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Introduction

On 21 May 2000 the Minister of Foreign Affairs and the State Secretary for Social Affairs and Employment requested the Advisory Council on International Affairs (AIV) to prepare an advisory report on the multi-year equal opportunities policy document (request enclosed as Annexe I).

The AIV was asked to provide suggestions and views on the direction to be taken on human rights policy, as set out in the section on human rights and women.¹ In recent months several reports and papers have been written and incorporated into the finalised multi-year equal opportunities policy document.² The AIV has examined the sections related to human rights and has noted that its conclusions largely answer the questions posed in the original request to the AIV. After consultation with the Ministry of Social Affairs and Employment (SZW), the AIV has therefore decided to limit the main thrust of its advisory report to the most recent developments in international law related to protecting the human rights of women, with special attention to violence against women. It also looks at government proposals for tackling gender-based discrimination, which continues to be a deeply-rooted phenomenon in many countries. Progress in this area has been limited and slow.

The request states that recent decades have seen important developments in international law relating to combating violence against women. The AIV was asked to appraise them and give its opinion on whether the new international norms have been defined clearly enough to protect women's rights effectively. There are still some differences of interpretation of the terms used. These are often related to the issue of universality versus cultural relativism, the subject of a 1998 AIV report which also examined ways of protecting women's rights. In principle, the issues and the conclusions reached have not changed since then. In this connection the AIV will therefore confine itself to a general reference to that advisory report.³

To gain insight into which organisations have been working on the issue of violence against women in recent decades and into the types of violence that are involved, the AIV has commissioned two background reports. The first report, written by Dr I. Boerefijn,⁴ shows that many international organisations are working to prevent and eliminate violence against women and have developed specific programmes and projects to that end. Each one interprets 'violence against women' in its own way, and differences of opinion exist on definitions and their application. Developments in formulating legal definitions and in criminalising forms of violence are the main themes of

1 See multi-year emancipation policy document 'From Women's Lib to Inalienable Right', Ministry of Social Affairs and Employment, March 2000, Section IV.

2 'Multi-year plan on emancipation policy; Short and medium term'. Ministry of Social Affairs and Employment, November 2000, hereafter referred to as 'Multi-year emancipation policy plan'.

3 AIV report no 4 'Universality of human rights and cultural diversity', The Hague, June 1998.

4 See report by Dr I Boerefijn 'Violence against women, an overview of current international law', SIM, Utrecht, November 2000.

the second report, written by Ms H.M. Verrijn Stuart.⁵ The AIV would like to thank both authors for these reports, which will be published separately.

Section I of this advisory report looks at a number of general legal aspects of violence against women and the development of norms in several international forums. Section II examines the monitoring of compliance with the norms, with reference to specific kinds of violence against women such as honour crimes. It also examines types of violence against women which have not yet been explicitly condemned by international bodies or which the AIV believes should receive more attention (such as genital mutilation). Section III looks at other relevant developments and at the desirability of creating a single unambiguous definition of violence against women. It also looks at new developments in the law, at the formulation of definitions in the criminal tribunals for the former Yugoslavia and Rwanda, and at the drafting of the Statute of the International Criminal Court. Section IV briefly examines aspects of the policy on prosecution and on granting refugee status in the Netherlands in the light of the developments detailed in this advisory report. Section V presents a summary of the recommendations.

The advisory report was compiled by a Multi-Year Emancipation Policy Document Committee (CME) set up for the purpose. Its members were: Professor C.E. von Benda-Beckmann-Droogleever Fortuijn (chair), Professor P.R. Baehr, Dr M.C. Castermans-Holleman, T. Ety, Professor C. Flinterman, Professor W.J.M. van Genugten, L.Y. Gonçalves-Ho Kang You, C. Hak, M. Koers-van der Linden and H.M. Verrijn Stuart (Human Rights Committee), and Dr O.B.R.C. van Cranenburgh*, I.E.M. Dankelman, Professor E.J. de Kadt*, Professor R. Rabbinge*, E.M. Schoo and Professor J.Th. Schrijvers* (Development Cooperation Committee). Members whose name is marked with an asterisk (*) acted chiefly as a corresponding member of the CME.

In drawing up the advisory report, the committee was assisted by its official advisor M. van Zomeren (Human Rights Division, Human Rights and Peacebuilding Departement of the Ministry of Foreign Affairs) with the assistance of the Human Rights Committee secretary T.D.J. Oostenbrink and interns E. van Zimmeren, A.S. Brinks and M.M.T. Keyte.

The advisory report was adopted by the AIV on 12 February 2001.

5 See report by H.M. Verrijn Stuart, 'Sexual violence during armed conflicts: a discussion of recent developments in case law', January 2001.

I General legal aspects of the problem of violence against women

In previous advisory reports⁶ the AIV has noted the many developments that have led to the universal acceptance of human rights norms in both the legal and ethical senses since 1948. There is now general agreement that violence against women is a violation of their human rights, even if most of that violence occurs in the family and is mainly perpetrated by private individuals, not by public servants.⁷ Violence against women may severely restrict their exercise of their rights and fundamental freedoms on equal terms with men. The human rights at risk of violation are: the right to life; the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; the right to liberty and security of person; and the right to the highest standard attainable of physical and mental health. The responsibility and liability of the state are based on the fact that violence against women is not a matter of crimes committed on an incidental basis by individual men. Rather it is a structural phenomenon that is symptomatic of the structural inequality of men and women in society.

As Dr Boerefijn's report shows, it has taken a long time for this view to gain general acceptance. Until the early 1990s, matters that largely or exclusively concerned women were usually dealt with in separate international forums such as the UN Commission on the Status of Women (CSW). As a result, developments in human rights issues failed for many years to focus sufficiently on gender-specific human rights violations. One exception was the Convention on the Elimination of All Forms of Discrimination against Women (1979). However, there have been obstacles in implementing and monitoring compliance with this Convention. Because the Convention is presented largely in terms of the obligations of states, it is difficult to invoke its provisions in national courts. The Programme of Action of the World Conference on Human Rights (Vienna, 1993)⁸ is one of the many that have called on all states to ratify the Convention on Women with a view to achieving universal ratification in 2000. The majority of states have now ratified the Convention.⁹ The Programme of Action also called for the withdrawal of reservations to human rights conventions, since these can seriously undermine their potential impact. This is certainly the case for the Convention on Women. Although certain countries have taken action (Bangladesh has withdrawn all its reservations, Turkey and Malaysia have withdrawn some, although Malaysia still maintains a number of far-reaching reservations), the majority of countries have maintained their reservations in full. The AIV takes the view that the Dutch government should continue to strive, in bilateral as well as multilateral policy, to achieve the universal acceptance of human rights

6 See e.g. 'Universality of human rights and cultural diversity', report no 4, The Hague, June 1998 and 'The functioning of the UN Commission on Human Rights', report no 11, The Hague, September 1999.

7 See also Dr I. Boerefijn, M.M. van der Liet-Senders, Professor T. Loenen, 'Preventing and overcoming violence against women', July 2000. Chapter 2 deals with developments in international forums and the theoretical basis for this position.

8 A/CONF.157/23, Vienna Declaration and Programme of Action, par. 39.

9 On January 2001, 166 states were party to this Convention.

conventions, including the Convention on Women. It should also continue to play an active role in encouraging other states to withdraw reservations that undermine the objectives and the spirit of the conventions.

The Optional Protocol to the Convention on Women has now been adopted and has entered into force. It provides for an individual complaint procedure and for the Convention's provisions to be invoked at international level. The ratification procedure is under way in the Netherlands but has not yet been completed.¹⁰ In view of the major significance of improving women's human rights and of the Dutch government's key role in creating the Optional Protocol to this Convention, the next logical and necessary step is to give priority to the approval and ratification procedure at home;¹¹ timely completion of the proposed ratification would lend all-round credibility to Dutch actions in multilateral forums. However, the ratification of conventions and protocols is not enough. The major issue is for every individual to be made aware of his or her rights and of the legal remedies available to enforce them. The Dutch government should promote awareness not only through active public information campaigns, but also by publishing texts (such as the conclusions and recommendations of convention committees with specific relevance to the Netherlands) in an accessible form in Dutch and in languages spoken by minority groups living in the Netherlands.

A great deal of ground has been covered since the early 1990s, thanks mainly to well-organised lobbying by the women's movement, focusing initially on the second International Conference on Human Rights held in Vienna in 1993 and the ensuing Programme of Action¹² and subsequently on the Fourth World Conference on Women in Beijing in 1995 and its Platform for Action.¹³ These programmes call on states and human rights organisations to address women's human rights in general and the elimination of violence against women in particular. The issue of violence against women is now on the agendas of numerous global and regional forums, and several important instruments have been adopted as a result:

- General Recommendation No. 19 (1992) by the Committee on the Elimination of Discrimination against Women (hereafter referred to as CEDAW);
- The UN Declaration on the Elimination of Violence against Women (1993) which was adopted without a vote by the UN General Assembly;
- The UN Sub-Commission on the Promotion and Protection of Human Rights (hereafter referred to as the Sub-Commission) appointed a Special Rapporteur on harmful traditional practices;
- The Commission on Human Rights appointed a Special Rapporteur on violence against women (1994);
- The Council of Europe adopted a declaration on the issue (1993);¹⁴

10 The Netherlands signed the Protocol on 10 December 1999 but has not yet ratified it.

11 See note 2, Multi-year emancipation policy plan, p. 85.

12 See section 42 of the Vienna Programme of Action.

13 See A/CONF.177/20, Report of the Fourth World Conference on Women, Beijing 1995, Platform for Action, par. 306 onwards.

14 CM(93) 193, Appendix III, 'Declaration on policies for combating violence against women in a democratic Europe'.

- The Organisation of American States adopted a convention which came into force in March 1995.¹⁵

At first sight it seems as though significant progress has been made in setting norms to eliminate violence against women. UN conventions, the UN Declaration on the Elimination of Violence against Women, UN General Assembly resolutions and outcome documents of world conferences have universally condemned a number of serious forms of violence. These include the ill-treatment of women, sexual abuse of girls, dowry-related violence, marital rape, genital mutilation and other harmful traditional practices, violence related to exploitation, compulsory sterilisation and abortion. Nonetheless, there are still numerous obstacles to comprehensive implementation of these instruments. The Beijing +5 outcome document¹⁶ lists action points to clear these obstacles, with particular emphasis on the private sector, non-governmental organisations (NGOs) and other actors in civil society, the UN, international and regional organisations and national governments.

There has been less progress in setting norms in respect of other forms of violence against women (such as sexual harassment) even though recent EU developments offer some hope of improvement in the near future. The AIV would note that these norms have largely been arrived at using legally non-binding instruments and resolutions. These are often a necessary step on the way to creating legislation and should be further developed. The AIV recommends that the Dutch government examine the scope for converting the Declaration on the Elimination of Violence against Women into a binding Protocol to the Convention on Women. The supervision procedure laid down in the Convention on Women and in the Optional Protocol should apply to the provisions set out in a new Protocol on Violence against Women. The AIV also recommends the adoption of a broad definition of violence against women which should include domestic violence.¹⁷ Particular attention should be paid to the wording of such a provision since this area may involve a clash between different fundamental rights.

The AIV has noted the government's proposal to widen the norms relating to grounds for discrimination. The AIV considers that it would in any case be undesirable for this widening to be achieved by revising ILO Convention 111,¹⁸ the Discrimination (Employment and Occupation) Convention 1958. Any change to this fundamental human rights convention would entail other undesirable changes to this and the seven other fundamental human rights conventions of the ILO. A better alternative would be to achieve the proposed widening through a new, supplementary ILO Convention or declaration (see Section III).

15 Ursula O'Hare, 'Realizing Human Rights for Women', *Human Rights Quarterly*, 21 (1999), pp. 373-374.

16 A/S-23/10/Rev.1, Suppl. no 3, par. 69, 'Report of the Ad Hoc Committee of the Whole of the twenty-third special session of the General Assembly', New York, 2000.

17 See the section on the problem of definitions and on international tribunals below.

18 See 'Multi-year emancipation policy plan', p. 86.

II Monitoring compliance with norms

Given the content of the request for advice and the proposals already made in the multi-year emancipation policy plan, this advisory report concentrates mainly on factors relating to setting, interpreting and enforcing norms. The AIV would emphasise the significance of this legal framework to the important work of combating many forms of violence against women. At the same time it wishes to stress that the main thrust of the effort to eliminate violence against women should be channelled through national and international programmes aimed at raising awareness, at education and training, and at giving support to NGOs and other organisations working to improve the status of women. The AIV recommends that the Dutch government give financial and other forms of support to promote and strengthen these programmes. The fact that the process of changing traditional attitudes is fraught with difficult and sensitive issues does not alter the need for states, civil society organisations and the international community to make more concerted efforts to fulfil their obligations than they have done in the past. This may be illustrated by the following examples.

Honour crimes

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms Asma Jahangir, paid a great deal of attention to the issue of honour crimes in her most recent report.¹⁹ She works closely on this issue with the Special Rapporteur on violence against women in investigating cases of honour crimes which are approved or supported by the state or which perpetrators can in practice commit with impunity.

Ms Jahangir notes that honour crimes occur both in countries with a Moslem majority and in countries with a different majority religion. These crimes take a variety of forms: in some cases young girls and women are driven to suicide following public condemnation of their behaviour and open threats; others are badly mutilated in acid attacks; and many die as a result. The Special Rapporteur has also received reports about girls being whipped to death following accusations of immoral behaviour. The perpetrators are often members of the family.

Honour crimes represent a serious form of violence against women and they constitute manslaughter and mutilation under Dutch criminal law. The AIV welcomes the Dutch government's active efforts in the last few years to draw attention to specific forms of violence against women in political forums such as the UN Commission on Human Rights, Beijing +5 and the UN General Assembly. The Dutch efforts to secure condemnation of honour crimes in a UN General Assembly resolution merit special mention. These efforts culminated in the adoption of a resolution on honour crimes during the General Assembly 2000 session by a large majority of votes.²⁰ The Dutch government should continue these vigorous efforts in the coming years and link them to specific activities in the area of legally non-binding instruments.

19 E/CN.4/2000/3, 'Extrajudicial, summary or arbitrary executions. Report of the special rapporteur, Ms Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1999/35', par. 78-84.

20 At the plenary session of the UN General Assembly on 4 December 2000 there were 146 votes in favour, 1 against and 26 abstentions on resolution A/55/66.

Other forms of violence against women

Certain forms of violence against women, such as widow burning and early and forced marriages, have yet to be explicitly condemned by the international community. The AIV takes the view that these practices should be included in the definition of the term 'violence against women'. The Dutch government should take the initiative in this respect within the UN General Assembly, the CSW and the UN Commission on Human Rights. It should also be acknowledged that violence against women is not confined to physical and sexual violence, but includes sexual harassment as well. The consequences of psychological violence (for instance the threat of violence, confinement, isolation and constant psychological humiliation) may be just as serious as those of other forms of violence.

Reproductive rights

The issue of women's reproductive rights is closely related to that of violence against women and has yet to receive the attention it deserves in the human rights debate.²¹ It is essential that women themselves should be free to determine the number of children they have and the interval between pregnancies. Many women around the world die or fall ill as a result of inadequate access to family planning measures or safe abortion procedures. Approximately 20% of the estimated 50 million abortions carried out each year can be said to be unsafe. 95% of these take place in developing countries: 78,000 women die every year while millions of others are injured or fall ill as a result. In addition almost 1,400 women die every day in low or average income countries from complications during pregnancy or labour.²² Given the gravity of the issue, the AIV recommends that the Dutch government give substantial support to initiatives related to reproductive rights, including financial support. The government's decision to seek financial compensation from EU funds for programmes which may fall victim to the US government's change of policy is praiseworthy. It should also continue its efforts within the CSW to draw up a Declaration on the Reproductive Rights of Women.

Genital mutilation

Genital mutilation is an example of a violation of the reproductive rights of women which can be seen as a form of violence against women. The WHO estimates that 130 million women have been subjected to this practice, with some two million new cases each year. Genital mutilation is extremely painful and regularly causes infection, shock and even death. CEDAW General Recommendation no 14 (1990) deals specifically with genital mutilation²³ and urges states to take appropriate measures aimed at eliminating it. These include gathering and disseminating information on the practice, supporting NGOs involved in work to eliminate genital mutilation and other harmful practices; encouraging politicians, health care workers, religious and community leaders and the media to contribute to the process of changing attitudes; and setting up appropriate educational programmes.

21 See also Dr I. Boerefijn, M.M. van der Liet-Senders, Professor T. Loenen et al. Chapter 7 of this study looks at this issue in detail.

22 Source: UNFPA, Dr Nafis Sadik, The State of World Population 2000, 'Lives together, world apart: Men and Women in a time of change'.

23 General Recommendation no 14, 'Female circumcision'. Adopted on 2 February 1990. Published in A/45/38, 'Report of the Committee on the Elimination of Discrimination Against Women'

The WHO is specifically involved in combating genital mutilation and has published many reports on its short and long-term consequences for girls and women. As early as 1982 it condemned the medicalisation of the practice, stating that under no circumstances should genital mutilation be carried out by medical staff or in medical establishments.²⁴ The AIV fully endorses this position and wishes to point out, at the risk of stating the obvious, that the WHO's position does not constitute a licence for non-medical people to carry out the operation with impunity. The AIV believes that the Dutch government should continue to strongly support initiatives designed to eliminate genital mutilation, including providing financial support if necessary.

Under Dutch criminal law genital mutilation constitutes assault and is therefore prohibited. When genital mutilation is carried out within the Netherlands, the perpetrator can be prosecuted under articles 300-309 of the Dutch Criminal Code. In the Netherlands it is possible to prosecute parents who send their daughters back to the country of origin to undergo genital mutilation if the involvement of the parents in the act of mutilation constitutes a criminal offence under Dutch law. This is the case if the parents do anything in the Netherlands that can be defined as participation (co-perpetration, incitement or complicity) in genital mutilation carried out abroad.

It is possible to prosecute parents for performing genital mutilation on their child outside the Netherlands if the parents have Dutch nationality and if genital mutilation is an offence in the country in which it was carried out. The scope for prosecuting on other grounds depends on whether the conditions for Dutch jurisdiction as laid down in articles 2-6 of the Dutch Criminal Code are met. These conditions for jurisdiction are not specifically geared to ethnic minorities resident in the Netherlands nor to this particular offence. The AIV would suggest setting up a study into a possible extension of jurisdiction in respect of both points. The Dutch government should continue to urge in its bilateral and multilateral policies that genital mutilation be made an offence in the national legislation of the countries concerned.

There are pressures from several sides for genital mutilation to be included in the Convention on Torture. This would guarantee extraterritoriality. The broad definition of torture, as accepted by the tribunals for former Yugoslavia and Rwanda (see below) which includes humiliation as a method of torture, would probably allow for the prosecution of cases of genital mutilation as a form of torture. The UN Special Rapporteur on violence against women somewhat hesitantly reached the conclusion that domestic violence should be included in the definition of torture, but added that further research into this interpretation is required. The AIV believes that the application of the Convention on Torture to domestic violence is not the way forward. The definition of torture is geared to acts committed by public officials. The AIV takes the view that the right way forward would be to create an additional Protocol to the Convention on Women in order to provide a legal basis for combating this form of violence against women.

24 Quoted in WHO, 'Female Genital Mutilation. An overview'. WHO, 1998, Chapter 6. (Source: Internet: www.who.int/dsa/cat98/fgmbook.htm).

III Other relevant developments

Various harmful practices have not yet received the attention they deserve. This raises the question of which practices should be included within the definition of violence against women.²⁵ A related question is whether it is necessary for all UN bodies to employ the same definition.

One of the two background reports commissioned by the AIV²⁶ shows that the UNICEF definition of violence against women is very broad, including as it does social and economic forms of violence. In contrast, the WHO looks at the issue almost exclusively from a health perspective, whilst UNESCO emphasises economic rights. Other international organisations too, such as the ILO, focus on the specific aspects which fall within their mandate. It is striking that the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women²⁷ defines the right of women to be free from violence in the public and private sphere as a human right in itself.

It is even more striking that the Council of Europe has developed only limited initiatives in this area and that whenever it has looked at the issue of violence against women it has done so mainly from the perspective of equal treatment of the sexes. It could indeed be said that the human rights bodies of the Council of Europe are not yet sufficiently gender-aware. In this connection the AIV is of the opinion that the Dutch government should not confine itself to 'soft law' in the form of recommendations and declarations or judgments issued by monitoring bodies. It should also strive to introduce a legally binding instrument at European level. The adoption of Protocol no. 12, which extends the non-discrimination clause of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²⁸ is an important step in this direction and should be further refined in a subsequent Protocol on the issue of violence against women. The AIV supports the government's proposal to back European Commission initiatives on violence against women.

As regards the proposals for an EC directive to combat sexual harassment, the AIV believes that the same should be done within the framework of the ILO, and would welcome efforts to draw up a convention on sexual harassment in the workplace. This should preferably be drawn up in cooperation with other EU member states and following consultations with employers and employees.

25 Although a number of interesting developments have taken place in the field of people smuggling, as is clear from the Multi-year emancipation policy plan, this report does not consider these further.

26 See Dr I. Boerefijn, *op. cit.*, note 4.

27 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 'Convention of Belém do Pará', adopted on 9 June 1994, OAS.Ser.LV/II.92/doc.31 rev.3.

28 Protocol no 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 2000. This Protocol is designed as an amendment to article 14 ECHR; the new text of article 14 is as follows: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The Dutch government signed this Protocol on 4 November 2000 but has not yet ratified it.

Finally, the AIV notes that various international organisations are making their own contributions to the elimination of violence against women, depending on their mandates. It is important that these contributions are made from the human rights perspective, for which a broad definition of violence against women is essential.

International criminal tribunals

The recent establishment of international criminal tribunals is another important development in international law. The Yugoslavia tribunal (ICTY) and the Rwanda tribunal (ICTR) - set up in 1993 and 1994 respectively - and the adoption of the Statute for a permanent International Criminal Court have led to significant developments in defining sexual violence.

Up to the early 1990s the literature paid scant attention to the fact that the prohibition of rape in war situations had been incorporated into humanitarian law. Analysis of the background to the establishment of the tribunals, and in particular of the case law of the Nuremberg and Tokyo Tribunals, shows that the prohibition on sexual violence was a general principle of international humanitarian law even then. Sexual violence was considered to be a war crime for which the excuse of 'military necessity' was not accepted. The major issue facing the ad hoc tribunals has been how to put existing norms into practice. As a result the violation of sexual integrity has become a central theme and the accent has shifted from the setting of norms to their implementation and enforcement.

Although the ad hoc tribunals for Yugoslavia and Rwanda set to work on the basis of statutes in which the term 'rape' was scarcely mentioned, the statutes and the case law of the ICTY and the ICTR as a whole have been highly significant in making sexual violence an offence in both international and internal armed conflicts. Through its detailed descriptions and definitions of offences the body of case law from both tribunals has repositioned sexual violence so as to allow for criminal prosecutions in specific cases. Generally it can be said that, following the work of the two ad hoc tribunals, the most significant development in international humanitarian law and international law on human rights is not simply that the normative framework has been further developed, but that individuals can now in fact be prosecuted.

The AIV-commissioned report on sexual violence during armed conflicts²⁹ summarises the most significant elements of the ICTY and ICTR case law relating to sexual violence as follows:

- Sexual violence may be committed with the intention of genocide and as part of the process of genocidal annihilation.
- Rape as part of a widespread or systematic attack may constitute a crime against humanity without there being a need to prove that the rapes occurred systematically and on a large scale.
- Sexual violence may constitute a form of torture.
- Even the rape of a single person may constitute a serious violation of international humanitarian law.
- Not only the perpetrator, but also anyone who facilitates the rape by giving orders, providing assistance or support or by any other means may be held liable as a perpetrator.

29 See footnote 5.

- Men may also be victims of sexual violence.
- Persecution on political, racial or religious grounds was already defined as a crime against humanity; persecution on grounds of gender has now been added.
- Sexual violence may be regarded as a form of discrimination.
- Military commanders and civilian leaders may be held responsible for sexual violence perpetrated by their subordinates.

The International Criminal Court

The Statute of the permanent International Criminal Court, which will shortly be entering into force, takes account of the judgments of the two ad hoc tribunals. These judgments are reflected in the procedural rules and the 'Elements of Crimes' which have since been drawn up. The Statute defines genocide, crimes against humanity and war crimes as offences. It also includes several 'gender offences'.³⁰ However, a number of restrictions were agreed upon during the negotiations which merit closer examination.

One major restriction is contained in the preamble to article 7, which limits the jurisdiction of the International Criminal Court in respect of crimes against humanity to cases in which there is 'active promotion or encouragement' on the part of the state or a comparable body and cases of 'deliberate failure'. One reason why this restriction was adopted was to make it difficult for the Court to prosecute cases of sexual or domestic violence. A number of states feared that genital mutilation, violence related to reproductive rights and domestic violence as promoted, approved of or tolerated by the state would fall within the jurisdiction of the International Criminal Court since these forms of violence could be included within the definition of the offences of slavery or torture.

The inclusion of this restriction in the Statute also has consequences for cases of domestic violence and puts the onus on prosecutors and judges to interpret these terms. In order for prosecutors to pass this obstacle, it must be shown that a state or comparable body has deliberately allowed or promoted assault, mutilation or sexual abuse for these to be deemed crimes against humanity. The Dutch government should closely follow future developments in this field in order to obtain insight into the precise scope for interpreting this restriction in article 7.

If it becomes clear that the Public Prosecutor of the International Criminal Court or the Court itself interprets the terms narrowly, governments and NGOs could try to exert influence by filing *amicus curiae* briefs in specific cases, as allowed under the rules of the ICTY, ICTR and the International Criminal Court. The AIV believes that in this respect too, the Dutch government has a role to play in the future.

'Genuine consent'

A second important point requiring further action is the question of whether the decisive factor in cases of sexual violence should be the perpetrator's intent or the victim's consent. The inclusion of the phrase 'genuine consent' in the description of the

³⁰ See in particular Statute article 6 (genocide), article 7 (crimes against humanity) and article 8 (war crimes).

offence of rape³¹ has caused great consternation amongst women's organisations. They believe that the word 'genuine' is superfluous: consent is either given or withheld.

The terms 'force' and 'consent' have since been objectified in the descriptions of offences of sexual violence in the case law of the ad hoc tribunals. This is in line with developments in Dutch case law: courts base their judgments on the context in which an offence took place. The context may be an observable situation of abuse of power or of coercion. For example, not only war or situations of armed conflict but also situations involving an age difference or detention could be defined as a context of coercion. This is another reason why the emphasis on 'genuine consent' which has found its way into the definition of the offence of rape in the Statute of the International Criminal Court is unusable. As specific cases arise the Dutch government and NGOs should avail themselves of the option of filing *amicus curiae* briefs with the International Criminal Court insisting that objective criteria be drawn up.

31 In article 8(2)e the definition states: 'The invasion [of a person's body] was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.' [...] 'A person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.' [...] 'Genuine consent does not include consent obtained through deception.'

IV Prosecution in the Netherlands and refugee status

The case law of the ICTY and ICTR and the preparations for the International Criminal Court have far-reaching consequences for the issue of violence against women. The Dutch government will therefore have to develop an active policy on prosecuting perpetrators of war crimes, crimes against humanity and genocide. The AIV believes that, in comparison to certain other Western European countries, the Dutch government has been too passive to date. Only recently has the possibility of prosecuting people suspected of war crimes and crimes against humanity who are resident in the Netherlands become the subject of public debate.

Many cases of violence against women will never come before the International Criminal Court because they are not considered important enough or for other reasons. It is precisely in these cases that the national courts in the country of reception should play an important role. In order to make this possible the government should set a clear political course and adopt policy which can be used to guide the Public Prosecution Service in deciding whether to prosecute in each particular case. Although institutional measures have been taken towards an active policy of prosecution in the Netherlands, to date these have yielded few results in practice. The AIV regrets this lack of results and recommends further investigation into its causes. Legal complications and the time-consuming nature of the procedures may be contributory factors. In some cases, the Public Prosecution Service may decide not to prosecute because of a lack of detailed information. To overcome this problem, the AIV recommends that experts in the Netherlands be encouraged systematically to gather relevant information and to conduct investigations into refugees resident in the Netherlands on behalf of the Public Prosecution Service.

Another important aspect of this issue is whether to grant refugee status to perpetrators as well as victims. The case law of both ad hoc tribunals and the Statute of the International Criminal Court provide definitions of sexual violence in international humanitarian law as elements of 'war crimes', 'grave breaches of the Geneva Conventions', 'genocide' and 'crimes against humanity'. The AIV recommends that this case law be accepted in full as prevailing law when evaluating applications for refugee status and that it may constitute grounds for denying refugee status to perpetrators (article 1F of the Convention relating to the Status of Refugees) and for granting it to victims. Recent developments have clearly shown that sexual violence is a core offence in wars and other conflicts. For this reason the AIV holds that having been subjected to sexual violence in a war situation should constitute grounds for admission as a refugee, on the same basis as having been subjected to torture or other violations of physical integrity. The authorities evaluating applications for admission as a refugee should pay due attention to this specific aspect of the case and show sufficient sensitivity to the issue of violence against women. Public servants involved in the process should undergo thorough training in dealing with this material.

V Summary of recommendations

1. The AIV takes the view that the Dutch government should continue to strive in bilateral as well as multilateral policy to achieve the universal acceptance of human rights conventions, including the Convention on Women. It should also continue to play an active role in encouraging other states to withdraw reservations that undermine the objectives and the spirit of the conventions.
2. In view of the major significance of improving women's human rights and of the Dutch government's key role in creating the Optional Protocol to this Convention, the next logical and necessary step is to give priority to the approval and ratification procedure at home.
3. In order for norms to be implemented effectively, every individual must be made aware of his or her rights and of the legal remedies available to enforce them. The Dutch government should promote awareness not only through active public information campaigns, but also by publishing texts (such as conclusions and recommendations of convention committees with specific relevance to the Netherlands) in an accessible form in Dutch and in languages spoken by minority groups living in the Netherlands.
4. The AIV recommends that the Dutch government examine the scope for converting the Declaration on the Elimination of Violence against Women into a binding Protocol to the Convention on Women. The supervision procedure laid down in the Convention on Women and in the Optional Protocol should apply to the provisions set out in a new Protocol on Violence against Women. In addition, a broad definition of violence against women should be adopted, including domestic violence. Particular attention should be paid to the wording of such a provision since this area may involve a clash between different fundamental rights.
5. The AIV has noted the government's proposal to widen the norms relating to grounds for discrimination. The AIV believes this should be done by means of a new, supplementary ILO Convention or declaration, and not by revising ILO Convention 111.
6. A proper legal framework is essential to efforts to combat many forms of violence against women. At the same time the AIV wishes to stress that the main thrust of the effort to eliminate violence against women should be channelled through national and international programmes aimed at raising awareness, at education and training, and at giving support to NGOs and other organisations working to improve the status of women. The AIV recommends that the Dutch government give financial and other forms of support to promote and strengthen these programmes.
7. The AIV welcomes the Dutch government's active efforts in political forums to draw attention to specific forms of violence against women that have received little if any attention to date. It should continue these vigorous efforts in the coming years and link them to specific activities in the area of non-binding instruments.
8. Certain forms of violence against women, such as widow burning and early and forced marriages, should be included in the scope of the term 'violence against women'. The Dutch government should take the initiative in this respect within the UN General Assembly, the CSW and the UN Commission on Human Rights.
9. Given the gravity of the issue of women's reproductive rights, the AIV recommends that the Dutch government give substantial support to related initiatives, including financial support. The Dutch government should continue its efforts within the CSW to draw up a Declaration on the Reproductive Rights of Women.

10. The AIV believes that the Dutch government should continue to strongly support initiatives designed to eliminate genital mutilation, including providing financial support if necessary. It should continue to urge in its bilateral and multilateral policies that genital mutilation be made an offence in the national legislation of the countries concerned.
11. In the Netherlands it is possible to prosecute parents who send their daughters back to the country of origin to undergo genital mutilation if the involvement of the parents in the act of mutilation constitutes a criminal offence under Dutch law. The scope for prosecuting on other grounds depends on whether the conditions for Dutch jurisdiction, which are not specifically geared to ethnic minorities resident in the Netherlands nor to this particular offence, are met. The AIV suggests setting up a study into a possible extension of jurisdiction in respect of both aspects.
12. The AIV believes that the application of the Convention on Torture to domestic violence is not the way forward. The definition of torture is geared to acts committed by public officials. The AIV takes the view that the right way forward would be to create an additional Protocol to the Convention on Women in order to provide a legal basis for combating this form of violence against women.
13. Efforts should be made to introduce a legally binding human rights instrument on violence against women at European level. The adoption of the extended Protocol no. 12 to the ECHR is an important step in this direction and should be further refined in a subsequent Protocol. The AIV supports the government's proposal to back European Commission initiatives on violence against women. As regards the proposals for an EC directive to combat sexual harassment, the AIV believes that the same should be done within the framework of the ILO, and would welcome efforts to draw up a convention on sexual harassment in the workplace.
14. The AIV notes that various international organisations are making their own contributions to the elimination of violence against women, depending on their mandates. It is important that these contributions be made from the human rights perspective, for which a broad definition of violence against women is essential.
15. The Dutch government should closely follow future developments in order to obtain insight into the precise scope for interpreting the restriction in article 7 of the Statute of the International Criminal Court. If it becomes clear that the Public Prosecutor of the International Criminal Court or the Court itself interprets the restriction narrowly, governments and NGOs could try to exert influence by filing *amicus curiae* briefs in specific cases. The AIV believes that the Dutch government has a role to play in this connection in future.
16. The AIV has noted the inclusion of the term 'genuine consent' in the International Criminal Court's definition of offences. This wording is controversial and could lead to undesirable judgments in future. As specific cases arise the Dutch government and NGOs should avail themselves of the option of filing *amicus curiae* briefs with the International Criminal Court insisting that objective criteria be drawn up.
17. The Dutch government should set a clear political course if it wishes to effect real changes in national policy on prosecuting perpetrators of war crimes. Although institutional measures have been taken towards an active policy of prosecution, to date these have yielded few results in practice. The AIV regrets this lack of results and recommends further investigation into its causes. If this demonstrates that the Public Prosecution Service fails to prosecute because of a lack of detailed information, the AIV recommends that experts in the Netherlands be encouraged systematically to gather relevant information and to conduct investigations into refugees resident in the Netherlands on behalf of the Public Prosecution Service.

18. The AIV holds that having been subjected to sexual violence in a war situation should constitute grounds for admission as a refugee, on the same basis as having been subjected to torture or other violations of physical integrity. Conversely, anyone who has perpetrated such crimes should be denied refugee status on those grounds. The authorities evaluating applications for admission as a refugee should pay due attention to this specific aspect of the case show and sufficient sensitivity to the issue of violence against women. Public servants involved in the process should undergo thorough training in dealing with this material.

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Re: request for an advisory report on
the multi-year Equal Opportunities policy document

Enclosed you will find a copy of the multi-year policy document on Equal Opportunities, in which the government outlines the five domains in which it will pursue policies, and the line it plans to take in doing so.

The government has chosen the three domains traditionally targeted by equal opportunities policy, i.e. work, care and income; power and decision-making; and human rights. But it has also selected two new themes, i.e. time allocation and ICT. Each section of the document looks at the current state of affairs in the domain in question, relevant trends, and pointers for future policy.

The government has consulted various civil society organisations, representing women, ethnic minorities and young people on the main outlines of policy and the line it plans to pursue. It has also asked a number of advisory bodies for their recommendations. These include the Socioeconomic Council, the Public Administration Council, the Housing, Spatial Planning and Environment Council, the Education Council and the Social Development Council as well as the Advisory Council on International Affairs. Once it has received these recommendations, the government will work out the details of policy in the medium term, and present them in a multi-year policy plan. By adopting this approach, the government hopes to build a solid base of public and political support for policy that aims to speed up efforts to ensure equal opportunities for all.

We would appreciate in particular receiving your suggestions and views on the direction to be taken by human rights policy, as set out in the section on 'human rights and women' of the policy document. In addition to your general views on this section, we would ask you to give us your opinion on the following two specific points.

1. Universality versus cultural relativism. The final declaration of the World Conference on Human Rights in Vienna in 1993 recognises the existence of differences in attitudes deriving from tradition, culture and religion, but regards them as secondary to the universality of human rights. The Advisory Council on International Affairs published its report "Universality of human rights and cultural diversity" in 1998, which examined the question of human rights in relation to women. We would be grateful if the Council were

to update this advisory report, since some countries still claim religious background and traditional practices as reasons for restricting the rights of women and girls, for instance. With the arrival of immigrants from a wide variety of cultural backgrounds, different attitudes on women's rights are also making their way into the Netherlands. This presents many opportunities to upgrade the quality of society – an aim that the policy document expresses with the word 'diversity', but also brings the discussion on universality versus cultural relativism closer to home. Cultural, traditional and religious obstacles to women's human rights observance also perpetuate practices such as genital mutilation and blood feud.

- Can the Council recommend any further measures that can be taken in the field of prosecution and penalties, and information and education to prevent and combat these traditional practices?
- What are the Council's views on parents sending their daughters to their country of origin to undergo circumcision?

2. In the past few years a number of new basic concepts have been developed in the international discourse on women's rights. They include terms such as 'reproductive and sexual rights', 'sexual and gender-based violence' and 'rape as a war crime', which are increasingly being accepted and defined in international law, for instance in the case law of the International Criminal Tribunal for the former Yugoslavia, the Statute of the International Criminal Court, the Platform for Action of the Fourth World Conference on Women in Beijing in 1995, resolutions of the UN General Assembly, the UN Commission on the Status of Women and the UN Commission on Human Rights. These concepts are essential to the effective protection of women's rights in the future too. They are not all defined in legally binding instruments, and the definitions themselves sometimes differ. Reproductive and sexual rights, which are sensitive subjects, are not yet fully defined in international law, and many countries have still to accept them.

- What value does the Council attach to these new developments in international law?
- Are these new international norms adequate in the Council's opinion and have they been defined clearly enough to protect women's rights, or does the Council feel there is reason to develop them more fully in international law instruments? If so, should these instruments be legally binding?

We look forward to receiving your report at your earliest convenience.

Yours sincerely,

(signed)

J.J. van Aartsen
Minister of Foreign Affairs

A.E. Verstand-Bogaert
State Secretary for Social Affairs and Employment

List of abbreviations

AIV	Advisory Council on International Affairs
CEDAW	Committee on the Elimination of Discrimination Against Women
CME	Multi-Year Emancipation Policy Document Committee
CMR	Human Rights Committee (of the AIV)
COS	Development Cooperation Committee (of the AIV)
CSW	Commission on the Legal Status of Women
DMV	Human Rights and Peacebuilding Department
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organisation
NGO	Non-governmental Organisation
OAS	Organisation of American States
SIM	Netherlands Institute of Human Rights
SZW	Ministry of Social Affairs and Employment
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children's Fund
UN	United Nations
WHO	World Health Organisation

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