interests of the asylum-seekers or irregular migrants will be weighed against the interests of the state.<sup>91</sup> However, the cases reviewed by Amnesty International, and confirmed in interviews with legal practitioners, migrants and asylum-seekers, show a very limited interpretation of the interests of migrants and asylum-seekers. The courts are allowed a marginal review but only for the presence of a possibly burdensome situation. A similar limited scrutiny by the court regards the use and possibility of alternatives. The only full review by the court concerns the assessment of whether detention is still lawful with a view to expulsion within a reasonably short period of time.

Amnesty International has repeatedly criticized the marginal review of district courts in asylum procedures and expresses similar concerns about this type of review in *habeas corpus* appeals, which are fundamental to avoiding arbitrary immigration detention. Given the high stakes, both in asylum cases and in detention cases, Amnesty International believes the decisions by the government in such cases should be subjected to a full judicial review.

### 3.5 Detention regimes

Irregular migrants and asylum-seekers can be detained under either Article 6 (border detention) or Article 59 of the Aliens Act 2000 with different detention regimes. Whereas border detention is governed by the Regulation on Border Accommodation (RBA, *Reglement Grenslogies*),<sup>92</sup> detention following the discovery of an irregular migrant is governed by the Penitentiary Principles Act (PPA, *Penitentiaire Beginselenwet*).<sup>93</sup> The Juvenile Penitentiary Principles Act (JPPA, *Beginselenwet Justitiële Jeugdinstellingen*)<sup>94</sup> is applicable to irregular migrants who are under the age of 18, mostly unaccompanied minors. The latter regime is modelled on the PPA and contains special provisions for juvenile detainees. Most migrants are detained in pairs or in four- or six-person cells.

The responsibility for administrative detention of migrants falls under the Directorate for Detention and Special Facilities (*Directie Bijzondere Voorzieningen*) of the National Agency of Correctional Institutions (NACI, *Dienst Justitiële Inrichtingen*) of the Ministry of Justice. Currently,<sup>95</sup> administrative detention of irregular migrants and (rejected) asylum-seekers takes place in thirteen facilities, each with different capacities (given in brackets below). They include:<sup>96</sup>

### Under Article 6 Aliens Act 2000

- Expulsion Centre Zestienhoven (*Uitzetcentrum*, 180)
- Transit Zone Schiphol-Oost (*Passantenverblijf*, 20)
- Border Detention Centre Schiphol-Oost (*Grenshospitium*, 168)
- Detention Centre in Alphen aan den Rijn (128)

### Under Article 59 Aliens Act 2000

- Expulsion Centre Schiphol-Oost (*Uitzetcentrum*, 228)
- Expulsion Centre Zestienhoven (*Uitzetcentrum*, 32)
- Detention Centre Zeist (since January 2006, 440)
- Detention Platforms *Australis* (288) and *Borealis* (288) in Zaandam (since October 2007)
- Detention Centre Zwaag (24, juveniles)
- Detention Centre for Juveniles “De Doggershoek”, Den Helder (juveniles)
- Detention Boat *Stockholm* (472) in Rotterdam – a former British hotel boat that was used to house soldiers during the Falklands War
- Detention Boat *Kalmar* (496) in Dordrecht<sup>97</sup>
- Detention Centre in Alphen aan den Rijn (1300, since November 2007) is the biggest detention centre for irregular migrants in the Netherlands. It has 900 places designated for immigration detention, while the other 400 will be used for migrants serving prison sentences. Currently 282 places are in use.

Both the PPA and JPPA regimes were principally developed for criminal detention purposes. The RBA alone was specially developed for the detention of irregular migrants and, as such, allows more leeway in terms of, for example, internal freedom of movement. However, various irregular migrants reported to Amnesty International a different application of the RBA in various detention centres that come under the same detention regime.

In the past, some detention centres offered daily activities for their detainees. However, due to budget cuts, migrant detainees are no longer given the opportunity to learn and develop skills through practical courses. The lack of a useful daily life in a detention centre creates a lot of tension between irregular migrants and sometimes a confrontational attitude towards prison staff.<sup>98</sup>

Amnesty International is disappointed by the State Secretary of Justice’s reaction in September 2007 (referring to a 2004 research project)<sup>99</sup> in which she showed no intention of reversing the decision to stop educational courses for irregular migrants “since it did not contribute to their return”.<sup>100</sup> Amnesty International points out that the provision of daily activities for detainees is first and foremost to guarantee respect for their human dignity and to make life in detention bearable.

The people interviewed during the 2004 research valued the activities offered as a diversion from the reality of their detention. In addition, international human rights instruments and supervisory bodies can be said to support such a view.<sup>101</sup> The standards developed by the CPT state: “The longer the period for which the persons are detained, the more developed should be the activities that are offered to them.”<sup>102</sup> Effectively, irregular migrants are detained under more restrictive conditions than ordinary remand prisoners or sentenced prisoners subjected to the same penitentiary rules and regulations.<sup>103</sup>

The detention boats in Rotterdam came in for particular criticism after an undercover journalist worked for several weeks as a guard on the boats.<sup>104</sup> He reported disrespectful treatment of irregular migrants by guards, violent incidents and a lack of facilities, including an alleged lack of skills to deal with emergencies.<sup>105</sup> An investigation by the Inspectorate for

Sanction Administration and the Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor de Strafrechtstoepassing en Jeugdbescherming*), concluded that there were “no structural abuses or a disturbed relationship between the detainees and the personnel on the boats.”<sup>106</sup> However, they did recommend 24 improvements to the conditions on board. A follow-up inspection by the Inspectorate in May 2007 concluded that all but four of the 2006 recommendations had been followed up. The remaining issues concerned the lack of access to legal counsel, a lack of privacy whilst using the telephone, insufficient provision of information to detainees and inadequate facilities for outdoor exercise.<sup>107</sup>

### **Ben**

*Ben (32) spent a total of six months on both detention boats in Rotterdam. “I first stayed on the small boat which was very old;<sup>108</sup> it was rocking and creaking all day long. Many people complained of being seasick and the noise of the creaking bolts made it difficult to sleep. During a storm in December 2006 the boat was rocking so heavily that we feared it would capsize and we would all drown. You cannot imagine the anxiety you feel when you are trapped in such a situation. Eventually, the storm forced the prison authorities to transfer us to the big boat.*

*“Conditions on both boats were very difficult. There were four people in a cell, which caused frequent fights over the use of the television, cleaning the cell and the noise. There is only a little daylight in the cells, which makes reading difficult. Moreover, the ventilation in the small cell is insufficient to keep the cell fresh; when someone went to the toilet the smell would fill the whole cell. In the morning the guards would open the cell with their nose covered to protect themselves against the stench which filled the cell overnight.”*

*Months later Ben told Amnesty International that since his stay on the boats he has felt depressed and still suffers from “memory loss”, has trouble concentrating and sleeping, and feels unsafe and anxious. “Though they may not beat you, the conditions force you into submission; they kill you psychologically.”*

Amnesty International expresses serious concern about the fact that the conditions under which migrants and asylum-seekers are detained are similar to those in regular (remand) prisons and that migrants and (rejected) asylum-seekers are held under a regime that is based on one designed for regular prisons. Despite the fact that under all regimes individuals may not be further restricted in the exercise of their rights than is necessary to safeguard their presence in the detention centre or to maintain the safety and order in the facility,<sup>109</sup> most migrants experience and describe the regimes as “harsh” and even “inhuman”. They complain, in particular, about inadequate medical care, poor access to their lawyers and humiliating routine procedures.

### **Caroline**

*Awaiting expulsion to another European country on the basis of a Dublin claim, Caroline (33) spent two months in administrative detention.*

*She told Amnesty International: “The thing that upset me most was the humiliating experience of having to squat naked. This happened when I entered the detention centre. Removing my clothes, however, brings back bad memories for me. I also cannot understand the necessity. When you go to*

*court and return to the centre, they make you squat again. But why? The whole day you sit in a cell and only see guards. They just want to humiliate you.”*

*Squatting naked is part of the safety procedures. Detainees are made to do so to check that they are not hiding anything inside their body cavities. Caroline refused to strip and squat after she went to court, and was reportedly put in isolation for two days.*

A series of 61 in-depth interviews with irregular migrants and asylum-seekers in detention in 2004 showed similar anger and frustration about the regime, and about the fact that people feel that they are treated “as criminals”.<sup>110</sup>

Amnesty International emphasizes the essential role of lawyers in *habeas corpus* proceedings. As such, the organization welcomes the announcement by the Legal Aid Council (*Raad voor de Rechtsbijstand*) to make a high level of knowledge of immigration detention and relevant legislation mandatory for lawyers seeking financial assistance for their work. This will be done through enhanced training and the development of a best practice guide on immigration detention.<sup>111</sup> The guide will serve as a reference in cases of complaint against lawyers.

In addition, Amnesty International welcomes plans for the establishment of an information service<sup>112</sup> within immigration detention centres to which detainees can turn with questions about their rights and other legal issues, but regrets the delay in setting it up. In its research Amnesty International noted strong support for such a service among detainees and organizations. Amnesty International strongly recommends that such a service should be able to work independently of prison management. Moreover, personnel working for the information service should be sufficiently well trained to identify important migration related issues, such as possible victims of human trafficking and other vulnerable groups.

Amnesty International points out that international regional human rights standards, like the Council of Europe's Twenty Guidelines on Forced Return and the CPT argue that:

*...care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a “carceral” [prison] environment<sup>113</sup>*

and that:

*A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence. In view of the CPT, in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.<sup>114</sup>*

In its report on the visit carried out in the Netherlands in 2007, the CPT found the detention boats unsuitable for long-stay detention. Although the CPT regarded living conditions to be acceptable, the lack of space created “an oppressive environment”. In addition, there was poor ventilation and an unsuitable outdoor yard for detainees in isolation, providing hardly any fresh air. It recommended ceasing the use of the detention boats at the earliest possible opportunity. In addition, the CPT recommended introducing an absolute maximum time limit on immigration detention and was critical about the increasingly austere detention regimes for irregular migrants, illustrated by the lack of recreational possibilities and the fact that people were confined to their cells for some 21 hours per day.<sup>115</sup>

*It has been over 10 years since the CPT last visited an immigration detention centre in the Netherlands and the delegation noted the extent to which the Dutch approach to the administrative detention of immigration detainees has changed, largely duplicating the transformation in the prison system. Indeed, both forms of detention are linked by Article 9 of the Penitentiary Principles Act. Facilities used for the administrative detention of immigration detainees, such as the two detention boats, are classified as remand prisons; thus, the regime applied to immigration detainees is similar to that of remand prisoners.<sup>116</sup>*

Amnesty International is disappointed by the Dutch government's refusal to implement the CPT's recommendations regarding the introduction of an absolute time limit on immigration detention and the closure of the detention boats, and urges it to change its position. Regarding the closure of the detention boats, the Dutch government has responded by saying that the boats will be phased out over time. The *Reno* in Rotterdam has been closed and the government is planning to close the *Stockholm* in Rotterdam during the second half of 2008. However the government is refusing to close the *Kalmar* in Dordrecht since this boat has just become operational and a five-year contract has been signed.<sup>117</sup> The platforms in Zaandam (which were not visited by the CPT) are not considered to be a boat and will remain operational.

### 3.6 Duration of immigration detention

The Netherlands is one of the few European countries that do not have a statutory limitation for administrative detention of irregular migrants, in either of the two forms of administrative detention.<sup>118</sup> In practice, however, jurisprudence has developed a general maximum duration of six months. During six months they can be detained as long as there is a continued intention to expel them, and no exceptional circumstances are in play. Circumstances which prolong the immigration detention beyond six months are the existence of an exclusion order (being an "undesirable alien"), a criminal record, when the alien frustrates any investigation into his identity or nationality, the initiation of one or more procedures with a view to stalling the expulsion or when the removal will take place shortly after the expiry of the six month period. The six month period will be shorter when a cooperative alien cannot be removed due to circumstances beyond his control, when the immigration service is inactive or when there are other reasons for considering that the removal will be unlikely.<sup>119</sup>

*No explicit international law standard or jurisprudence exists which sets a clear limit on the duration of detention. Generally speaking, the period of detention may affect the assessment of the arbitrariness of the detention measure. As was indicated by the European Court of Human Rights in *Saadi v United Kingdom* in 2006, detention could be arbitrary on account of its length,<sup>120</sup> although no clear time limits have so far been set by the Court or the UN Human Rights Treaty monitoring bodies. However, it is clear that detention should not be for excessive periods and should be proportionate to its lawful purpose; detention should in all cases be justified.<sup>121</sup>*

Recently, representatives of the EU Member States agreed on the position of the European Council with regard to a directive on common standards and procedures for returning illegally staying third country nationals (Returns Directive). The European Parliament's approval is needed for the Returns Directive to be adopted and it is expected to vote in plenary on this directive in June 2008. The compromise text allows detention for the purpose of removal for up to 18 months. Amnesty International considers such a long period of detention to be excessive, disproportionate and therefore unacceptable as a common EU

standard.<sup>122</sup>

An initial proposal by the government in 2002 to allow for the *indefinite* detention of irregular migrants was not further pursued after the Advisory Commission on Aliens Affairs advised against it.<sup>123</sup> However, the State Secretary recently reaffirmed her “policy to in principle detain irregular migrants until their effective return”.<sup>124</sup>

Over the years the *average* detention period in the Netherlands has increased from one month to three months in 2007;<sup>125</sup> this is due to the fact that countries such as Romania and Bulgaria entered the EU, which were previously the source of a significant group of irregular migrants. Romanian and Bulgarian nationals could be returned to their countries of origin within a short period, so their average stay in detention was three to five days, which lowered the average detention period. These figures, however, do not reveal the sometimes excessive detention periods that can exceed 12 months.<sup>126</sup> Various immigration lawyers however, stress that many of the rejected asylum-seekers from conflict ridden countries are affected more by long detention periods than irregular migrants who come from relatively more stable places.

The length of the detention period is greatly contested topic in individual cases and is one of the most frequently heard complaints among irregular migrants. In response to such complaints, the government merely points to an alleged lack of cooperation, or even to obstruction on the part of the migrant.

### **Tensing**

*In 2005, Amnesty International intervened in the case of Tensing (23), a Nepalese national, because of his prolonged detention. His asylum application – filed in 2004 – was rejected during the accelerated asylum procedure at Schiphol Airport. Tensing was subsequently detained awaiting his removal.*

*Due to the unstable political and security situation in Nepal at the time, Tensing filed a new application in 2005, by which time he had spent almost nine months in detention. Although the new application was rejected by the Dutch Immigration Service (IND), the district court upheld an interim measure with regard to the “worsening situation as it appears from the Dutch Country Report in combination with the most recent developments”, such as the declaration of the state of emergency.*

*Despite this ruling, the district court dealing with the lawfulness of the detention, found grounds to continue Tensing’s detention. The court argued that, since the IND is not allowed to continue its expulsion activities pending the new application, the new application contributed significantly to the duration of the detention.*

*Amnesty International’s intervention<sup>127</sup> was critical of the long duration of Tensing’s detention and stressed that international human rights law contains a strong presumption against detention of asylum-seekers. The letter was to no avail; the District Court did not lift the detention.<sup>128</sup> Only after spending 16 months in detention, was Tensing eventually released and left destitute.*

In 2006 the length of detention and its proportionality was the subject of litigation with particular regard to the very basic facilities on the detention boats in Rotterdam. Although there is no statutory limitation on the length of detention on these boats, the Supervisory Commission (*Commissie van Toezicht*) acknowledged the fact that extensive detention in these conditions leads to physical and mental problems. The Commission ruled that after a duration of 10 months the regime should be adjusted.<sup>129</sup>

Due to the limited freedom of movement and lack of privacy on the detention boats, the Appeals Court of The Hague ruled that administrative detention in such a detention centre would violate Article 8 of the ECHR if it continued beyond a duration of six months.<sup>130</sup>

Amnesty International has serious concerns about the extensive periods that some individuals spend in immigration detention, particularly where an asylum application is filed during detention but the incarceration is not always lifted, even in cases where interim measures (a preliminary injunction) have been won.<sup>131</sup> Amnesty International recommends that, in cases in which an interim measure is granted and expulsion will therefore not take place shortly, detention should be lifted.

### **Peter**

*Rejected asylum-seeker from Liberia, 40-year-old Peter was expelled twice on the basis of documents provided by his country's embassy. In both cases, however, the local Liberian authorities refused him entry on the basis that his travel documents were allegedly false.*

*The first expulsion resulted in Peter being sent back to the Netherlands on the same plane on which he had been expelled. During the second expulsion, however, he was taken into custody by the local authorities and spent a month in immigration detention before again being sent back to the Netherlands. Peter's continued detention – in the Netherlands and in his home country – lasted a total of 13 months, before the Dutch government eventually released him and left him destitute.*

### **3.7 Alternatives to immigration detention**

International human rights law attaches great value to the right to liberty. The detention of migrants is a drastic limitation of this fundamental human right and, as such, merits active assessment and the use of alternatives to detention. In the Netherlands, however, alternatives to detention for migrants and asylum-seekers are hardly considered,<sup>132</sup> despite the fact that the Aliens Act 2000 contains several other possibilities, such as a duty to report regularly.<sup>133</sup>

The State Secretary of Justice is granted discretionary powers to establish grounds for immigration detention and of the use of possible alternatives;<sup>134</sup> courts may only marginally scrutinize these powers. However, alternatives to detention are hardly used in practice.<sup>135</sup> Amnesty International's research shows that in detention cases the grounds for ordering the detention are given, but that there is a lack of substantive arguments for not using alternatives to immigration detention in particular cases, such as a reporting measure or providing a surety. The existence of a former criminal background, the mere absence of official registration or an address, and a lack of financial means are considered sufficient grounds to show that there is a risk of absconding.

Amnesty International recommends that the government use alternative non-custodial measures, with detention being a measure of last resort only if, in each individual case, it is demonstrated that it is a necessary and proportionate measure that conforms with international law.

Amnesty International points out that the mere fact that someone has committed a criminal offence, for which the person was prosecuted, does not in itself establish a risk of absconding. Neither does the absence of official registration, which is not even possible for irregular migrants. In many cases there are friends, family or shelter homes that could serve as a contact address. International human rights standards require the authorities to substantiate the risk of an individual absconding and accordingly justify the decision to detain them, in each individual case.<sup>136</sup>

The lack of alternatives to detention is particularly harmful in the case of vulnerable groups such as children and unaccompanied minors. The independent expert for the UN, Paulo Sergio Pinheiro, in his report on violence against children stressed:

*Detention should be reserved for child offenders who are assessed as posing a real danger to others, and significant resources should be invested in alternative arrangements...*<sup>137</sup>

In a case before the Council of State in October 2007, the Council condoned the Dutch government's defence that only alternatives presented by the migrant should be examined and that the government does not have an independent responsibility to seek alternatives to the detention of migrant children.<sup>138</sup> Amnesty International rejects the government's point of view. Since international human rights standards contain a strong presumption against the detention of migrants and asylum-seekers, the state should actively seek alternative solutions to immigration detention.<sup>139</sup> This holds for all migrants. With regard to children, Amnesty International emphasizes the particular obligations laid down in the UN Convention on the Rights of the Child which states in Article 37 (b):

*The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*<sup>140</sup>

In this respect, in order to protect "the best interests of the child" – including by avoiding having children unnecessarily separated from their families – and to ensure that administrative detention is used only as a measure of last resort, the authorities must limit and decrease the use of immigration detention for irregular migrants.<sup>141</sup>

Although Amnesty International welcomes the announcement in the 2008 State Budget that more use would be made of alternatives to administrative detention, in particular with regard to families with children, an addition of 140 cells for the immigration detention of migrants seems to contradict such promises.<sup>142</sup>

## 4 THE USE OF EXCLUSION ORDERS

*The penalization of people present on an irregular basis will lead to a further marginalization of the irregular migrant and therefore to possible further criminalization. Irregular migrants will be forced to fall back on survival crimes even more, which will lead to more inconvenience for society. Moreover, it is likely that it will also lead to an increase in other crimes such as identity fraud and human trafficking,*

Former acting Minister Donner of Alien and Integration Affairs on penalizing irregular migration.<sup>143</sup>

The Aliens Act 2000 contains the possibility of imposing an exclusion order on a migrant or an asylum-seeker by declaring him or her to be an “undesirable alien”. This administrative measure is used in conjunction with an expulsion order with the intention of protecting the Netherlands against further public order infractions by the designated person.

The consequences of an exclusion order are severe. A migrant confronted with such an order no longer has the right to reside lawfully in the Netherlands. An “undesirable alien” cannot acquire any form of residence, including refugee status.<sup>144</sup> Moreover, the exclusion order does not allow for a pending application for residence, including an asylum application to have the effect of suspending expulsion proceedings. An undesirable alien has no longer right to shelter and basic facilities. Finally, the exclusion order makes continued presence in or a return to the Netherlands a crime, which carries a maximum prison sentence of six months.<sup>145</sup> The goal of declaring people undesirable aliens is to ensure that the migrants comply with the order to leave the country and to ensure that they do not return.

The exclusion order is an individual measure and should be imposed only after scrutiny of a migrant’s personal circumstances. Being a public order measure, the exclusion order can be invoked as grounds for extending the duration of administrative detention beyond the six month scrutiny period with a view to a speedy expulsion.<sup>146</sup> Recently, the State Secretary of Justice confirmed that her policy was to “in principle detain people until they [can] return”.<sup>147</sup>

An unconditional prison sentence for a crime carrying a sentence of three years or more can lead to the withdrawal of a legally residing migrant’s residence permit. In most cases such withdrawal is accompanied by the imposition of an exclusion order. The longer the migrant’s legal residence in the Netherlands, the longer the unconditional sentence needs to be for an exclusion order to be imposed. However, when the Aliens Act 2000 came into force, the threshold for withdrawal of a residence permit was lowered to a minimum of a nine-months sentence – and then to a minimum of one month in 2002.<sup>148</sup>

For irregular migrants without a residence permit, broader possibilities exist for imposing an exclusion order. An unconditional prison sentence of one month already suffices. In the case of repeated crimes, the mere repetition of criminal activity is sufficient grounds for imposing the order, even in cases where the prosecution has only incurred a fine.<sup>149</sup> Furthermore, an exclusion order can be imposed on migrants who repeatedly (meaning twice or more) violate immigration regulations, such as a duty to report, or who are otherwise considered a threat to public order or national security, following a treaty obligation or in the interests of the Netherlands’ international relations.<sup>150</sup> Amnesty International opposes the practice of declaring minor offenders or people who have violated the Aliens Act 2000 to be undesirable. The organization believes the imposition of exclusion orders can violate the obligations as laid down in the 1951 Refugee Convention.

### **Pierre**

*Before Pierre filed an asylum application in 2004 (he was then 17), he had already seen and experienced a considerable amount of violence, such as losing his mother during a bombing, being raped by four soldiers and being forced to witness the rape of others.*

*However, various psychological impediments prevented him from telling the whole story, in particular of the sexual violence. As a result his asylum application was rejected for not being “weighty enough”. Following this rejection he was left destitute.*

*Pierre was later discovered when he was illegally working to survive. He was sentenced to two months imprisonment for showing a false ID, and was declared an “undesirable alien”, making any prospect of being granted a residence permit bleak, including through a new asylum application. In addition he spent some eight months in administrative detention in 2006 before he was again left destitute. He told Amnesty International: “The period in immigration detention is when the feeling started of ‘being dead’; it hasn’t left me since.”*

*A later medical examination by Amnesty International, made with the aim of assisting a new application, confirmed the causal link between Pierre’s history and his medical complaints.*

The duration of an exclusion order can be one year for multiple violations of immigration regulations or five years for all categories of crimes, except crimes involving drugs or violence. For the latter crimes the order lasts 10 years.<sup>151</sup> Repeated criminal activities during the time of an exclusion order result in the period starting anew. After expiry of the period for which the order was imposed, it does not automatically end; an explicit request to lift the order needs to be filed by the person concerned. However, in practice, the burden of proof for lifting an exclusion order is extremely high; for example one has to show proof of a continuous stay outside the Netherlands during the period that the order was in effect.

Although the government has refused to penalize mere irregular presence as such, a parliamentary call for a more systematic use of exclusion orders caused the number of such orders to rise significantly, which amounts to a *de facto* penalization of irregular presence. Whereas in 2000, exclusion orders were imposed on fewer than 1,000 irregular migrants, by 2005, the number of exclusion orders had doubled to more than 2,100.<sup>152</sup> Though research suggests that exclusion orders are ineffective in persuading irregular migrants to make the decision to return,<sup>153</sup> the measure is embraced by politicians and policy makers alike as an important tool against irregular migration. In an interview, the State Secretary of Justice Mrs. Nebahat Albayrak said:<sup>154</sup>

*People who have twice failed to report (to the authorities) as aliens are obliged to do, are declared “undesirable aliens”. After that you are simply committing a criminal offence when you stay on. It is one of the most important instruments we have in our fight against illegal criminals.<sup>155</sup>*

The increasingly standardized use of exclusion orders fits in with the restrictive immigration approach of the Netherlands.<sup>156</sup> Moreover, the State Secretary of Justice recently announced a one-year pilot project to study the effectiveness of an increased use of exclusion orders for violations of immigration regulations under the Aliens Act 2000.<sup>157</sup> The current government position represents a significant shift from the position taken in 2005, when former Minister of Justice Piet Hein Donner acknowledged that:

*the penalization of irregular presence will lead to a further marginalization of the irregular migrant and therefore to possible further criminalization. Irregular migrants will be forced even more to fall back on survival crimes, which will lead to more inconvenience for society.<sup>158</sup>*

Amnesty International is concerned about the increased use of exclusion orders and the plans to expand their application to violations of immigration regulations. Effectively, such measures introduce a broad range of situations that create a general punishment for irregular presence, despite this being rejected only a few years ago. The increased use of exclusion orders already brings irregular migrants into the realm of criminal law.

Amnesty International fears that such measures constitute a further criminalization of irregular migrants and will reinforce stereotypes and public prejudices about all irregular migrants being “criminals”, including rejected asylum-seekers. Moreover, a more standardized use of exclusion orders and increased detention – in combination with a limited judicial review, since the court is only allowed to marginally review the decision of the Immigration Service to detain a person – seriously undermine the human rights of the individuals who find themselves in an irregular situation, particularly their rights to liberty and freedom of movement.

The announced measure may impact heavily on rejected asylum-seekers who are genuinely considering a subsequent asylum application. Amnesty International's experience over the years has shown that the current accelerated asylum procedure does not always allow asylum-seekers, in particular members of vulnerable groups such as traumatized people, to present a coherent detailed account of their experiences of persecution. An independent commission of experts concluded in its evaluation of the Aliens Act 2000 that the emphasis in the accelerated asylum procedure appears to be on examination within 48 hours, at the expense of the quality of the decision.<sup>159</sup>

Amnesty International considers exclusion orders a blunt instrument, which should not be used except in cases involving people who actively and objectively pose a serious threat to public order or national security, without prejudice to the Netherlands obligations under the principle of non-refoulement.<sup>160</sup>

Irregular migrants and asylum-seekers who are considered a threat to public order or national security and who cannot be returned to their country of origin or a third country should not be confronted with an exclusion order. In such cases Amnesty International considers the use of exclusion orders to be unnecessarily punitive and stigmatizing.

### 4.1 Article 1F of the Refugee Convention: punishment without prosecution?

#### Article 1F of the 1951 Refugee Convention states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- *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;*
- *He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
- *He has been guilty of acts contrary to the purposes and principles of the United Nations.*

A group of individuals particularly affected by the use of exclusion orders are those against whom there are “serious reasons for considering” that they have allegedly committed crimes against humanity or war crimes, who are excluded from protection

## THE USE OF EXCLUSION ORDERS

under the 1951 Refugee Convention.<sup>161</sup> In contrast to paragraph 31 of the UNHCR Guidelines, the Dutch asylum determination process considers the application of the exclusion clause of Article 1F before a decision on *inclusion* is taken.<sup>162</sup> Amnesty International repeatedly stressed the need to follow the UNHCR Guidelines.<sup>163</sup> Once an exclusion decision is taken, the person in question is no longer entitled to any form of legal residence.<sup>164</sup> Moreover, the case is then forwarded to the public prosecutor to investigate the possibilities of a criminal prosecution.

Amnesty International welcomes the Dutch government's willingness effectively to exclude people who are not eligible for protection under the Refugee Convention, and its intention to prosecute alleged perpetrators of crimes against humanity and war crimes. However, the organization also notes the growing gap between the exclusion of asylum-seekers and the effective criminal prosecution of such perpetrators.<sup>165</sup> Until the end of 2007, only three cases had led to successful prosecutions.<sup>166</sup>

Amnesty International is alarmed by the growing group of rejected asylum-seekers who are left destitute after they have been excluded on the basis of Article 1F but who cannot be returned to their countries. This has become particularly pressing with the standard imposition of exclusion orders on this group of rejected asylum-seekers even in cases where the individual cannot be returned to their country of origin as they would be at risk of torture or inhuman or degrading treatment. This approach makes their continued presence in the Netherlands a crime under Article 197 of the Criminal Code, which carries a maximum penalty of six months imprisonment.<sup>167</sup> Moreover, the exclusion clause and the exclusion order are both public order grounds legitimizing prolonged immigration detention.

At present the group of excluded asylum-seekers remaining in the Netherlands comprises some 700 people (with another 800 family members).<sup>168</sup>

### **Hamid**

*Soon after Hamid (32) arrived in the Netherlands his asylum request was rejected because the IND found that "there were serious reasons for considering" that he had committed one of the crimes mentioned in Article 1F of the Refugee Convention.*

*As a result, Hamid's asylum application was rejected and an exclusion order was imposed. Despite the fact that his lawyer filed a request for a preliminary injunction to avoid expulsion while the appeal was pending, Hamid was detained during his duty to report periodically in the reception centre where he was staying.*

*Arguments put forward by his lawyer that no actual expulsions took place, and pointing out the absence of concrete and individual indications of a risk of absconding, were of no avail. Subsequent decisions by the district court approved his continued detention. Hamid was released in February 2008 after six months.*

Family members of excluded asylum-seekers often share the same fate, even if they have no link to the crimes described in Article 1F.<sup>169</sup> In light of the recent amnesty for rejected asylum-seekers,<sup>170</sup> Amnesty International called upon the Dutch government to allow such family members to be eligible for the amnesty, which would allow them full enjoyment of basic human rights laid down in important human rights instruments such as the Convention on the Rights of the Child.<sup>171</sup>

### **Sherif**

*Following the regime change in his country, Sherif (57) fled “to find protection from the new regime”. However, because of his former job in one of the ministries of the regime, he was excluded from refugee protection on the basis of Article 1F of the Refugee Convention.*

*During the legal proceedings, his children and wife arrived in the Netherlands. While his children were recognized as Convention Refugees, and currently hold Dutch nationality, the application by Sherif’s wife was rejected on the same grounds as Sherif’s.*

*In 2007, almost seven years after arriving in the Netherlands, Sherif was declared an “undesirable alien” and was detained. According to the Dutch government there was no issue of non-refoulement where Sherif was concerned. However, despite being well documented, the authorities of his country refused to provide the necessary travel documents. Therefore he could not be expelled to his country and was released and left destitute after spending six months in immigration detention.*

*By remaining in the Netherlands to stay with his family, his presence now constitutes a crime for which he can be arrested and sentenced to six months in criminal detention.*

A recent comparison between European countries shows that other countries use the exclusion clause in a more restricted manner than the Netherlands. Apart from Luxemburg no other country automatically imposes additional exclusion orders on excluded asylum-seekers, even when most of these countries face similar non-refoulement limitations, which prevent the expulsion of excluded asylum-seekers.<sup>172</sup>

In its letter of 14 November 2007, the UNHCR criticized the Dutch government’s approach of routinely excluding certain categories of asylum-seekers without establishing concrete individual responsibility.<sup>173</sup> The UNHCR is of the opinion that the Dutch government’s approach is deemed not to conform with the requirements of the exclusion clause under Article 1F of the Refugee Convention.<sup>174</sup> Similarly, like Amnesty International, the Dutch section of the International Commission of Jurists (*Nederlands Juristen Comité voor de Mensenrechten, NJCM*) criticized the gap between the failure to effectively prosecute alleged perpetrators of serious human rights violations and the broad application of the exclusion clause, which has the effect of leaving hundreds of people destitute.

*We need to call an end to the situation in which persons excluded under Article 1F, who cannot reside here, cannot be expelled because of Article 3 ECHR, but are also not prosecuted for their acts, find themselves. The International Commission of Jurists request you (the State Secretary of Justice) to investigate the options for granting temporary residence permits. One possibility would be to grant temporary permits after five years ... Because war crimes do not expire, criminal prosecution will always remain an option. <sup>175</sup>*

Amnesty International supports NJCM’s call to explore the possibilities of granting temporary residence permits in cases where people cannot be returned, since there is no statutory limitation to prosecuting the types of crimes in Article 1F.

## 4.2 Irregular migration and crime

One of the results of effectively bringing irregular migration into the realm of criminal law is a growing tendency to automatically link irregular migration with crime. The 2002 Coalition Agreement put the issue of penalizing irregular migration on the political agenda; it was expected that this would not only be a powerful signal but that it would deter new arrivals. Eventually, the government chose *not* to penalize irregular migration as such.<sup>176</sup> Former Minister of Justice Piet Hein Donner expected that penalizing irregular migration would not have the intended deterrent effect, since the sanctions would be difficult to apply. Irregular migrants would be further marginalized and would be even more likely to commit crimes in order to survive.<sup>177</sup>

In addition, prosecuting such crimes was expected to impact heavily on the already limited capacity of the justice system. It was expected that it would be more effective to increase indirect penalization by expanding the use of exclusion orders (declaring an irregular migrant an “undesirable alien”), following concrete breaches of the law.<sup>178</sup>

A 2002 study by researchers at Erasmus University Rotterdam on irregular migrants in police statistics, showed that more than half of them appeared in police records because of offences under the Aliens Act 2000 or violations of municipal by-laws. Many of these crimes concerned crimes committed by people in order to survive. The increased number of restrictive legislative and policy measures – leading to further marginalization and increased vulnerability – was seen as the major cause of the unexpected and unwanted increase in such crimes.<sup>179</sup> However, the Dutch government acknowledges that most irregular migrants are law abiding.<sup>180</sup>

Nevertheless, research shows that public perception of irregular migration has been influenced by such links being made.<sup>181</sup> Undoubtedly, this has added to the increased efforts to prosecute migrants who have committed criminal offences.<sup>182</sup> One of the more controversial issues in this context was the announcement in October 2006 of a more results oriented approach by police forces, with numerical “targets” regarding prioritized tracing of criminal migrants and migration-related crimes.<sup>183</sup>

A target of stopping 11,883 irregular migrants was set for 2007.<sup>184</sup> Along with the number of migrants involved, the financial bonus for reaching the target generated a public outcry and accusations of “man hunting” of irregular migrants and asylum-seekers. The former Minister for Alien Affairs and Integration publicly defended the policy by pointing out that it was primarily directed against criminal irregular migrants, and that the arrest of irregular migrants was surrounded with sufficient legal remedies and guarantees.<sup>185</sup> A police raid at an African party in Amsterdam, however, created renewed public unrest in neighbourhoods where large numbers of irregular migrants live.

### **Targeting criminal migrants?**

*On the night of 15-16 June 2007, 80 Amsterdam police officers raided a Nigerian party at café Het Vervolg in the south-eastern part of the city, which has a sizeable migrant population. The police operation, codenamed Phantom, led to the arrest of 103 of the 250 visitors, most of whom were of African origin; 67 of them were detained or expelled.<sup>186</sup>*

*According to a leaflet distributed by the police, their research had identified the café as a meeting point for West African “irregular migrants involved in criminal activities” such as internet fraud, human and drugs trafficking and prostitution. The police found reasons for further criminal investigation in the case of 37 of the 103 arrested persons. The office of the Public Prosecutor informed Amnesty International that eight people were subpoenaed for possession of false identity papers.<sup>187</sup>*

*In subsequent court cases and in the Municipal Council of Amsterdam, the police were accused by the lawyers of the people who had been arrested of going on a “manhunt for irregular migrants”.*

*The Amsterdam district court declared the arrests made that night to be “unlawful” on the grounds that*

## THE USE OF EXCLUSION ORDERS

*there was not “reasonable suspicion” that the people at the party were irregular migrants. The district court ruled that there is a need to take into account the public character of the location and the size of the crowd present. The larger the number of persons present and the more public the location, the greater the violation on “public life” is. However, in parallel proceedings, the district courts of Utrecht and The Hague found the arrests to be lawful.<sup>188</sup>*

*Eventually, the Council of State (Raad van State) overruled the Amsterdam district court’s judgement in its decision of 30 July 2007.<sup>189</sup> It stated that the information leading up to the raid was sufficient to make the raid lawful. The fact that the party was held in a public location (a café) did not lead to the conclusion that the burden of proof for “reasonable suspicion” should be raised.*

Amnesty International opposes the criminalization of irregular migration; the organization believes it can only lead to increased vulnerability and marginalization of irregular migrants and (rejected) asylum-seekers and urges the government to uphold their dignity and human rights and protect them from situations of destitution and abuse by criminals that can force them into illegal activities in order to survive.<sup>190</sup>

## 5 ALLEGATIONS OF ILL-TREATMENT AND THE EXCESSIVE USE OF FORCE

*...it will often be a difficult task to enforce an expulsion order in respect of a foreign national who is determined to stay on a State's territory. Law enforcement officials may on occasion have to use force in order to effect such a removal. However, the force used should be no more than is reasonably necessary. It would, in particular, be entirely unacceptable for persons subject to an expulsion order to be physically assaulted as a form of persuasion to board a means of transport or as punishment for not having done so*

CPT Standards<sup>191</sup>

Immigration detention inherently entails a level of suffering, often expressed through strong emotional reactions in the people concerned. Most complained of the length of their detention and the feeling of being “debased as a human being” or “treated as criminals”. Various people interviewed by Amnesty International expressed anxiety, frustration and anger. Families and friends voiced similar concerns and complaints. Whilst a level of suffering and distress is unavoidable, the authorities must respect the absolute prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment at all times. In this report the term ‘ill-treatment’ refers to a variety of treatment that constitutes cruel, inhuman and degrading treatment or punishment and in some instances may amount to torture.

Amnesty International reviewed the various reports and allegations it received against the background of the absolute prohibition of ill-treatment of detainees, regardless of their legal status. Or in the words of the European Court of Human Rights:

*...Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour.*

*...the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.<sup>192</sup>*

Amnesty International was particularly alarmed by the repeated reports and allegations of ill-treatment of irregular migrants and asylum-seekers received in 2007-2008. Moreover, such allegations included complaints about ineffective investigations or other forms of follow-up into reports of ill-treatment.

The December 2007 CPT report stated that during its 2007 visit from 4-14 June the CPT did not encounter “allegations of recent physical ill treatment”.<sup>193</sup> However, it did mention three cases of ill-treatment, one in 2004 and two in 2006.<sup>194</sup>

Based on its own findings, Amnesty International shares the CPT's concerns about the current ineffective procedures by which independent investigators examine allegations of ill-treatment. The CPT identified the absence of a comprehensive procedure on how to deal with allegations of ill-treatment. The involvement of the National Agency of Correctional Institutions is not mandatory. Instead, responsibility for dealing with allegations of ill-treatment is left in the hands of the director of the establishment concerned.<sup>195</sup>

Amnesty International is even more concerned about the discovery by both the CPT and Amnesty International itself that

such allegations seem to have been “softened”, concealed in investigative reports or reported with apparent bias in favour of the alleged perpetrators.<sup>196</sup>

Amnesty International’s research shows that: allegations of ill-treatment are not systematically followed by prompt and full independent investigations; a clear judicial review of allegations of disproportionate use of violence is lacking; relevant stakeholders, such as witnesses, staff, lawyers and family members, are not informed nor interviewed; and those suspected of being involved in abuses are often not held to account.

### **Jamil**

*In September 2007, Jamil was collected from the Detention Centre by members of the Transport and Support Service (Dienst Vervoer & Ondersteuning, DV&O) to be presented to his embassy so they could arrange for travel documents.*

*Upon arrival at the embassy the car was parked some distance away. Initially, Jamil cooperated in being handcuffed but later resisted when it became clear that he had to walk some distance from the van to the embassy in public.*

*During the struggle, Jamil was reportedly painfully pulled by his handcuffs and beaten with a short baton by one of the personnel. During an internal investigation the latter denied beating Jamil with a short baton.*

*As a result of the struggle, eventually the presentation was cancelled. When Jamil returned to the Detention Centre later that day, no mention was made to the prison authorities of “irregularities” taking place during the presentation.<sup>197</sup> Jamil, however, complained about pain in his neck, shoulder and back, and had severely bruised wrists. A prompt medical check up confirmed Jamil’s medical complaints and discovered slashes on his back, neck and shoulder. According to Jamil, these were caused by being beaten and pressed with the baton. Jamil’s lawyer, who visited him two days later, took photographs of the injuries and asked for an investigation into the allegations.*

*The internal investigation conducted by DV&O itself revealed that, particularly with regard to the alleged use of the baton to beat Jamil, unclear statements existed; witnesses (staff) neither confirmed nor denied that Jamil was beaten with the baton. This was not further explored. The investigative report further emphasized, in particular, the seemingly excusable elements of the transporters’ actions, demonstrating an apparent bias in favour of the personnel accompanying him. In addition, forensic investigative questions were apparently only asked some two months after the alleged event.*

*Amnesty International has expressed serious concern about the failure to initiate a prompt, thorough and impartial investigation into this incident. The investigative conclusion by the DV&O, that “no disproportionate violence was used”, cannot be based on the findings of the medical reports and the statements.*

In 2006, a television network broadcast allegations by former Royal Constabulary Officers of violence against irregular migrants and rejected asylum-seekers during their expulsion by members of the Constabulary. In response, the Dutch government asked the independent and external Supervisory Commission on Expulsions, to investigate the allegations.<sup>198</sup> In its May 2007 report, the Commission concluded that no “structural excessive violence” is used by the Royal Constabulary but that “incidental

improvised violence” does occur. The Commission stressed, however, that since 2004 the Royal Constabulary had improved its procedures and limited its discretionary powers to use force. As such, the Commission was of the opinion that the television broadcast did not reflect the current state of the expulsion process.<sup>199</sup>

In this particular instance a fairly broad investigation was carried out into the activities of the Royal Constabulary Officers. However, this has not been the case regarding equally serious allegations of ill-treatment of detained migrants and asylum-seekers by other governmental organizations, such as personnel working in detention centres, or members of the DV&O (the organisation responsible for transporting detainees within the Netherlands). Neither has there been an in depth investigation into allegations of inadequate medical care in immigration detention centres.

### 5.1 Isolation in detention

In accordance with national law, under some circumstances, an irregular migrant or asylum-seeker may be placed in an isolation cell. The Penitentiary Principles Act (PPA) and Juvenile Penitentiary Principles Act (JPPA) provide for the use of an isolation cell either as a disciplinary sanction or as a measure to maintain order (often called separation or observation) or for the protection of a detainee, for example during sickness or at a person’s own request.<sup>200</sup> The difference between the two forms of isolation is that the “separation” is used on medical grounds and lasts for an indefinite period, while isolation as a sanction is imposed for a fixed and known period of time.<sup>201</sup> The Regulation on Border Accommodation (RBA) contains provisions for the use of an isolation cell for separation and observation only;<sup>202</sup> under this regime an isolation cell cannot be used as a disciplinary sanction.

Isolation can be imposed for a maximum period of two weeks under all regimes; after that it can only be prolonged beyond those two weeks for periods of two weeks at a time; there is no maximum limitation for the total duration of isolation. The director of the establishment is responsible for such decisions. The director must give reasons in writing for imposing isolation, and for the decision to extend the period of isolation beyond two weeks. Isolation as a measure to maintain order can be extended more easily than isolation as a sanction. Detainees may complain to the Complaints Commission about the imposition of an isolation cell. The PPA and JPPA provide for appeals of the Commission’s verdicts.

In practice, along with detainees who have been violent or have threatened violence, people on hunger strike, people with a mental illness and individuals awaiting transfer are reportedly placed in isolation cells up to several hours. Prior to entering an isolation cell all people are ordered to strip and receive clothing that rips easily to prevent suicide attempts. In some detention locations a mattress and a blanket are only provided to detainees at night during the period of isolation.

Furthermore, Amnesty International has received various reports of individuals being threatened with isolation by prison personnel as a means of maintaining order. While Amnesty International acknowledges the duty of prison authorities to maintain a safe and orderly environment in the detention facility, it is concerned about the frequency with which such reports reach the organization. These reports indicate that isolation is being used as a means of control, or that punishment is used frequently rather than as a last resort, and is imposed at the expense of medical or other considerations relating to the well being of the detainee, and contrary to international standards relating to the treatment of persons deprived of their liberty.

Placing a detainee in isolation can facilitate torture and other forms ill-treatment and can itself amount to a violation of the absolute prohibition of these forms of abuse. The Human Rights Committee has found violations of Article 7 of the ICCPR in cases where persons have been held in solitary confinement.<sup>203</sup> The European Committee for the Prevention of Torture (CPT) has stated that “a solitary confinement-type regime ... can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.”<sup>204</sup>

The European Prison Rules do not rule out the possibility of isolation as a form of punishment (so long as it is not done in

## ALLEGATIONS OF ILL-TREATMENT AND THE EXCESSIVE USE OF FORCE

a manner that would violate the prohibition against ill-treatment) but they also state that it should be used in exceptional cases only and for a specified time that should be as short as possible.<sup>205</sup>

Amnesty International's request for statistical data on the use of isolation cells evoked varying degrees of cooperation from Supervisory Commissions. Only a few readily provided such data. Amnesty International regrets that this information is not easily available in public sources.<sup>206</sup>

Amnesty International considers the complaints procedure in place for detainees in isolation to be an ineffective remedy because, in practice, the Complaints Commissions only review decisions to impose or prolong isolation, but do not consider themselves authorized to review the treatment or use of force against detainees before or during the isolation period. This restrictive interpretation of their mandate is contrary to the powers granted to the Commissions through legislation. For example, the RBA explicitly states that "an alien can forward any complaint arising out of or in relation to his stay in the [RBA] facility, to the Complaints Commission",<sup>207</sup> in practice the Complaints Commission seem reluctant to review the treatment within the facility, including in the isolation cells.

### **Diallo**

*Following his treatment in a psychiatric hospital, 27-year old Diallo was taken into immigration detention. During and following his asylum application he was treated for his psychiatric condition.*

*Some six weeks into his detention, Diallo was informed that he would be expelled the following day. Because he indicated that he would not cooperate, he was placed in isolation the night before his expulsion. Diallo violently resisted his transfer to the isolation cell and wounded one of the guards.*

*Because of his behaviour, the director of the detention centre decided that Diallo would be transferred to the national isolation unit in Vught, where he was taken after the deployment of an Internal Assistance Team (IAT).<sup>208</sup> According to Diallo's lawyer the IAT reportedly beat, kicked and cuffed him by the hands and feet to break Diallo's resistance. To prevent him from biting IAT personnel, a black hood was placed over his head.*

*Diallo's lawyer complained about a disproportionate use of force, including the use of a hood, considering Diallo's psychiatric condition. She also complained about the reported absence of a doctor and the unlawful prolongation of the isolation period – in total some four weeks – without reasons being given.*

*The Complaints Commission ruled that the prolongation of the time spent in isolation was indeed unlawful; Diallo was accorded compensation of €200 for the 20 days he unlawfully spent in isolation. The Commission, however, remained silent about the allegations of disproportionate use of force, and, despite the presence of medical documents, considered Diallo's medical condition "insufficiently concrete".*

The CPT has voiced similar concerns about the practice of isolation cells being used to threaten juveniles in immigration detention. Moreover, the CPT even discovered an adult migrant handcuffed whilst in isolation; the measure was reportedly taken to prevent him from tampering with the sprinkler installation within the cell. The CPT considered this treatment to be in conflict with the prohibition of ill-treatment.<sup>209</sup> Amnesty International shares these concerns and urges the Dutch government to immediately review and amend the use of isolation measures and ensure that they are imposed only for exceptional cases

and for a specified length of time, which should be as short as possible, in accordance with international standards. Amnesty International urges the Dutch government to give personnel, who are qualified for the purpose, instruction about the proper use of isolation measures.

### 5.2 The excessive use of force

As stated earlier, both the PPA and the JPPA are based on provisions meant principally for criminal detention. An important difference from the RBA immigration regime is that both the PPA and JPPA are themselves Acts, which contain administrative measures (for example visiting limitation, separation, transferral) and disciplinary punishment powers (for example isolation, fines), while the RBA is a regulation based on the Aliens Act 2000. In contrast to the PPA and JPPA, the RBA merely allows for the use of administrative measures against detainees who are subject to the regime.<sup>210</sup>

The PPA and the JPPA allow the director of a detention facility to use force against detainees, including irregular migrants and rejected asylum-seekers, in order to maintain or restore order and safety in the institutions to protect personnel and other detainees from imminent and dangerous situations.<sup>211</sup> In contrast to this, the RBA does not contain provisions on the use of force. The use of force is further regulated by the Use of Force Instruction for Penitentiary Institutions (*Geweldsinstructie penitentiaire inrichtingen*),<sup>212</sup> which allows the use of handcuffs, restraining trousers, other mechanical means and even firearms. In accordance with these regulations, any force should be proportional to the aim for which it is used. This safeguard is also laid down in various international human rights instruments, such as the United Nations *Code of Conduct for Law Enforcement Officials*:

*Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.<sup>213</sup> ... Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.<sup>214</sup>*

In cases of serious disturbances within a detention facility, an Internal Assistance Team (IAT) can be brought in to deal with the situation.<sup>215</sup> An IAT consists of personnel from the detention facility who have had special training in crowd control, weapon use and tactics. When they are deployed within a detention facility, all detainees are consigned to their cells, and other detention staff have to withdraw. The IAT is equipped with riot gear, including helmets and, if necessary, batons and shields. Amnesty International has received reports of the IAT using excessive force against detainees.

#### **Crackdown on detainees at Schiphol-Oost**

*In May 2006 a peaceful demonstration by a religious solidarity group gathered outside the fence of the detention centre Schiphol-Oost to protest against immigration detention. Their activities included a joint prayer, and they held banners with such words as "Freedom!" As the group arrived that day, they saw detainees being given outdoor exercise time in the cage-like construction attached to the centre. Both detainees and members of the group waved and called to each other.*

*However, the presence of the solidarity group caused unrest among the guards, who had not expected them. Police officers were sent to ask the group to leave, while the detainees were ordered to go inside. A dozen detainees protested against their exercise being cut short and wanted to stay*

out until their regular outdoor time was scheduled to end. When that time came they returned to their respective cells.

A member of the solidarity group told Amnesty International: "While some individuals stayed outside, several vans hastily entered the facility. It was scary to see; we left because of the nervous reactions of the guards and we didn't want to cause any trouble for the people in prison".

Soon after all detainees were back in their cells, the dozen who had protested were visited by the head of the detention department, who told them that, because of their disobedience, they were going to be transferred to "another room". One of the detainees, Wazo, told Amnesty International: "The head of the detention department asked me whether I was willing to cooperate, which I confirmed. My roommate however did not respond immediately and asked why he needed to cooperate since he had obeyed the order to go inside. Instead of a response, the door suddenly swung open and some five to seven men in riot gear entered the room and jumped on my roommate and me. They were very brutal and hurt me and my roommate, who was shouting in panic 'Don't kill me!' In a painful position we were brought to an isolation cell where I spent the next four days."

### **Foday**

The allegations of disproportionate use of force in this instance were repeated by other migrants, such as Foday: "I refused to go inside when the guards ordered us. I did not see the necessity to do so just because there is a group of people waving to us and holding up a banner saying 'Freedom for all'.

"Only, after the regular exercise time was over, we returned to our cells as usual. Shortly after – I was making my bed – the cell door suddenly swung open and three men wearing riot gear jumped on me and handcuffed me. I did not hear any warning; they just came in and were very aggressive. They took me to isolation where I had to strip, put on a boiler suit and stay in a cold cell without a mattress or blanket during daytime. The guards told me it was part of the punishment. There was also a camera in my cell, which could see me using the toilet. After two days I was transferred to another isolation cell where I spent some other days.

Foday is known to have a medical condition for which he received medication in the detention centre but he told Amnesty International that he did not receive adequate medical care or attention whilst in isolation. "I was not well in isolation: I had to vomit and could not always keep my medication inside. I also had to go to the toilet a lot. The first toilet didn't even work. What made things worse was that the guards put my food next to the toilet, even after I protested." Two months later Foday was released from the detention centre because of his medical condition.

Amnesty International interviewed several people involved in the incident, including the prison authorities, about the allegations of excessive use of force. Some of the detainees could not be reached because they had been expelled from the country.

In discussions with the prison authorities, the director of the detention centre referred to the incident as an "uprising". From reports received by Amnesty International it would be difficult to regard the incident as an uprising, since most of the detainees had already returned to their cells and were locked in before the IAT was deployed. Moreover, the director confirmed that only two people actively showed resistance during the transfer by the IAT from their cell to an isolation cell. Warnings do not seem

to have been given nor clearly understood in all cases before the use of force by the IAT. Moreover, because of the number of people placed in isolation, some of the migrants concerned ended up in cells with the lights permanently on and toilets that didn't work. In addition, some of the staff allegedly humiliated the individuals concerned by placing their food near the toilets. It appears that isolation was enforced as a form of punishment by the detention staff, contrary to the provisions of the RBA.

When considering one of the complaints made by the detainees concerned in this incident, the Complaints Commission held that the isolation order was lawful and that the complaints about the use of excessive use of force were inadmissible. Reviewing allegations under the RBA, which does not contain provisions on the use of force, the Commission held that it had no authority to make judgements on these aspects of the case.

### 5.3 Investigation and review of allegations of ill-treatment

All detention regimes and the activities of the director are monitored by the Supervisory Commission, and the Complaints Commission (chosen by and from among the members of the Supervisory Commission). The latter is allowed to review complaints by detainees.<sup>216</sup> However, irregular migrants and asylum-seekers detained under the PPA and JPPA – who constitute the majority of those held in immigration detention – may appeal against a rejected complaint to the Appeals Commission of the Council for the Sanction Application and Youth Protection.<sup>217</sup> The RBA offers no such possibility of appeal. Moreover, since formally the director may not use force against individuals detained under the RBA, the Complaints Commission is not authorized to consider claims of ill-treatment or excessive use of force even when they happen, which creates an unacceptable void in the protection of irregular migrants and asylum-seekers who are detained.

To address such issues, irregular migrants and asylum-seekers and their lawyers are currently forced to resort to civil proceedings or to report incidents of ill-treatment and excessive use of force to the police. In practice, such proceedings are fraught with difficulties and delay a prompt, thorough and independent investigation into such serious allegations. According to the CPT, internal investigative mechanisms are largely absent, and reporting allegations of ill-treatment to an investigative body of the National Agency of Correctional Institutions is not mandatory.<sup>218</sup> Despite reassurances in the Dutch government's response to the CPT's report, that an adequate procedure already exists,<sup>219</sup> Amnesty International has concerns about the promptness, thoroughness, independence and effectiveness of the procedures followed.

The organization is concerned by the findings of the CPT regarding three cases in Noordsingel remand prison (2004), in the Rotterdam Expulsion Centre (2006) and on the detention boat *Stockholm* (2006) of alleged ill-treatment.<sup>220</sup> One of the three cases (in the Rotterdam Expulsion Centre) has also been researched by Amnesty International, and raises serious concerns about the current complaints procedure for dealing with allegations of ill-treatment and excessive use of force. The organization urges the Dutch government when creating a regime specifically for immigration detention to introduce a complaint procedure as a matter of urgency, that ensures for any allegation of ill-treatment or excessive use of force to be investigated promptly, thoroughly and independently.

#### ***Ill-treatment in Expulsion Centre Zestienhoven<sup>221</sup>***

*On the morning of 27 June 2006, 40-year-old Simon was informed of his imminent expulsion to Nigeria. When he indicated that he did not want to return to his country and resisted, members of the Transport and Support Service (Dienst Vervoer & Ondersteuning, DV&O) and personnel of the Expulsion Centre with an IAT background used force to transfer Simon to his plane.*

*Reports received by Amnesty International indicate that the team, which is reported to consist of*

## ALLEGATIONS OF ILL-TREATMENT AND THE EXCESSIVE USE OF FORCE

*six people, used disproportionate force to restrain Simon. He was reportedly pushed against a wall and, when he fell, he was beaten and kicked in his throat and back during the ensuing struggle. As a result of the struggle, all parties reported injuries. Witnesses heard him crying for help and calling out: "Don't kill me, don't kill me!" before he fell silent for a short time. Later that day he was expelled to his country of origin.*

*The responsible Supervisory Commission of the detention facility confirmed that a complaint of disproportionate force had been made and informed Amnesty International that the investigations conducted by the Integrity and Safety Bureau of the National Agency for Correctional Institutions finally published its conclusions in December 2007. The delay was caused by an earlier internal investigative report being considered inadequate. The Integrity and Safety Bureau interviewed seven witnesses; three DV&O staff, three Expulsion Centre staff, and one cell-mate. The three members of the Expulsion Centre staff testified that Simon had been kicked in the throat and beaten. However, the three DV&O staff denied this and therefore the Integrity and Safety Bureau came to the conclusion that it was difficult to assess whether disproportionate force had been used.*

*Amnesty International managed to contact Simon; he not only confirmed many of the allegations, but also showed medical documentation, which has since been authenticated by Amnesty International, that he spent two weeks in hospital upon arrival in his country. Simon states: "I was surprised by the sudden announcement of my expulsion; my lawyer was even supposed to visit me later that day! Therefore I refused to cooperate and resisted my expulsion. Then six men entered the room in blue uniforms and shields. They pushed me and I fell to the ground against a heater. They began beating me violently all over my body. I was bleeding from various parts on my body, at my wrists and legs and from my nose."*

*At the airport Simon was handed over to a team of the Royal Dutch Constabulary, who took him "chained and roped as a cow" to his country. "The team also used force and in the aeroplane passengers reacted with outrage to the way I was treated, although it was less violent than by the first team."*

In response to questions from Amnesty International, the investigator of the Integrity and Safety Bureau confirmed that no effort was made to find Simon or to contact his lawyer about the incident. Parts of the investigative reports, which were provided for Amnesty International, make it clear that several versions of the incident were reported and that the first report to the alleged abuse was extremely poor, lacked precise dates, and failed to take the Use of Force Instruction as the principal reference. Neither of the reports seems to have investigated the different and at times contradictory statements. Finally, Amnesty International is still awaiting a response regarding the further follow up by the Supervisory Commission of the Expulsion Centre to this complaint.

In response to questions posed by Amnesty International regarding the number of complaints of ill-treatment, the use of isolation cells and the deployment of the IAT, the director of the Directorate for Special Facilities responded that the various data requested could not easily be gathered; he reported that it was currently not registered as management information, which means that, although files of individual complaints are kept, a comprehensive overview is lacking.<sup>222</sup> This included, among other things, the nature of the complaints by. The National Agency of Correctional Institution (NACI)<sup>223</sup> merely registers the number of complaints and whether they were finalized.

In an interview with the director of the Directorate for Special Facilities,<sup>224</sup> Amnesty International was informed that both the directors of the detention facilities and the Supervisory Commissions reported separately to the Directorate for Special Facilities.

## ALLEGATIONS OF ILL-TREATMENT AND THE EXCESSIVE USE OF FORCE

However, the data provided by both parties showed discrepancies which remain unchallenged. In addition, while the reports of the Supervisory Commissions contained data in a form in which the most pressing complaints could easily be identified,<sup>225</sup> the statistical data provided by the director of the detention facility was sparse, but explained that developments to improve the quality of management data were underway. The lack of reliable statistical information on the use of force, the use of isolation cells and complaints received make it hard to identify the systemic nature of the problems. As it is, many problems that are structural are dismissed as individual incidents.

Amnesty International is concerned by the fact that there is no reporting obligation on directors regarding the deployment of IATs, and therefore there is no clear mandate to review complaints of excessive use of force and ill-treatment. Complaints Commissions at different locations differ in opinion as to whether they are mandated to review such complaints. Amnesty International considers this to be a serious flaw in the obligation to provide an effective remedy for detainees against whom force is used. The absence of such an effective remedy creates an environment in which excessive force can be used with impunity.

All complaints and reports of ill-treatment, excessive use of force, racism or any other abuses in immigration detention should be investigated promptly, thoroughly and impartially by an independent body. The methods and findings of such investigations should be made public. When there are indications of a criminal offence, the director of the facility should refer the case to the Public Prosecution Service (Openbaar Ministerie) without delay. If the director of the facility fails to refer the case, the Supervisory Committee should refer the case directly to Public Prosecution Service. Officials suspected of committing ill-treatment should be suspended from active duty during the investigation. Those suspected of being responsible for ill-treatment and other serious human rights violations should be prosecuted according to international standards of fair trial. Victims should be accorded appropriate compensation.

## 6 DETAINING VULNERABLE MIGRANTS AND ASYLUM-SEEKERS

Migration alone, even when it is voluntary, brings many changes in the personal situations of migrants, asylum-seekers and their families. They often experience feelings of separation and loss, have difficulties in adapting, and experience legal and physical insecurity.<sup>226</sup> They may even have to cope with dangerous travelling and working conditions or suffer from human rights abuses as a result of situations such as human trafficking, forced prostitution and forced labour.<sup>227</sup>

The effects of administrative detention and other restrictive administrative measures against irregular migrants and (rejected) asylum-seekers are likely to increase their vulnerability, in particular of those individuals belonging to groups that are already vulnerable, such as migrant children and their families, (unaccompanied) minors, torture or trauma victims, people with a mental or physical disability and victims of human trafficking. The presumption against detention is particularly strong with reference to these vulnerable groups. In addition, the above administrative measures severely affect rejected asylum-seekers who cannot be expelled to their country of origin due to widespread human rights violations and security concerns.

Various legal instruments and jurisprudence elaborate on the various international treaty obligations relating to immigration detention.

### 6.1 Traumatized irregular migrants and asylum-seekers

There is ample evidence that immigration detention has a severe impact on the physical and mental health of detained irregular migrants and asylum-seekers. In extreme cases, poor conditions of detention may even amount to ill-treatment. Immigration detention is particularly detrimental for those who have suffered from persecution before being detained, such as asylum-seekers:<sup>228</sup>

*Asylum-seekers held in detention have not only experienced past trauma, abuse, and loss, but are living in a situation of entrapment, faced with constant uncertainty about their future safety. Significantly, all detainees, including children, report ongoing traumatic experiences within immigration detention.*<sup>229</sup>

Such vulnerability was also explicitly addressed in 1999, when the Committee against Torture (the Committee) voiced similar concerns in *A v The Netherlands*.<sup>230</sup> In its view the Committee noted that

*The author has been held in detention ever since he arrived in the Netherlands, [and as such] it has been very difficult for him to gather evidence in support of his claim, and it is therefore unreasonable to question his credibility by asserting, for instance, that he had not produced any medical certificates attesting to alleged acts of torture or ill-treatment or their subsequent effects.*

Moreover, the Committee expressed

*concern about the fact that the author has been held in detention since his arrival in the Netherlands ... only two months after he was allegedly tortured. The Committee considers that if torture indeed did take place, the fact of keeping him in detention for such a prolonged period could have an aggravating effect on his mental health and ultimately amount to cruel or inhuman treatment.*

Despite such warnings Amnesty International repeatedly comes across cases of asylum-seekers, including torture victims, who

were administratively detained despite their history of violence-related health problems following human rights violations in their country of origin. In cases where irregular migrants and asylum-seekers suffered disabilities as a result of being tortured in the country from which they have fled, administrative detention could amount to degrading treatment if the conditions they are detained in are inappropriate to meet their needs.<sup>231</sup>

### **Sarian**

*The asylum application of 19-year old Sarian was rejected after she failed to produce a coherent and detailed account of the human rights abuses she had suffered since she was 12. She witnessed rebels killing her father and was then taken to a rebel camp where she was forced to serve as a sex slave before she managed to escape. A seemingly concerned adult who provided shelter, took advantage of her vulnerable situation and forced her to work as a prostitute and to undergo Female Genital Mutilation before she managed to flee to the Netherlands.*

*Following the rejection of her asylum application, she was left destitute and ordered to leave the Netherlands. She did not leave and was detained upon discovery when she was stopped during a traffic control inspection several months later. In detention, Sarian's second asylum application was also rejected, despite her claim that "psychological impediments" as a result of the traumatic experiences had prevented her from giving a detailed and coherent account during the previous application.*

*In December 2004 she was expelled to another country – not her own country but the place that the Dutch authorities alleged was her country of origin. Upon arrival she was detained for three weeks and was eventually returned to the Netherlands after the second country had established her nationality – which was the nationality she had consistently given in her asylum applications.*

*When Sarian was again detained in the Netherlands, both the UNHCR and Amnesty International intervened on her behalf. A medical examination by Amnesty International confirmed the causal relation between the abuses she had reported and the psychological state she was in. She spent several months in detention before she was eventually released in October 2005. Soon after that she was granted a residence permit on the basis of the "special harrowing experiences" she had endured.*

More recently, Amnesty International intervened in another case of a torture victim being placed in administrative detention.

### **Taner**

*Upon the rejection of his asylum application, Taner (42) was administratively detained in October 2006. In detention, Taner filed a new asylum request.*

*During his first application Taner had reported being tortured in detention in his own country by government officials. He was held for eight years. To extract a confession and other information on his political activities, he spent months in isolation. During the interrogations he reported being beaten on the soles of his feet, being raped, deprived of sleep, tortured with electricity and threatened*

*with execution. During the asylum application he explicitly mentioned the physical and psychological injuries he suffered from the torture.*

*An examination by an Amnesty International Medical Examination Group confirmed that his medical complaints were consistent with the torture allegations.<sup>232</sup> The examining psychiatrist described Taner as a severely traumatized person. He considered that his immigration detention “could lead to an increase in his psychiatric problems” and that the detention could have “a disproportionately traumatizing effect”.*

*The district court ruling on the lawfulness of the detention followed Amnesty International’s report and ordered Taner’s release pending his asylum application. In August 2007 Taner eventually received a residence permit under the general amnesty measure.*

Amnesty International has repeatedly called upon the Dutch government to respect international human rights law and standards, which contain a presumption against the detention of traumatized asylum-seekers, and to provide victims of human rights violations the necessary time and means to prepare their application.

Where necessary a medical examination should be offered to substantiate reported human rights violations which are part of their asylum claim. Amnesty International points to the useful contribution of medico-legal examinations modelled on the *Istanbul Protocol* as a means of securing legal evidence to prosecute human trafficking as well as to assist victims in substantiating their case.<sup>233</sup> Equally, such measures should be available to other migrants, such as victims of trafficking, who may have experienced violence. Amnesty International urges the Dutch government to actively seek alternatives to detention for such persons, whether in relation to border detention or other forms of immigration detention.

In cases where the detention of traumatized individuals is still considered, a thorough and suitable medical examination by a qualified physician should be undertaken *before* the detention measure is imposed and the mental as well as physical health of anyone detained under such a measure should be regularly reviewed throughout the period of detention.<sup>234</sup>

### 6.2 Victims of human trafficking

Irregular migrants and (rejected) asylum-seekers, are at heightened risk of exploitation and other human rights abuses. Amnesty International welcomes the recognition of this vulnerability in both the Dutch Policy Memorandum on Return and the Memorandum on Illegals:

*it places [irregular migrants] in a weak socio-economic and socially vulnerable position, which may lead to exploitation and seduce people to participate in unlawful or criminal activities.<sup>235</sup>*

As a result of the reports and recommendations of the independent National Rapporteur on Trafficking in Human Beings (*Nationaal Rapporteur Mensenhandel*),<sup>236</sup> in 2004, the Minister of Justice presented the *National Action Plan on Human Trafficking*.<sup>237</sup> Among other things, the Plan announced the improvement of the so-called “B9 Regulation”,<sup>238</sup> which governs the protection of migrant victims of human trafficking.

The B9 Regulation was originally developed in the context of criminal prosecution, and is laid down in the Aliens Circular 2000. It offers victims a temporary residence permit and shelter during investigation of a crime, in exchange for their testimony and formal reporting of the crime.

Despite the expansion in the penalization of human trafficking since 1 January 2005,<sup>239</sup> in practice victims remain very reluctant to report this crime and assist in the prosecution, fearing reprisals from the perpetrators.<sup>240</sup> NGOs such as the victim support organization *Bonded Labour in the Netherlands* (BLinN) signal a lack of awareness in detention centres of possible victims of human trafficking.<sup>241</sup> Once detained, an irregular migrant is often no longer identified as a possible victim. Moreover, fear, shame and coping mechanisms prevent victims from coming forward.

In 2005 BLinN started two awareness projects in the detention centres Zeist and Schiphol-Oost. In 2006 they reported 43 possible victims of human trafficking, 14 of whom eventually received protection under the B9 Regulation.<sup>242</sup> Because of the lack of policy and awareness in identifying victims of human trafficking in immigration detention, BLinN fears that the increased emphasis on “combating” irregular migration may lead to an increase in irregular migrant victims of human trafficking being overlooked.

On 18 October 2007 – the first European day against human trafficking – the State Secretary of Justice announced the expansion of the B9 Regulation to allow victims to apply for a residence permit on compelling humanitarian grounds, *without* officially reporting the crime and giving testimony in the criminal investigation.<sup>243</sup> In addition, the State Secretary of Justice also promised to increase the protection of under-age victims, including (former) unaccompanied minors.

The policy change is a response to a parliamentary motion to expand the B9 policy as a result of questions from members of parliament,<sup>244</sup> and the implementation by the State Secretary of Justice of the recommendations by the National Rapporteur.<sup>245</sup> These changes follow earlier improvements to the B9 regulation in 2006, which made it easier to obtain a continued residence permit when the prosecution of the suspect led to a conviction or after three years of residence, regardless of the result of the criminal proceedings.

Amnesty International welcomes the recent improvements in providing protection to migrant victims of human trafficking and the commitment given to the human rights dimension through a victim centred approach.<sup>246</sup> In practice, however, Amnesty International underlines the need for giving more attention to the identification of possible victims of human trafficking, in particular with regard to individuals who fall within the expanded definition of human trafficking in the Dutch Criminal Code.<sup>247</sup>

The UN Guidelines on Human Rights and Human Trafficking,<sup>248</sup> are very clear about victims of human trafficking: they should never be placed in immigration detention. The explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings is similar to a certain extent in its unambiguous condemnation of detaining such children: “Placement of a child in a detention institution should never be regarded as appropriate accommodation.”<sup>249</sup>

In this context, Amnesty International is alarmed about recent jurisprudential developments, where the Dutch Council of State did not consider that being a victim of human trafficking was a clear reason for lifting the detention of an irregular migrant.<sup>250</sup> If potential victims of human trafficking come forward whilst in detention, that detention should be lifted and they should be transferred to adequate alternative shelter facilities.

In order to accurately identify possible victims, detention staff should receive adequate training. Amnesty International points to the useful contribution of medico-legal examinations modelled on the *Istanbul Protocol* as a means of securing legal evidence to prosecute human trafficking as well as to assist victims in substantiating their case.<sup>251</sup>

Under no circumstances should victims of human trafficking be penalized for their illegal entry into the Netherlands or be administratively detained while awaiting their expulsion.<sup>252</sup> Neither should victims of human trafficking be prosecuted for crimes committed as a result of their exploitation.<sup>253</sup>

### 6.3 Detaining children and their families

Migrant children, children of asylum-seekers and their families or unaccompanied minors are at particular risk in detention.

Research in several countries shows that, as a result of their immigration detention, children are likely to suffer from a variety of psychological and physical problems such as delayed development, post-traumatic stress reactions, bed-wetting, nightmares and weight loss.<sup>254</sup> These and other physical and mental health problems are caused by exposure to the trauma and stress of their parents or other detainees, conflicts between detainees or guards or as a result of witnessing violent acts such as suicide attempts or self-mutilating behaviour.<sup>255</sup>

Until recently it was estimated that, in the Netherlands, dozens of children and their families and unaccompanied minors are detained annually. However, public information on the number of children in detention is sparse. In response to parliamentary questions, the government made clear that specific data on the number of children and their parents in immigration detention is not systematically gathered. A manual count, however, revealed that in 2005 and up to May 2006 some 142 families (involving 235 children) were administratively detained for periods ranging from one to 187 days.<sup>256</sup> A report by the Inspectorate for Sanction Administration (*Inspectie voor de Sanctietoepassing*) of December 2006 on four detention centres put the number of children in detention between 1 September 2005 and 1 September 2006 at 240; on average they spent 59 days in detention, with a maximum of 244 days.<sup>257</sup> According to Defence for Children and UNICEF, in 2007 some 160 children were detained.<sup>258</sup>

On 29 January 2008 the Dutch government publicized its new policy regarding the immigration detention of children and their families. Its aim is to reduce the detention period for children by introducing a maximum detention period of two weeks prior to expulsion, the creation of more alternative accommodation for children and their families, and the improvement of detention conditions.<sup>259</sup>

Previously, the immigration detention of children was a much debated topic in the Netherlands, following critical reports by a variety of national and international supervisory bodies about insufficient and inadequate facilities for children in the existing detention facilities.<sup>260</sup> The repeated concerns in the reports led to the adoption of a parliamentary motion urging the government to seek alternatives for children and their parents in detention.<sup>261</sup>

In response to the motion, the government announced that it would add 12 weeks to the 28-day period given to asylum-seekers and migrants to leave the country voluntarily after their application has been rejected. In addition, in the case of children with two parents, only one of them would be detained, to allow the other parent and the migrant child(ren) to remain outside a detention setting until their effective return.<sup>262</sup> Pending the development of the new policy, the number of children and their parents in immigration detention decreased significantly.<sup>263</sup>

In support of this motion, the Council of Churches started a national campaign entitled No Child in Detention (*Geen kind in de cel*), calling for alternatives in order to avoid as far as possible the immigration detention of children and their families.<sup>264</sup> The campaign was joined and supported by a variety of NGOs, including Amnesty International.<sup>265</sup> The organization stressed the fact that international human rights law contains a clear presumption *against* the detention of children and their families and the fact that unaccompanied minors who are migrants or asylum-seekers should *never* be detained, including in situations where their age is disputed.<sup>266</sup>

The Dutch government repeatedly stressed the difference between children being detained as a result of the detention of their parents and the detention of children by themselves, most of them unaccompanied minors,<sup>267</sup> indicating a lesser presumption against the detention of unaccompanied minors. Amnesty International considers such reasoning to be in violation of the non-discrimination principle, enshrined in the Convention on the Rights of the Child,<sup>268</sup> and the fact that the best interests of the child should be the primary consideration in decisions affecting the rights of a child.<sup>269</sup> The presumption against detention applies to all migrants and asylum-seekers and to all children, including unaccompanied minors. There should be a prohibition on the detention of unaccompanied children provided by law. All unaccompanied minors should have adequate professional care in an appropriate location and, if necessary, other protection mechanisms such as secure shelter facilities to safeguard them from falling into the hands of traffickers.

Amnesty International holds that the choice offered to parents, either to remain united with their children or to accommodate them with unknown foster parents an illusory one.<sup>270</sup> Many parents – especially those with young children and who are unfamiliar with the concept of unknown foster parents – choose to stay united with their children with the result that many of these children are effectively detained. Moreover, Amnesty International expresses concern about the fact that the responsibility and choices made by parents to stay united with their children are seemingly used by both the government and judiciary to reject a continued and active search for alternatives to *prevent or end* the detention of migrant children and their families altogether.<sup>271</sup> Detention of migrants and asylum-seekers should be used only if, in each individual case, it is demonstrated that it is a necessary and proportionate measure which conforms with international law, and that detention should always be for the shortest possible time and must not be prolonged or indefinite.

The government's new approach to the detention of migrant children – and its reiterated commitment to the Convention on the Rights of the Child – was welcomed by Amnesty International and other members of the campaign. However, serious concerns remain with regard to a number of issues,<sup>272</sup> such as the lack of a statutory time limit for detention, and the preservation of a marginal judicial review of immigration detention regarding, for example, the use of alternatives to detention.

Amnesty International regrets that the new policy has not yet led to an equally significant decrease of unaccompanied migrant minors in detention. SAMAH, a national NGO working on behalf of unaccompanied minors in detention, estimated in June 2007 that some 40 unaccompanied minors were at the time detained in juvenile detention centres.<sup>273</sup> SAMAH criticized the criminal-based detention regime and the lack of information, educational facilities and individual counselling, in particular from a psychosocial perspective.

Currently, the government is conducting a pilot project, housing unaccompanied minors considered to be at risk of trafficking in "secure shelter facilities" rather than in juvenile justice institutions. These are semi-closed facilities, where unaccompanied minors are housed in a semi-closed regime to guard them from traffickers. Amnesty International welcomes the initiative to seek alternatives for detention and will closely scrutinize the results of this pilot project.

The position of single parents and the safeguards to assure that families will not be expelled separately are unclear in the new policy. In this regard, Amnesty International points to the European Court of Human Rights judgement *Mayeka/Mitunga v Belgium* in which it stressed that actions to "combat illegal immigration" should be in accordance with international obligations under the Convention on the Rights of the Child and the right to family life.<sup>274</sup>

### 6.4 Exposed to war: the case of detained rejected Iraqi asylum-seekers

Another concern to Amnesty International is the administrative detention of irregular migrants and asylum-seekers from countries to which few, if any, expulsions take place, often because of the unstable security and human rights situation, such as Iraq.

There is an ongoing need for international protection for all Iraqi asylum-seekers. Amnesty International opposes all forcible returns to any part of Iraq. Any return of failed asylum-seekers should only take place when the situation in the whole of Iraq has stabilized and there are adequate conditions for a stable and durable peace.<sup>275</sup>

Despite a deteriorating human rights and security situation in Iraq,<sup>276</sup> the Dutch government announced the end of the temporary protection regime for asylum-seekers from Iraq on 20 January 2006.<sup>277</sup> The policy change was based on the fact that no other EU country provided for such a policy and the fact that forced return to the whole of Iraq was "deemed possible and under preparation".<sup>278</sup> A parliamentary motion to reconsider the policy change was rejected;<sup>279</sup> the Council of State subsequently approved the policy change.<sup>280</sup>

Amnesty International criticized the policy change, which was based more on a comparison with other EU countries<sup>281</sup> than on a serious consideration of the security and human rights situation.<sup>282</sup> On 20 December 2006, a parliamentary motion was put

forward and adopted to reinstate a temporary protection policy for Iraqi asylum-seekers from central and southern Iraq.<sup>283</sup> As a result the government announced on 2 April 2007 that it would reinstate a policy of temporary protection for Iraqi asylum-seekers from central and southern Iraq.<sup>284</sup> North Iraq was considered “relatively safe”.

Amnesty International welcomes the partial reinstatement of the temporary protection policy for Iraqi asylum-seekers, but noted that the organization’s repeated concerns about the situation in northern Iraq were not heeded.<sup>285</sup> As such, it leaves open the possibility of people being forcibly returned to a situation that is considered volatile and unsafe.<sup>286</sup> Recent government statistics seem to substantiate these concerns, which hamper an effective return: in 2006, nine Iraqis were returned to Northern Iraq and in 2007 only one was returned.<sup>287</sup>

Despite legal and practical barriers to return, on 1 August 2007 a total of 106 Iraqi nationals remained administratively detained to be expelled to the country. As in other EU countries, most Iraqi nationals threatened with expulsion seem to be those whose asylum claims have been rejected and who have a criminal history. The fact that hardly any expulsions take place did not lead to a temporary ban on administrative detention or to the release of Iraqi asylum-seekers and migrants already in detention. On the contrary, a criminal background is in most cases followed by an exclusion order, allowing for prolonged or repeated detention for up to more than a year.

### **Basim**

*Following the murder of his father and subsequent threats to his own life, Basim (then 22) fled central Iraq. In the Netherlands he became a drug addict and left his asylum procedure without reporting his whereabouts. As a result, his asylum application was rejected and his procedure closed.*

*Basim survived by stealing and burglary to pay for his addiction. In February 2007 an exclusion order was imposed. Following a prison sentence of four months for one of his crimes, he was subsequently administratively detained in February 2007 to be expelled to Iraq.*

*Basim told Amnesty International about severe weight loss in detention and depression due to the uncertainty of the duration of his detention and his pending expulsion to Iraq. Apart from his lawyer and Amnesty International, no one visited him during his time in detention. After more than seven months in detention he was set free and left destitute, and ordered to leave the Netherlands within 24 hours.*

However, administrative detention of Iraqi asylum-seekers is not limited to people who have committed crimes; it also affects Iraqi asylum seekers without a criminal record.

### **Samira**

*A day after she arrived in the Netherlands, in 2007, the police arrested Iraqi asylum-seeker Samira (25) in a private family house. She had not yet had the opportunity to go to the police to file an asylum application. During the police interrogation, Samira told the police that her husband was already legally residing in the Netherlands.*

*Although she gave his name and address, she was not released but was placed in administrative detention. Despite the fact that her husband corroborated the story with documents, and the fact that she filed her asylum application, she was not released until some three weeks later.*

## DETAINING VULNERABLE MIGRANTS AND ASYLUM-SEEKERS

Amnesty International reiterates that it is opposed to the forcible return of *any* Iraqi national to *any* part of Iraq since they have a continued need for international protection and as such their expulsion may constitute a breach of the principle of *non-refoulement*, a fundamental norm of international law. The continued detention of rejected Iraqi asylum-seekers is incompatible with international human rights standards and is a violation of the human rights of detained individuals.

## 7 CONCLUSIONS

The restrictive policies of the Netherlands regarding irregular migrants and (rejected) asylum-seekers have led to a significant increase in the use of immigration detention: each year some 20,000 irregular migrants and asylumseekers are detained in a total of around 3,000 cells. Initially, legislative and policy measures were aimed at excluding irregular migrants from social support facilities, however, over the last five years the Dutch stance has hardened, making immigration detention and the use of exclusion orders principal tools for implementing the Dutch “control-oriented” immigration policy.

As such, immigration detention has effectively become a tool of deterrence and punishment, undermining the principles of necessity and proportionality in the use of detention found in international human rights law. **Detention of migrants and asylum-seekers will only be lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective to be achieved, that alternatives will not be effective, that it is on grounds prescribed by law, and when there is an objective risk of the person absconding.** In any detention case, including for the purpose of expulsion or to prevent illegal entry, the individuals concerned should be provided with an effective opportunity to challenge the decision to detain them. In every case, detention should always be for the shortest possible time and must not be prolonged or indefinite. In the Netherlands, however, detention periods exceeding periods of one year are no longer exceptional. The combination of strict, criminal-based detention regimes with the use of exclusion orders means that irregular migrants and (rejected) asylum-seekers encounter an increasing atmosphere of criminalization.

Detention cannot be justified simply on grounds of wanting to enforce the expulsion of someone from the territory of a state. The authorities must demonstrate that there is a reasonable prospect of enforcing the expulsion of the person concerned from their territory and that they are pursuing expulsion arrangements with due diligence. In this context, “reasonable” means within reasonable time.

Amnesty International is concerned about recent measures that increasingly tend to “criminalize” irregular migration, first of all by forcing people to the margins of society where they become vulnerable to criminals who take advantage of their position, and where they may also become drawn into criminal activities in order to survive. Secondly, the increasing influence of criminal law into the area of immigration policy unjustly stigmatizes irregular migrants as “criminals”, generating stereotyped and xenophobic images and attitudes towards migrants and asylum-seekers in general.

Dutch policy on irregular migration lacks accountability when it comes to the courts exercising full and effective scrutiny of detention cases. Amnesty International finds it alarming that it encountered allegations of ill-treatment. This is particularly worrying, considering the lack of prompt and full independent investigations into allegations of ill-treatment, which allows for conditions to be created in which abuses can be perpetrated with impunity. Current Supervisory Commissions and Complaints Commissions do not seem to be in a position to review such allegations effectively.

Amnesty International welcomes recent positive developments by the Dutch government to reduce the detention of migrant children and their families and expand protection for victims of human trafficking. However, the organization is concerned about the number of irregular migrants and asylum-seekers still in immigration detention, the duration of their detention, the conditions in detention and the fact that vulnerable individuals, such as unaccompanied minors and torture victims continue to be detained.

This report concludes that elements of Dutch policies and practices breach the state’s human rights obligations. Policies and measures which, in principal, are in accordance with minimum obligations imposed by international human rights standards, still have a negative impact on the well-being of irregular migrants and asylum-seekers.

A lack of publicly available statistical data on various aspects of immigration detention prevents effective parliamentary and judicial scrutiny of the results and effects on migrants and asylum-seekers of the Dutch immigration policy. As a result of this lack of transparency, it is not possible to assess whether immigration measures to “combat” irregular migration are effective and proportionate to the goal they aim to achieve and are therefore justified, and whether they are compatible with the Netherlands’ international human rights obligations.

## CONCLUSIONS

The Dutch government, respecting its international obligations, should accept that detention of irregular migrants and asylum-seekers should be a measure of last resort, used in exceptional cases and only after alternatives to detention have been given serious consideration. Amnesty International considers that, in addition to limiting their rights to liberty and freedom of movement, the criminal-based detention regimes unnecessarily restrict the human rights of irregular migrants and asylum-seekers by effectively limiting their privacy by putting up to six persons in one cell, access to meaningful daily activities, leisure, visiting hours and communication with the outside world.

## 8 RECOMMENDATIONS

Following the findings and conclusions of this report, Amnesty International urges the Dutch government to implement the following recommendations regarding the administrative detention of irregular migrants and asylum-seekers:

### **With regard to the presumption against detention**

- There should be a statutory presumption in law, policy and practice against the administrative detention of migrants and asylum-seekers. Immigration detention should be used only if, in each individual case, it is demonstrated that it is a necessary and proportionate measure in conformity with international law.
- Alternative non-custodial measures, such as reporting requirements, should always be explicitly considered before resorting to the immigration detention. The use of existing alternatives should be increased.
- There should be a statutory prohibition on the immigration detention of vulnerable persons such as unaccompanied minors, victims of torture and human trafficking, pregnant women, those, with a serious medical condition, people with a mental illness, disabled or the elderly people.
- The criteria applied by medical services in detention centres to assess whether a person is fit for detention should be made public. Who is responsible for making such an assessment and the legal base for this authority should be clarified.
- In cases where the detention of traumatized migrants and asylum-seekers continues to be considered, a thorough and appropriate medical examination by a qualified physician should be undertaken *before* the detention measure is imposed, and the mental and physical health of anyone detained under such a measure should be regularly reviewed throughout the period of detention.

### **With regard to the use of administrative detention of irregular migrants and asylum-seekers**

- The decision to detain should always be based on a detailed and individualized assessment, including the personal history of, and the risk of absconding presented by, the individual concerned. Such assessment should consider the necessity and appropriateness of detention, including whether it is proportionate to the objective to be achieved. Any form of immigration detention should always be as short as possible.
- A maximum time limit for administrative detention of irregular migrants and asylum-seekers, which is reasonable in length, should be provided by law. Once this period has expired, the individual concerned should automatically be released.
- The Immigration Service (IND) and the National Agency of Correctional Institutions (DJI) should record and monitor statistical data on the use of immigration detention, and this information should be publicly available.

### **With regard to effective remedies against detention**

- Any detention decision should be automatically and regularly reviewed as to its lawfulness, necessity and appropriateness, by means of a prompt, oral hearing by a court or similar competent independent and impartial body, accompanied by the appropriate provision of legal assistance.
- To ensure that every irregular migrant or asylum-seeker – regardless of his or her status or place of entry – is granted unrestricted access without delay to a lawyer in order to be able to challenge the lawfulness of his or her detention.
- The powers of judicial authorities dealing with first appeal immigration detention cases should be expanded by law so that they are able to engage in a full scrutiny of all relevant aspects of the case and not be limited to a marginal aspect.
- A judicial review of administratively detained migrants and asylum-seekers should allow for a full disclosure of documentation on all activities undertaken to facilitate the removal of an irregular migrant, so as to provide the maximum opportunities for preparing a legal defence and to allow the courts close scrutiny of the case in hand.
- The plans to set up an information service point for irregular migrants and asylum-seekers in detention should be implemented

## RECOMMENDATIONS

without undue delay in all immigration detention centres. The service should be independent and should be accorded adequate and sufficient facilities and professionally trained staff.

### **With regard to detention conditions**

- To develop, as a matter of urgency, a more open regime appropriate to the legal situation of irregular migrants and asylum-seekers, which should be applied in similar ways in centres that share this regime, to avoid arbitrary treatment.
- Any form of immigration detention should be implemented in centres with adequate facilities, adjusted to the nature of the detention and in conformity with the CPT standards. This means that the design and layout of the premises should, as far as possible, avoid giving any impression of a prison environment.
- The use of detention boats should be ended at the earliest opportunity (in accordance with the CPT's recommendations of 2007 to the Dutch government).
- Detained individuals should be granted unrestricted access to legal counsel and interpreters.
- Detained asylum-seekers should have access to the United Nations High Commissioner for Refugees (UNHCR), refugee assisting organizations and to religious and social assistance. This should not be at the expense of visiting hours for family and friends.
- There should be lenient visiting hours for family members and friends.
- Detained individuals should have access to adequate medical care. The Netherlands Health Care Inspectorate (IGZ) should supervise and investigate the quality and accessibility of health care in immigration detention facilities. The IGZ should conduct on-site inspections and take enforcement measures when standards are not met.

### **With regard to ill-treatment and excessive use of force**

- Any allegations of ill-treatment, excessive use of force, racism or any other abuses in immigration detention should be investigated promptly, thoroughly and impartially by an independent body. The methods and findings of such investigations should be made public. When there are indications of a criminal offence, the director of the facility should refer the case to the Public Prosecution Service (Openbaar Ministerie) without delay. If the director of the facility fails to refer the case, the Supervisory Committee should refer the case directly to Public Prosecution Service. Officials suspected of committing ill-treatment should be suspended from active duty during the investigation. Those suspected of being responsible for ill-treatment and other serious human rights violations should be prosecuted according to international standards of fair trial. Victims should be accorded appropriate compensation.
- A new, uniform, and appropriate regime as suggested above, should include a clear, simple and efficient complaints procedure. This complaints procedure should include necessary safeguards, such as the possibility of interim measures for the Complaints Commission to suspend the detention, the right to appeal and the possibility of a rogatory hearing.
- Pending improvement of the complaints procedure, authorities who receive a complaint but are not competent to deal with it should redirect the complaint to the competent authorities.
- The mandate of the Supervisory Commissions should be clarified.
- The mandate of the Complaints Commissions should be expanded from marginal scrutiny to full scrutiny.
- There should be uniform criteria for the composition of all Complaints Commissions, which should include a judge, a lawyer, a doctor and a welfare expert.
- The Supervisory Commissions and the Complaints Commissions should forward their reports to the Commission for Intergral Supervision of Returns (Commissie Integraal Toezicht Terugkeer) and the Inspectorate for Sanction Administration (Inspectie voor de Sanctietoepassing).

## RECOMMENDATIONS

- As a matter of urgency to create an external supervision procedure and an external and independent complaints procedure for allegations of ill-treatment and excessive use of force by the Dienst Vervoer & Ondersteuning (DV&O, Transport and Support Service)
- All cases of natural and unnatural death of detainees in detention centres or during transport should be investigated promptly, thoroughly and impartially. These investigations should, in principle, be carried out by the (regional) police, but all cases should be reviewed by the Coordination Commission of the National Police Internal Investigations Department (Rijksrecherche) to ascertain whether an investigation by the National Police Internal Investigations Department is warranted under the specific circumstances.
- To immediately review and amend the use of isolation measures and ensure that they are only imposed in exceptional cases and for a specified length of time, which should be as short as possible, in accordance with international standards.
- To properly instruct personnel, who are qualified for the purpose, in the use of isolation measures.
- The National Agency of Correctional Institutions (NACI) should properly record and monitor statistical data on the use of isolation cells and any other measures. The NACI should also ensure that statistical data on complaints is recorded.

### **With regard to other administrative measures against irregular migrants**

- The use of exclusion orders should be avoided and should never be imposed in cases where an irregular migrant cannot be returned to their country of origin. Any use of exclusion orders should be limited to irregular migrants and asylum-seekers who pose an actual and serious threat to public order or national security, and in no case should it lead to a violation of the Netherlands' non-refoulement obligations.
- Destitution should not be used as a means or threat to force rejected asylum-seekers and other irregular migrants to return to their country of origin. Rejected asylum-seekers and irregular migrants who indicate their wish for voluntary return should continue to receive shelter and other support facilities during the preparation for their return. Adequate shelter and social support should be available for all irregular migrants and asylum-seekers belonging to vulnerable groups.

### **With regard to irregular migration in general**

- Develop a rights based, all-inclusive approach to irregular migration in which measures to "combat" irregular migration and crimes such as human trafficking and other human rights violations are balanced with increased protection for victims of such crimes and abuses.
- As a matter of priority, to sign, ratify and effectively implement the 1990 International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families, the only one of the seven core international human rights treaties to which the Netherlands is not a state party.
- Unconditionally implement international recommendations on immigration detention by professional supervisory treaty bodies, such as the CPT.
- Government statistics on the detention of irregular migrants and asylum-seekers should be made more transparent and readily available to parliament and other third parties and include data such as, but not limited to, the number of individuals in immigration detention, their nationality, gender, age, family situation, particularly of those belonging to vulnerable groups; the duration of their detention in relation to their country of origin; the types and alternatives to detention and how often they are used.

### **With regard to asylum-seekers**

- Border detention of asylum-seekers should be as short as possible and should only be prolonged under exceptional circumstances that need to be substantiated.

## RECOMMENDATIONS

- Provide traumatized asylum-seekers and victims of human rights violations with the necessary time and means to prepare their asylum applications.

### **With regard to victims of human trafficking**

- To consider the identification of a person as a victim of human trafficking to be a sufficient reason for lifting the administrative detention of an irregular migrant. If possible victims of human trafficking come forward whilst in detention, that detention should be lifted and they should be transferred to adequate shelter facilities outside a detention context; they should also be given full access to asylum procedures if they so wish.
- Detention staff should receive adequate training to identify victims of trafficking.
- To make use of medico-legal examinations modelled on the *Istanbul Protocol* as a means of securing legal evidence to prosecute human trafficking as well as to assist victims of torture and other ill-treatment in substantiating their case.
- Under no circumstances should victims of human trafficking be penalized for their illegal entry into the Netherlands or be administratively detained while awaiting their expulsion.<sup>288</sup> Neither should victims of human trafficking be prosecuted for crimes committed where they have been compelled to do so.<sup>289</sup>

## ANNEX I: REGULARISATION AND AMNESTY MEASURES

Despite the Netherlands' restrictive immigration policy, in recent years the Dutch government has passed several regularization and amnesty measures that deal with limited groups of irregular migrants and rejected asylum-seekers.<sup>290</sup> Most measures were combined with or followed by more restrictive legislation. The most recent amnesty measure of 2007 – from which an estimated 25,000 - 30,000 (rejected) asylum-seekers will benefit – is no different in this respect.<sup>291</sup> Although the scope of this measure is considerably broader than the previous ones, it was seen as the provisional conclusion of a national discussion on long-term asylum-seekers in the Netherlands.<sup>292</sup> Moreover, the measure was accompanied by the announcement that “maximum efforts” would be undertaken to expel those to whom the amnesty measure did not apply. In addition, the State Secretary of Justice and the municipalities agreed to the ending of municipal assistance – including the provision of shelter – to rejected asylum-seekers and irregular migrants by the end of 2009.

Amnesty International welcomes the 2007 amnesty as a measure that will improve the protection of the human rights of those to whom it applies. The amnesty will end years of anxiety and uncertainty for a large group of rejected asylum-seekers, some of whom find themselves in a situation of destitution or whose application has been pending for more than five years. Moreover, the use of such measures is seen by both the Global Commission on International Migration and the Parliamentary Assembly of the Council of Europe as an appropriate way to end the irregular status of irregular migrant and rejected asylum-seekers and allow them full enjoyment of their human rights.<sup>293</sup>

However, Amnesty International expresses concern about the agreement aimed at ending social assistance by municipalities to rejected asylum-seekers and irregular migrants by 2009. Such a situation will effectively force rejected asylum-seekers and irregular migrants into a situation of destitution, seriously affecting their human dignity. In this respect, Amnesty International points to international criticism in 2005 by the rapporteur of the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe:

*about steps to withdraw access to social assistance ... and that the culmination of measures impacting harshly on irregular migrants, including failed asylum-seekers, may lead to a situation of inhuman treatment of those persons concerned*<sup>294</sup>

Groups such as single women, children and victims of torture and trafficking are particularly vulnerable to abuse under such circumstances. Amnesty International therefore urges the Dutch government to heed the recommendation by the Parliamentary Assembly to:

*[E]nsure an appropriate level of access to housing, social benefits and health care for all failed asylum-seekers up to the time of their departure from the country.*<sup>295</sup>

## ENDNOTES

- 1 Amnesty International, *Annual Report 2006* (AI Index: POL 10/001/2006), p196. See also: Amnesty International, *The Netherlands: Amnesty International saddened by deaths of immigrants* (AI Index: EUR 35/001/2005). For all Amnesty International publications, go to [www.amnesty.org](http://www.amnesty.org).
- 2 The findings of the DSB, laid down in its report *Fire at the Detention Centre Schiphol Oost*, 21 September 2006, confirmed earlier allegations about inferior detention conditions and the lack of safety procedures and conditions for irregular migrants. The conclusions of the DSB on the causes of the Schiphol fire led to the resignation of the Ministers of Justice and Housing, [www.safetyboard.nl/publications/dsb/report\\_fire\\_detention\\_centre\\_schiphol.pdf](http://www.safetyboard.nl/publications/dsb/report_fire_detention_centre_schiphol.pdf). See also: Amnesty International, *The Netherlands: Concerns about Schiphol fire need urgent follow up* (AI Index: EUR 35/001/2006).
- 3 District Court (DC, *rechtbank*) Maastricht 21 November 2005 (AWB 05/48623). On 10 November 2005 a parliamentary motion was adopted calling for an expulsion ban as long as the presence of the survivors could assist the investigation into the Schiphol fire. The motion called for future expulsion cases to obtain clear guarantees from countries of origin to ensure that people continued to receive adequate medical and psychological assistance and treatment, *Kamerstukken (Submissions to the House of Representatives II, 2005-2006, 24 587, No 142*. All official government documents can be accessed via [www.overheid.nl](http://www.overheid.nl).
- 4 Earlier, Amnesty International had called upon the Dutch government to postpone any expulsions until the investigations into the fire were concluded. See: Amnesty International, *The Netherlands: No expulsions until investigations have been concluded* (AI Index: EUR 35/002/2005).
- 5 Letter from Amnesty International of 19 January 2006 (Dir/hh/2006/002) and the response by IND of 21 March 2006 (INDUIT 06/1465 (AUB).
- 6 *Kamerstukken II 2005-2006, 24 587, No. 187, p2*.
- 7 Amnesty International prefers the term irregular migrant – someone who does not have legal permission (any more) to stay in a host country – rather than “illegal” migrant; the latter has a normative connotation, conveying an idea of criminality. Amnesty International, *Living in the Shadows. A primer on the human rights of migrants* (AI Index: POL 33/007/2006), p8.
- 8 In Europe these include the Amnesty International reports: *United Kingdom: Seeking asylum is not a crime: detention of people who have sought asylum* (AI Index EUR 45/015/2005), *Spain: The Southern Border: The State turns its back on the human rights of refugees and migrants* (AI Index: EUR 41/008/2005), *Italy: Temporary stay - Permanent rights: The treatment of foreign nationals detained in ‘temporary stay and assistance centres’ (CPTAs)* (AI Index: EUR 30/004/2005) and *Greece. Out of the spotlight: The rights of foreigners and minorities are still a grey area* (AI Index EUR 25/016/2005). For a more general research document on immigration detention see Amnesty International, *Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees* (AI Index: POL 33/005/2007).
- 9 Police cells were not visited or researched.
- 10 Global Commission on International Migration (GCIM), *Migration in an interconnected world: New directions for action*, New York 2005 (GCIM report 2005), [www.gcim.org](http://www.gcim.org).
- 11 GICM report 2005, p32-41. Estimates by the UN Population Division (UNPD) put the number of people living outside their home country at 200 million, some 3 per cent of the world’s population; 90 million of them are considered migrant workers and almost 10 million are considered refugees. For the first time since 2002, the declining trend in numbers of refugees was reversed, putting the number of refugees at the end of 2006 at 9.9 million people. The total number of “people of concern” to UNHCR rose significantly to 32.9 million people. The rise is caused by an increase in Internally Displaced Persons (IDPs) who fall under the UNHCR’s expanded mandate as a result of the new “cluster approach” taken in December 2005, *UNHCR Global Report 2006*, p14, [www.unhcr.org](http://www.unhcr.org).
- 12 Amnesty International, *Refugees. Human rights have no borders* (AI Index: ACT 34/03/97) p79.
- 13 See Brouwer, Catz and Guild, *Immigration, Asylum and Terrorism*, Nijmegen: Centrum voor Migratierecht 2003 and Türk and

## ENDNOTES

- Nicholson, "Refugee protection in international law: An overall perspective", in: Feller, Türk and Nicholson, *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Geneva: UNHCR 2003, 5. Also, in the Netherlands, such links are regularly made, for example, "In combating terrorism and irregular migration and presence, it is increasingly important to secure the external borders as part of a wider security concept," in: Ministry of Justice, *Rapportage vreemdelingenketen*, January - April 2006, p23, [www.justitie.nl](http://www.justitie.nl).
- 14 Van Liempt, *Navigating Borders. Inside perspectives on the process of human smuggling into the Netherlands*, Amsterdam: Amsterdam University Press 2007, p24-32 (Van Liempt 2007).
- 15 Chairperson's Summary of the High Level Dialogue on International Migration and Development 14-15 September 2006, UN Doc. A/61/187, para 17.
- 16 The International Organization for Migration (IOM) estimates that the number of irregular migrants in the EU is around 3 million people; see Rapporteur Van Thijn, *Human Rights of Irregular Migrants*, Doc 10924, 4 May 2006 and the subsequent Parliamentary Assembly Resolution 1509 (2006) on *Human rights of irregular migrants*, [www.assembly.coe.int](http://www.assembly.coe.int). Entering "Fortress Europe", however, comes at a significant cost to the human rights of migrants; Amnesty International, *The Human Cost of "Fortress Europe": Asylum-seekers unfairly detained and unfairly expelled. Amnesty International releases reports on UK, Spain and Italy* (AI Index: IOR 61/015/2005) and Rapporteur Van Thijn, *State of human rights and democracy in Europe*, Doc 11217, 30 March 2007.
- 17 Heijden a.o. (WODC), *Een schatting van het aantal in Nederland verblijvende illegale vreemdelingen in 2005*, Utrecht: Universiteit van Utrecht 2006, [www.wodc.nl](http://www.wodc.nl). The number of rejected asylum-seekers was put at 8,500, calculated on the basis of people who completed an asylum procedure in the year preceding the last time they were stopped by the police. The Minister of Justice acknowledged that the number of rejected asylum-seekers would be much higher if it included previous asylum procedures beyond the one-year limit, Answers to parliamentary questions, 5454386/06/DVB, 8 January 2007, p3, via [www.justitie.nl](http://www.justitie.nl).
- 18 See: Leerkes a.o., *Wijken voor illegalen. Over ruimtelijke spreiding, huisvesting en leefbaarheid*, Den Haag: SDU uitgevers 2004, for a summary of the report, see [www.os.amsterdam.nl/pdf/2004\\_illegalen.pdf](http://www.os.amsterdam.nl/pdf/2004_illegalen.pdf). Earlier Engbersen a.o., *Illegale vreemdelingen in Nederland. Omvang, overkomst, verblijf en uitzetting*, Rotterdam: RISBO 2002. This study roughly estimates the number of irregular migrants in the period of 1997-2000 at between 112,000 and 163,000 people (Engbersen 2002), [www.wodc.nl](http://www.wodc.nl)
- The decrease is attributed to EU expansion, with new member states, providing more regular opportunities for European migrants to work and live in other European countries. The number of non-European migrants shows neither a significant drop nor an increase. Answers to parliamentary questions, 5463597/07, 22 February 2007, p3, via [www.justitie.nl](http://www.justitie.nl).
- 19 Central Bureau of Statistics (CBS), 18 February 2008, [www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/artikelen/archief/2008/2008-2389-wm.htm](http://www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/artikelen/archief/2008/2008-2389-wm.htm).
- 20 Immigration and Naturalization Service, [www.ind.nl](http://www.ind.nl). These figures include asylum related regular statussen. The UNHCR also reported a Europe-wide, decrease in asylum applications, compared with the first half of 2006.
- 21 See [www.ind.nl](http://www.ind.nl). Numbers for 2007 are based on estimates mentioned in the State Budget 2007. [www.rijksbegroting.nl](http://www.rijksbegroting.nl). In 2007, the State Secretary of Justice asked the Scientific Investigation and Documentation Centre (*Wetenschappelijk Onderzoeks- en Documentatie Centrum*, WODC) for a new qualitative estimate of the number of irregular migrants, *Kamerstukken II 2006-2007*, 19 637, No 1167. The results are expected in the first half of 2008.
- 22 Van Kalmthout, Hostee-van der Meulen and Dünkel, *Foreigners in European Prisons*, Chapter 1: "Comparative overview, conclusions and recommendations, 2007", p649 (Van Kalmthout 2007a), p52 and Van Kalmthout, "The administrative detention of irregular migrants in the Netherlands", in Muller and Vegter (eds), *Detentie: gevangenen in Nederland*, 2006 (Van Kalmthout 2006), p5.

## ENDNOTES

- 23 Schoordijk Instituut, *Terugkeermogelijkheden van vreemdelingen in vreemdelingenbewaring: het vergeten gelaat van de vreemdeling*, Vol 1, 2004, pxvi.
- 24 In response, the government did not deny such figures but stressed the limited scope of the investigation, which included only two detention centres; *Kamerstukken II 2004-2005*, 29 344, No 39, p2-3.
- 25 “Bijna 1500 illegalen weg in eerste helft 2007”, *NRC Handelsblad*, 3 November 2007.
- 26 For example In November 2006, “the Dutch government announced that it would ‘unconditionally continue the use of measures to combat irregular migration and where possible to intensify such measures’,” *Kamerstukken II 2006/2007*, 29 344 en 19 637, No 60, p2, [www.overheid.nl](http://www.overheid.nl).
- 27 For example the successive government coalition accords of 1998 (“the restrictive immigration policy will be maintained”, p84), 2002, p13-15 and 2003, p11. Also see: Government coalition accord 2007, p43-44, [www.regering.nl/Het\\_kabinet/Regeerakkoord](http://www.regering.nl/Het_kabinet/Regeerakkoord)
- 28 *Aanhangsel Handelingen II 2007-2008*, No 549, p1.
- 29 Engbersen a.o., *Illegale vreemdelingen in Nederland. Omvang, overkomst, verblijf en uitzetting*, Rotterdam: RISBO 2002. This study roughly estimates the number of irregular migrants in the period of 1997-2000 at between 112,000 and 163,000 people (Engbersen 2002), [www.wodc.nl](http://www.wodc.nl), 5.
- 30 Over the years, regular migration was also further restricted, in particular in the case of family formation (migration through marriage). In this context, the minimum income criteria were increased from 100 to 120 per cent of the national social benefit level, and the minimum legal age for family formation raised from 18 to 21 years. In addition, in 2004 legal fees (*leges*) for all kinds of visa and immigration permits rose steeply, sometimes by over 500 per cent compared with 2002. For example a visa to bring a partner rose from €107 to €830; a visa to study from €107 to €433; and people arriving since 15 March 2007 are obliged to pass an admission exam testing basic Dutch language skills and knowledge of Dutch society (*basisexamen inburgering*, currently €350) at a Dutch embassy before a visa is granted.
- 31 Law Gazette (*Staatsblad*) 1994, 190.
- 32 Law Gazette 1994, 405.
- 33 Law Gazette 1998, 204.
- 34 Law Gazette 1999, 29, the Act entered into force on 1 February 1999.
- 35 Article 31 paragraph 2 under the f Aliens Act 2000.
- 36 Amnesty International The Netherlands, Letter to Members of the Permanent Justice Committee of the Parliament, 10 October 2000, [www.amnesty.nl/documenten/algemeen101200.pdf](http://www.amnesty.nl/documenten/algemeen101200.pdf).
- 37 The Aliens Act 2000 codified the strict documentation review mentioned earlier and reinforced its implementation by the expansion of (coastal) border police personnel and the use of biometric and other technology. Ministry of Justice, *Rapportage vreemdelingenketen*, September-December 2006, p23-25. For example the “@migoproject” is camera surveillance project at Dutch border crossings to register foreign number plates.
- 38 Respectively Articles 53 and 50 of the Aliens Act 2000.
- 39 Evaluation Aliens Act 2000, 2004, p153.
- 40 Violation is punishable by a penalty, Law Gazette 2004, 300 and 583.
- 41 *Kamerstukken II 2003-2004*, 29 344, No 1.
- 42 *Kamerstukken II 2003-2004*, 29 537, No 2, p2. The memorandum identifies three categories of irregular migrants: 1) those irregularly entering the territory of the country, 2) people overstaying their visa and (3) rejected asylum-seekers.
- 43 Earlier Memoranda on return focused on difficulties beyond the sphere of influence of the migrant, such as a lack of facilities to stimulate voluntary return, people falling victim to human trafficking, diminishing public support for return and unforeseen policy changes; *Kamerstukken II 1996-1997*, 25 386, No 1 and *Kamerstukken II 1998-1999*, 26 646, No 1.

## ENDNOTES

- 44 The measures include 1) increased border controls, 2) increased emphasis on the (future) possibility of return throughout the asylum procedure, 3) increased surveillance measures to trace rejected asylum-seekers and other irregular migrants in the Netherlands, 4) centralizing the return process in a new organizational structure to enable a more effective and efficient return of irregular migrants – the current Return and Departure Service (*Dienst Terugkeer & Vertrek*) which became operational on 1 January 2007, 5) measures to improve societal support for the return policy, and 6) a more integrated approach on return – via the Dutch foreign policy agenda – towards countries of origin, engaging development aid and return agreements. Priority countries mentioned were: Afghanistan, Algeria, Angola, China, the Democratic Republic of Congo, Guinea, Iran, Nigeria, Serbia and Montenegro, Somalia and Syria, *Kamerstukken II 2003-2004*, 29 344, No 1, p22.
- 45 *Kamerstukken II 2003-2004*, 29 344, No 1, *Kamerstukken II 2006-2007*, 19 637, No 1098.
- 46 The Dutch Council for Refugees, Stichting Landelijk Ongedocumenteerden Steunpunt, Professor Anton van Kalmthout of Tilburg University.
- 47 E/CN.4/2003/85, paras 73 and 74.
- 48 AI Index: POL 33/005/2007, November 2007, [www.amnesty.org/en/library/info/POL33/005/2007](http://www.amnesty.org/en/library/info/POL33/005/2007).
- 49 Treaty Gazette (*Tractatenblad*) 1969, 99 and 1978, 177.
- 50 Treaty Gazette 1969, 100 and 1978, 178.
- 51 Treaty Gazette 1951, 154.
- 52 Treaty Gazette 1988, 19.
- 53 Treaty Gazette 1985, 69.
- 54 Treaty Gazette 1990, 46.
- 55 Treaty Gazette 1981, 61.
- 56 Treaty Gazette 166, 48.
- 57 Treaty Gazette 1954, 88 and Treaty Gazette 1967, 76.
- 58 Notably the Temporary Protection Directive 2001/55 (Pb. EG L 212), the Reception Directive 2003/9 (Pb. EG L 031), the Family Reunion Directive (2003/86 (Pb. EU L 51, 12), Asylum Qualification Directive 2004/83 (Pb. EU L 304) and the Asylum Procedures Directive 2005/85 (Pb. EU L 326).
- 59 The MWC does not advocate irregular migration (Article 34) nor does it oblige states to regularize the status of irregular migrants (Article 35). Rather it seeks to safeguard certain core rights of irregular migrants who are particularly vulnerable to human rights abuses as a result of their lack of status such as “the right to recognition everywhere as a person before the law” (Article 24). At the same time, the MWC recognizes that irregular migration is inherently undesirable and has a negative impact on the human rights of those migrants. Therefore, it aims to reduce irregular migration, obliging States Parties, including transit states, to “collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation” (Article 68(1)). It calls for sanctions, where necessary, on employers who hire irregular workers, and Article 69 obliges states to take appropriate measures to ensure that the situation of irregular migration in its territory does not persist.
- 60 European Platform for Migrant Workers' Rights, *The UN Migrant Workers Convention: Steps towards ratification in Europe*, 2007, [www.epmwr.net](http://www.epmwr.net).
- 61 Although the MWC creates very few new rights, it elaborates and specifies how established human rights standards apply specifically to migrant workers and their families. It should be seen in the same way as the CRC and CEDAW, which consolidate the human rights of two specific groups – children and women respectively. Like children and women, migrant workers and their families, as a group, are at risk of human rights violations as a result of their membership of this group. The MWC has several unique provisions, such as requiring governments to take the necessary measures to ensure that migrant workers and their families are informed by the host state, the state of transit or state of origin, of their rights as contained in the Convention;

## ENDNOTES

- it allows migrant workers and their families to make individual and formal complaints via an established procedure when they believe their rights have been violated; and gives migrant workers the right to be informed of the conditions of admission into the territory of a state in a language they understand (Article 33). Also, under the MWC, countries of origin have a responsibility to provide information and appropriate assistance prior to departure, and adequate consular and other services in the country of destination “in order to meet the social, cultural and other needs” of migrant workers and their families (Article 65).
- 62 Committee of Ministers of the Council of Europe, *Twenty Guidelines on Forced Return*, Adopted on 4 May 2005, [www.coe.int](http://www.coe.int).
- 63 Amnesty International, *Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees* (AI Index: POL 33/005/2007).
- 64 Van Kalmthout, “Het regiem van de vreemdelingenbewaring”, in: *Justitiële Verkenningen*, Vol 33, No 4, 2007 (Van Kalmthout 2007b), p90.
- 65 Boone & Moerings, “De cellenexplosie”, in: *Justitiële verkenningen*, Vol 33, No 4, 2007 (Boone 2007), p9-30. Van Kalmthout, “The administrative detention of irregular migrants in the Netherlands”, in Muller and Vegter (eds), *Detentie: gevangen in Nederland*, 2006 (Van Kalmthout 2006), p4. Also see Leertouwer and Huijbrechts, *Prognoses sanctiecapaciteit tot en met 2008*, 2004; an English summary can be accessed at [www.wodc.nl/images/ob221\\_Summary\\_tcm11-10207.pdf](http://www.wodc.nl/images/ob221_Summary_tcm11-10207.pdf).
- 66 The Aliens Act 2000 contains the possibility of imposing an exclusion order on a migrant by declaring him or her an “undesirable alien”. This administrative measure of an exclusion order is used in conjunction with an expulsion order and with the intention of protecting the Netherlands against (further) public order infractions by the designated person. See Chapter 4.
- 67 The rise in prison capacity follows an overall rise in detention of foreigners in Europe, including the “common use” of administrative detention, Van Kalmthout, Hostee-van der Meulen and Dünkel, *Foreigners in European Prisons*, Chapter 1: “Comparative overview, conclusions and recommendations, 2007”, p649 (Van Kalmthout 2007a).
- 68 Van Kalmthout 2007a, p54.
- 69 A person can be detained for further investigation for six hours, which can be extended once by 48 hours. Detention at a police station may not last longer than 10 days, unless the State Secretary of Justice can “demonstrate special circumstances or serious considerations which make such a prolonged detention necessary, such as serious public order or national safety considerations.” Article 50 paras 2-4 Aliens Act 2000 and A6/5.3.6.1 Aliens Circular 2000.
- 70 ECTHR 27 November 2003 (*Shamsa v Poland*), 2004/31, comment by Vermeulen and ECTHR 25 June 1996 (*Amuur v France*), RV 1996/73, comment by Vermeulen.
- 71 Also, in the case law of the European Court of Human Rights, such conditions have been found to amount to inhuman and degrading treatment, ECTHR 6 March 2001 (*Dougoz v Greece*), RV 2001/68.
- 72 HRC 30 April 1997 (*A v Australia*), Communication No 560/1993, CCPR/C/59/D/560/1993, para 9.4. Although the Committee stated that it was not arbitrary *per se* to detain a person requesting asylum, “remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context”, see para 9.2.
- 73 Amnesty International, *United Kingdom: detention of asylum-seekers must be the exception, not the rule* (AI Index: EUR45/002/2008) [www.amnesty.org/en/alfresco\\_asset/95946985-cf35-11dc-a98a-359eaace9fe9/eur450022008eng.html](http://www.amnesty.org/en/alfresco_asset/95946985-cf35-11dc-a98a-359eaace9fe9/eur450022008eng.html). See Grand Chamber ECTHR 29 January 2008 (*Saadi v. United Kingdom*), paragraph 80: “... the Court finds that, given the difficult administrative problems with which the United Kingdom was confronted during the period in question, with an escalating flow of huge numbers of asylum-seekers ..., it was not incompatible with Article 5 § 1(f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily. Moreover, regard must be had to the fact that the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary

## ENDNOTES

- recourse to a broader and more extensive use of detention powers”, [cmiskp.echr.coe.int/tkp197/default.htm](http://cmiskp.echr.coe.int/tkp197/default.htm).
- 74 Law Gazette 2000, 495; the Act replaces the earlier Aliens Act of 1965, as amended in 1994.
- 75 In 2006, 242 cells were available for detention under Article 6 of the Aliens Act 2000; the remaining detention facilities were reserved for detention under Article 59 of the Aliens Act 2000 (2137) and for irregular migrants in Expulsion Centres (880), Year Report of the Ministry of Justice, *Kamerstukken II* 2006-2007, 31 031 VI, No 1, p152.
- 76 Article 3 of the Aliens Act 2000 in conjunction with WBV 2006/16 of 15 March 2006 and Article A2/5.5.1 Aliens Circular 2000.
- 77 Regulation (EC) No 562/2006 (Pb. L105/1)
- 78 Vogelaar, *Gesloten OC Procedure voor Asielzoekers*, VluchtelingenWerk Nederland, September 2007, [www.vluchtelingenwerk.nl](http://www.vluchtelingenwerk.nl). See also WBV 2004/32, 20 April 2004.
- 79 Other reasons for a prolonged detention can be public order issues, abuse of the asylum procedure, manifestly unfounded asylum claims, Dublin Regulation cases, evident Article 1F Refugee Convention cases: Article C12/2.2 Aliens Circular 2000.
- 80 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
- 81 Article C11/3.3 Aliens Circular 2000.
- 82 Case witnessed by Amnesty International in the district court of Amsterdam, DC 22 February 2007 (AWB 07/6048).
- 83 “*Feiten en omstandigheden die, naar objectieve maatstaven gemeten, een redelijk vermoeden voor illegaal verblijf opleveren, hetzij ter bestrijding van illegaal verblijf na grensoverschrijding*”, Article 50 para 1 Aliens Acts 2000. The current criterion is a compromise between two earlier criteria. Under the Aliens Act of 1965, “a reasonable presumption of irregular residence” (“*en redelijk vermoeden over illegaal verblijf*”; Article 19 paragraph 1) was used as a criterion. However, the entry into force of the Identification Act 1994, changed the criterion into a less discriminatory one, demanding “concrete evidence of irregular residence” (“*concrete aanwijzingen over illegaal verblijf*”); Evaluation Aliens Act 2000, 2004, p123-126. See also Van Liempst 2007, p155.
- 84 Soon after the entry into force of the Aliens Act 2000, the Council of State (*Raad van State*) ruled that the Act did not allow for a challenge of the lawfulness of powers outside an immigration context; this should be done before the relevant court. However, in most cases these judgements take much longer than the immigration detention procedure. In practice, therefore, they hardly play a role in detention appeal cases, COS 26 July 2001, *Jurisprudentie Vreemdelingenrecht (JV)* 2001/234 (on criminal powers preceding immigration detention), comment by Baudoin.
- 85 Law Gazette 2004, 298.
- 86 Article 94 para 1 Aliens Act 2000.
- 87 A study of immigration lawyers working on detention cases revealed that the quality of the work of lawyers varies. While some 10-15 per cent provided an excellent defence, a similar number of lawyers provided a very poor service. The rest were considered average. In several interviews held by Amnesty International, individuals voiced criticism of their lawyers and said that they had expected a more active defence; IVA, *De kwaliteit van de rechtsbijstand voor vreemdelingen in vreemdelingenbewaring in Nederland*, 2006, (IVA 2006), p69, [www.iva.nl](http://www.iva.nl).
- 88 For example, the existence of a criminal background or the absence of shelter and a fixed address which is considered entailing the risk that a person will wander and may be forced to steal.
- 89 Articles 94 and 96, Aliens Act 2000 respectively.
- 90 Article 95, Aliens Act 2000.
- 91 Kamerstukken II (Submissions to the Parliament) 1999-2000, 26732, No 7.
- 92 Law Gazette 1993, 45 as amended on 7 September 2000, Law Gazette 2000, 364.
- 93 Law Gazette 1998, 430.

## ENDNOTES

- 94 Law Gazette 2001, 370.
- 95 On 1 February 2008.
- 96 The oldest immigration detention facility in Tilburg (574) was closed in November 2007. The detention boat *Reno* (288) in Rotterdam was closed for detention purposes in January 2007. Both facilities held irregular migrants and (rejected) asylum-seekers detained under Article 59, Aliens Act 2000.
- 97 At the opening of the detention centre in Alphen aan den Rijn in November 2007 the State Secretary of Justice announced the closure of the detention boats in Rotterdam: “*detentieboten in Rotterdam gesloten*”, *NRC Handelsblad*, 29 November 2007.
- 98 Raad voor de Strafrechtstoepassing en Jeugdbescherming, *Detentiecentra Rotterdam, locatie Merwehaven, detentieboten Reno en Stockholm*, July 2005, Inspectie voor de Sanctietoepassing, *Detentieboten Zuid-Holland, locatie Merwehaven*, July 2006.
- 99 Schoordijk Instituut, *Terugkeermogelijkheden van vreemdelingen in vreemdelingenbewaring: het vergeten gelaat van de vreemdeling*, Vol 1, 2004
- 100 Letter from the State Secretary of Justice to the Dutch Asylum Lawyers Association (*Vereniging Asieladvocaten en -Juristen Nederland*, VAJN) on 7 September 2007, 5495615/07.
- 101 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), Principle 28: “A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.”
- 102 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *The CPT Standards*, CPT/Inf/E (2002) 1 – Rev 2006, para 29 on p39-43 (chapter IV) dealing with *Foreign nationals detained under aliens legislation* (the CPT Standards 2006): [www.cpt.coe.int/en/documents/eng-standards-scr.pdf](http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf).
- 103 Van Kalmthout 2007a, p653-654.
- 104 Van de Griend, “Undercover op de illegalenboot”, *Vrij Nederland*, 25 March (Part I) and 1 April 2006 (Part II).
- 105 In 2005 the Council for the Administration of Criminal Justice and Protection of Juveniles expressed appreciation of the motivation of the private security personnel but concluded that contact with detainees was superficial and should be improved, considering the stress they were under. In addition the boats were criticized for their lack of space and were deemed not to be suitable for a long stay, *Detentiecentra Rotterdam (boten Reno en Stockholm)*, 23 February 2005.
- 106 *Kamerstukken II* 2005-2006, 24 587, No 188, p1.
- 107 Inspectie voor de Sanctietoepassing, *Detentieboten Zuid-Holland, locatie Rotterdam*, July 2007.
- 108 Ben means the *Reno*, which closed at the beginning of 2007.
- 109 Article 4 para 1 RBA and Article 5.4 para 1 Aliens Decree 2000.
- 110 Schoordijk Instituut, *Terugkeermogelijkheden van vreemdelingen in vreemdelingenbewaring: het vergeten gelaat van de vreemdeling*, Vol 3, 2004.
- 111 Raad voor de Rechtsbijstand, *Actieprogramma “vreemdelingenbewaring”*, 5 July 2006.
- 112 Het Juridisch Loket, an independent public organization which provides free legal advice.
- 113 Respectively the COE *Twenty Guidelines on Forced Return*, Guideline 10.
- 114 CPT Standards 2006, paras 28-29.
- 115 CPT Report 2007, paras 56, 58 and 60-61.
- 116 CPT Report 2007, para 61.
- 117 Proceedings of Parliament 2007-2008, 24 587, No 264.
- 118 Van Kalmthout 2007a, p59.
- 119 Rechtenheidskamer (REK) 21 August 1997, *RV* 1997/65, para 9.2.

## ENDNOTES

- 120 ECTHR 11 July 2006 (*Saadi v United Kingdom*), para 14, NAV 2006/22, comment by Reneman.
- 121 A v Australia, Human Rights Committee Communication No 560/1993. 30/04/97.
- 122 Amnesty International and the European Council for Refugees and Exiles, letter to the Members of the European Parliament, 13 May 2008, [www.amnesty-eu.org/static/documents/2008/Joint\\_AI-ECRE\\_Letter\\_130508.pdf](http://www.amnesty-eu.org/static/documents/2008/Joint_AI-ECRE_Letter_130508.pdf)
- 123 *Kamerstukken II* 2002-2003, 19 637, No 704, p2 and ACVZ, *Advies over vreemdelingenbewaring en verwijdering van "criminele" illegalen*, May 2002.
- 124 *Aanhangsel Handelingen II* 2007-2008, No 549, p1.
- 125 Boone 2007, p19 and Ministry of Justice, *Rapportage vreemdelingenketen*, January-June 2007, p29.
- 126 For example DC Amsterdam 3 August 2006 (AWB 06/33693, 14 months; Chilean national), DC Zutphen 7 March 2007 (AWB 07/7445, more than 10 months; Afghan national, JV 2007/201) and DC Amsterdam 14 December 2006 (AWB 06/57602, more than 8 months; Surinam national). Some even report detention periods of 15 to 18 months, Van Kalmthout 2007a, p650. If a criminal sentence follows an administrative detention, the duration of each should be added together, COS 26 October 2004, JV 2004/480.
- 127 Amnesty International letter of 27 June 2005 (Vlu-ASA31-05-004.i).
- 128 DC Alkmaar 8 July 2005 (AWB 05/28122), para 5.
- 129 Supervisory Commission 3 November 2006 (complaint D 2143), JV 2006/28, comment by Van Kalmthout.
- 130 Appeals Court (AC, *Gerechtshof*) Den Haag 26 April 2007 (KG 07/03 and KG.46), NAV 2007/34, comment by Van Kalmthout. Also see DC Den Haag 11 December 2006 (KG 06/1258), NAV 2007/18, comment by Van Kalmthout. In its letter of 7 September 2007 (5495615/07) to the Asylum Lawyers and Jurists Association, the State Secretary of Justice indicated that the six month period is also applicable for other detention boats.
- 131 COS 10 January 2005, NAV 2005/85, comment by Reneman. Also see the case of Tensing in this report.
- 132 Boone, "Penitentiare beginselen en de bewaring van vreemdelingen", *Proces*, Vol 6, 2003 (Boone 2003), p304. This was confirmed by several immigration lawyers.
- 133 Article 54 para 2 Aliens Act 2000 jo A3/7.7.2. *Aliens Circular 2000*.
- 134 COS 23 June 2006, JV 2006/323.
- 135 Boone 2003, p. 304. Exceptions are sometimes found in cases where detention would include children.
- 136 See for example Guideline 6 paragraph 1 of the Twenty Guidelines on Forced Return of the Council of Europe: "A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems."
- 137 Report of the independent expert for the United Nations on violence against children, A/61/299, 29 August 2006, para 112.
- 138 COS 31 October 2007, JV 2007/543. The decision follows earlier decisions in which the Council of State rejected the direct applicability of, amongst others, Articles 2, 3 and 27 CRC; COS 23 September 2004, JV 2004/449, comment by Boeles, COS 13 September 2005, JV 2005/409, comment by Spijkerboer and COS 22 February 2006, JV 2006/132.
- 139 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 1, 3 and 6.
- 140 United Nations Convention on the Rights of the Child, Article 37 (b).
- 141 See also UNHCR, *Alternatives to Detention of Asylum-seekers and Refugees. Legal and Protection Policy Research Series*, POLAS/2006/03, April 2006 and *UNHCR Guidelines on Formal Determination of the Best Interests of the Child*, May 2006.

## ENDNOTES

- 142 Rijksbegroting 2008, Chapter 15, [www.rijksbegroting.nl](http://www.rijksbegroting.nl). See also "Effectiever terugkeerbeleid", *Justitie Magazine*, pxx.
- 143 *Kamerstukken II* 2004-2005, 29 537, No 23, p4.
- 144 For example COS 26 July 2006, *JV* 2006/352, r.o. 2.3.
- 145 Article 197 Criminal Code.
- 146 REK 21 August 1997, *RV* 1997/65, para 9.2.
- 147 *Aanhangsel Handelingen II* 2007-2008, No 549, p1.
- 148 Article 3.86 Aliens Decree 2000. See also Van der Woude and Kuijper, "Ongewenste Euroburgers", *Advocatenblad*, 18 January 2007, p10.
- 149 For example regular "theft" (Article 310 of the Criminal Code) carries a maximum prison sentence of four years.
- 150 Article 67 paragraph 1 Aliens Act 2000. The latter ground is often used in cases where individuals are excluded from refugee protection on the basis of Article 1F of the Refugee Convention.
- 151 Article 6.6 paragraph 1 a-c Aliens Decree 2000.
- 152 The motion of 21 June 2004 is mentioned in WBV 2005/29, 23 June 2005, p7.
- 153 Schoordijk Instituut, *Terugkeermogelijkheden van vreemdelingen in vreemdelingenbewaring: De vreemdelingenbewaring in Tilburg en Ter Apel; het dossieronderzoek*, Vol 1, 2004, p238.
- 154 For example *Aanhangsel Handelingen II*, 2005-2006, No 1983 and the discussion in parliament on 15 November 2007 on the budget proposal 2008 of the Ministry of Justice.
- 155 "Mensen die zich twee keer niet gehouden hebben aan de meldplicht die geldt voor vreemdelingen kregen een ongewenstverklaring. Dan ben je gewoon strafbaar als je blijft. Het is een van de belangrijkste instrumenten die we hebben om de strijd met illegale criminelen aan te binden", in Van Westerloo, "Er komt geen nieuw pardon", *Wordt Vervolgd*, November 2007, p9.
- 156 The former Minister for Aliens Affairs and Integration Verdonk announced in 2005 a further lowering of the threshold to impose exclusion orders on long term residents and acknowledged that the proposed change would "probably make the Netherlands become part of a group of countries with the strictest public order policy for immigration purposes, which will contribute to the foreseen signalling function of the new measures"; *Kamerstukken II* 2005-2006, 19 637, No 971, p15. However, in 2007, the current State Secretary of Justice postponed the plans pending the outcome of research into their effectiveness, *Kamerstukken II* 2006-2007, 19 637, No 1168, p3.
- 157 *Kamerstukken II* 2006-2007, 19 637, No 1168, p5. Policy regulations already indicate that "where possible an exclusion order should be imposed on criminal migrants", for example WBV 2006/39, 30 November 2006, p15.
- 158 *Kamerstukken II* 2004-2005, 29 537, No 23, p4.
- 159 See the Evaluation Commission on the Aliens Act 2000, also known as the "Commission Scheltema", in *Evaluatie Vreemdelingenwet 2000. Terugkeerbeleid en Operationeel Vreemdelingtoezicht*, 2004 (Evaluation Aliens Act 2000, 2004). [www.wodc.nl/images/ov04VreWet\\_Oper\\_Summary\\_tcm11-19707.pdf](http://www.wodc.nl/images/ov04VreWet_Oper_Summary_tcm11-19707.pdf), contains an English executive summary
- 160 Amnesty International recognises that under specific circumstances exclusion orders may be legitimate under international human rights law. For example ECTHR 2 October 2000 (*Maaouia v France*), para 31, *JV* 2000/264. In case of family life also see ECTHR 2 August 2001 (*Boultif v Switzerland*), para 48, *J V* 2001/254 and ECTHR 18 October 2006 (*Üner v the Netherlands*), para 57-58, *JV* 2006/417, all with comments by Boeles.
- 161 See Article 1F Convention Relating to the Status of Refugees and UNHCR, *Guidelines on the Application of the Exclusion Clauses*, HCR/GIP/03/05, 4 September 2003.
- 162 Letter of the State Secretary of Justice of 28 November 1997, *Kamerstukken II* 1997-1998, 19 637, No 295, p4.
- 163 For example Amnesty International (Dutch section)'s letter of January 1998.

## ENDNOTES

- 164 Article 31 para 1 under k of the Aliens Act 2000, Article 3.107 para 1 and 3.77 para 1 under a Aliens Decree 2000 and Article C4/3.11.3 Aliens Circular 2000.
- 165 Letter of Amnesty International (Dutch section) of 20 June 2006 (Dir/en/2006/056)
- 166 Van Sliedregt, "Afghaanse zaken – over 1F-beschikkingen en de vervolging van oorlogsmisdadigers in Nederland", *NJCM Bulletin* 2007/3, p330.
- 167 *Kamerstukken II* 2005-2006, 19 637, No 1067, p4.
- 168 Wijers a.o., *Evaluatie plan van aanpak opsporing en vervolging oorlogsmisdrijven*, Verwey Jonker Instituut, November 2005, p46. Despite the non-refoulement risk, under Dutch law (Article 62 Aliens Act 2000) the obligation to leave the country remains in place, even in cases where family members have received refugee protection; COS 12 November 2007, *JV* 2008/16. Advies Commissie Vreemdelingenzaken, *Artikel 1F vluchtelingenverdrag in het Nederlands vreemdelingenbeleid*, 26 May 2008, p22.
- 169 Article 31 para 1 under k of the Aliens Act 2000, Article 3.107 paragraph 2 and 3.77 paragraph 1 under b Aliens Decree 2000.
- 170 In June 2007 an amnesty scheme ("*pardonregeling*") came into effect. Under the amnesty scheme, a conditional residence permit is granted to foreign nationals who submitted an application for asylum before 1 April 2001, under the former Aliens Act, and who were still present in the Netherlands at the time the scheme came into force, even if their applications had been rejected previously. It is estimated that the general amnesty will cover up to 30,000 individuals.
- 171 Amnesty International (Dutch section) letter of 11 June 2007 (Dir/en/2007/169).
- 172 *Kamerstukken II* 2006-2007, 30 800 VI, No 123, p2. The Minister of Justice concluded that the Netherlands is "at the forefront" when it comes to the automatic declaration of being an "undesirable alien".
- 173 Laid down in Article C4/3.11.3.3 Aliens Circular.
- 174 UNHCR, Letter to the Minister of Justice, 14 November 2007, p2.
- 175 NJCM letter and commentary on "Persons excluded on the basis of Article 1F and their family members" to the Minister and State Secretary of Justice, 24 January 2008, [www.njcm.nl](http://www.njcm.nl).
- 176 *Kamerstukken II* 2003-2004, 29 537, No 2, p7.
- 177 *Kamerstukken II* 2004-2005, 29 537, No 23, p4.
- 178 Nevertheless, the issue of penalizing irregular migration continues to come up in discussions. In November 2007, the People's Party for Freedom and Democracy (VVD) presented a policy paper on immigration with a similar proposal, Henk Kamp, *Immigratie en Integratie*, 12 November 2007 [www.vvd.nl/index.aspx?FilterId=974&ChapterId=1147&ContentId=7497](http://www.vvd.nl/index.aspx?FilterId=974&ChapterId=1147&ContentId=7497)
- 179 Engbersen 2002, p138.
- 180 *Kamerstukken II* 2003-2004, 29 537, No 2, p4.
- 181 Engbersen 2002, p30-32.
- 182 See the Evaluation Commission on the Aliens Act 2000, also known as the "Commission Scheltema", in *Evaluatie Vreemdelingenwet 2000. Terugkeerbeleid en Operationeel Vreemdelingtoezicht*, 2004 (Evaluation Aliens Act 2000, 2004). [www.wodc.nl/images/ov04VreWet\\_Oper\\_Summary\\_tcm11-19707.pdf](http://www.wodc.nl/images/ov04VreWet_Oper_Summary_tcm11-19707.pdf), contains an English executive summary.
- 183 Resp. *Aanhangsel Handelingen II* 2006-2007, 294, p633 and *Kamerstukken II* 2003-2004, 29 344, No 1, p18.
- 184 Landelijk Kader Nederlandse Politie 2007, 9 October 2007.
- 185 Verdonk, "Illegalen opsporen, is niet pervers", *de Volkskrant*, 7 October 2006.
- 186 Police Memorandum of 22 August 2007 to the Municipal Council of Amsterdam.
- 187 Information provided to Amnesty International by the press office of Public Prosecutor in Amsterdam in a telephone call on 22 August 2007.
- 188 DC Amsterdam 3 July 2007, LJN BA8628, DC Utrecht 2 July 2007, (AWB 07/24859) and DC Den Haag 2 July 2007, LJN

## ENDNOTES

- BA8821, [www.rechtspraak.nl](http://www.rechtspraak.nl).
- 189 Council of State (CoS, *Raad van State*) 30 July 2007, LJN BB1267.
- 190 Amnesty International, *Living in the Shadows. A primer on the human rights of migrants*, AI Index: POL 33/007/2006, p17-18.
- 191 The CPT Standards 2006, para 36 p39-43.
- 192 As quoted from for example ECTHR 24 July 2001 (*Valasinas v. Lithuania*), paras 100 and 102.
- 193 Report to the Authorities of the Kingdom of the Netherlands on the Visits Carried Out to the Kingdom in Europe, to Aruba and to the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, CPT (2007) 71, adopted on 9 November 2007 (CPT Report 2007), paras 31.
- 194 CPT Report 2007, paras 31-36.
- 195 CPT report 2007, para 37.
- 196 CPT Report 2007, para 37.
- 197 In 2006 the Inspectorate for Sanction Application reviewed the Transport and Support Service of the NACI and recommended, among other things, giving more attention to integrity, to safe driving and to instructing personnel about proper reporting in case the use of violence was deemed necessary, Inspectie voor de Sanctietoepassing, *Gedetineerdenvervoer. Themaonderzoek*, December 2006.
- 198 *Kamerstukken II* 2006-2007, 19 637, No 1095. In May 2007, the State Secretary announced that the Supervisory Commission would become part of the new Integrated Supervisory Commission on Return (*Commissie Intergraal Toezicht Terugkeer*); *Kamerstukken II* 2006-2007, 19 637, No 1158.
- 199 Commissie van Toezicht Uitzettingen Koninklijke Marechaussee, *Toepassing van geweld door de KMar bij uitzetting vreemdelingen*, GM23/006 report, 23 July 2007 p17, [www.mindef.nl](http://www.mindef.nl).
- 200 Articles 51 and 22-23 PPA and Articles 55 and 24-25 JPPA respectively.
- 201 Explanatory Memorandum to the PPA, in *Handboek Rechtspositie Gedetineerden* (2006), p116.
- 202 Article 7 RBA.
- 203 See General Comment 20 on Article 7 of the ICCPR, para 6.
- 204 CPT 2nd General Report, para 56.
- 205 European Prison Rules 60.3 and 60.5, Recommendation of the Committee of Ministers to member states on the European Prison Rules, Rec (2006) 2.
- 206 An example of more detailed statistical data is found on the website of the Immigration and Naturalisation Service [www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/2007/index.asp](http://www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/2007/index.asp).
- 207 Article 11 RBA. For example Article 7 para 2 under b PPA states among others that the Supervisory Commissions' task is "to take note of complaints brought forward by the detainee". Such a task would be a farce if the Commission were not able to act upon complaints.
- 208 For a description of an Internal Assistance Team, see para 5.2 of this report.
- 209 CPT Report 2007, paras 88 and 68-69.
- 210 Respectively Articles 4-7 RBA, Articles 23-26 (order measures), 27-35 (use of violence) and 50-55 (disciplinary punishment) PPA and Articles 4 (general powers), 24-27 (order measures), 32-40 (use of violence) and 54-59 (disciplinary punishment) JPPA.
- 211 Articles 35 PPA and 40 JPPA.
- 212 Government Gazette (*Staatscourant*) 1998, 247, [www.wetten.nl](http://www.wetten.nl).
- 213 Article 3 of the *Code of Conduct for Law Enforcement Officials*, adopted by the UN General Assembly in resolution 34 /169 on 17 December 1979, [www2.ohchr.org/english/law/codeofconduct.htm](http://www2.ohchr.org/english/law/codeofconduct.htm). The commentary to this Article states: "(a ) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement

## ENDNOTES

- officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.”
- 214 Article 6 of the Code and its commentary which states: “(a) ‘Medical attention’, which refers to services rendered by any medical personnel, including certified medical practitioners and paramedics, shall be secured when needed or requested.”
- 215 Based on an interview with the director of Detention Centre Schiphol-Oost in August 2007 – following a letter for clarification of 10 July 2007 (Dir/en/2007/184). For more information on the IAT, see [www.arrestatieteam.nl/eenhedenbinnenland/ibtjustitie.php](http://www.arrestatieteam.nl/eenhedenbinnenland/ibtjustitie.php). A report of the Inspectorate on Sanction Application of June 2007 indicated that the IAT of the detention centre in Tilburg (now closed) on average was deployed some 3-4 times a month; Inspectie voor de Sanctietoepassing, *PI Tilburg, Doorlichting*, June 2007. According to the director of Detention Centre Schiphol-Oost, the IAT was deployed only once.
- 216 Articles 7 and 60-68 PPA, Articles 7 and 65-73 JPPA and Articles 10-19 RBA.
- 217 Articles 69-71 PPA and Articles 74-76 JPPA.
- 218 CPT Report 2007, para 37.
- 219 Government reaction to the CPT Report 2007 by the Minister and State Secretary of Justice in a letter to parliament, 5523152/07/6, 29 January 2008, p5-6.
- 220 CPT Report 2007, para 34-37.
- 221 See CPT Report 2007, para 35.
- 222 Letter to Amnesty International by the director of the Directorate for Detention and Special Facilities within NACI, 5517618/07/DJI, 3 December 2007.
- 223 National Agency of Correctional Institutions (NACI, *Dienst Justitiële Inrichtingen*).
- 224 Held on 11 February 2008.
- 225 The top four complaints in various detention centres concerned medical care, treatment by guards, loss of personal belongings and disciplinary measures.
- 226 Kristal-Andersson, *Understanding refugees, immigrants and their children. A psychological model*, 2001.
- 227 Amnesty International, *Living in the Shadows. A primer on the human rights of migrants* (AI Index: POL 33/007/2006), p47 etc.
- 228 In addition to the Amnesty International reports on detention of migrants in Europe mentioned earlier, see *United States of America: Lost in the labyrinth: Detention of asylum-seekers* (AI Index: AMR 51/051/1999), p8, *Australia: The impact of indefinite detention: The case to change Australia’s mandatory detention regime*, (AI Index: ASA 12/001/2005), p21-22 and Steel a.o. “Impact of immigration detention and temporary protection on the mental health of refugees”, *British Journal of Psychiatry*, Vol 188, 2006, p58-64.
- 229 Steel 2004, p670.
- 230 View of the Committee against Torture in *A v The Netherlands*, CAT/C/22/124/1998, 12 May 1999, in particular paras 6.3 and 9; NAV 1999/86, p372-377.
- 231 Analogous interpretation of ECTHR 10 July 2001 (*Price v United Kingdom*), paras 29-30.
- 232 The Medical Examination Group of the Dutch section of Amnesty International consists of medical doctors who work on a voluntary basis to examine torture allegations. Such examinations are based on the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Istanbul Protocol), [www.ohchr.org/english/about/publications/docs/8rev1.pdf](http://www.ohchr.org/english/about/publications/docs/8rev1.pdf).
- 233 Alempijevic a.o., “Forensic medical examination of trafficking in human beings”, *Torture*, Vol 17, No 2, 2007, p117-121.
- 234 UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers*, 1999. Amnesty International considers the Istanbul Protocol, or similar standards, to be a suitable protocol for such an examination.
- 235 *Kamerstukken II* 2003-2004, 29 344, No 1, p6.

## ENDNOTES

- 236 The National Rapporteur on Trafficking in Human Beings was established in 2000 and reports on the nature and scale of human trafficking in the Netherlands, [www.bnrm.nl](http://www.bnrm.nl).
- 237 *Kamerstukken II* 2004-2005, 28 638, No 13.
- 238 Named after chapter B9 of the Aliens Circular 2000; the policy has existed since 1998.
- 239 The new Article 273f Penal Code now extends to more forms of human trafficking, including organ removal and slave-like situations outside the sex industry.
- 240 Amnesty International interview of 19 September 2007 with the project coordinator on immigration detention at BLinN. **Also see:** De Jonge van Ellemeet, "Slecht werkgeverschap of 'moderne slavernij'", *Justitiële verkenningen*, Vol 33, No 7, 2007, p107-119.
- 241 BLinN, "*Dan moeten ze hun mond maar open doen!*" *Slachtoffers van mensenhandel in vreemdelingenbewaring*, July 2005.
- 242 BLinN, *Jaarverslag 2006*, p12, [www.blinn.nl/docs/Jaarverslag%202006.pdf](http://www.blinn.nl/docs/Jaarverslag%202006.pdf).
- 243 Letter to parliament of 18 October 2007, 5481810/DVB/07. **In 2006 the B9 Regulation was expanded in the sense that there would be a presumption of risk for migrant victims formally reporting human trafficking**, WBV 2006/36A, 8 November 2006.
- 233 *Kamerstukken II* 2007-2008, 19 637, No 1148.
- 245 *Human Trafficking*, Fifth Report by the Dutch Rapporteur on Trafficking in Human Beings, The Hague: 2007.
- 246 "Aanwijzing mensenhandel" van het College van procureurs-generaal, Government Gazette 2006, 58, 6 March 2006, p14.
- 247 The *Siliadin v France* case of the European Court for Human Rights developed various aspects that can be used to identify possible victims of human trafficking, ECTHR 26 July 2006 (*Siliadin v France*).
- 248 *UN Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.
- 249 Explanatory Report to the Council of Europe Convention on Action against Trafficking (CETS No 197), para 155, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>.
- 250 COS 30 juni 2006, *JV* 2006/325, comment by Van Kalmthout.
- 251 Alempijevic a.o., "Forensic medical examination of trafficking in human being", *Torture*, Vol 17, No 2, 2007, p117-121.
- 252 *UN Guidelines on Human Rights and Human Trafficking*, Guidelines 2 and 4.
- 253 The so-called "non punishment clause" of Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings.
- 254 See also International Detention Coalition, Position Paper on Children in Immigration Detention, 21 November 2007, [www.idcoalition.org](http://www.idcoalition.org).
- 255 Steel a.o., "The Politics of Asylum and Immigration Detention: Advocacy, ethics and the professional role of the therapist", in: Wilson and Drozdek, *Broken Spirits. The treatment of traumatized asylum-seekers, refugees, war and torture victims*, 2004, p663-665 (Steel 2004).
- 256 Proceedings of Parliament, attachment 2005-2006, No. 1714.
- 257 Inspectie voor de Sanctietoepassing, *Ouders met minderjarigen in vreemdelingenbewaring; vervolgonderzoek*, December 2006, p4.
- 258 DCI/UNICEF, *Jaarbericht Kinderrechten 2008*, p10, 21 January 2008; to download the report, go to [www.unicef.nl/upload/153087\\_822\\_1200848785920-jaarbericht.pdf](http://www.unicef.nl/upload/153087_822_1200848785920-jaarbericht.pdf).
- 259 Letter by the Minister and State Secretary of Justice to parliament on migrant children in immigration detention, 29 January 2008, 5499165/07.
- 260 The Inspectorate concluded that the emphasis in the facilities on order and safety was not conducive to a child friendly environment, in particular in cases of detention lasting more than 28 days. It recommended the development of alternative accommodation, Inspectie voor de Sanctietoepassing, *Ouders met minderjarigen in vreemdelingenbewaring*, August 2005, [www.inspectiesanctietoepassing.nl/publicaties/inspectierapporten](http://www.inspectiesanctietoepassing.nl/publicaties/inspectierapporten), Raad voor de Strafrechtstoepassing en Jeugdbescherming, Detentiecentrum Zeist (15 April 2005) and Grenshospitium, locatie: Tafelbergweg (29 April 2005) and UNHCR, Letter to

## ENDNOTES

- the Minister of Justice Donner, 29 November 2005. The government initially showed a reluctance to seek alternatives for the detention of migrant children and their families, *Kamerstukken II 2005-2006*, 29 344, nr 48, p2. In November 2007, the European Commission criticized various European countries, including the Netherlands, for not applying the Reception Directive in Detention which effectively excluded migrant children from receiving access to education, Commission of the European Communities, *Report on the Application of Directive 2003/9/EC of 27 January 2003, Laying Down Minimum Standards for the Reception of Asylum-seekers*, COM(2007) 745 final, 26 November 2007.
- 261 *Aanhangsel Handelingen II 2005-2006*, 29 344, No 54. Though a follow up inspection by the Inspectorate for Sanction Administration (*Inspectie voor de Sanctietoepassing*) in December 2007 revealed some improvements, the Inspectorate also identified various deficiencies in aspects such as privacy, educational and recreational facilities. It therefore repeated its recommendation to develop alternative accommodation for migrant children and their families, *Inspectie voor de Sanctietoepassing, Ouders met minderjarigen in vreemdelingenbewaring; vervolgonderzoek*, December 2006, p20; [www.inspectiesanctietoepassing.nl/publicaties/inspectierapporten](http://www.inspectiesanctietoepassing.nl/publicaties/inspectierapporten).
- 262 *Kamerstukken II 2005-2006*, 29 344, No 57.
- 263 On 19 January 2007 a total of seven migrant children and their parents were detained and spent an average of 19 days in detention. The number of unaccompanied minors in detention, however, did not show a significant decrease. On 10 January 2007 some 40 children were detained for an average detention period of 105 days, *Aanhangsel Handelingen II 2005-2006*, No 1714, 28 June 2006 and *Aanhangsel Handelingen II 2005-2006*, No 1714, 28 June 2006 and *Aanhangsel Handelingen II 2006-2007*, No 873, 22 February 2007 respectively.
- 264 See [www.geenkindindecel.nl](http://www.geenkindindecel.nl).
- 265 Other NGOs were UNICEF, the Dutch Council for Refugees, Defence for Children International, INLIA Foundation, Church in Action, SAMAH and the Children's Stamps Foundation. **The campaign gained momentum in the media, was widely supported** by the public and resulted in the presentation to members of parliament of some 140,000 signatures on a petition against the detention of migrant children and their families.
- 266 "When [abolishing all forms of administrative detention] is not immediately possible, governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:
- (a) Ensuring that the legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only when it is in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child, including access to education and health. ... Should the age of the migrant be in dispute, the most favourable treatment should be accorded until it is determined whether he/she is a minor," Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, Recommendations, para 75.
- 267 Letter by the Minister and State Secretary of Justice to parliament on children in immigration detention, 29 January 2008, 5499165/07, p6.
- 268 Principally Articles 2 and 22 CRC.
- 269 Article 3 CRC. See also HRC 6 November 2003 (*Bakhtiyari v Australia*), para 9.7.
- 270 Amnesty recognizes that in certain cases it might be in the best interests of children to be detained with their family so as not to be separated from them if there really are no alternatives. Guidance can be taken from UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (1999), which states:
- "Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate

## ENDNOTES

- accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered. "All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.
- "If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time."
- 271 For example *Kamerstukken II* 2005-2006, 29 344, No 56, p6 and 8 and COS 13 September 2005, NAV 2005/240, comment by Meuwese and *JV* 2005/409, comment by Spijkerboer.
- 272 Letters by the coalition of 30 January 2008 and by Amnesty International (Dutch Section) of 1 February 2008 (Dir/en/2008/111).
- 273 SAMAH, *AMV's in vreemdelingenbewaring in Justitiële Jeugdinstellingen*, June 2007, [www.samah.nl](http://www.samah.nl).
- 274 ECHR 12 October 2006 (*Mayeka/Mitunga v Belgium*), para 81, *JV* 2007/29 comment by Battjes.
- 275 Amnesty International, *Millions in flight: The Iraqi refugee crisis* (AI Index: MDE 14/041/2007), p38-43. A new report on the situation of Iraqi refugees will be released by Amnesty International in June 2008.
- 276 See UNHCR, *Guidelines Relating to the Eligibility of Iraqi Asylum-seekers*, October 2005, p24-25. See also UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers*, August 2007.
- 277 *Kamerstukken II* 2005-2006, 19 637, No 1003. The policy was later laid down in WBV 2006/10 of 14 February 2006.
- 278 *Kamerstukken II* 2005-2006, 19 637, No 1022, p7-8.
- 279 *Kamerstukken II* 2005-2006, 19 637, No 1008, and its rejection in *Handelingen II* 2005-2006, No 49, p3245.
- 280 COS 3 July 2006, NAV 2006/25. Following a further deterioration of the security and human rights situation in Iraq – acknowledged in the Iraq Country Report of 27 April 2006 by the Ministry of Foreign Affairs – a later appeal to reconsider the policy was also rejected, COS 22 November 2006, *JV* 2007/37.
- 281 Letters of the Dutch section of Amnesty International to the former Minister for Alien Affairs and Integration on 30 January 2006 (Dir/hh/2006/005). In its letter of 26 June 2006 (Dir/en/2006/060) Amnesty International again called for a reconsideration of the policy.
- 282 Article 3.106 Aliens Decree 2000 mentions three indicators to decide whether or not a temporary protection policy is called for in a given country situation: 1) the nature, seriousness, arbitrariness and spreading of the violence, 2) the activities of international organizations and 3) the policy in other EU countries.
- 283 *Kamerstukken II* 2006-2007, 19 637, No 1118, 20 December 2006.
- 284 *Kamerstukken II* 2006-2007, 19 637, No 1137, 2 April 2007. The policy was laid down in WBV 2007/05 of 21 May 2007.
- 285 For example Letters of Amnesty International to the Minister of Justice on 22 January 2007 (Dir/en/2007/107) and to the State Secretary of Justice on 23 July 2007 (Dir/en/2007/204).
- 286 Amnesty International, *Millions in Flight: The Iraqi refugee crisis* (AI Index: MDE 14/041/2007), p38-43. A new report on the situation of Iraqi refugees will be released by Amnesty International in June 2008.
- 287 Letter by the IND to the Dutch Asylum Lawyers Association of 12 October 2007 (INDUIT07-4650 (AUB)).
- 288 *UN Guidelines on Human Rights and Human Trafficking*, Guidelines 2 and 4.
- 289 The so-called "non-punishment clause" of Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings.
- 290 Since the 1990s those measures were: in 1991 and 1997, a regularization measure for so-called "white irregular migrants": migrants who, despite having no residence permit, had worked and paid taxes, and whose irregular status had not been challenged by the Dutch government for years. Some 3,000 people benefited from these measures, which ended on 1 January 1998. Other amnesty measures dealt mainly with clearly defined groups of (rejected) asylum-seekers, such as a special

## ENDNOTES

amnesty in 2000 (TBV 2000/12, 5 June 2000) for asylum-seekers who survived the fall of Srebrenica on 11 July 1995; eventually most of them (several dozen) benefited from the measure, which expired on 31 December 2001, *Kamerstukken II 2006-2007*, 19 637, No 1171. In 2003 a more general limited amnesty measure was issued for asylum-seekers whose applications had been pending for more than five years (TBV 2003/38, 2 October 2003). It expired on 31 December 2003 and resulted in residence permits for 2,097 people. In 2006 some 180 Syrian rejected asylum-seekers received residence permits following criticism about a presentation to a Syrian government delegation. In the same year a limited group of Schiphol fire survivors were granted resident permits, *Kamerstukken II 2005-2006*, 24 587, No 187.

- 291 Its official name is the “settlement of the old” Aliens Act estate scheme” (*Regeling ter afwikkeling van de nalatenschap van de oude Vreemdelingenwet*) and that is only meant for asylum-seekers who applied under the old Aliens Act, i.e. before 1 April 2001, when the Aliens Act 2000 entered into force, WBV 2007/11, 12 June 2007. For an English translation see [www.pardonnu.nl](http://www.pardonnu.nl) under “algemene informatie”. On 21 January 2008 some 21,000 people had already benefitted from the measure according to the State Secretary of Justice in a letter to parliament (5528864/08/DVB), 1 February 2008.
- 292 The topic was strongly debated immediately after the parliamentary elections of November 2006, where opposition parties received a majority vote and forced the former government to accept and implement a motion calling for a general amnesty measure (“motion Bos” of 30 November 2006, *Kamerstukken II 2006-2007*, No 1106). Initially, the government rejected the motion in a letter of 5 December 2006, but it was later forced to accept the earlier motion after a second one was adopted by parliament (“motion Dijsselbloem” of 12 December 2006, *Kamerstukken II 2006-2007*, No 1111).
- 293 GCIM report 2005, p37-39 and Rapporteur Greenway, *Regularisation programmes for irregular migrants*, Doc11350, 6 July 2007.
- 294 Report of Rapporteur Zapfl-Helbling, *Policy of return for failed asylum-seekers in the Netherlands*, Doc 10741, 15 November 2005.
- 295 COE Resolution 1483 (2006), para 15.14.

## GLOSSARY

<b>B9 Regulation</b>	Offers temporary residence during investigation of a crime in return for the victim of the crime giving testimony
<b>Beijing Rules</b>	UN Standard Minimum Rules for the Administration of Juvenile Justice
<b>BLinN</b>	Victim support organization, Bonded Labour in the Netherlands
<b>BMA</b>	State Medical Service ( <i>Bureau Medische Advisering</i> )
<b>CAT</b>	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CBS</b>	Central Bureau of Statistics
<b>CCPR</b>	Human Rights Committee
<b>CEAS</b>	Common European Asylum System
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CoE</b>	Council of Europe
<b>CPT</b>	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Commission Intergral Supervision Returns (Commissie Integraal Toezicht Terugkeer) - Supervisory body for the returns process
<b>CRC</b>	Convention on the Rights of the Child
<b>Dublin Regulation</b>	an agreement between the EU member states which ensures that an application for asylum in an EU country is handled by one single country
<b>DSB</b>	Dutch Safety Board
<b>DV&amp;O</b>	Transport and Support Service ( <i>Dienst Vervoer &amp; Ondersteuning</i> )
<b>ECHR</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>Havana Rules</b>	UN Rules for the Protection of Juveniles Deprived of their Liberty
<b>IAT</b>	Internal Assistance Team
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IDP</b>	Internally Displaced Person
<b>IGZ</b>	Netherlands Health Care Inspectorate ( <i>Inspectie voor de Gezondheidszorg</i> )
<b>IND</b>	Dutch Immigration Service
<b>IOM</b>	International Organization for Migration
<b>Istanbul Protocol</b>	guidelines for investigating cases of alleged torture, and for reporting such findings to the judiciary and any other investigative body
<b>JPPA</b>	Juvenile Penitentiary Principles Act
<b>MWC</b>	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
<b>NACI</b>	National Agency of Correctional Institutions ( <i>Dienst Justitiële Inrichtingen DJI</i> )
<b>NGO</b>	Non-Governmental Organization
<b>NJCM</b>	Dutch section of the International Commission of Jurists ( <i>Nederlands Juristen Comité voor de Mensenrechten</i> )
<b>PPA</b>	Penitentiary Principles Act ( <i>Penitentiare Beginselenwet, Pbw</i> )

<b>RBA</b>	Regulation on Border Accommodation ( <i>Reglement Grenslogies</i> )
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNICEF</b>	United Nations Children's Fund
<b>UNPD</b>	United Nations Population Division
<b>WODC</b>	Scientific Investigation and Documentation Centre (Wetenschappelijk Onderzoeks- en Documentatie Centrum)