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# I Introduction

The Advisory Council on International Affairs (AIV) was asked on 27 April 2001 to advise on the World Conference against Racism and Racial Discrimination, which is to be held in Durban, South Africa, from 31 August to 7 September 2001.

The request for advice (see Annexe I) indicates, among other things, that the objective of the World Conference is to devise measures and policy at national, regional and international level to combat contemporary forms of racism, discrimination, xenophobia and related intolerance. In the period leading up to the World Conference, States and regions have tended to focus mainly on their own problems during the regional conferences. The World Conference is intended to produce 'action-oriented' and 'forward-looking' results, which will be combined in a Declaration and Action Programme.

The request also addresses with developments during the preparation of the Conference and indicates that on the basis of the discussions held hitherto acceptable compromises would seem possible on many points, but that a number of problem areas will continue to exist. One of these areas is the subject of compensatory measures for victims of slavery and colonialism; a subject that has been strongly pushed by the African States in particular. This concerns the question of whether States with a colonial past or a history of slavery or both owe compensation to certain individuals, groups or States that are still disadvantaged today as a result of slavery or colonialism in the past.

Reference is also made to the fact that the European Union (EU) solemnly acknowledged at the European Conference in Strasbourg that suffering caused by slavery or arising from colonialism should be remembered. In recent months the EU has adopted the following position on reparation and compensation. It recognises that awareness of slavery and colonialism, which must be viewed in their historical context, is necessary and must be widely promoted, particularly among young people, so that the damage caused is not repeated in the future. In addition, the EU considers that the aims of the World Conference would not be served by a debate on financial compensation for the events of the past. Such a debate would distract the Conference from its main objective, namely achieving results aimed at the present and future, and not settling scores from the past. Nor would such a debate be in keeping with a number of legal principles on reparation. Moreover, the EU considers that a debate about financial compensation during the conference would be more likely to be a hindrance than a help in the battle against racism and discrimination, xenophobia and related forms of intolerance.

Against this background, advice was requested on the following questions:

1. Building on the EU position outlined above, the Netherlands wants to make a positive contribution to the discussion on how to put into practical effect the acknowledgement of the suffering caused to victims of slavery and colonialism and the possible consequences for their descendants. What possibilities exist for such a contribution?
2. How would any positive measures for the descendants of victims of slavery and colonialism fit into a broader anti-racism policy that also takes account of other groups who suffer racism, discrimination, xenophobia and related forms of intolerance?

In reply to the request for advice the AIV deals in the first place with more general aspects of the subject in the form of a description of racism and racial discrimination past and present (section II). Section III considers various aspects of the right to reparation of victims of racism and racial discrimination. Among the subjects discussed in this connection are the existing legal framework and the various forms of reparation. Section IV examines the results of the regional meetings on this subject and the positions adopted at them. Finally, Section V contains conclusions and recommendations. As the World Conference is due to start very shortly, the AIV has been obliged to confine itself in this report to a consideration of the broad issues.

The advisory report was drawn up by a sub-committee of the Human Rights Committee (CMR) of the AIV. This Committee consists of the following persons: Professor P.R. Baehr\*, Professor C.E. von Benda-Beckmann-Droogleever Fortuijn (vice-chair), Professor T.C. van Boven\* (chair of the sub-committee), Dr M.C. Castermans-Holleman\*, Professor C.P.M. Cleiren, Professor P. Cliteur, T. Ety\*, Professor C. Flinterman\* (chair), Professor W.J.M. van Genugten\*, Ms L.Y. Gonçalves-Ho Kang You\*, Ms C. Hak\*, Ms M. Koers-van der Linden, F. Kuitenbrouwer, Ms A.L.E.C. van der Stoel, J. G. van der Tas and Ms H.M. Verrijn Stuart. Members whose name is marked by an asterisk sat on the sub-committee which prepared this draft report. Professor Cliteur and Mr Kuitenbrouwer participated as corresponding members.

Professor I. Wolffers of the Development Cooperation Committee (COS) also assisted in the preparation of this report. Particular assistance in the drafting of the report was provided by Ms W.A. van Aardenne (DMV/MR), an official of the Ministry of Foreign Affairs who acted as advisor to the Committee. The secretary was T.D.J. Oostenbrink (executive secretary to the Human Rights Committee), who was assisted by M.M.T. Keyte, M.F. De Lange and Ms W. Neeft (interns).

The AIV discussed the present report at its meeting of 1 June 2001, when it decided on the procedure that led to the adoption of the report on 18 June 2001.

## II Racism and racial discrimination past and present

### *The term racial discrimination*

The term racial discrimination has long been associated with white rule, in other words the domination of coloured peoples by whites. In the United Nations (UN) the fight against racial discrimination and racism was viewed as an extension of the fight against colonialism. The UN's Decolonisation Declaration and Anti-Racism Declaration are strikingly similar in their condemnation of 'colonialism and all practices of segregation and discrimination associated therewith' and in their assertion that 'any doctrine of racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous'.<sup>1</sup>

It was against this same background that the UN adopted the International Convention on the Elimination of All Forms of Racial Discrimination in 1965.<sup>2</sup> This Convention - the first UN Human Rights Convention to have its own monitoring mechanism - is the most comprehensive international legal instrument for combating and eliminating racial discrimination.<sup>3</sup> 157 States, including the Netherlands, were parties to the Convention on 28 March 2001. The definition of racial discrimination in the Convention is strikingly broad. The term is taken to mean 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (Article 1).<sup>4</sup> This definition is noteworthy because it not only covers race and colour but also extends to descent and national or ethnic origin. In practice, this means that discrimination against ethnic minorities, including migrants, indigenous peoples and other groups characterised by descent or origin, for example the outcastes (untouchables), comes within the scope of the Convention, as has been repeatedly confirmed by the Committee on the Elimination of Racial Discrimination (CERD).<sup>5</sup> Although individual parties to the Convention in some cases challenge this comprehensive approach (for example, India in relation to the Dalits), the broad definition given above must be regarded as authoritative. The AIV endorses this definition, which has also been accepted in the Netherlands through the decisions of the Supreme Court.

1 General Assembly resolution 1514 (XV) (1960) and General Assembly resolution (XVIII) (1963).

2 General Assembly resolution 2106A (XX) (1965).

3 The term discrimination is defined in a manner similar to that in ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (1958) and the UNESCO Convention against Discrimination in Education (1960).

4 It should, incidentally, be noted that when used as a characteristic to distinguish between people the term 'race' is a social concept involving harmful assumptions and effects. There is only one race, namely the human race.

5 It follows that forms of intolerance related to racism and racial discrimination, for example those of a religious nature, also come within the remit of the Conference.

The application of this broad definition has also brought recognition that racial discrimination is not purely a historical given connected with the perverse racial delusions of national socialism, the institutionalised white policy of apartheid or the racial oppression against which the American civil rights movement fought. Moreover, application of the broad definition has meant that racial discrimination cannot be regarded as something that occurs only in other parts of the world. Although some governments may find it an attractive option to associate the evil of racial discrimination with the past and with practices that occur elsewhere and, in consequence, to apply the Convention as an instrument of foreign policy, the work of monitoring observance of the Convention has shown in practice that problems of racial discrimination in their different forms, latent and acute, occur everywhere, not just abroad but also in one's own country and region, and therefore have domestic policy implications. The AIV believes that the World Conference will achieve its aims to some extent if all the participating states summon up a similar spirit of critical self-examination. The World Conference should then reflect the results of such self-examination and include provisions in the Action Programme that are designed to monitor practical measures to combat racism and racial discrimination.

#### *The European agenda*

For a long time, political and legal developments in post-war Europe failed to recognise the evil of racism and racial discrimination.<sup>6</sup> While human rights in Europe (and elsewhere too) acquired a prominent place on political and legal agendas, racial discrimination continued to receive insufficient recognition as a human rights problem. This is evident, for example, from the very sparse case law of the European Court of Human Rights relating to racial discrimination. Although this situation has started to change, there is a long way to go before the subject receives the attention it deserves. Within the Council of Europe, the European Commission against Racism and Intolerance (ECRI) has done important work by publishing frank country reports and propagating good practices. Moreover, the conclusion in June 2000 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which is intended to widen its non-discrimination scope,<sup>7</sup> serves to strengthen the legal instruments for combating racial discrimination in Europe. The resolve to take vigorous measures in Europe to combat and prevent racial discrimination and xenophobia is also enshrined in the Political Declaration adopted by the Ministers of the Council of Europe at the regional preparatory conference entitled 'All different, all equal: From principle to practice', which was held in Strasbourg from 11 to 13 October 2000.<sup>8</sup> This resolve was amplified in the General Conclusions of the European Conference against Racism.<sup>9</sup>

6 During the parliamentary procedure to implement the Convention for the Elimination of All Forms of Racial Discrimination the then Minister of Justice, C.H.F. Polak, expressed the view in the Explanatory Memorandum to the Implementing Act that 'the situation in the Netherlands is not so bad that there is a pressing need for new statutory measures specially designed to combat racial discrimination'. (Explanatory Memorandum 9724 no. 3, p. 3).

7 As a result of the adoption of this Protocol, the principle of non-discrimination is no longer confined to the rights contained in the European Convention on Human Rights. Discrimination in respect of social rights too now comes within the ambit of the Protocol

8 EUROCONF (2000) 1 final.

9 EUROCONF (2000) 7 final.

Partly owing to the pressure exerted by the European Parliament, which has demonstrated its vigilance over the years in relation to the dangers posed by the extreme right and the many racist incidents that have occurred in the Member States of the European Union, the European Commission too has started to play a more active role in the fight against racism and in promoting tolerance and respect in a multicultural society. This was demonstrated by the European Year against Racism (1997) and the adoption of an Action Plan (1998). A factor of great legal and political importance was the adoption by the Council of the European Union on 29 June 2000 of Directive 2000/43/EC (pursuant to Article 13 of the Treaty of Amsterdam) for the purpose of implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. This Directive focuses mainly on areas of daily life in which racial discrimination is most perceptible, i.e. access to employment, vocational training and promotion, working conditions, membership of trade unions, social security and health care, education, housing and access to public services and facilities. The establishment of the European Monitoring Centre on Racism and Xenophobia in Vienna is a positive step towards increasing vigilance, stepping up monitoring and supporting policy. All these measures in the field of legislation, policy, supervision, information and education remain extremely necessary. The annual reports and country reports of the ECRI paint a worrying picture of the situation in Europe year-in and year-out, for example widespread and continuing hostility towards immigrants, aliens, asylum-seekers and refugees, racist behaviour among law enforcement officers, encouragement of intolerance and incitement to racial or ethnic hatred, etc.<sup>10</sup> The AIV notes with approval the measures being taken at various levels in Europe to counter manifestations of racism and practices of racial discrimination and stresses that these matters should be given continuing priority in national and European agendas. The AIV also recommends that this priority, as expressed for example in the Final Document of the Regional Meeting in Strasbourg, should be emphatically highlighted during the World Conference.

#### *Contemporary and historical forms of racism and racial discrimination*

Even today, forms of racism, often of an insidious nature, undermine the foundations of all societies, sometimes visibly and sometimes less visibly. They undermine people's self-esteem and contribute to a climate of injustice, inequality and discord. Moreover, they have the potential to escalate to the point of inhumanity, causing irreparable suffering. The urge to expand and dominate, aggression, occupation and annexation, economic exploitation and subjugation and, to talk in contemporary terms, ethnic cleansing and ethnic violence: all these historical and contemporary phenomena of mass political, economic and sometimes cultural violence were and are frequently based on racist attitudes and racist motives. Often, too, they have racial effects. People are traded and exploited as merchandise: the classical forms of slavery and servitude still exist, for example in certain countries in Africa and Asia. Forced labour, trafficking in human beings, particularly women and children,<sup>11</sup> are just a few contemporary forms of exploitation, often in combination with sexist subjugation for racial motives. In sport too expressions of racist violence, particularly verbal violence, are becoming increasingly prevalent. These practices have been extensively documented, for example by the Anti-

10 European Commission against Racism and Intolerance, 1999 Annual Report, pp. 7-9.

11 See for example, the Advisory Committee on Human Rights and Foreign Policy, 'Trafficking in human beings', report number 14, The Hague, 1992. See also EGM/GDR/Report, 'Report of the Expert Group on Gender and Racial Discrimination', Zagreb, 21-24 November 2000, publication of the UN Division on the Advancement of Women.

Slavery Society and in reports submitted annually to the UN Working Group on Contemporary Forms of Slavery.<sup>12</sup> For centuries indigenous peoples, whose very humanity was implicitly or explicitly denied by their rulers, were victimised, liquidated, marginalised or assimilated or their rights otherwise violated.<sup>13</sup> Their lands were declared *terra nullius* (no-man's-land) and their natural resources confiscated.

Racism and racial discrimination as practised in the past by and between individuals, groups and peoples have repercussions even today, for example in the form of discrimination on the basis of colour, historical and contemporary forms of slavery, racist exploitation of women,<sup>14</sup> marginalisation of indigenous peoples, anti-Semitism and the exclusion of Roma and Sinti. Discrimination and injustice in the past leave a trail to the present and have had consequences that determine the situation in which people find themselves today.<sup>15</sup> This applies, for example, to the descendants of those who suffered from the slave trade and slavery, to indigenous peoples and to deportees. It would be impracticable and impossible to provide compensation and reparation for all the racial and ethnic injustice committed in the past, but it should be recognised and admitted that this injustice did occur and is still part of many people's perceptions and reality.

It should also be noted that since the Second World War provisions have been made on a large scale for the survivors and victims of persecution and their claims honoured by way of 'Wiedergutmachung'.<sup>16</sup> Naturally, this compensation could never make up for the pain caused and suffering undergone, but it was nonetheless essential for the victims from a human and moral point of view and was an important prerequisite for Germany's resumption of its place in the international community. Claims submitted to Japanese courts for compensation by women sexually abused by the Japanese army ('comfort women') and by those used by the Japanese as forced labour have hitherto had little if any result, which has caused great frustration and dissatisfaction among the survivors/victims. Such claims are attracting increasing attention in the United States too. Precedents set in respect of native Americans and Japanese Americans are being invoked by Afro-Americans as a basis for claims for compensation for historical

12 See most recently: *Report of the Working Group on Contemporary Forms of Slavery on its twenty-fifth session*, UN Doc. E/CN.4/Sub.2/2000/23.

13 For a more detailed description of the problem of indigenous peoples, see the report on 'Indigenous Peoples' of the Advisory Committee on Human Rights and Foreign Policy, report number 16, The Hague, 1993. See also ILO Convention 169 on Indigenous Peoples (1989).

14 Women are often discriminated against on more than one ground, for example on the grounds of both colour and gender.

15 The consequences of protracted and systematic disadvantage and discrimination, not just materially but also mentally and emotionally, were trenchantly described by the US Supreme Court in its famous judgment in *Brown v. The Board of Education* (1954), in which it held that racially segregated education '... generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone'.

16 In this connection see the *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report by Theo van Boven*, UN.doc. E/CN.4/sub.2/1993/8, in particular paras. 107-111 and 125.



injustice due to slavery and long-term systematic racial discrimination.<sup>17</sup> In Australia the Aborigines are demanding compensation for their expropriated historical rights to the land and for the children removed from their communities. Moreover, measures are being taken and claims honoured in various countries, particularly in Latin America and Central and Eastern Europe, as part of the transition from authoritarian regimes to a democratic system, in order to provide reparation and compensation for victims of persecution. All these developments have led to a situation in which greater attention is being paid to the justified interests and rights of victims and in which a political and legal culture aimed at recognition and reparation is being created.

Another noteworthy development that has caused a decisive change in international legal thinking since 1945 and defines racial discrimination in a special way is the view that practices of systematic racial discrimination are contrary to the fundamental principles of the international legal order and to the requirements of peremptory norms (*ius cogens*). This legal development is also connected with the fact that in so far as racial or ethnic practices have genocidal dimensions or come within the terms of the definition of crimes against humanity (see Articles 6 and 7 of the Rome Statute of the International Criminal Court), they constitute international crimes for which the perpetrators and their accomplices may be held accountable under the criminal law. The criteria of contemporary international law in this field are peremptory and unmistakable. This is a legal development which distinguishes the second half of the twentieth century from previous periods.

Contemporary racism is influenced to a large extent - more than in the past - by what the High Commissioner for Human Rights aptly described in a recent report as: 'movement of people' (migration, trafficking in human beings, displacement and uprooting), 'movement of information' (including incitement to hatred through the media and the Internet) and 'movement of capital' (with its adverse social effects and exploitation of the disadvantaged and marginalised).<sup>18</sup>

In summary, the AIV considers that historical and contemporary practices of racial discrimination and their effects should be distinguished from one another but cannot always be separated. Depending on place and time, differences and changes have occurred. Events and practices of the past often continue to influence people's perceptions and therefore affect the present. Besides the material consequences of protracted disadvantage and persistent discrimination for those concerned and their descendants, the mental and moral consequences too should be taken into account in the right to reparation for victims of racial discrimination.

17 Natasha Parassram Concepcion, Reparations for Afro-Americans, in: *Human Rights Brief*, Center for Human Rights and Humanitarian Law, Washington College of Law, Vol. 8, Issue 2 (Winter 2001), p. 16.

18 *Report of the High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, UN doc. E/CN.4/2001/16.

### **III Right to reparation for victims of racial discrimination**

The debate about compensatory claims and compensatory measures with a view to granting reparation to victims of historical and contemporary practices of racial discrimination should be placed in a broader legal framework. This framework includes openings and options that are not confined to financial forms of reparation, but extend to other forms of recognition and satisfaction for victims. Reference will be made briefly in this connection to some relevant provisions of human rights conventions. This will be followed by a classification of the different forms of reparation and then by consideration of a number of relevant recommendations of the Committee on the Elimination of Racial Discrimination (CERD), the Committee responsible under the convention for monitoring elimination of racial discrimination. Finally, various other developments will be considered for the purpose of clarifying the legal framework.

#### *Legal framework*

The Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law (Article 8). This provision is confirmed and elaborated in the International Covenant on Civil and Political Rights (Article 2 (3) (a)). Of particular relevance is the provision in the International Convention on the Elimination of All Forms of Racial Discrimination which obliges States to assure to everyone within their jurisdiction effective protection and remedies and, in particular, grants victims of racial discrimination the right to seek 'just and adequate reparation or satisfaction for any damage suffered' (Article 6). The European Convention on Human Rights gives the European Court the power, if it finds that there has been a violation of the Convention, to 'afford just satisfaction to the injured party' (Article 41). Likewise, under the American Convention on Human Rights the Inter-American Court of Human Rights may determine that the consequences of a violation of the Convention must be remedied and that fair compensation be paid to the injured party (Article 63 (1)). Although the legal framework provides the basis for reparation to victims, the implementation and assessment of these matters are complex and still leave much to be desired.

#### *Classification of the different forms of reparation*

In the course of its activities in the field of State responsibility, the International Law Commission of the United Nations drew up rules relating to the different forms of reparation in inter-State relations. The generic term reparation was thus taken to cover restitution, compensation and satisfaction.<sup>19</sup> On the basis of these rules the different forms of restitution have been elaborated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, which are now before the UN Commission on Human Rights.<sup>20</sup>

This document, which has not yet been approved by the Commission on Human Rights, provides a good basis for clarifying and specifying the term reparation.

19 See UN.doc. A/CN.6/L.600, Art. 35 et seq.

20 See UN.doc. E/CN.4/2000/62, Annex.

The document employs the following classification:

- The right to **reparation** is intended to promote justice by redressing violations of international human rights or humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered (para. 15). Reparation may be made in the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (para. 21).
- **Restitution** should, where possible, restore the victim to the original situation before the violations occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property (para. 22).
- **Compensation** should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as: physical or mental harm, lost opportunities (including education), material damages and loss of earnings, harm to reputation or dignity, costs required for legal or expert assistance, medicines and medical services, and psychological and social services (para. 23).
- **Rehabilitation** should include medical and psychological care as well as legal and social services (para. 24).
- **Satisfaction and guarantees of non-repetition** include a wide range of provisions and policy measures. For the purpose of this report mention may be made of verification of the facts and full and public disclosure of the truth, official declaration or judicial decision restoring dignity and reputation, acknowledgement of the facts and acceptance of responsibility, commemorations and tributes to victims and survivors.

It should be noted that reparation is a general and comprehensive term for the redress of injustice and that restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition are special forms of reparation. The provision of reparation in one form does not preclude its provision in other forms. Various forms of reparation can go hand in hand in order to provide redress for injustice.

*Relevant rulings and recommendations of the Committee on the Elimination of Racial Discrimination (CERD)*

In its concluding observations of country reports and its opinions on individual complaints, CERD has expressed its views on numerous occasions, pursuant to Article 6 of the Convention, on the award of just and adequate reparation to victims of racial discrimination in the broad sense of this term, as defined in Article 1 of the Convention.<sup>21</sup>

In a series of General Recommendations too, CERD has pointed to the importance of reparation in one form or another in relation to certain categories of person in order to redress an injustice. For example, the Committee held in relation to refugees and other persons who have been displaced for racial or ethnic reasons that after their return to their countries of origin they have the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately from for any such property that cannot be restored to them.<sup>22</sup> In another General Recommendation on the rights of indigenous peoples, CERD calls upon the States Parties

<sup>21</sup> See *Common Problems linked to all Remedies available to Victims of Racial Discrimination*, background paper by Theo van Boven, Doc. HR/GVA/WCR/SEM.1/2000/BP.5.

<sup>22</sup> General Recommendation XXII (1996).

to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories without their free and informed consent, to take steps to return such lands and territories. Only where this is not possible for factual reasons should the right to restitution be substituted by the right to just, fair and prompt compensation.<sup>23</sup> As regards discrimination against Roma, CERD recommended that the States Parties to the Convention should 'acknowledge the wrongs done during the Second World War to Roma communities by deportation and extermination and consider ways of compensating them'.<sup>24</sup> These Recommendations, which are intended to secure reparation for injustice and harm caused to groups, minorities and peoples owing to racial and ethnic factors, are also important to other groups that suffer or have suffered protracted and persistent injustice. What these groups often have in common is that the injustice suffered by them has been insufficiently acknowledged and recognised worldwide or has been brushed aside in comparison with other injustice or other interests.

#### *Some other developments*

It is noteworthy that, under the Rome Statute of the International Criminal Court, the Court is required to establish principles relating to reparations to victims, including restitution, compensation and rehabilitation (Article 75). On this basis the Court may in due course, either upon request or on its own motion, determine the scope and extent of any damage, loss and injury suffered by the victims. This provision from the Rome Statute is relevant in the context of the World Conference against Racism since offences over which the International Criminal Court has jurisdiction, in particular genocide and crimes against humanity, are often committed in situations of racial and ethnic violence and conflict and are terrible manifestations of widespread or systematic racial discrimination.

#### *Some conclusions*

On the basis of the framework, classification, rulings and developments in support of a right to reparation for victims of racial discrimination, as outlined above, the AIV concludes as follows:

- Victims of racial discrimination have a right to reparation under the existing legal framework as contained in international conventions on human rights and elaborated in recent developments of international criminal law.
- Reparation takes different forms, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. What forms of reparation should be awarded to victims of racial discrimination and whether different forms may be combined depends on the circumstances, for example the wishes and desires of the victims themselves, the seriousness of the suffering caused, the legal culture of the society concerned and the availability of resources.
- Both financial and non-financial forms of reparation are essential if justice is to be done to the victims of racial discrimination. Non-financial forms of reparation include revealing and verifying facts and full and public disclosure of the truth, official declaration or judicial decision restoring honour, dignity and reputation, acknowledgement of the injustice caused and acceptance of responsibility, correct historical accounts of the events, tributes to victims through commemorations, monuments and other means of keeping their memory alive.

23 General Recommendation XXIII (1997).

24 General Recommendation XXVII (2000).

## **IV The forthcoming World Conference: proposals and positions**

It is of crucial importance that the planned World Conference against Racism should provide a stimulus for combating racial discrimination, xenophobia and related intolerance at international, regional and national level as effectively as possible and for creating a climate of greater understanding, respect and tolerance between individuals, groups and peoples. The two previous World Conferences against Racism, which were held in 1978 and 1983, were hampered by deep political divisions (caused, for example, by efforts to brand Zionism as a form of racism). It is very important that the third World Conference should take place in more propitious circumstances.

The third World Conference is in any event being prepared more thoroughly than its two predecessors, due in part to the personal efforts of the UN High Commissioner for Human Rights. The regional meetings, expert seminars, contributions of bodies such as CERD and the Sub-Commission on the Promotion and Protection of Human Rights, and contributions of non-governmental organisations have generated a plethora of ideas and proposals that will form the building blocks for a Declaration and a Programme of Action, the expected outcome of this World Conference. Despite these preparations, it is probable that political divisions will occur at this Conference too in connection with the deterioration of the situation in the Middle East and as a consequence of the wish expressed, for example, by African countries that the World Conference should express itself on financial compensation for victims of slavery and colonialism. This issue has encountered stiff resistance from the United States and other Western countries.

Preparatory conferences have been held at regional level in the run-up to the World Conference, namely in Strasbourg (Europe, 11-13 October 2000), Santiago de Chile (Americas, 5-7 December 2000), Dakar (Africa, 23-25 January 2001) and Teheran (Asia, 19-21 February 2001). There have also been general preparatory meetings (PrepComs). The theme of reparation has already generated sometimes intense debate at these meetings. The various aspects of reparation raised at the meetings are summarised below.

### *European proposals*

The European Union's documents on the subject of reparation for the World Conference against Racism<sup>25</sup> indicate that reparation for contemporary forms of racism and racial discrimination should be regulated first and foremost at national level, preferably through legal proceedings. As mentioned in the request for advice, the documents reflect the position that reparation should mainly be of a non-financial nature and that the objectives of the World Conference would not be served by a debate on financial compensation for events that happened in the past. The emphasis should be on measures relating to legal protection, law enforcement and education. In brief, the European opinion is that reparation should focus on legal and/or policy measures for individual victims.

<sup>25</sup> *General Conclusions of the European Conference against Racism*, Strasbourg, 16 October 2000.

### *Latin-American proposals*

The recommendations of the American regional conference also suggest that reparation is mainly a matter that should be regulated at national level.<sup>26</sup> Section 70 of the recommendation calls for reparation and above all a recognition of the injustice that is a consequence of slavery. A reservation was made by Canada and the United States in respect of this specific paragraph.<sup>27</sup>

In addition, the meeting called for special funds to be established at national and international level (for development and education) for reparation to the descendants of African slaves and to indigenous peoples. Programmes and measures in this respect should be effectuated above all by States which have benefited materially.

### *African proposals*

The results of the African preparatory meeting place great emphasis on the international community's responsibility for the consequences of slavery and other forms of racism. The importance of financial reparation takes precedence.<sup>28</sup> To this end proposals were made for the establishment of a Development Reparation Fund, reparation of economic, cultural and political injury and part-financing of the proposed institutions from private sources. The meeting also urged that apologies be offered and that effective protection and remedies and legal assistance be made available.<sup>29</sup>

### *Asian proposals*

The recommendations of the Asian preparatory meeting emphasise measures that must be taken at national level to prevent racism.<sup>30</sup> According to the meeting, special attention should be paid to the victims and great attention should also be paid to prevention and education. The meeting also asked for recognition and classification of forms of racist violence. Historical responsibility should be accepted in order to do justice to the victims. The document points out that reparation should be prompt, adequate and just.

### *Draft text of the UN Secretariat*

The meetings of the inter-sessional working group to prepare the World Conference discussed a draft Declaration.<sup>31</sup> The draft text of the UN Secretariat refers only in a general sense to the problem of international financial compensation. The emphasis is

26 *Documents adopted by the Regional Conference of the Americas*, Santiago de Chile, 5-7 December 2000, paras. 68, 70, 193 and 194.

27 *Ibid*, 41: Note 3.

28 Recommendations by the African Regional Preparatory Conference for a Programme of Action to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Dakar, 25 January 2001.

29 *Ibid*, Articles 3, 5, 6, 21, 22 and 24 bis.

30 *Asian Preparatory Meeting for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Teheran, 19-21 February 2001

31 *Draft Declaration of The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN. Doc. A/Conf. 189/WG.1/3, 22 February 2001, Draft plan of action, Art. 15-16.

on national legal arrangements and measures. The text, which was prepared before the meeting of the working group from 6 to 9 March 2001, included the following wording in draft article 88, which reads:

'The World Conference urges States to adopt the necessary measures to ensure the rights of victims, in particular the right to an effective judicial remedy and to prompt, adequate and fair reparation for acts of racism, racial discrimination, xenophobia and related intolerance, and effective measures designed to prevent the resurgence of such acts. In this regard, the World Conference invites the Commission on Human Rights to consider the suggestion put forward at the African Regional Conference with regard to a possible international compensation scheme and a development reparation fund.'

#### *Interim position*

The proposals put forward by the various regions clearly show differences of approach and emphasis in relation to the reparation of injustice and of harm and suffering. The European and African proposals appear to diverge the most widely in this respect. The former regard 'reparation' mainly as a matter to be regulated within the national framework for the benefit of individual victims. By contrast, the African proposals put the emphasis on reparation in the form of a financial transfer between States and in the international community for systematic and mass injustice that occurred in the past as a result of colonialism and slavery. Broadly speaking, there can be said to be two approaches or two tracks here. The Latin American and Asian proposals contain elements of both approaches.

The AIV is aware of the complex legal, moral and political aspects of the subjects under consideration. A general question that needs to be asked is whether the making of historical claims and the concentration of the debate on this point will not from the outset greatly increase the difficulty of finding solutions to the racial injustice that occurs in today's world.

As already mentioned, the AIV considers that historical and contemporary practices should be distinguished from one another, but cannot always be separated. Serious injustice in the past often affects people's lives and perceptions today. The suffering experienced by the victims of slavery and colonialism in the past and its effects on their descendants should be recognised in this connection.<sup>32</sup> The AIV observes as follows on this subject.

Slavery and colonialism were characterised by deeply rooted perceptions and practices of inequality between people. The social, psychological, political and economic consequences of repugnant and misguided views on human superiority and inferiority and the acts based on them are obvious.<sup>33</sup> It should, however, be noted in this connection that other factors too may possibly have played a role in causing the disadvantaged position of these groups. After all, other forms of deep-seated historic and contemporary injustice too have been responsible for the fact that large numbers of descendants of victims and slavery still live in circumstances of disadvantage and poverty.

<sup>32</sup> See footnote 17: section 24 of this report is relevant in this context and has been included in Annex II.

<sup>33</sup> See International Council on Human Rights Policy, *The persistence and mutation of racism*, Versoie, Geneva, 2000, pp. 12-13

According to prevailing norms of international law, slavery and colonial rule are incompatible with the basic principles and objectives of the international legal order. The Netherlands too has a share in this historical injustice.

As regards reparation for present generations of victims of racial discrimination, the AIV would emphasise that these victims should be able to claim the various forms of reparation, both financial and non-financial. Often this right to reparation is realised through national remedies.

On the other hand, the AIV considers that reparation payments of the kind used mainly in the past to settle accounts between States, for example between former belligerents, are not suitable ways of compensating for historical practices of slavery and colonialism. In the opinion of the AIV, such an approach would present considerable practical and legal difficulties. First of all, there is the concern that this kind of reparation payments, which are awarded to States and governments, would not benefit the actual victims or their descendants. Yet even if the compensatory measures were to be victim-oriented, there would still be questions about who is and is not entitled to compensation for injustice committed in the past, and which States or other legal entities should be obliged to contribute to the compensatory measures. Questions may also arise about the individual or collective nature of the claims, about quantifying the harm suffered and about the legal, political or administrative channels through which claims could be brought and substantiated. There is also the issue of prescription to consider. Although the prevailing international opinion is that war crimes and crimes against humanity are not subject to a statute of limitations, there is less agreement on whether this is also true of civil claims for compensation arising from such crimes.<sup>34</sup>

The AIV therefore considers that compensatory claims and funds would not be an appropriate means of redressing the historical injustice of slavery and colonialism. However, the AIV does consider it desirable that in order, among other things, to recognise the suffering undergone by victims in the past, policy measures aimed at achieving a more just distribution of wealth and natural resources should be taken at both national and international level for the benefit of their descendants who are still in a position of disadvantage. Such measures should, in fact, apply to all racially and ethnically disadvantaged, deprived and systematically injured groups, particularly in the realisation of equal rights in the socioeconomic field, education, employment and health care (e.g. measures to combat HIV/AIDS). In this respect the AIV refers to the obligation contained in the International Covenant on Economic, Social and Cultural Rights,<sup>35</sup> to the effect that States must take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of their available resources, with a view to achieving progressively the full realisation of the rights recognised in the Covenant. This obligation, if it is taken seriously, is of special significance to the development of socially and economically disadvantaged and deprived groups in national and international society, including those groups which suffer the consequences of persistent racial injustice.

<sup>34</sup> See 'Basic Principles and Guidelines', in footnote 21, in particular sections 6 and 7.

<sup>35</sup> See, above all, Articles 2 and 22 of the Covenant. 144 States, including the Netherlands and all other Member States of the European Union, were parties to this Covenant on 18 May 2001.



If the World Conference against Racism were to recommend special provisions for the latter groups, for example the institution of a Special Fund, the AIV considers that safeguards should be created to ensure that these resources actually benefit the victims of racial injustice and discrimination.

## V Conclusions and recommendations

- The AIV observes that it is of crucial importance that the planned World Conference against Racism should provide a stimulus for combating racial discrimination, xenophobia and related intolerance at international, regional and national level as effectively as possible and for creating a climate of greater understanding, respect and tolerance between individuals, groups and peoples.
- The AIV endorses the broad definition of racial discrimination contained in the International Convention on the Elimination of All Forms of Racial Discrimination, which covers every type of distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.
- The AIV observes that in many places in the world, including Europe, there are disturbing manifestations of racial discrimination, racist behaviour and racist practices. The AIV notes with approval the measures being taken at various levels in Europe to counter manifestations of racism and practices of racial discrimination and stresses that these matters should be given continuing priority in national and European agendas.
- The AIV observes that injustice in the past often leaves a trail to the present and has consequences that determine the situation in which people find themselves today. Although it would be impracticable and impossible to provide compensation and reparation for all the racial and ethnic injustice committed in the past, it should be recognised and admitted that this injustice did occur and is still part of many people's perceptions and reality.
- The AIV points out that, owing to the distress and suffering caused in the Second World War and in the context of the transition from authoritarian regimes to democratic governance, reparation has since been awarded in many countries, sometimes on a large scale, to the survivors and victims of persecution.
- The AIV observes that all these developments have led to a situation in which greater consideration is being given to the justified interests and rights of victims and in which a political and legal culture aimed at recognition and reparation has been created. The proposals formulated in respect of reparation with a view to the forthcoming World Conference should be viewed against this background.
- The AIV points out that in addition to the material and financial forms of reparation, in particular restitution and compensatory measures, there are other forms of reparation such as rehabilitation and satisfaction and guarantees of non-repetition. Financial and non-financial forms of reparation are of equal importance if justice is to be done to the victims of racial discrimination. Non-financial forms of reparation, which are of particular relevance to the recognition of historical injustice, include revealing and verifying facts (correct historical accounts of events and research) and full and public disclosure of the truth, acknowledgement of the injustice caused and acceptance of responsibility, restoration of the honour and good name of victims, commemoration of the injustice committed (e.g. by means of slavery monuments) and tributes to victims. An important role in these non-financial forms of reparation can be played by education, research and the provision of information and by the media. The AIV recommends that all these forms of reparation should be considered at the World Conference.
- The AIV notes that many people believe there is a causal link between historical injustice and contemporary injustice in consequences and effects on the life and circumstances of people and groups of people. As far as reparation for the present generations of victims of racial discrimination is concerned, a legal framework

exists (as explained in Section III of this report). By contrast, the AIV takes the view that a different approach should be adopted with regard to claims for compensation for the suffering undergone by victims of slavery and colonialism. The objection to these claims is that they are pursued at inter-state level and that the perspective of the victims and their descendants is therefore in danger of being overlooked. In addition, the legal framework previously described generates too many questions and uncertainties to allow it to function adequately in respect of reparation for this historical injustice.

- This is why the AIV considers that compensatory claims and ensuing measures would not be an appropriate means of redressing the historical injustice of slavery and colonialism. Instead, greater efforts should be made at national and international level to achieve a more just and more equitable distribution of wealth and natural resources. Such efforts and measures should benefit all racially and ethnically disadvantaged, deprived and systematically injured groups, particularly in the realisation of equal rights in the socioeconomic field. The International Covenant on Economic, Social and Cultural Rights provides a normative basis for this.
- If the World Conference against Racism were to make recommendations for the creation of special provisions, for example the institution of a Special Fund, the AIV considers that safeguards should be created to ensure that these resources actually benefit the victims of racial injustice and discrimination.

Advisory Council on International Affairs  
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27 April 2001

Request for advisory report on possible measures to assist descendants of victims of slavery and colonialism

Dear Professor Andriessen,

The World Conference against Racism will be held in Durban, South Africa, from 31 August to 7 September 2001. The aim of the Conference is to devise national, regional and international measures and policies to combat contemporary forms of racism, discrimination, xenophobia and related forms of intolerance. In the runup to the World Conference, every state and region is expected to focus on its own particular problems in this area. This will be happening at a series of regional conferences. The World Conference itself is intended to be 'action-oriented' and 'forward-looking'. The results will be laid down in a Declaration and Action Programme, which will form the basis for regional and national action plans to combat racism.

During the preparations for the World Conference there have been repeated references to the need to pay specific attention to disadvantaged and possibly vulnerable groups and to positive measures that might be taken to strengthen their position in society. The agenda is based on five main themes. The attention of Western countries is focused especially on preventive measures and protection mechanisms in legislation, policy and practice. This will require the creation of an infrastructure at both local and national level that protects individuals from racism.

The African group, in particular, has made a strong plea for compensatory measures for the descendants of victims of slavery and colonialism. The key question is whether states with a colonial past, or an involvement in slavery, should pay financial compensation to certain individuals, groups or states that are currently disadvantaged as a result of colonialism or slavery in the past.

At the European Conference in Strasbourg the EU solemnly acknowledged that the suffering caused by slavery or arising from colonialism must be commemorated. In recent months, the EU has adopted the following position on reparations and compensation. It acknowledges that awareness of slavery and colonialism, which must be viewed in their historical context, is necessary and must be widely promoted, particularly among young people, so

that the damage caused is not repeated in the future. The EU is also of the opinion that the aims of the World Conference would not be served by a debate on financial compensation for the events of the past. Such a debate would distract the Conference from its main aim, namely to achieve results focused on the present and the future, not the settling of accounts from the past. Furthermore, such a debate would be incompatible with a number of legal principles regarding reparation.<sup>36</sup> The EU is also of the opinion that a debate on financial compensation might render the outcome of the Conference entirely ineffective as regards the actual fight against racism and discrimination, xenophobia and related forms of intolerance.

It is against this background that I hereby request advice regarding the following question:

- 1) Building on the EU position outlined above, the Netherlands wants to make a positive contribution to the discussion on how to put into practical effect the acknowledgement of the suffering caused to victims of slavery and colonialism, and the possible consequences for their descendants. What possibilities exist for such a contribution?

I would also appreciate your advice on the following:

- 2) How would any positive measures for the descendants of victims of slavery and colonialism fit into a broader anti-racism policy that also covered other groups who suffer racism, discrimination, xenophobia and related forms of intolerance?

I look forward with interest to receiving your advisory report.

(signed)

J.J. van Aartsen  
Minister of Foreign Affairs

<sup>36</sup> The EU bases its actions regarding reparation for victims of racism mainly on the following instruments: Article 8 of the Universal Declaration of Human Rights, Article 6 of the Convention on the Elimination of Racial Discrimination, Article 2 of the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and additional protocols, particularly Article 13 of that Convention, and the European Convention on the compensation of victims of violent crimes.

(E/CN.4/Sub. 2/1993/8)  
COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of Discrimination and Protection of Minorities

Forty-fifth session  
Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENT IN FIELDS WITH  
WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of  
Gross Violations of Human Rights and Fundamental Freedoms

Final report submitted by Mr. Theo van Boven, Special Rapporteur

Paragraph 24

The Working Group on Contemporary Forms of Slavery also referred to the need for moral compensation for victims of the slave trade and other early forms of slavery. The problem was also touched upon by two African members of the Sub-Commission in connection with the issue of compensation to the African descendants of the victims of gross violations of human rights by colonial Powers. 15/ In this respect the Special Rapporteur would draw attention to the report of the Secretary-General on the international dimensions of the right to development as a human right in which a series of ethical aspects of the right to development were listed, among these a moral duty of reparation to make up for past exploitation by the colonial Powers and some others. The Secretary-General noted that acceptance of such a moral duty is by no means universal. 16/ Perhaps more to the point on this issue are some recommendations included in the study on the achievements made and obstacles encountered during the Decades to Combat Racism and Racial Discrimination, prepared by Special Rapporteur Mr. A. Eide. 17/ In the section of recommendations relating to situations originating in slavery, the following are pertinent in the present context:

- (a) Research should be carried out in the countries concerned to determine the degree to which descendants of persons held as slaves continue to suffer from social handicaps or deprivations (recommendation 17);
- (b) Effective affirmative action should be carried out until such time as members of these groups experience no further handicaps or deprivations. Such affirmative action should not be construed to constitute discrimination against members of the dominant society (recommendation 18).

While it would be difficult and complex to construe and uphold a legal duty to pay compensation to the descendants of the victims of the slave trade and other early forms of slavery, the present Special Rapporteur agrees that effective affirmative action is called for in appropriate cases as a moral duty. In addition, an accurate record of the history of slavery, including an account of the acts and the activities of the perpetrators and their accomplices and of the sufferings of the victims, should receive wide dissemination through the media, in history books and in educational materials.

**List of abbreviations**

<b>AIV</b>	Advisory Council on International Affairs
<b>CERD</b>	Committee on the Elimination of Racial Discrimination
<b>CMR</b>	Human Rights Committee of the AIV
<b>DMV</b>	Human Rights and Peacebuilding Department
<b>EC</b>	European Commission
<b>ECHR</b>	European Convention on Human Rights
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>EU</b>	European Union
<b>EUROCONF</b>	European Conference
<b>ILO</b>	International Labour Organisation
<b>UN</b>	United Nations

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