# UNIVERSALITY OF HUMAN RIGHTS

## PRINCIPLES, PRACTICE AND PROSPECTS

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ADVIESRAAD INTERNATIONALE VRAAGSTUKKEN

AIV

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# Table of contents

# Foreword

On 21 May 2008, the Minister of Foreign Affairs and the Minister for Development Cooperation asked the Advisory Council on International Affairs (AIV) to prepare an advisory report on the issue of 'reclaiming the universality of human rights' (see annexe I for request for advice). The report was prepared by a joint committee chaired by Professors C. Flinterman and W.J.M. van Genugten. The members of the committee were Dr K.C.J.M. Arts, Ms S. Borren MA, Ms C. Hak, R. Herrmann, Professor P.J.G. Kapteyn, Professor B.M. Oomen, Professor N.J. Schrijver, Ms H.M. Verrijn Stuart and Ms J.M. Verspaget. Assistance in drafting the report was provided by civil service liaison officer A.S. Versluis (Ministry of Foreign Affairs, DMH/MR). The executive secretaries were Ms Q. Eijkman (temporary) and Ms A.M.C. Wester (secretary of the Human Rights Committee), who were assisted by Ms. S. van Schoten and the trainees S. van Hooff and M. Erik.

In preparing this advisory report, the committee benefited greatly from a background study by Dr C. Reyngaert of Utrecht University. To obtain more information, the committee consulted a number of experts including A.P. Hamburger, the Dutch Human Rights Ambassador. The AIV very much appreciates their willingness to share their insights with the preparatory committee.

This report was adopted by the AIV on 5 November 2008.

# I Introduction: universality in the 21st century

As noted above, the Ministers asked the AIV to draw up an advisory report on the subject of the universality of human rights and its relationship to cultural and religious diversity. The underlying assumption of the request was that even though all UN Member States support the Universal Declaration of Human Rights, and most of them have ratified many of the subsequent human rights instruments, the universality of human rights is still being disputed by an increasing number of States, most often by pleading cultural and religious arguments. The AIV was asked to give its views on this assumption and to elaborate on the possible arguments States use in support of their position and on ways the Netherlands could respond to these arguments. Also, the AIV was asked to include the role of civil society in its views.

First of all, the AIV would like to emphasise the timely nature of the request for advice on this matter. This year marks the 60th anniversary of the Universal Declaration of Human Rights, and universality is one of the cornerstones both of the Universal Declaration and of the international human rights system, of which it is one of the main foundations. As a matter of fact, one of the first reports of the AIV was dedicated to the same subject – in 1998, the year of the 50th anniversary of the Declaration.[1]

A new, updated report on ways to approach universality is justified by the importance of the subject matter, as well as by the developments of the last ten years. These years have been marked by the attacks of 11 September 2001 and the subsequent international counterterrorism strategies, both of which have had a resounding impact on discussion and practice concerning international human rights.[2] Also, countries like China, Russia, and India have shown new or renewed confidence and claimed a more prominent role on the world stage, in relation to both human rights and other subjects. Furthermore, the beginning of the 21st century saw the advent of the Millennium Development Goals, which can in some ways be perceived as the translation of economic, social and cultural rights into political terms.[3] In the same period, some of these and other rights, notably the rights of women and children, the rights of indigenous people and minorities, and the rights to health care and water and sanitation, seem to have gained a more central role in the human rights debate. Unfortunately, also over the last ten years, new violent conflicts have broken out, within rather than between States, resulting in gross violations of human rights. And new fragile States have emerged for which democracy and respect for human rights seem to be little more than distant ideals that may not be realised any time soon. Furthermore, globalisation has led to greater interdependence and interaction between societies and to a shift in traditional forms of governance and decision-making processes. Non-state actors, especially NGOs and

1 AIV, *Universality of human rights and cultural diversity*, advisory report no. 4, The Hague, June 1998.

2 See also: AIV, *Counterterrorism in a European and international perspective, interim report on the prohibition of torture*, advisory letter no. 11, The Hague, December 2005, and AIV, *Counterterrorism from an international and European perspective*, advisory report no. 49, The Hague, September 2006.

3 See also: AIV, *Response to the 2007 Human Rights Strategy*, advisory letter no. 12, The Hague, November 2007, pp. 7-8.

companies, have had a decisive influence in these transitions and their roles have expanded as a result.[4] The debate on the universality of human rights must be considered against the background of these developments.

From the outset, the AIV would like to observe that the assumptions put forward in the request for advice – that the universality of human rights is disputed by an increasing number of States and that there is an urgent need for counterarguments – might be too defensive. The idea of the universality of human rights is sometimes challenged by cultural and political ideas or economic circumstances that are at times seen as incompatible with international or universal human rights norms,[5] but there are also other signs. For example, 'Human rights and the rule of law' was one of the main pillars of the outcome document of the 2005 World Summit, in which *all* UN Member States reaffirmed that human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing.[6] And in a recent general debate (2008) in the Human Rights Council on the follow-up and implementation of the 1993 Vienna Declaration and Programme of Action *all* Members again reaffirmed the universality of human rights.

That said, the AIV does acknowledge that there is an underlying debate of a more complex nature. While States may not cast doubt on the universality of human rights in a formal sense in international forums, they often defend religious and political traditions and in doing so they frequently use instruments provided by international human rights law: in other words, they enter reservations to treaties or invoke treaty clauses that accept restrictions of human rights in certain circumstances. Furthermore, formal adherence to universal human rights norms does not mean that these norms are observed in practice. This is not just a matter of State responsibility; powerful local ethnic communities at sub-State level sometimes defend cultural or contextual exceptions to universally accepted human rights norms, and thus hinder their actual implementation.

The AIV therefore recognises the need for an updated approach to the question of universality, and feels that the formal as well as the informal discourse should be taken into account. Furthermore, the AIV is of the opinion that this approach should focus not only on intergovernmental relations but also on the variety of actors involved in the human rights debate and in the implementation of human rights norms at local level. This is related to the way the AIV would like to embrace the concept of universality in this report.

Even though the universality of human rights can be seen as a cornerstone of the human rights system, this does not mean that it is a foregone conclusion and a matter of course. The AIV prefers to see it as the product of a process. This is also inherent in the Universal Declaration of Human Rights, which speaks of '… a common standard of

4 As was also observed in: AIV, *Universality of human rights and cultural diversity*, advisory report no. 4, The Hague, June 1998, p. 8.

5 There are also other challenges to the rule of international human rights law, e.g., the tension between the global fight against terrorism and the protection of civil liberties which was addressed in: AIV advisory report no. 49, *Counterterrorism from an international and European perspective*, The Hague, September 2006. The current report focuses primarily on arguments of a cultural, religious or economic nature.

6 2005 UN World Summit Outcome, par. 121 (A/RES/60/1).

achievement for all people and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive…'

In this report, the AIV will elaborate on the process leading to universality, namely universalisation, in which the local level plays an important role. After all, human rights can never be universally respected if they are not embedded in the local 'vernacular'. This applies to civil and political as well as to economic, social and cultural rights. Change can also be brought about by linking international human rights with local cultural practices, as has been shown for example in cases where female genital mutilation has been replaced by other, harmless rites of passage.

The AIV believes that cultural diversity should not only be accepted or tolerated, it should also be welcomed, as long as it is in line with human rights norms.[7] This raises the question of what latitude States have: at what point do the limitations imposed on the exercise of human rights fall outside the universal human rights framework?[8] In order to solve this conundrum, the AIV will distinguish between rights and multiple *interpretations* and *applications* of these rights. The AIV will also elaborate on the usefulness of the margin of appreciation doctrine in reconciling the poles of universality and cultural diversity.

Following the discussion on human rights and their application, the AIV will focus on the formulation of a Dutch international human rights policy in relation to cultural exceptions that includes support for grassroots initiative. A final section of the report will be dedicated to the consistency and credibility of a Dutch universal human rights strategy, both of which are prerequisites if the Netherlands wants to play an effective role at international level.

The views on universality outlined in this advisory report might seem wide-ranging to an extent. But the AIV believes that there are no simple 'one-size-fits-all' solutions in the complicated and multifaceted discussion on the universality of human rights and cultural and religious diversity. That said, the AIV's intention is for this report to contribute to a further enhancement of the concept of universality and to its effective implementation in practice.

7 It should be noted that, for the purposes of this report, the AIV has adopted the same definition of culture as in its 1998 report on the same topic (AIV, *Universality of human rights and cultural diversity*, advisory report no. 4, The Hague, June 1998), at p. 9 ('Culture means the entire set of customs, institutions, symbols, conceptions and values of a group. Culture includes not only learned behaviour, but also language and hence whatever can be thought and uttered.').

8 In certain cases, i.e. the non-derogable rights, the question of latitude does not apply since these rights constitute peremptory standards of international human rights.

# II Universality and universalisation of human rights

Human rights instruments are rooted in the assumption that they indicate universally acknowledged standards of achievement. Even though the notion of universality has been under discussion ever since the Universal Declaration of Human Rights was conceived,[9] in the second half of the 20th century human rights have gradually become accepted as *the* touchstone of international morality. This is reflected in, for example, the Bangkok NGO Declaration on Human Rights of 27 March 1993, which captured 'universality' as follows: 'Universal human rights standards are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights, including women's rights, must not be tolerated.'[10]

The general acceptance of the universal nature of human rights is quite remarkable, as has been pointed out recently by Roger Normand and Sarah Zaidi: 'The success of human rights in becoming the accepted standard of international morality is one of the more improbable stories of the twentieth century. It stands out as an anomaly in the bloodiest and most destructive period in human history, an age marked by world wars and myriad lesser conflicts, genocides, holocausts, massacres, and all manner of abuse. […] The speed with which human rights has penetrated every corner of the globe is astounding. Compared to human rights, no other system of universal values spread so fast.'[11] That said, it is also noted by the same authors (and countless others) that there is an 'undeniable chasm between rhetoric and reality', which poses a fundamental challenge to human rights. 'It is hard to escape the conclusion that the idea of human rights has gained surface acceptance across the globe without sufficiently influencing the practice of states and other powerful actors.'

These views are fully shared by the AIV: human rights can indeed be considered as the accepted standard of international morality. Still, the universality of human rights should not be perceived as a *foregone conclusion*. For it to be effective, universality needs to be truly accepted and implemented over time. That is why this advisory report will make the distinction between the *concept* of universality and the *process* of universalisation by which human rights come to be realised.

9 Whereas during the Cold War the debate on universality – and the admissibility of reservations to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – was dominated by the East-West divide, during recent decades the debate has mainly been conducted in terms of general North-South contrasts and contrasts between countries with largely Islamic populations and other countries.

10 The Bangkok NGO Declaration on Human Rights of 27 March 1993 was adopted by 110 NGOs from the Asia-Pacific region in the lead-up to the Asian intergovernmental conference on human rights (Bangkok, 29 March – 2 April 1993) and the World Conference on Human Rights (Vienna, June 1993). See also M. Nowak (ed.), *World Conference on Human Rights. The contribution of NGOs*, Vienna 1994: Manzsche Verlags- und Universitätsbuchhandlung, p. 124.

11 R. Normand and S. Zaidi, *Human Rights at the UN. The Political History of Universal Justice*, Bloomington 2008: Indiana University Press, pp. 6-10.

Universalisation should reduce the gap between principles and practice and covers a number of separate actions and processes that should take place within a given cultural, religious, social and political context: a) increasing knowledge and awareness of human rights, in governmental and non-governmental circles, and among the different ethnicities (for example indigenous peoples and national minorities and their leaders) of which States are composed; b) popular acceptance of human rights as a relevant way of looking at certain issues; c) the implementation and legal enforcement of human rights norms; d) their mobilisation in addressing social concerns; and e) the actual realisation of human rights by all economic, political and legal means. In answering the questions concerning policy options open to the Netherlands it is important to focus on these actions and processes, and the contexts in which they take place.

When it comes to knowledge and awareness of human rights, for instance, attention can be drawn to the importance of human rights education (both in schools and through, for instance, radio and television programmes) and of translating information on rights into the language(s) of the country concerned. The existence of a general knowledge of legal rights and procedures among the population also creates an enabling environment for increasing awareness of human rights. Where the acceptance of rights claims is concerned – relating to for instance equality before the law or access to health care – policies can focus on searching for and underlining the commonalities between human rights principles and those in the dominant cultural traditions of the country concerned. Useful initiatives in this field concern the Group of Friends of the Alliance of Civilisations[12] (of which the Netherlands is a member) and the meeting of religious leaders from all over the world that is due to take place in The Hague on 9 and 10 December 2008 to commemorate the 60th anniversary of the Universal Declaration. With respect to the implementation and legal enforcement of human rights norms, the relevant issues include the role of domestic constitutional and administrative law, the independence of the judiciary, and access to justice. The mobilisation process depends on the willingness and the ability of both lawyers and NGOs to 'frame' concerns in terms of rights violations. All these factors play a role in the full realisation of human rights, as measured – for instance – by means of human rights impact assessments.

The issue of harmful traditional practices, such as female genital mutilation, may serve as an example: whilst the right of women not to be subjected to these practices has been recognised as part of the universal right to life, to physical integrity and to non-discrimination, the universalisation of this right requires a great deal more: women's knowledge and awareness of these rights, the agreement within a cultural community that these practices should not be accepted, laws reaffirming universal principles, institutions and agencies to enforce them and victims and lawyers – in some cases –

12 The Alliance of Civilisations originates from a 2005 initiative by the Turkish and Spanish Prime Ministers, Recep Tayyip Erdogan and José Luis Rodriguez Zapatero, which was later taken up by UN Secretary-General Kofi Annan. The Alliance arranges high-level political meetings and promotes contact between people from different backgrounds at international, regional, national and local level, thereby attempting to reduce tensions between population groups with different ethnic, cultural or religious backgrounds.

willing to mobilise them in court.[13] One reason to address universality as well as universalisation is the fact that the two concepts are so closely related: the universalisation of rights feeds into their acceptance as universal, and the other way around.

The AIV observes that universalisation should normally take place after a State has ratified a treaty (for ratification see next section), in order to convert the norms enshrined in the treaty into practice. But some of the different phases of universalisation, mainly the increase of knowledge and the acceptance of human rights claims, can also happen before a treaty has been ratified. In each and every phase governments can play an important role, although they are not the only actors: NGOs, lawyers, and local community leaders can also have a decisive influence.

The AIV recommends that the Netherlands, while promoting the universality of human rights, keep the process of universalisation and its distinct components in mind. This means that in certain cases the Netherlands might consider supporting policies aimed at increasing knowledge of human rights, while in others it might support the enforcement of human rights norms, depending on the particular situation and the particular needs in a country or a locality – and always keeping in mind that in the end these different processes contribute to universalisation, which in turn leads to enhanced universality.

While promoting universality, the indivisibility of human rights should always be borne in mind. In its 1998 report, the AIV devoted ample attention to the friction between civil and political rights on the one hand and economic, social and cultural rights on the other.[14] The AIV wishes to reiterate that all human rights are indivisible, interdependent and interrelated, and in this connection endorses the observations on the indivisibility of human rights in chapter 4 of the Minister of Foreign Affairs' Human Rights Strategy (2007).[15]

13 For the conditions needed to successfully address harmful traditional practices in Africa see: C. Packer, 'African Women, Traditions, and Human Rights. A critical analysis of contemporary "universal" discourses and practices', in: D.P. Forsythe and P.C. McMahon, *Human Rights and Diversity, Area Studies Revisited*, Lincoln and London: University of Nebraska Press 2003, pp. 159-181. According to Packer the agreement of a community that harmful traditional practices should not be accepted is key in the strategy to eradicate these practices.

14 AIV, *Universality of human rights and cultural diversity*, advisory report no. 4, The Hague, June 1998, pp. 24-32.

15 Ministry of Foreign Affairs of the Netherlands, *Human dignity for all. A human rights strategy for foreign policy*, November 2007.

# III Ratification of treaties and incorporation in constitutions as vehicles for the universalisation of human rights

Over the last decade a large number of States, some of them with little or no human rights tradition, have ratified international human rights conventions. This testifies to the fact that States recognise the universal character of human rights, and are willing to face the scrutiny of international human rights treaty bodies – bodies which as a rule are not greatly inclined to accept cultural exceptions as a justification of non-compliance.

Ratification of human rights conventions typically implies an obligation to report periodically to the relevant treaty bodies. This in turn requires domestic institutional implementation of human rights norms, and undercuts the persuasiveness of arguments drawn from a discourse that is anathema to human rights. Because treaty ratification increases the chances that human rights will become institutionalised, the Netherlands is advised to continue persuading States of the added value of ratifying the international human rights conventions, of entering as few reservations as possible upon ratification, and of withdrawing their reservations over time.[16]

The further acceptance of the universality of human rights is illustrated not only by the ratification of treaties, but also by the constitutionalisation of rights. The Chinese example is instructive here. After Mao's death in 1976, human rights started gradually to play a more prominent role in official Chinese discourse, which eventually led to the incorporation of a chapter on the fundamental rights (and duties) of citizens in Articles 33-56 of the Chinese Constitution of 1982, i.e. before China started ratifying human rights conventions. With an interruption of some years following the suppression of the demonstrations in Tiananmen Square (1989), this was followed by China's ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the signature of the International Covenant on Civil and Political Rights (ICCPR) and the adoption of an explicit reference to human rights in the Constitutional Reform of 2003.[17] This articulation of human rights in domestic legal instruments, even in the absence of strict respect for them in practice or the ratification of the treaties in which those rights are enshrined, contributes to the crystallisation of general principles of international human rights law, and thus to their universality. In such a case, international human rights law is not imposed by the international community, but develops organically in conjunction with national constitutional practice.[18]

That being said, treaty ratification and domestic constitutional protection of human rights do not guarantee that universal human rights norms will be adequately implemented as a matter of course. Ratification and domestic protection may be said to represent necessary, but in themselves insufficient, conditions for the universal implementation of human rights norms. Adequate implementation will in the final

16 See Section IV on reservations.

17 In November 2008 the government of China also announced that it will issue a 'human rights action plan' in due course.

18 See also: AIV, *China in the balance: towards a mature relationship*, advisory report no. 55, The Hague, April 2007.

analysis hinge on the State's political willingness to enforce human rights law strictly. This willingness should translate, for example, into legislation guaranteeing every individual access to an independent court in the event of human rights violations. States should also consider establishing national human rights institutes and design specific policy programmes geared toward mainstreaming human rights in all government policies, while educating the population on the advantages of human rights-based approaches.

In the final analysis, laws will prove most effective if they can garner broad popular support, and thus exert extra pressure on governments.[19] When developing human rights policies in respect of the situation in other States, the Netherlands may thus want to bear in mind that top-down imposition of human rights norms that are not widely supported may sometimes be effective but will often lack the desired impact in the long run. Accordingly, resources should also be made available to support pressure from below, since laws that reflect popular ideas have more legitimacy and a greater chance of becoming effective (see section VIII below).

19 Cf. R. Banakar, 'When Do Rights Matter? A Case Study of the Right to Equal Treatment in Sweden', in: S. Halliday & P. Schmidt, *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, Oxford, Hart, 2004, 165 (demonstrating that one Swedish equal treatment law was more effective than another because the former enjoyed popular support, whereas the latter was imposed top-down by politicians).

# IV Cultural context

Although the language of human rights is almost universally accepted by now, it is implied in the Ministers' request to the AIV that culture- or context-specific discourses advocating deviations from universal human rights standards are still prevalent. The AIV would observe, however, that by and large, as a result of the trickle-down effect of international human rights law in national legal systems, cultural exceptions are in practice put forward only to a limited degree. And when they are, they are mainly voiced by local communities (as opposed to the State that has ratified the relevant human rights instrument), or by States if they serve the interests of the political or religious establishment.

It should be noted here that many African States no longer support such harmful traditional practices as female genital mutilation/circumcision, domestic violence and child marriage. This is in line with the relevant human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).[20] These practices have also been explicitly banned by pan-African conventions. The African Charter on the Rights and Welfare of the Child (1990), which has been ratified by 41 African States (out of a total of 53), for instance, provides that States parties 'shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child' (Article 21); the more recent Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which has been ratified by 23 (and signed by 43) African States, provides, for its part, that the States parties 'shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards' (Article 5). In addition, political elites typically shun harmful traditional practices and promise that the perpetrators will be prosecuted, while sometimes asking for time to eradicate the practices in question, given the limited resources of developing countries. In so doing, they invoke a concept familiar to economic, social and cultural rights discourse: the progressive realisation of rights.

Progressive realisation of human rights is not always a matter of course. In many countries, traditional local authorities – who may support harmful practices – may be stronger than the State authorities. In Afghanistan, for instance, as the Special UN Rapporteur on violence against women has pointed out, the 'normative framework governing the lives of most Afghan women, particularly in rural areas, is in fact dictated by tribal customs'.[21] These customs accept gender-biased practices such as marital rape, sexual assault and other forms of violence against women within the household as a norm. By the same token, traditional local power blocs in Ghana have endorsed such harmful practices as ritual servitude, sexual exploitation of girls, and female genital mutilation, although the State of Ghana has, at least at international level,

20 See for harmful traditional practices: CEDAW Article 5(a) and CRC Article 24(3) and for domestic violence CEDAW Article 16(2) and CRC Article 19.

21 Special UN Rapporteur on violence against women, its causes and consequences, Mission to Afghanistan, 2005, p. 12.

spoken out against these practices.[22] In her 2008 report on Ghana, the Special UN Rapporteur noted that 'local State officials are often unwilling to challenge these chiefs, since the balance of power is often tilted against the State'.[23] Due to the power of local chiefs or authorities, human rights bills may sometimes even stall in parliament. Some States argue that it is not their job to change certain cultural traditions observed by conservative ethnic communities within their territory. In countries where local or tribal communities wield considerable power, the Netherlands could explore the possibility of entering into a dialogue both with the State authorities and with representatives of those communities. If possible, the Netherlands could also try to approach these representatives – local chiefs, elders, religious leaders, opinion makers – indirectly through funding for NGOs and grassroots organisations that engage in intercultural dialogues (see also Section VIII).

When a State itself (as opposed to local or tribal communities) invokes culture, it is mainly *within* the framework of universal human rights protection. Statements by some States typically reveal a concern that this framework is being abused in order to impose Western conceptions of human rights. The argument is that Western conceptions undermine non-Western religious values and beliefs (in particular Islam). Traditional religious practices have also prompted States to enter reservations to human rights treaties. Some Muslim States, for instance, have entered interpretative declarations and reservations to CEDAW and the CRC. An example is the perceived incompatibility of the *sharia* with Article 16 of CEDAW, which requires that States 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations'. The number of States that have entered reservations to Article 16, in whole or in part, is so high that the CEDAW Committee has voiced its serious concern.

Culture- or context-specific arguments are, however, not only based on religion, but are sometimes also drawn from a country's economic situation (especially as regards social and economic rights) or from a culture that emphasises citizens' duties over their rights. In the Confucian and Vedic traditions, for example, duties are supposed to be more important than rights, while in African countries the community often plays an important role in nurturing the individual.[24] Unlike the universal human rights conventions, the African Charter on Human and Peoples' Rights, for example, includes a chapter on the *duties* of the individual. These are duties owed not only to the State, but also to the family, to society and to other communities. It goes without saying that in carrying out these duties respect for the rights of the individual as defined by international human rights instruments should not be compromised. Although the concept of duties as such is not foreign to the international human rights discourse,[25] it was never intended to be invoked in order to restrict the human rights of individuals.

22 Special UN Rapporteur on violence against women, its causes and consequences, Mission to Ghana, 2008, pp. 14-16.

23 *Ibid.,* p. 6.

24 Cf. S. Tharoor, 'Are Human Rights Universal?', *World Policy Journal*, Volume XVI, No. 4, Winter 1999/2000.

25 Article 29(1) of the Universal Declaration of Human Rights reads: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.'

Some Asian States have been using the concept of 'Asian values', especially since the early 1990s, in response to the more forceful export of 'Western ideas' that followed the end of the Cold War. Singapore and Malaysia have been the main proponents of these values, though other Asian countries, such as China, Japan, Korea, Indonesia and India, have largely adopted the same stance. In their view, 'Asian values' stem from sources that include Taoism and Confucianism. Confucianism, for instance, takes a different view of morality than the rights-based morality of human rights. It is virtue-based and centres not on being an individual holder of rights, but on becoming 'a person of excellence', a concept in which modesty plays a significant role, and on living in harmony with other members of the community. Generally speaking, the discussion of 'Asian values' involves the claims of a wide cultural, economic and religious diversity that must be taken into account when further developing international human rights law.

Writers trying to formulate 'Asian values' that are valid throughout Asia focus on the following: respect for hierarchy and authority; the primacy of the family and social consensus over conflict; the higher priority given to law, social order, and security than to individual civil and political rights, in the interests of economic and social development; the precedence of communal welfare over individual human rights; and an emphasis on self-discipline. However, other voices can also be heard in this debate, for example in the Bangkok NGO Declaration of 1993, which champions the universality of human rights (see section II). The Association of Southeast Asian Nations (ASEAN) is now tentatively exploring ways of developing a human rights system that can combine compliance with international human rights norms and cooperation with international human rights mechanisms on the one hand with respect for 'Asian values' on the other.[26] In this process ASEAN is drawing on the Asean-European Dialogue, which started as long ago as 1972 and which, since the 1994 meeting in Karlsruhe, has also focused explicitly on human rights issues.[27]

One State which has placed much emphasis on the idea that the individual has duties *vis-à-vis* the State, and has acted accordingly, is the People's Republic of China. The Chinese State has made ample practical use of this concept in ways that strengthen State power and are at odds with universal human rights standards. China has explicitly linked this concept of duties with its own 'human rights' tradition. In its first white paper on human rights in 1991, the State Council of the People's Republic of China

26 This section on 'Asian values' is based upon the work of Byung Sook de Vries, Ph.D. student at Tilburg University. Sources used by her include: S.L.Y. Arriola, 'Proposing an ASEAN Human Rights Commission: a critical analysis', *Ateneo Law Journal* 2004, pp. 906-949; E. Brems, *Human rights: universality and diversity*, The Hague: Kluwer Law International 2001; M. Criselda (ed.), *Philosophy of human rights and emerging perspectives: Western versus Eastern concept-The ASEAN scenario*, Quezon City (Philippines): The Institute of Human Rights University of the Philippines Law Centre 1999; V. Iyer, 'Asian values and human rights', in: Venkat Iyer, *Democracy, human rights and the rule of law: essays in honour of Nani Palkhivala*, New Delhi: Butterworts India 2000; F. Luthans, W. Zhu & B.J. Avolio, 'The impact of efficacy on work attitudes across cultures', in: *Journal of World Businesses* 2006, pp. 121-132; K. Mahbubani, *Can Asians think?*, Singapore: Times Books International 2002; K. Mayambala, 'A critical examination and appraisal of the continuing relevance of the universality/cultural relativism debate in international human rights discourse', *Journal of International law* 2006, pp. 28-43; and W. Osiatynski, 'On the universality of the Universal Declaration of Human Rights', in: A. Sajó (ed.) *Human rights with modesty. The problem of universalism*, Leiden/Boston: Martinus Nijhoff Publishers 2004, *op. cit.*, pp. 33-50.

27 See <http://www.aseansec.org/5612.htm>.

stated that '[a] country's human rights situation cannot be judged in total disregard of its historical and national conditions, nor can it be evaluated according to the preconceived model or standard of another country or region.'[28] It should be noted in passing that this view strongly influenced the 1993 United Nations Conference on Human Rights in Vienna, which drew attention to varying contextual and cultural interpretations of universal human rights.

Whereas a communitarian approach could be legitimate for cultures worldwide, if they choose to adopt it, the emphasis on the interests of society should not undermine citizens' exercise of their rights against their governments. Having said that, it could also be argued that the distinction between the primacy of the individual and the alleged supremacy of society is often merely theoretical and creates an unrealistic dichotomy. It suggests that protecting the interests of society at large would by definition not be in the interest of the individuals composing it and vice versa. In reality, many of the civil and political rights protect groups, whereas many of the social and economic rights protect individuals. Balancing the rights of the individual with the interests of society at large can in certain cases be a delicate matter, but in the AIV's view that balancing act should be performed by independent courts rather than political leaders (see also section VI).

28 State Council of the People's Republic of China, *Human Rights in China*, Beijing, 1991, p. ii, p. 85.

# V Universality of human rights and cultural variety: distinguishing between norm setting and norm application

Cultural particularities should not be seen as necessarily at odds with universal human rights. As Indonesia recently stressed in the UN Human Rights Council (2007): 'cultural specificities should not be seen as incompatible with [universal] human rights'. The AIV strongly believes that universality, in the sense of universal acceptance of human rights, will be *reinforced* if cultural variation is acknowledged. Indeed, if human rights norms leave room for cultural-specific implementations, cultures and States might be more willing to embrace the universal appeal of the international human rights framework. In other words, universality does not mean uniformity.

Some of the UN human rights treaties have acknowledged this by explicitly creating space for the accommodation of economic, cultural or legal diversity. Perhaps the best example so far is the 1989 Convention on the Rights of the Child (CRC), which shows an above-average sensitivity to various forms of diversity. For example, it allows some room for interpretation as regards the definition of childhood. Article 1 states: 'a child means every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier.' Subsequently, the concept of the 'best interests of the child' is presented as 'a primary consideration' in 'all actions concerning children'. While it thus guides all CRC implementation action, this concept is not actually defined in the CRC, the idea being that it is best defined in the specific context in which a particular child rights case or issue arises. Interestingly, various national legislators have picked up on this challenge and opportunity and have codified their definitions of best interests.[29]

The AIV is of course aware that cultural diversity is sometimes invoked to justify harmful practices. The AIV would emphasise, however, that it holds strong views about the dynamic nature of cultures. With the right incentives, local leadership and support of local opinion formers, an overlapping consensus on the harmful character of such practices could be established, which could lead to their eventual eradication. The eradication of foot binding in China and of sati (widow burning) in India are good examples.[30] In both cases the involvement of people indigenous to the cultures in question proved vital in framing the campaign leading to eradication within the appropriate cultural context. Those in favour of the practices were engaged in discussion and the justifications put forward for these practices proved not to be insurmountable, regardless of whether they were based on religion, tradition, marriageability or beauty.

It is important to realise that change will only occur when it is allowed to occur. Closed societies tend to ossify and to be extremely hostile to change. All States, if they take culture seriously, should therefore guarantee the freedom of expression, information and communication.[31]

29 See e.g. the Uganda Children Act.

30 See for a more detailed description and analysis: C. Packer, *Using Human Rights to Change Tradition,* Antwerp, Intersentia 2002, chapter 7.

31 Cf. Article 2.1 of the UNESCO Declaration on Cultural Diversity.

For it is precisely the freedom of expression, information and communication, the right to education, and the right to political participation that may allow cultures to change from within, and to incorporate universal human rights values. The potential for change within cultures makes it clear that, as An-Na'im argued, 'the universality of human rights should be seen as a *product of a process* rather than as an established given concept and specific determined normative content'.[32] The product of this process, facilitated by a number of procedural rights, is necessarily contingent and temporary.

In the final analysis, the universality of human rights is not a 'one-size-fits-all' concept, but one that allows for a certain diversity of interpretations, within the margins set at international level (see section VI below). Respect for, and not merely tolerance of, specific cultural manifestations should pervade the entire universality discourse. In the AIV's view, a constructive dialogue, as advocated by the Minister of Foreign Affairs in his Human Rights Strategy,[33] is more effective than an approach based on the assumption of clashing civilisations, with the human rights absolutism that entails. Absolutism in no way contributes to the universality of human rights, universality being understood as the spread of human rights ideas to all civilisations through local contextualisation.

32 A.A. An-Na'im, 'Area Expressions and the Universality of Human Rights', in: D.P. Forsythe and P.C. McMahon, *Human Rights and Diversity, Area Studies Revisited*, Lincoln and London: University of Nebraska Press 2003, p. 2.

33 Dutch Ministry of Foreign Affairs, *Human dignity for all. A human rights strategy for foreign policy*, November 2007, pp. 4-5.

# VI Discretionary competence and margin of appreciation

As pointed out in the previous section, the AIV is of the view that cultural diversity is a good to be supported, and not something to be progressively abolished.[34] In this connection, the AIV would draw attention to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, signed in Paris in 2005, a convention to which the Netherlands should become party. However, respect for cultural diversity does not mean that human rights and fundamental freedoms can be infringed under the banner of cultural diversity. Article 2.1 of the said UNESCO Convention actually makes it abundantly clear that States cannot justify any practice by resorting to cultural arguments.

Generally, a large part of the 'universality versus cultural relativism' debate actually takes place *within* rather than outside a universal human rights discourse, as pointed out in section IV. This raises the question of what latitude the universal human rights framework allows for cultural understandings and interpretations of universal standards.

As the AIV stated in its 1998 report, the answer to this question differs from one right to another.[35] Some non-derogable rights, such as the right to life, the right not to be subjected to torture or to inhuman or degrading treatment, and the right to recognition before the law, must be observed strictly and the provisions on them must therefore be applied uniformly. In other cases governments can be allowed some latitude to make policy regarding application, although it should always be possible to hold them accountable for their use of this latitude before national or international judicial bodies.

A number of human rights treaty provisions allow for restrictions to be placed on the freedoms they protect.[36] This gives States the freedom to curtail certain rights, provided that the conditions set forth in the treaties have been met. In the case of some other rights – in particular, but not exclusively, economic, social and cultural rights – it is likewise accepted that States should achieve them progressively, or according to their available resources. This also creates a certain degree of latitude in policymaking. This does not mean, however, that ratification of the ICESCR can be considered merely an 'aspiration' to realise the relevant human rights. Over more than twenty years, the work of the UN Committee on Economic, Social and Cultural Rights has shown that to take this attitude is to underestimate and misunderstand the obligations arising from the Convention.

The freedom of religion (Article 18 ICCPR) and the freedom of expression (Article 19 ICCPR) are prominent examples of freedoms that can be subjected to restrictions. Article 18 ICCPR, for instance, provides that the '[f]reedom to manifest one's religion or

34 See also: AIV, *Universality of human rights and cultural diversity*, advisory report no. 4, The Hague, June 1998, at p. 9 ('cultural diversity can be a source of great dynamism').

35 Ibid., p. 14.

36 It should be noted that, even if a right is not subject to restriction on the basis of the provision specifically protecting it, it may still be derogated from '[i]n time of public emergency which threatens the life of the nation' (see Article 4.1 ICCPR). The non-derogable rights are an exception here.

beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Article 19 ICCPR, for its part, provides that the exercise of the right to freedom of expression 'carries with it special duties and responsibilities', and that '[i]t may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals'. Limitations are often imposed, and they are explicitly allowed under the European Convention on Human Rights,[37] giving rise to an extensive and evolving body of case law.[38] In the Netherlands, too, freedom of speech is not unlimited; hate speech, for instance, is not protected by the law. Although the question has come up in the context of an advisory report on the universality of human rights, the AIV is of the opinion that the debate on freedom of speech and freedom of religion, and on the friction between them, should be cast not in terms of universality versus cultural relativism, but rather in terms of the discretionary competence allowed to States by universal and regional human rights standards.

This leads once again to the question posed by the AIV in its 1998 report: how much latitude does a State have in applying human rights law, and when has a State exceeded that latitude?[39] It is not easy to define the exact contours of 'permissible restrictions' on the rights which are often the subject of culturally relativist arguments. At European level, the European Court of Human Rights has developed what is known as the 'margin of appreciation' doctrine. This doctrine does not imply that States are free to interpret as they please the scope of the rights enshrined in the European Convention on Human Rights. However, by determining the degree of latitude States have in specific cases, a general idea emerges as to the application of the Convention's limitation clauses. It would be good, though, if the Court made its views on this issue more explicit than it has done so far.[40] It could thus clarify the doctrine by explaining its reasons and the criteria for extending or restricting the margin of appreciation.

At the same time, it is questionable whether the margin of appreciation doctrine as developed at European level would be useful or effective at a universal level. Since Europe can be seen as a more coherent community of values than the world community, it is easier to extrapolate European Court of Human Rights case law from

37 Article 9.2 (freedom of religion); Article 10.2 (freedom of expression).

38 An example of restriction of the freedom to express racist ideas could be given here. As early as 1979, the European Commission of Human Rights decided that the prosecution by the Netherlands of a neo-Nazi political party for distributing racist texts did not constitute a violation of Article 10 of the European Convention (*Glimmerveen en Hagenbeek v. Netherlands*, 18 D&R 187). The European Court of Human Rights confirmed this point of view in the case of *Jersild v. Denmark*, 1995, Series A, no. 298, in which it held that racist remarks by a group of Ku Klux adherents did *not* fall under the protection of the freedom of speech in Article 10.

39 AIV, *Universality of human rights and cultural diversity*, advisory report no. 4, The Hague, June 1998, p. 15.

40 See also: E. Brems, 'The Margin of Appreciation Doctrine of the European Court of Human Rights', in: D.P. Forsythe and P.C. McMahon, *Human Rights and Diversity, Area Studies Revisited*, Lincoln and London, University of Nebraska Press 2003, pp. 81-110.

one State to another. However, developing an equivalent of the margin of appreciation doctrine at global level might help to reconcile the poles of universality and diversity in the interpretation and implementation of human rights standards. Authoritative statements and interpretations made by the UN treaty bodies, not only with respect to particular cases but also in general (for example in a General Comment), could help to define what would be considered permissible restrictions on specific human rights at global level. One way to develop this line of thinking is to conceive of rights as having a 'core' and a 'periphery'.[41] Whereas the core of the rights should be interpreted uniformly, the periphery could allow more scope for diversity. This could only work if the core of each right is determined authoritatively, for example in General Comments by the UN treaty bodies. It is interesting to note in this connection that the Committee on Economic, Social and Cultural Rights promoted this 'core' concept in its General Comment no. 3.[42]

In the context of the discussion on discretionary competence, the AIV does not agree with the Ministers' suggestion in their request for advice that the extension of the mandate of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to cover the abuse of freedom of speech for purposes of racial and religious discrimination represents an encroachment by cultural relativism on the universal core of international human rights. Rather, it is legitimate and consistent with the discretionary competence allowed by international human rights law to determine what limitations on freedom of speech are advisable.[43] The Netherlands should do its utmost to explain at international level that reasonable people can reasonably differ over the ideal definition of freedom of speech, and that the Netherlands opts for a wide definition of that freedom. At the same time, the Netherlands should show understanding for States that espouse a narrower definition but still remain within the discretionary competence allowed by universal human rights law.

But if that discretionary competence – which of course is not to be defined by the Netherlands alone (see above) – is exceeded,[44] the Netherlands may, and indeed should, speak out in defence of human rights, be it in a bilateral or a multilateral setting. In so doing, it could for instance draw attention to existing human rights-friendly interpretations and applications of certain cultural, legal or religious norms within the country concerned. It should be borne in mind here that, as Amartya Sen observed, 'voices have been persistently raised in favour of freedom – in different form – in

41 *Ibid.*, p. 106.

42 UN Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States Parties' obligations (Article 2, par. 1)*, fifth session, 1990.

43 This matter has been under discussion for some considerable time, as shown by the large number of declarations, interpretations and reservations entered by Western countries regarding Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (Article 4 concerns limitations on the freedom of speech and the freedom of organisation in the event of attempts to justify or promote racial hatred and discrimination).

44 In its 1998 report, the AIV held that '[a]lthough the extent of this right will vary from place to place and from time to time owing to existing differences, including religious differences, between cultures and countries, any curtailment most be *as limited as possible*' (p. 20, emphasis added), but also, on a general note, that '[t]olerance ends where other people's intolerance begins' (p. 10).

distant and distinct cultures'.[45] An attempt should be made to identify these 'voices' and support them where possible. Adopting this strategy could effectively invalidate suspicions that alien norms and values were being imposed.

45 A.K. Sen, *Development as Freedom*, Oxford University Press 2001, p. 246.

# VII Formulating a Dutch human rights policy in relation to cultural exceptions

The AIV understands the Ministers' concerns about a possible erosion of universal human rights standards of freedom of speech through the vehicle of Article 19(3) ICCPR, concerns which have also been raised by the NGO Article 19. It is true that some States pay lip service to international human rights law while at the same time construing the authorisation to impose restrictions on certain freedoms so broadly as to undermine the entire edifice of human rights. As the AIV held in its 1998 report, the latitude allowed States when applying universal human rights norms should always be a controlled one, i.e. a latitude subject to international supervision, for example by international human rights bodies, whether political or judicial in nature.

While this check on State discretion is potentially a powerful one, it should not be forgotten that the system of enforcement and supervision of international human rights law is essentially decentralised, with States and their courts being the primary arbiters of human rights law. The system of supranational supervision is incomplete and weak. There are supervisory courts in Europe (European Court of Human Rights) and the Americas (Inter-American Court of Human Rights). And in 2004 the Protocol on the establishment of an African Court on Human and Peoples' Rights (1998) entered into force.[46] However, there is no universal human rights court, nor is it expected that one will be set up. In addition, most human rights treaty bodies have no enforcement power. Nevertheless, when adjudicating on individual communications or responding to periodic reports, they may question and set aside reservations to human rights conventions which are informed by cultural or religious considerations, on the grounds that they are incompatible with the object and purpose of the convention. To date, however, the treaty bodies have not developed standard practices on this point.[47] As a political body, the Human Rights Council might also contribute to defining the limits of State discretion in the application of human rights norms. The instrument of the Universal Periodic Review could be helpful in this respect.

Faced with the deficiencies of supranational supervision, individual States often want to develop strategies to respond to other States' restrictions on human rights. In its international relations, its bilateral and multilateral dialogues, and its development cooperation, it is legitimate for the Netherlands (as an individual country and as an EU Member State, participating in the Common Foreign and Security Policy) to use these strategies, and on that basis to criticise the human rights records of other States and to try to improve their human rights compliance. In doing so, however, it is important for the Netherlands to ensure that these strategies are not based solely on its own attitude to human rights (which itself is the result of a centuries-long process). Instead, such standards ought to be informed by an international consensus. Preferably, the standards should be translated into norms, practices and traditions that the State

46 This court is still in the process of being merged with the African Court of Justice.

47 One exception is the General Comment on 'Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' by the UN Committee on Civil and Political Rights, CCPR/C/21/Rev.1/Add.6, 2 November 1994.

addressed can identify with. They ought to be internalised, so that citizens as well as their leaders recognise them as part of their own value system.[48] This is in line with the suggestion given by the Ministers themselves in their request for advice, where they state that bottom-up or grassroots universality could be part of a more vigorous defence of the universality of human rights. By linking up with the cultural foundations of human rights norms, the universality of human rights discourse could become more entrenched. This requires a sensitivity to arguments that are likely to be persuasive to a specific community or to address the particular apprehensions of the members of that community. It might for example be necessary to address religious, cultural, political or economic issues of concern and adjust the formal human rights discourse accordingly.[49]

Translating international human rights standards into the cultural language of the country with which the discussion is taking place may at times require abandoning terminological rigour. International donors, and the Netherlands is no exception, often make human rights project financing for other countries dependent on specific human rights language in the formulation of proposals. This is understandable, for instance because non-human rights related projects should not be funded with money earmarked for human rights capacity-building. Nonetheless, an insistence on human rights wording in the proposal may exclude from funding valuable projects that avoid references to human rights because of the cultural and political context in which the project proposers are operating, although in practice the projects do promote human rights. Field research in China, for instance, has demonstrated that many NGOs avoid the term 'human rights' for fear of being harassed by the government, even though in fact they actively promote such human rights as the rights of the child and of disabled people.[50] The AIV suggests that projects that contribute to respect for human rights in the wider sense be funded irrespective of the name-tag given to them by local NGOs.

By funding human rights projects that are in line with local cultural conceptions and which are not deemed politically sensitive by the government, the Netherlands may create goodwill with the authorities, goodwill that may open the door to a fruitful dialogue on politically more sensitive human rights issues. But in this sensitive dialogue, too, attention should be devoted to anchoring universal human rights language in traditional values. The dialogue should therefore be conducted not only by representatives with legal training, but also by representatives with a background in anthropology or ethnology, who can understand the local cultural system better.

A mature dialogue provides partners with a platform from which to criticise each other. While emphasis is to be put on human rights processes and on respect for other civilisations' views on human rights, criticism has its place in a respectful dialogue,

48 Cf. S. Engle Merry, *Human Rights and Gender Violence*, The University of Chicago Press, 2006, 1 ('In order for human rights ideas to be effective … they need to be translated into local terms and situated within local contexts of power and meaning.').

49 A.A. An-Na'im, 'Area Expressions and the Universality of Human Rights', in: D.P. Forsythe and P.C. McMahon, *Human Rights and Diversity, Area Studies Revisited*, Lincoln and London: University of Nebraska Press 2003, pp. 16-17.

50 S. Deklerck, 'Human Rights in China: Tradition, Politics and Change', 16 *Studia Diplomatica* 2003, no. 6, Part 3.D.b.

especially when one partner is not living up to its own human rights rhetoric or the promises it has made, or when a State blatantly exceeds its margin of appreciation in relation to a specific right. States may even have a *duty* to speak out against serious human rights abuses in other States, as part of their moral and legal responsibility to protect vulnerable people from violations of international human rights norms, norms in which the international community as a whole has an interest.[51] While foreign pressure may at times be ineffective or even counterproductive, it can also be a force for change for the better. In order to gain more international legitimacy, States may want to polish up their human rights credentials, and take action in response to sustained human rights criticism from abroad. China, for instance, has widened press freedom for foreign journalists, quite probably because of the international community's criticism of its press freedom record in the run-up to the 2008 Olympic Games in Beijing, and China's desire to enhance the legitimacy of the Games.

When a State modifies its human rights policies in a desirable direction, the State voicing criticism or the international community may obviously want to make sure that the changes have been internalised and are durable, not cosmetic. An effective strategy could be for the critic to first commend the State on the progress it has made in the human rights field, and only then to make any critical observations, supplemented by a proposal to share good practices and technical assistance if need be. The AIV believes that coercive measures should be taken with a view to human rights compliance only in extreme circumstances, since coercion often reduces trust and can even worsen the human rights situation. An example that reflects a preference for incentives to ensure compliance with universal human rights can be found in the 2000 Cotonou Agreement between the African, Caribbean, and Pacific States (ACP States) and the European Community and its Member States. This Agreement provides for a regular political dialogue on human rights, democracy and the rule of law, the essential elements of the partnership (Article 8-9), for consultations if this political dialogue fails (Article 96), and only ultimately, if all efforts fail, for dispute settlement and subsequent sanctions (Article 98).

51 Cf. Article 48 of the Draft Article on the Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001).

# VIII Support for grassroots initiatives

Human rights must be respected, protected and promoted by the State, as it is the State that is the primary bearer of human rights obligations.[52] In States with a weak human rights tradition, it is necessary to build capacity, for instance by providing human rights training to police forces and the judiciary, if human rights are to be universally respected and protected on the ground. The State cannot abdicate its primary responsibility for human rights compliance on the ground by arguing that effective implementation is the task of grassroots organisations.

Yet it should be emphasised that support for grassroots human rights NGOs and civil society is key to compliance with universal human rights standards. Provided that the NGOs concerned contribute to the realisation of human rights, they can act as persuasive intermediaries between international human rights law and local practices, as they are thoroughly familiar with the grass roots, while often at the same time being part of transnational networks where a universal human rights language is spoken. Such NGOs may tap into the cultural resources of a society where human rights violations are still common, ensure that the international legal formulation is embedded in the vernacular, and then use this vernacular to effect change and 'push the envelope'. In this respect, it should be reiterated, as the AIV also held in its 1998 report, that cultures are not static, but dynamic, including in relation to human rights.[53] Cultures may change from within, with some fertilisation and transplantation (and sometimes prodding) from without. For human rights campaigns to be successful, it is important to consider the community itself as a resource rather than draw on resources outside the culture in question.[54] Very often it is essential to involve the educated middle class in efforts to eradicate harmful practices, as was shown with regard to the eradication of foot binding in China and widow burning in India (see section V). The potential for change is also recognised by the human rights supervisory bodies, which have repeatedly called on States to eradicate certain traditional practices. It should obviously not be glossed over that some practices will prove particularly resistant to change, examples being women's rights, practices in relation to HIV/AIDS, and equal treatment for homosexuals. However, even in these areas considerable progress has been made over the last 20 years, which goes to prove that ultimately change should never be ruled out, even in the most sensitive parts of a society.

When it comes to changing deeply ingrained cultural practices, the Netherlands may want to ensure that it does not overplay its hand. Bringing too much (albeit well-meant) human rights pressure to bear on culturally conservative societies may ultimately not serve the interests of the universality of human rights. The Netherlands should

52 E.g. Article 2.1 of the ICCPR ('Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant').

53 AIV, *Universality of human rights and cultural diversity*, advisory report no. 4, The Hague, June 1998, p. 9.

54 As also stated by C. Packer in 'African Women, Traditions, and Human Rights. A critical analysis of contemporary "universal" discourses and practices', in: D.P. Forsythe and P.C. McMahon, *Human Rights and Diversity, Area Studies Revisited*, Lincoln and London, University of Nebraska Press 2003, pp. 159-181.

therefore, as far as possible, view universality as a process, centred on translating universal human rights concepts into local concepts and practices. This could be done for instance through Dutch or EU funding of radio broadcasts that express universal human rights in terms of locally recognisable norms and practices, or through the provision of legal aid aimed at ensuring effective access to justice for victims of human rights violations. Such programmes raise human rights awareness among the local population, which could in turn create bottom-up pressure for the modification of undesirable local practices that impede the full realisation of universal human rights.

In order for internalisation to be successful, the AIV recommends that the Netherlands disburse funds to grassroots organisations for both local activities and international networking. A universal human rights discourse can only trickle down if local organisations link up with international human rights NGOs, in particular at NGO-meetings during international conferences. International human rights networks provide know-how and make possible the exchange of best practices by the participating members.

Donor governments and institutions should, however, be aware that support to grassroots organisations can potentially be very sensitive and they should see to it that this support does not backfire. If possible, governments in the partner country should somehow be informed of, and involved in, the development and financing of projects on their territory. Foreign social and development policy only breeds resentment if donors fund their pet grassroots projects, a strategy which possibly runs counter to the priorities set by the relevant government.

Another complication is that it is not always possible for donors to identify and work with grassroots organisations in foreign countries. In certain countries – for example authoritarian States or societies lacking an urban intelligentsia – a tradition of grassroots organisations might not even have taken hold, and the prospects of their ever doing so may be slight. A direct human rights dialogue with the State may prove to be the only alternative for such societies. Such a State-to-State dialogue and interaction could follow up on the ratification of human rights treaties by the 'partner'. In the framework of the dialogue, the Netherlands could support fledgling institutional structures that protect and support human rights and the rule of law (as it already often does).

To conclude, without the involvement of grassroots organisations, culturally sensitive translation of international human rights norms may not succeed. Dialogue with grassroots organisations could also address the role of the State in the protection of rights, which could in turn lead these organisations to demand that their governments sign up to and observe more human rights. Grassroots demands may carry more legitimacy and have more transformative power than top-down pressure from abroad. An interplay between the two lines is of course possible as well. In all cases, however, the action has to be conducted on a tailor-made, case-by-case basis.

# IX Consistency of a Dutch universal human rights strategy

As pointed out in the previous sections, a successful Dutch human rights strategy is based on acknowledgement of cultural diversity, on a process-oriented dialogue, and on support for grassroots initiatives. Success also depends, however, on strict respect for human rights norms within the Netherlands itself, and on an even-handed approach toward human rights violators worldwide. Applying double standards discredits a universal human rights strategy.

In this context, it should be acknowledged that the human rights record of the Netherlands is not flawless. In terms of cultural or religious exceptions, for example, the CEDAW Committee found the Netherlands to be in violation of the Convention on the Elimination of All Forms of Discrimination against Women as regards the banning of women from membership of the Calvinist Party (SGP).[55] In recent years, the Netherlands has also been criticised for its asylum policy and treatment of illegal migrants, especially children (not only by the European Court of Human Rights and UN treaty bodies but also by the Dutch courts and the National Ombudsman). And it is clear that over the last years counterterrorism strategies have lead to increased pressure on certain human rights, in Europe as well as worldwide.[56] The Netherlands should be willing to address these issues in an open and honest dialogue and redress the situation if necessary. Obviously, it can only be convincing at an international level if it puts its own house in order.

Moreover, when criticising the human rights record of other States, the Netherlands ought to make sure that all receive their fair share of criticism, be it in a bilateral or in a multilateral setting. Selected criticism, which spares allied States, is fatal to a credible and effective universal human rights strategy. In line with the AIV's 1998 report, this means that the Netherlands may sometimes have to distance itself from practices of other EU Member States (such as the treatment of Roma and Sinti) and allied countries like the United States.[57] It should be acknowledged that the US has done a major disservice to the universal appeal of human rights in several ways: in the context of the 'war on terror' through Guantánamo, Abu Ghraib, irregular rendition and harsh interrogation techniques; by refusing to ratify such basic human rights instruments as the ICESCR, CEDAW and the CRC; and by having ratified only 14 out of the International Labour Organisation's 188 Conventions.

As regards credibility, reference may also be made to the criticism which is often made in developing countries that the West emphasises civil and political rights rather than

55 The recommendations the CEDAW Committee made in 2001 regarding the Netherlands' national report can be found on the CEDAW website: <www.un.org/womenwatch/daw/cedaw/cedaw25/TheNetherlands_Final.htm>.

56 See also AIV, *Counterterrorism in a European and international perspective, interim report on the prohibition of torture*, advisory letter no. 11, The Hague, December 2005, and AIV, *Counterterrorism from an international and European perspective*, advisory report no. 49, The Hague, September 2006. Chapter II of this report also contains information on fundamental causes and roots of radicalisation.

57 AIV, *Universality of human rights and cultural diversity*, advisory report no. 4, The Hague, June 1998, p. 35.

economic, social and cultural rights and collective rights. As stated in section I above, the AIV wishes to reiterate that all human rights are indivisible, interdependent and interrelated, and that international human rights law allows States some latitude to implement these rights. The AIV also supports what is said on the indivisibility of human rights in chapter 4 of the Human Rights Strategy (2007).[58] Accordingly, the AIV recommends that the Netherlands become party to the Optional Protocol to the ICESCR, which will allow individuals to petition the competent supervisory committee about violations of economic, social and cultural rights, once it has been adopted by the UN General Assembly (the Human Rights Council adopted the Protocol in June 2008). Such a ratification would also be an important signal towards developing countries: the Netherlands is once again taking economic, social and cultural rights seriously.

As to the implementation of economic, social and cultural rights, the AIV again draws attention to the importance of development cooperation in realising such rights. The AIV emphasises that the ICESCR not only requires that each State party realise those rights on its own territory, but also that it 'take steps, individually and *through international assistance and cooperation*, especially economic and technical, to the maximum of its available resources' (Article 2 of the Covenant, emphasis added). This provision is the legal basis for extraterritorial obligations of countries of the global North *vis-à-vis* countries of the global South in the field of development assistance and trade and investment.

In the same vein, Western States have to make sure that discussions of the activities of corporations under their jurisdiction take account of legitimate human rights concerns of the host – developing – country.[59] These concerns are often contextual rather than culturally relativist, and typically relate to the progressive realisation of a number of economic and social rights, e.g. labour rights (minimum wages, health and safety etc.). Some sensitivity to less far-reaching human rights protection – which may be, in part, the engine of economic growth – is surely appropriate. The Netherlands may have to walk a fine line between, on the one hand, using overly Western interpretations of human rights protection and, on the other, allowing Dutch corporations and their foreign subsidiaries and suppliers to go unchecked in weak governance States, to the detriment of the local population. In this regard, it should be noted that a range of transnational corporations have already incorporated human rights-based thinking into their business ethics and can very well act as agents of change in societies overseas.

By supporting respect for and protection and promotion of economic, social, and cultural rights in developing countries, Western States such as the Netherlands may undercut *tu quoque* human rights arguments, and thus contribute to universal respect for all human rights. In addition, strengthening economic and social rights can alleviate poverty. And it is poverty that is arguably among the root causes of persistent human rights violations in the global South. The freedom from want – the third of the four freedoms listed by U.S. President Franklin D. Roosevelt in his 1941 State of the Union address to the U.S. Congress – may open up more scope for justice, which is, almost by definition, in line with universal human rights standards.

58 Dutch Ministry of Foreign Affairs, *Human dignity for all. A human rights strategy for foreign policy*, November 2007.

59 John Ruggie, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (UN Doc. A/HRC/8/5), April 2008.

# X Conclusions and recommendations

Sixty years after the adoption of the Universal Declaration of Human Rights, the issue of the universality of human rights still provokes debate in the international arena, although the discussion has shifted in the course of time. At the beginning of the 21st century, the debate should be placed against the backdrop of recent developments: the attacks of 11 September 2001 and the subsequent international counterterrorism strategies; the political and economic positioning of States like China, Russia and India; the birth of the Millennium Development Goals; gross human rights violations during or after violent conflicts, the number of which is again increasing; and the consequences of the ongoing process of globalisation.

In this advisory report, which can in many ways be considered as a follow-up to the 1998 AIV report on the same subject, the AIV intends to contribute to the further enhancement of the concept of universality and to its effective implementation in practice. In doing so, it focuses on different processes that play an important role in turning universality from a principle into reality.

In summarising its findings, the AIV will relate them to the questions posed by the Ministers in their request for advice. Four of the questions will be addressed in section X.1 (Conclusions), whereas the question regarding policy options for the Netherlands will be addressed in X.2 (Recommendations).

## X.1 Conclusions

1. Does the AIV recognise the development referred to in the request for advice, namely that the universality of human rights is disputed by an increasing number of States?

The AIV would like to observe that the assumptions put forward in the request for advice – that the universality of human rights is disputed by an increasing number of States and that there is an urgent need for counterarguments – might be too defensive. The idea of the universality of human rights is sometimes challenged by cultural and political ideas or economic circumstances that are at times seen as incompatible with international or universal human rights standards, but there are also other signs. For example, 'Human rights and the rule of law' was one of the main pillars of the outcome document of the 2005 World Summit, in which *all* UN Member States reaffirmed that human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing. And in a recent general debate (2008) in the Human Rights Council on the follow-up and implementation of the 1993 Vienna Declaration and Programme of Action *all* Members again reaffirmed the universality of human rights.

The general acceptance of the universal nature of human rights is quite remarkable, and the AIV fully supports the view that 'the success of human rights in becoming the accepted standard of international morality is one of the more improbable stories of the twentieth century.' The AIV would observe that by and large, as a result of the trickle-down effect of international human rights law in national legal systems, cultural exceptions are in practice put forward only to a limited degree. And when they are, they are mainly voiced by local communities (as opposed to the State that has ratified the relevant human rights instrument), or by States if they serve the interests of the political or religious establishment.

That said, the AIV does acknowledge that there is an underlying debate of a more complex nature. While States may not cast doubt on the universality of human rights in a formal sense in international forums, they often defend religious and political traditions and in doing so they frequently use instruments provided by international human rights law: in other words, they enter reservations to treaties or invoke treaty clauses that accept restrictions of human rights in certain circumstances.

Furthermore, formal adherence to universal human rights norms does not mean that these norms are observed in practice. This is not just a matter of State responsibility; powerful local ethnic communities at sub-State level sometimes defend cultural or contextual exceptions to universally accepted human rights standards, and thus hinder their actual implementation. It is hard to escape the conclusion that the idea of human rights has gained surface acceptance across the globe without sufficiently influencing the practice of States' governments and other powerful actors.

The AIV observes that the gap between principles and practice might even pose a greater challenge to the universality of human rights than cultural exceptions do. The universality of human rights should therefore be perceived not as a foregone conclusion but rather as the result of a process of universalisation by which human rights come to be realised.

2. What arguments do States use when challenging the universality of human rights?

When a State itself (as opposed to local or tribal communities) invokes culture, it is mainly within the framework of universal human rights protection. Statements by some States typically reveal a concern that this framework is being abused in order to impose Western conceptions of human rights. The argument is that Western conceptions undermine non-Western religious values and beliefs (in particular Islam). Traditional religious practices have also prompted States to enter reservations to human rights treaties.

Culture- or context-specific arguments are, however, not only based on religion, but are sometimes also drawn from a country's economic situation (especially as regards social and economic rights) or from a culture that emphasises citizens' duties over their rights. In the Confucian and Vedic traditions, for example, duties are supposed to be more important than rights, while in African countries the community often plays an important role in nurturing the individual.

In addition, the AIV observes that in many countries, traditional authorities – who may support harmful practices – may be stronger than the State authorities. Local State officials are often unwilling to challenge these chiefs, since the balance of power is often tilted against the State. Due to the power of local chiefs or authorities, human rights bills may sometimes even stall in parliament. Some States argue that it is not their job to change certain cultural traditions observed by conservative ethnic communities within their territory.

3. How much legitimacy do the arguments have that are put forward in support of challenges to universality on cultural or religious grounds?

The AIV strongly believes that universality, in the sense of universal acceptance of human rights, will be reinforced if cultural variation is acknowledged. Indeed, if human rights norms leave room for cultural-specific implementations, cultures and States

might be more willing to embrace the universal appeal of the international human rights framework. In other words, universality does not mean uniformity.

The AIV also holds strong views about the dynamic nature of cultures. With the right incentives, local leadership and support of local opinion formers, an overlapping consensus on the harmful character of such practices could be established, which could lead to their eventual eradication.

In the final analysis, the universality of human rights is not a 'one-size-fits-all' concept, but one that allows for a certain diversity of interpretations, within the margins set at international level. This raises the question of what latitude the universal human rights framework allows for cultural understandings and interpretations of universal standards. As the AIV stated in its 1998 report, the answer to this question differs from one right to another. Some non-derogable rights, such as the right to life, the right not to be subjected to torture or to inhuman or degrading treatment, and the right to recognition before the law, must be observed strictly and the provisions on them must therefore be applied uniformly. In other cases governments can be allowed some latitude to make policy regarding application, although it should always be possible to hold them accountable for their use of this latitude.

This leads once again to the question of how much latitude a State has in applying human rights law, and when has a State exceeded that latitude. It is not easy to define the exact contours of 'permissible restrictions' on freedoms that are often the subject of culturally relativist arguments. At European level, the European Court of Human Rights has developed what is known as the 'margin of appreciation' doctrine. Developing an equivalent of the margin of appreciation doctrine at global level might help to reconcile the poles of universality and diversity in the interpretation and implementation of human rights standards. Authoritative statements and interpretations made by the UN treaty bodies, not only with respect to particular cases but also in general (for example in a General Comment), could help to define what would be considered universally permissible restrictions on specific human rights. One way to develop this line of thinking is to conceive of rights as having a 'core' and a 'periphery'. Whereas the core of the rights should be interpreted uniformly, the periphery could allow more scope for diversity.

4. What is the role of civil society in this discussion and how could it influence government positions?

The AIV would stress that human rights must be respected, protected and promoted by the State, as it is the State that is the primary bearer of human rights obligations. In States with a weak human rights tradition, it is necessary to build capacity, for instance by providing human rights training to police forces and the judiciary, if human rights are to be universally respected and protected on the ground.

Yet it should be emphasised that support for civil society and grassroots human rights NGOs is key to compliance with universal human rights standards. Provided that the NGOs concerned contribute to the realisation of human rights, they can act as persuasive intermediaries between international human rights law and local practices, as they are thoroughly familiar with the grass roots, while often at the same time being part of transnational networks where a universal human rights language is spoken. Such NGOs may tap into the cultural resources of a society where human rights violations are still common, ensure that the international legal formulation is

embedded in the vernacular, and then use this vernacular to effect change and 'push the envelope'.

## X.2 Recommendations

In this section, the AIV will elaborate on the Ministers' fourth question, regarding the best approach for the Netherlands in the debate on universality.

As stated above, the AIV is of the view that human rights can indeed be considered as the accepted standard of international morality. But they should also be seen as the product of the process of universalisation. Universalisation should reduce the gap between principles and practice and covers a number of separate actions and processes that should take place within a given cultural, religious, social and political context:

a) increasing knowledge and awareness of human rights, in governmental and non-governmental circles, and among the different ethnicities (for example indigenous peoples and national minorities and their leaders) of which States are composed;
b) popular acceptance of human rights as a relevant way of looking at certain issues;
c) the implementation and legal enforcement of human rights norms;
d) their mobilisation in addressing social concerns; and
e) the actual realisation of human rights by all economic, political and legal means.

The AIV recommends that the Netherlands, while promoting the universality of human rights, keep the process of universalisation and its distinct components in mind. This means that in certain cases the Netherlands might consider supporting policies aimed at increasing knowledge of human rights, while in others it might support the enforcement of human rights norms, depending on the particular situation and the particular needs in a country or a locality – and always keeping in mind that in the end these different processes contribute to universalisation, which in turn leads to enhanced universality.

While promoting universality, the indivisibility of human rights should always be borne in mind. The AIV wishes to reiterate that all human rights are indivisible, interdependent and interrelated.

Because treaty ratification increases the chances that human rights will become institutionalised, the Netherlands is advised to continue persuading States of the added value of ratifying the international human rights conventions, of entering as few reservations as possible upon ratification, and of withdrawing their reservations over time.

When developing human rights policies in respect of the situation in other States, the Netherlands may want to bear in mind that top-down imposition of human rights norms that are not widely supported may sometimes be effective but will often lack the desired impact in the long run. Accordingly, resources should also be made available to support pressure from below, since laws that reflect popular ideas have more legitimacy and a greater chance of becoming effective.

In countries where local or tribal communities wield considerable power, the Netherlands could explore the possibility of entering into a dialogue both with the State authorities and with representatives of those communities. If possible, the Netherlands could also try to approach these representatives – local chiefs, elders, religious leaders, opinion

makers – indirectly through funding for NGOs and grassroots organisations that engage in intercultural dialogues.

Faced with the deficiencies of supranational supervision, individual States often want to develop strategies to respond to other States' restrictions on human rights. In its international relations, its bilateral and multilateral dialogues, and its development cooperation, it is legitimate for the Netherlands (as an individual country and as an EU Member State) to use these strategies, and on that basis to criticise the human rights records of other States and to try to improve their human rights compliance.

In doing so, however, it is important for the Netherlands to ensure that these strategies are not based solely on its own attitude to human rights (which itself is the result of a centuries-long process). Instead, such standards ought to be informed by an international consensus. Preferably, the standards should be translated into norms, practices and traditions that the State addressed can identify with. They ought to be internalised, so that citizens as well as their leaders recognise them as part of their own value system.

By linking up with the cultural foundations of human rights norms, the universality of human rights discourse could become more entrenched. This requires a sensitivity to arguments that are likely to be persuasive to a specific community or to address the particular apprehensions of the members of that community. It might for example be necessary to address religious, cultural, political or economic issues of concern and adjust the formal human rights discourse accordingly.

Translating international human rights standards into the cultural language of the country with which the discussion is taking place may at times require abandoning terminological rigour. The AIV suggests that projects that contribute to respect for human rights in the wider sense be funded irrespective of the name-tag given to them by local NGOs.

To sum up, a successful Dutch universal human rights strategy should be based on acknowledgement of cultural diversity, on a process-oriented dialogue, and on support for grassroots initiatives. Success also depends, however, on strict respect for human rights standards within the Netherlands itself, and on an even-handed approach toward human rights violators worldwide. Using double standards discredits a universal human rights strategy. The Netherlands should be willing to address concerns about its own human rights record in an open and honest dialogue and redress the situation if necessary. Also, when criticising the human rights record of other countries, the Netherlands ought to make sure that all receive their fair share of criticism. This means that the Netherlands may sometimes have to distance itself from practices of other EU Member States and allied countries such as the United States.

As regards credibility, reference may also be made to the criticism which is often made in developing countries that the West emphasises civil and political rights rather than economic, social and cultural rights and collective rights. By supporting respect for and protection and promotion of economic, social, and cultural rights in developing countries, Western States such as the Netherlands may undercut *tu quoque* human rights arguments, and thus contribute to universal respect for all human rights. Accordingly, the AIV recommends that the Netherlands become party to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which will allow individuals to petition the competent supervisory committee about violations of economic, social and cultural rights, once it has been adopted by the UN General Assembly.

Finally, the AIV would reiterate that respect for, and not merely tolerance of, specific cultural manifestations should pervade the entire universality discourse. A constructive dialogue, as advocated by the Minister of Foreign Affairs in his Human Rights Strategy, is more effective than an approach based on the assumption of clashing civilisations, with the human rights absolutism that entails.

To conclude, the AIV would like to address the question of whether these recommendations might – in the end – lead to a relativistic approach. This is certainly not the case. The international consensus on human rights norms is still the starting point *and* the outcome to be realised – or, to quote the Universal Declaration of Human Rights, the 'common standard of achievement'. However, this standard can only be achieved if the processes of universalisation and internalisation are given the attention they deserve. Strategies based on a top-down imposition of human rights need to be complemented by a bottom-up approach. Finding a new equilibrium between these two perspectives is imperative if human rights principles are to be truly realised in practice.

**Annexe I**

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| | |
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| *Date* | 21 May 2008 |
| *Our ref.* | DMH/MR – 245/08 |
| *Page* | 1/4 |
| Re | Request for advice on 'Reclaiming the Universality of Human Rights' |

**Introduction**

Within the various international human rights forums, the universality of human rights is being called into question by a growing number of states, and specific cultural or religious circumstances are being forcefully invoked in order to curtail that universality. In theory, the universality of human rights is endorsed by the member states of the United Nations, and hence by practically the entire international community, through their recognition of the Universal Declaration of Human Rights and ratification of the various human rights conventions. At the same time, however, other instruments, especially the Vienna Declaration of 1993, recognise the importance of particular national and regional circumstances in relation to human rights.

This trend is also noticeable in the political dialogues on human rights which the Netherlands conducts at multilateral and bilateral level: governments increasingly question the universality of human rights, putting forward cultural arguments in order to justify less than full respect for human rights.

This standpoint is recognisable at local, regional and global level, particularly in the Human Rights Council, where it manifests itself in factionalism, with the African Group and the members of the OIC taking a position contrary to Western and like-minded countries ('the West against the rest').

Together with its EU partners and other like-minded countries, the Netherlands must respond effectively to this undesirable erosion of human rights, so that wherever possible, any arguments that appear to condone human rights violations based on cultural relativism can be constructively refuted. However, the Netherlands' response cannot always be based on traditional arguments whereby states are reminded of their responsibility to respect human rights, such as the ratification of the UN human rights treaties and the recognition of the Universal Declaration of Human Rights and the internationally binding obligations they entail. Such arguments carry insufficient weight in the current political debate.

A new impulse must be given to states' unconditional obligation to respect human rights and human dignity, and thereby to the universal validity of these rights. The idea of 'bottom-up universality' as proposed by Professor Van Genugten in his article 'The African move

towards the adoption of the 2007 Declaration on the Rights of Indigenous Peoples: the substantive arguments behind the procedures' could point the way forward to a vigorous defence of the universality of human rights based on an analysis of the arguments in support of 'bottom-up universality'.

**Background**

The AIV report 'Universality of Human Rights and Cultural Diversity' (published June 1998) has already provided a thorough analysis of the academic and political developments and insights with regard to the universality of human rights and the influence of cultural factors on such issues as the implementation of human rights treaties and respect for human rights.

In that report, the AIV indicated a number of problems which could jeopardise the credibility of states which constantly emphasise the universality of human rights. One problem cited was a selective approach in responding to human rights violations. Within the Human Rights Council, the Universal Periodic Review will result in a broad analysis of the human rights situation in all UN member states, making it more difficult, in principle, for states to follow this selective approach.

In its conclusion to the 1998 report, the AIV also contends that 'the challenge for human rights policy is to identify shared basic principles in an intercultural context, without sacrificing the universal core on which the moral appeal and legal validity of human rights are based.'

This universal core is undermined when there is no effective counterweight to the kind of cultural relativist ideas on human rights put forward in human rights forums such as the Human Rights Council and at other diplomatic levels. Some parties have sought to introduce such views into international law through resolutions, as recently happened in the Human Rights Council during the debate on the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Under article 4C of the extended mandate, as proposed by the African Group, the Arab Group and the OIC, the Special Rapporteur will also report on the 'abuse' of freedom of expression for racial or religious discrimination. The article is derived from the terms of article 19 (3) of the International Covenant on Civil and Political Rights.

**Policy questions**

The Advisory Council on International Affairs is hereby requested to give up-to-date, supplementary advice about the above-mentioned developments and about the way in which the Netherlands can provide an effective counterweight to the growing tendency to give greater priority to the particular circumstances within an individual state than to the universal duty to respect human rights.

1. Does the AIV recognise the trend, outlined above, towards increased infringement by states of the universality of human rights?

2. In questioning the universality of human rights, what standpoints do states adopt and what arguments do they put forward in order to support them? What, in your view, are likely to be the underlying causes and motivating factors for this?

3. Following on from the previous question: to what extent do these states use the agreed text on universality and national and regional particularities from the 1993 Vienna Declaration as a basis for their argumentation? Is this argument a valid one (in line with the ‘margin of appreciation’) or an attempt to evade international interference?

4. How can the Netherlands – in collaboration with the EU and the international community – best respond to the standpoints and considerations presented by these states?

5. Does the AIV perceive a growing discrepancy between what the governments of the states proclaim about universality and the standpoints of civil society organisations, the judiciary and other groups within those same countries? In what ways could civil society influence and possibly change the position of governments who claim local custom as justification for their views?

We would appreciate the Council’s deliberation about these matters and its advice in relation to them.

Maxime Verhagen
Minister of Foreign Affairs

[signed]

Bert Koenders
Minister for Development Cooperation

[signed]

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