UNIVERSALITY OF HUMAN RIGHTS AND CULTURAL DIVERSITY

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Members of the Advisory Council on International Affairs

Chair	Professor R.F.M. Lubbers
Members	Professor F.H.J.J. Andriessen A.L. ter Beek Dr C.E. von Benda-Beckmann-Droogleever Fortuijn Professor G. van Benthem van den Bergh Dr O.B.R.C. van Cranenburgh Professor C. Flinterman Professor E.J. de Kadt Dr B. Knapen
Official advisors	M. Krop *(Ministry of Foreign Affairs)* E. Kwast *(Ministry of Defence)*

P.O. Box 20061
2500 EB The Hague
The Netherlands

telephone +31 (0)70 - 348 5108/6060
fax +31 (0)70 - 348 6256
e-mail AIV@SBO.MINBUZA.NL

Foreword

On 17 June 1997, the Minister for Foreign Affairs, the Minister of Defence and the Minister for Development Cooperation asked the Advisory Council on International Affairs to produce an advisory report on the issue of 'universality of human rights and cultural diversity'. The report was drawn up by the Human Rights Committee of the Advisory Council on International Affairs. This Committee consists of Professor P.R. Baehr, Dr C.E. von Benda-Beckmann-Droogleever Fortuijn (vice-chair), Professor Th.C. van Boven, Dr M.C. Castermans-Holleman, T. Etty, Professor R. Fernhout, Professor C. Flinterman (chairman), Professor W.J.M. van Genugten, L.Y. Gonçalves-Ho Kang You, C. Hak, M. Koers-van der Linden, F. Kuitenbrouwer, Dr G.A. van der List, G. Ringnalda and Professor E. van Thijn. Further preparatory work was done by A.H. Roemer of the Development Cooperation Committee. Assistance in drafting the report was provided by official advisors to the Ministry of Foreign Affairs, in particular A.H. Gosses and F.M.H. Moquette. The secretary of the Human Rights Committee was T.D.J. Oostenbrink, assisted by trainees working for the Advisory Council on International Affairs at the time.

In preparing its report, the Committee obtained information regarding the views of experts on this issue. Individuals consulted in the Netherlands in this connection include Dr. B. Klein Goldewijk (Institute of Social Studies), B. Lap (International League for Human Rights), S. Leckie (Centre on Housing Rights and Evictions), M. Meijer (Humanist Committee on Human Rights) and A. Stevens (Amnesty International). The Advisory Council on International Affairs is grateful to those consulted for their contributions. Thanks are also due to the Dutch Permanent Representation in Geneva and I. Boerefijn of the Netherlands Institute of Human Rights in Utrecht for providing a great deal of relevant documentation.

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I Introduction

On 17 June 1997, the Minister for Foreign Affairs, the Minister of Defence and the Minister for Development Cooperation asked the Advisory Council on International Affairs (referred to in the remainder of this report as the Advisory Council) to produce an advisory report on the subject of universality of human rights and cultural diversity, with specific reference to various aspects of the debate about how invocations of cultural diversity relate to the universality of human rights.

In preparing this report, attention was paid to a number of specific policy issues, including the meaning of the term 'universality of human rights' and its limitations in practice. Another important question was the extent to which international treaties and intergovernmental institutions at regional and global level allow human rights to be upheld in culturally distinct ways. The Advisory Council was also asked to comment on the range of instruments available to policymakers in the field of human rights and the international community in general in order to encourage the observance of human rights in a variety of cultural settings. More specifically, it was asked to examine whether any contribution can be made in fields other than that of human rights to ensure that human rights are upheld more effectively and to increase people's awareness of their rights. A final issue which the Advisory Council was asked to look at was the proliferation of human rights, including the question of whether adding to the existing catalogue of human rights enhances their intercultural character or, on the contrary, encourages the non-observance of existing rights.

Chapter II discusses various general aspects of the issue. In particular, it examines whether the arguments often heard in the debate on universality and cultural diversity are evidence of a genuine clash of views or, rather, conceal conflicting interests. It also looks at the ways in which claims to cultural diversity are usually put forward. It then discusses the development of the system for the international protection of human rights. Finally it examines whether universal acceptance of human rights norms means that they must always be applied in exactly the same way.

Human rights policy involves constantly striking a balance. It must always be implemented in a specific context. In order to shed more light on the relationship between universality of human rights and invocations of cultural diversity, Chapter III discusses some specific topics and outlines a number of dilemmas. It then examines in turn the right to freedom of expression, issues concerning the right to protection against discrimination (with particular reference to women's rights), the right not to be subjected to torture and other forms of degrading treatment or punishment, the right to housing, the friction between civil and political rights and economic, social and cultural rights, and the issue of collective rights. In each case specific attention is paid to the position to be adopted by the Netherlands and the policy instruments to be deployed.

Finally, Chapter IV contains conclusions and policy recommendations. The request for advice, a list of 'non-derogable' rights referred to in various conventions and a list of abbreviations are provided in annexes to the report.

II Universality and cultural diversity

II a. Introduction

The issue of universality of human rights and cultural diversity embraces a number of interrelated questions: are the human rights norms formulated at international level since 1948 universally valid, and to what extent does the cultural setting affect the way in which they are upheld by states around the world? In general terms, the foundations of today's human rights structure -in particular, the United Nations Charter ('UN Charter') of 1945 and the Universal Declaration of Human Rights ('Universal Declaration') of 1948- can be said to have been laid at a time when the norms in question were not yet considered universally valid in all areas. The Universal Declaration speaks of:

> '...a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...'.

Efforts to achieve this ideal have led, in successive stages, to a situation in which states -the primary duty-bearers or 'addressees' of human rights- can nowadays be called to account, and can call one another to account, for the manner in which they uphold human rights. This has gradually restricted states' sovereignty or obliged them to share it with other states. Although virtually all governments have, on various occasions, acknowledged the universality of human rights and the right of the international community to concern itself with their observance, not all human rights are considered in practice to be universally accepted.

During the Cold War there was an ideologically slanted debate -in which traditional notions of sovereignty and non-intervention were frequently invoked- regarding the rights of whole societies in contrast to individual rights, and social and economic rights in contrast to political and civil rights.[1] Especially since the fall of the Berlin Wall, the nature of this debate has changed. Global developments, for example in the field of mass communications, have led to greater interdependence and interaction between societies. The debate is also influenced by the differing stages of economic development in which states find themselves and the unequal balance of power that this implies. The 'globalisation' of society has meant changes in traditional forms of government and decision-making processes, and hence in the balance of power between governments and citizens. The part played by non-state actors, including non-governmental organisations (NGOs), has expanded as a result.

It is in this context that the universality of human rights norms is disputed by a number of governments, which often invoke cultural diversity. This debate is often referred to in the literature as 'the debate on Asian values'. However, 'Asian values' are by no means the only issue. The debate is conducted in terms of more general North-South contrasts, contrasts between certain countries with a largely Islamic population and other countries, and

1 See, for example, the policy document entitled 'Een wereld van verschil, nieuwe kaders voor ontwikkelingssamenwerking in de jaren negentig' ('A world of difference, a new framework for development cooperation in the 1990s'), Lower House of Parliament, 1990-1991, 21813, Nos. 1-2, paras 2.3, 2.3.1, 2.3.2 and 2.3.3.

contrasts between fundamentalist and non-fundamentalist systems. Issues raised include the role of the state in relation to the individual, topics such as citizens' rights and obligations, and the implications of invocations of cultural diversity for the upholding of specific human rights.

The above considerations, which play an important part in determining states' responsibility and liability for the upholding of human rights within their territories, will be discussed in greater detail in the following sections and in Chapter III. It is emphasised that, in preparing this report, the Advisory Council has focused on a number of more practical, policy-related aspects of the subject and has neither attempted nor intended to provide an exhaustive description of what is a largely academic debate.

II b. Cultural diversity

It is extremely difficult to define 'culture' in a few sentences. Over the years anthropologists have made countless attempts to define the term. The following broad definition has been adopted for the purposes of this report:

> '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.'[2]

If this definition is accepted, human rights cannot be seen in isolation from culture. Like other norms and values, human rights are an expression of a culture and are dynamic in nature. Culture concerns people's behaviour as members of a group. A society's norms and values are part of its culture. No society is culturally homogeneous, and there may be considerable cultural differences within states. As societies become more complex, internal cultural differences increase. At the same time, as societies come into closer contact with one another, cultural differences between them become more apparent. Although this report focuses on a number of dilemmas arising from cultural diversity, it should be borne in mind that cultural diversity can be a source of great dynamism.

The cultural heterogeneity that characterises the world has caused some to advocate cultural relativism. Such arguments can be found in the work of such leading cultural anthropologists as Franz Boas and Ruth Benedict.[3] They emphasise the extent to which human behaviour and ideas are determined by the cultures in which people grow up, and point to the differences between cultures. Seen from this point of view, the ideal of tolerance implies respect for 'equal patterns of life'[4] and considerable caution when making judgements about other cultures or cultural practices. Indeed, Melville Herskovits, a radical proponent of cultural relativism, has concluded that it is impossible to make universal judgements about cultures.[5]

Fear of ethnocentrism has also led cultural anthropologists to criticise the Universal Declaration. Asked for its comments when the Universal Declaration was being drawn up in

2 From Peter Kloos, 'Culturele antropologie, een inleiding' ('Cultural anthropology, an introduction'). Assen; Van Gorcum (1991), 5th revised edition (1991), pp. 15 ff.

3 See Franz Boas and Ruth Fulton Benedict, General Anthropology, New York, 1965.

4 See Ruth Benedict, Patterns of culture, London, 1971.

5 See Melville J. Herskovits, Cultural dynamics, New York, 1964.

1947, the American Anthropological Association (of which Herskovits was then chairman) said that 'a statement of the rights of men to live in terms of their own traditions' was lacking. The Association felt that the Universal Declaration represented, to an excessive extent, an attempt to impose Western values on other cultures.

Scepticism about universality is also a feature of certain currents of political and philosophical thought which are currently popular, at least in academic circles. The post-modernists, for example, criticise the notion of universal moral principles and instead advocate far-reaching relativism. The communitarians, for their part, assert that norms and values are determined by the communities to which individuals belong and, with their predilection for what is local and particularistic, are wary of normative claims to universality. The same is true of the proponents of multiculturalism, another current of political and philosophical thought which appears to be gaining popularity.

However, relativism tends to exaggerate the differences between cultures. Although superficially there are indeed great differences, there are striking similarities when it comes to fundamental principles. For example, all religions, philosophies and cultures condemn murder, theft, torture and deceit, and all acknowledge people's right to food or health.

Cultural relativism can be criticised not only on empirical grounds, but also on normative ones. No matter how worthy relativistic appeals for tolerance may be, an approach based entirely on the premise 'when in Rome, do as the Romans do' -which is where cultural relativism often leads- is hardly an attractive prospect. The moral humility advocated by cultural relativists all too often results in a moral paralysis which makes it impossible to pass critical judgement on situations and developments in other cultures. To take just one example, acceptance of discrimination against women because it is part of the tradition within a particular culture is too high a price to pay for relativism. Tolerance ends where other people's intolerance begins.

However, rejection of the ultimate implications of relativism does not mean that cultural uniformity should be the goal. Although certain features of cultural diversity do raise dilemmas when it comes to the implementation of human rights, human rights policy can actually be strengthened by taking advantage of the more positive aspects of cultural diversity. In formulating human rights policy, it is important to seek, in an intercultural context, shared principles which can serve as the universal core of the human rights philosophy. Human rights policy must therefore focus on increasing public support for universal human rights, for example by actively supporting NGOs and other social organisations and by promoting human rights awareness and educational programmes in a variety of sociocultural settings. Broad public support may not be required in order for universal human rights to have legal validity, but it is essential if they are to operate effectively in practice.

What is striking is that the universality of human rights norms is seldom disputed in the global debate on human rights. Appeals to cultural diversity as grounds for curtailing human rights are usually made by rulers seeking to strengthen their own positions and shield themselves against criticism from other states and social organisations ('the sovereignty principle in a new guise'). Such appeals are not, in practice, supported either by victims of human rights violations or by representatives of national and international NGOs and other social organisations such as churches, trade unions or employers' organisations. However, this does not necessarily mean that there is no support for them whatsoever. In societies where fundamentalist views have taken hold, there does sometimes appear to be widespread support for the curtailment of human rights.

It cannot be denied that it was Western countries that took the lead in preparing the Universal Declaration after the Second World War. However, actual negotiations on the draft Declaration took place within the United Nations Commission on Human Rights, eleven of whose fifteen members came from Africa, Asia, Latin America and Eastern Europe. Substantial contributions were made to the discussions by such countries as China, Egypt, Iran, Lebanon, the Philippines, Uruguay and Chile. Yet the argument that the Universal Declaration is Western-inspired is still used today by those who dispute its universality. This argument is not supported by the facts. The fact that virtually every country in the world has subscribed to the Universal Declaration and other declarations on human rights made at the World Conferences on Human Rights in Teheran in 1968 and Vienna in 1993 likewise points to the existence of globally shared norms and values. Whether the same can be said of other normative developments since 1948 is a question which will mainly be discussed in the next section.

II c. The claim that human rights are universal

In Greek philosophy, and in the various world religions such as Islam, Buddhism, Hinduism, Judaism and Christianity, attempts were made to formulate the values which were ultimately enshrined in the Universal Declaration of Human Rights in 1948. Various national documents, such as Magna Carta (1215), the Union of Utrecht (1579), the French Declaration of the Rights of Man and of the Citizen (1789), the American Declaration of Independence (1776) and the Constitution of the Batavian People (1798), also incorporated rights which citizens could invoke. Further steps on the long road towards international protection of human rights (and hence acknowledgement of their universality) were taken during the nineteenth century, when agreement was reached -admittedly with great difficulty- on major conventions and other texts which have significantly contributed to the emergence of the present-day system of legal protection of human rights (such as the conventions on the humanitarian law of war and the abolition of slavery). The establishment of the International Labour Organisation (ILO) in 1919 and the accompanying international conventions were an important step forward in the protection of socioeconomic rights. In the second half of this century, in the wake of the atrocities that took place during the Second World War, efforts which were to culminate in today's system for the protection of human rights rapidly gathered speed.

On 6 January 1941, in his State of the Union address, the US President Franklin D. Roosevelt identified four freedoms which he felt should serve as a basis for post-war reconstruction. 'Freedom of speech, freedom of every person to worship God in his own way, freedom from fear and freedom from want for anyone, anywhere in the world' were to be a major source of inspiration for the UN Charter, the Universal Declaration and successive international conventions and declarations drawn up by the United Nations in the field of human rights. These included the two human rights covenants which were adopted in 1966: the International Covenant on Civil and Political Rights (referred to in the remainder of this report as 'ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESC').[6] Others are the UN conventions on the prevention or elimination of genocide (1948), racial discrimination (1965), discrimination against women (1979) and torture (1984) and the International Convention on the Rights of the Child (1989).[7] In recent years there has been a substantial increase in the number of states acceding to and ratifying some of these documents. However, it should be noted in some cases -particularly

6 As of 31 December 1997, 137 and 140 states were party to these Covenants respectively.

7 As of 31 December 1997, a total of 191 states were party to this Convention.

that of the Convention on the Elimination of Discrimination Against Women- numerous reservations have been made, sometimes to such an extent that the applicability of the text is seriously limited in a large number of states.

Important non-treaty documents include the Standard Minimum Rules for the Treatment of Prisoners (1957), the Proclamation of Teheran, and the Declaration and Plan of Action of the World Conference on Human Rights in Vienna. It is important to emphasise here that more than eighty conventions and other agreements have been adopted by the UN in the field of human rights. Specialised organisations such as UNESCO and the ILO have human rights conventions and associated supervisory mechanisms and complaint procedures. At regional level, increasing international commitment to the field of human rights has been reflected in the entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), followed later by the American Convention on Human Rights (1978) and the African Charter on Human and Peoples' Rights (1986). The supervisory mechanisms provided for in these documents can be invoked in the event of violations, and have had an significant impact on the emergence and application of the rule of law in the regions concerned.

International state practice contains numerous examples of growing commitment to the development of a system of human rights. At global level, the emphasis during the first twenty years after the Second World War was on the development of a system of norms; later the focus was to shift towards application and supervision of compliance. In addition to the aforementioned UN human rights conventions, each of which has its own supervisory system with more or less extensive powers, a number of supervisory procedures and bodies have been set up by the UN Commission on Human Rights.[8] Significant progress has also been made in other areas of relevance to human rights. For example, the decolonisation process was virtually completed with Namibia's accession to independence in 1990; apartheid has been abolished in South Africa; there has been a major democratic breakthrough in Europe (particularly Eastern Europe); and a process to strengthen democracy has been initiated in almost every country in Latin America. Again, as a result of the various conferences on women, the position and rights of women have been further enhanced, particularly from a normative point of view.

In the debate on the universality of human rights, in addition to the Universal Declaration and the two UN covenants on human rights drawn up in 1966 (together referred to as the International Bill of Human Rights), the results of the two World Conferences on Human Rights are of particular importance. Although the results of these conferences were not laid down in mandatory legal conventions, they are of great political value. Both declarations were adopted by consensus. The Proclamation of Teheran, adopted after the two human rights covenants had been drawn up in 1966, is especially important, since Article 2 describes the Universal Declaration as:

> 'a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and ... an obligation for the members of the international community'.

The fact that, for the first time, this Proclamation links human rights to the issue of poverty also makes it a politically momentous document. Since a large number of new states joined the UN as a result of decolonisation during the 1950s and 1960s, considerably

8 For a detailed description of how these UN bodies operate, see Advisory Committee on Human Rights and Foreign Policy, VN Toezicht op mensenrechten ('UN supervision of human rights'), Advisory Report No. 22, The Hague: Ministry of Foreign Affairs, October 1996.

more states (84, of which 60 were non-Western) were involved in preparing the Proclamation than the 56 involved in preparing the Universal Declaration. In the years since 1968, this has often been used as an important argument in favour of the view that the Universal Declaration can indeed be considered universal.

Although there were fears that the universality of human rights would be undermined at the World Conference on Human Rights in Vienna in 1993, the more than 170 states that attended quickly managed to reach agreement on a statement (in the Declaration and Plan of Action) that 'the universal nature of human rights is beyond question'. They also agreed that all human rights are universal, indivisible, interdependent and interrelated, and added: 'while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.' The question was therefore not so much whether human rights were universally accepted, as whether states, taking account of the circumstances in which each state found itself, had room to interpret and apply those rights at national level.

NGOs have made a significant contribution to the emergence of an international normative structure in the field of human rights. This was so even before the UN Charter was drawn up; since then, NGOs (particularly in connection with the UN Commission on Human Rights) have played an important part in initiating and drafting human rights instruments. In addition, by making active use of the various political supervisory procedures as well as those laid down in conventions, they have ensured that human rights do not remain a dead letter but are genuinely used as a yardstick for judging government actions.

In the debate on universality, it is important to distinguish between norms and compliance. Reports in the press, by UN agencies, supervisory bodies and rapporteurs and by NGOs, among others, paint a gloomy picture of the extent to which human rights are upheld in practice. This is confirmed by the fact that Amnesty International's 1996 Annual Report refers to the human rights situation in over 140 countries and that the Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment for the same year mentions some 80 countries. The position in international law is, of course, the same as in national law: the fact that human rights are violated in practice is no reason to disregard the norm which is being violated. On the contrary, it is vital to reaffirm its value by calling the state in question to account. A major problem in reaffirming human rights norms concerns the way in which they are drawn up and how to supervise compliance effectively. Human rights norms are often the outcome of political compromises, which means that they are stated in general terms and often lend themselves to varying interpretations. This is true at regional as well as global level. Differences in the way that norms are interpreted lead to differences not only in compliance, but also in how compliance is supervised and action is taken.

What is also clear is that supervision of compliance is often selective. Specific action may be avoided or may prove impossible for political reasons, or far more drastic action may be taken in some cases than in others. Such selective responses to human rights violations are found in countries in all parts of the world. This can seriously undermine claims to universality. The Advisory Council therefore recommends the Dutch government, taking account of the comments made below regarding the latitude which states have in making policy on human rights norms, to lay down similar standards in similar cases and to encourage other countries and international bodies in the field of human rights to act in the same spirit.

II d. Universality and uniformity

The developments in international human rights law outlined above indicate that, however much their cultural backgrounds may differ, the member states of the United Nations have accepted human rights in both an ethical and a legal sense, and that there is no fundamental incompatibility between such rights and the leading philosophical, ethical and religious traditions. Does such universal acceptance mean that human rights should be applied in the same way throughout the world, or, to put it another way, does their universal validity automatically imply that they should be applied in a uniform manner?

The answer to this question differs from one human right to another. For reasons which will be explained below, the Advisory Council takes the view that some rights must be strictly implemented, that they permit no latitude in making policy, and that they must therefore be applied uniformly. In other cases, states can be allowed some latitude in making policy when it comes to application, although they can and should always be called to account regarding their use of this latitude. The Advisory Council's view is based on the following considerations.

International and regional human rights instruments lay down norms which in any event give states the freedom to afford individuals even greater protection than the agreement in question prescribes. More generally, it can be said that international and regional human rights instruments are designed to offer individuals legal protection which is complementary to, but does not (and cannot) replace, their own national legal systems. At the same time, many human rights conventions contain explicit limiting clauses which give states the freedom to curtail certain human rights, provided that the conditions set out in the convention are fulfilled. It is generally accepted that such limiting clauses should be interpreted in a restrictive manner. In the case of certain rights -particularly those in the economic social and cultural category- it is likewise accepted that states should implement them gradually (which, however, does not entitle them not to begin immediately). This also gives states a certain degree of latitude in making policy.

In general, then, the universality of human rights does not automatically imply that they should be applied in a uniform manner. Of course, states which are party to international human rights conventions are under an obligation to comply with them; this is especially true of the UN Charter, in which the protection and promotion of human rights are stated to be one of the member states' principal goals. Since abstractly phrased international human rights norms have to be applied in a variety of social, economic and cultural contexts, states have a certain degree of latitude in making policy. Within the UN system, both supervisory mechanisms laid down in conventions and political ones based on the UN Charter have been set up in order that states may be called to account regarding the way in which they apply human rights.

This raises the question of how much latitude there actually is and which human rights it applies to. In this connection, reference can usefully be made to experience gained within the framework of the Council of Europe, where the European Court of Human Rights ('European Court'), in particular, has been regularly confronted with these issues. The European Court has developed what is known as the 'margin of appreciation' doctrine as a method of judicial review in such cases.

The European Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention') contains various rights and limiting provisions which are formulated in general terms. Decisions by the European Court have consistently, though not always clearly, acknowledged that states have a certain degree of latitude in applying the

rights laid down in the European Convention. The guiding principle here is that the system of protection created by the Convention should be seen as complementary to national legal systems.

Decisions by the European Court emphasise that, in a number of cases, states differ in their interpretations of certain terms used in the European Convention (for instance, the term 'morals'). They also make it clear that the latitude available to states may differ from one right, or even from one element of a right, to another. The degree of latitude depends, among other things, on the prevailing circumstances, on the right which is purported to have been violated, and on the specific nature and seriousness of the violation. It is therefore important to emphasise that only the European Court is competent to judge whether a state has exceeded the limits of its latitude. Furthermore, by developing the 'margin of appreciation' doctrine briefly referred to above, the European Court has succeeded in giving meaning to the rights and freedoms set out in the Convention without insisting on uniform application in all cases. This has enhanced the pan-European nature of the rights laid down in the Convention.

What lessons can be learned at global level from the 'margin of appreciation' doctrine which the European Court has developed? Can this doctrine, which was developed in a judicial forum, mean anything in the global political arena, and more specifically in the context of Dutch foreign policy on human rights? In answering these questions it is important to keep in mind the essence of the doctrine, which is that states have a certain degree of latitude in applying human rights (subject to certain criteria) and that only an international forum is competent to judge whether they have exceeded the limits of that latitude. The Advisory Council believes that the experience of the European Court can indeed serve as a source of inspiration for Dutch foreign policy on human rights. However, it wishes to add the following qualifying remarks.

Firstly, there is the question of whether states should be allowed such latitude with respect to <u>all</u> human rights. In this connection one may point to the international consensus that certain rights cannot or must not be curtailed. These are what are known as 'non-derogable' rights - rights which must not be set aside in any circumstances whatsoever, even in times of armed conflict (see in general Article 4 ICCPR and Annex II). As will again be apparent from Annex II, the question of which rights should be considered 'non-derogable' is answered differently in different conventions. However, the guiding principle behind these provisions is that certain rights are so essential to a dignified existence that they must not be set aside in any circumstances; in that case, of course, states have no latitude at all. By way of illustration, the Advisory Council also refers to *general comment* No. 24 by the UN Committee on Human Rights,[9] which reads as follows:

> 'A State may not reserve the right to engage in slavery, to torture, to subject people to cruel, inhuman and degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women and children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profession, their own religion, or use their own language; and ... the right to a fair trial ...'.

This *general comment*, which prohibits states from making reservations to the ICCPR, is

9 See UN Doc. CCPR/C/21/Rev.1/Add.6 dated 11 November 1994.

generally understood to mean that states have no latitude in applying the rights covered by this ban. The Advisory Council shares this view.

The question has also been raised as to whether the degree of latitude available to states may vary from one element of a right to another. The Advisory Council has taken freedom of religion as an example. This includes the freedom to have or adopt a religion and the freedom to manifest one (see Article 18 ICCPR). The latter freedom may be curtailed: states have a certain degree of latitude in this respect, subject to the condition of external accountability referred to earlier. In the former case, on the other hand, there is no latitude at all; that freedom has been called the 'hard core' of freedom of religion. The same applies, *mutatis mutandis*, to other human rights.

More generally, then, it will be seen that human rights must primarily be protected at national level; the international supervisory system is complementary, but at the same time it indicates the direction to be taken. At national level states have no latitude with regard to some rights and a certain degree of latitude with regard to others (or elements of them).

The general guiding principle in Dutch foreign policy on human rights should be that universal acceptance of human rights does not in all cases imply their uniform application. It needs to be acknowledged that states have a degree of latitude, in the light of (among other things) the economic, cultural or religious situation prevailing within them, to implement certain human rights in their own way. This latitude may vary according to the nature of the right (or element of it); thus it is clear that states have greater latitude as regards compliance with the positive obligations that arise from human rights (mainly, but not only, in the case of economic, social and cultural rights) than in the case of the -strictly circumscribed- negative obligations that arise from them. What is important here is that individual states do not have the final say (on the basis of, among other things, the sovereignty principle) but can be called to account by other states and by international bodies. This can be done either in a judicial or semi-judicial forum or in political forums, but preferably in both. In other words, this is 'controlled' latitude of the kind observed within the framework of the Council of Europe. Through its foreign policy, the Netherlands can play an important part in this 'control', especially as, by ratifying a very large number of human rights conventions and accepting the associated complaint procedures, it has shown itself ready to submit its own human rights policy to external criticism.

II e. Summary

The above sections briefly review some important elements of the debate on universality and cultural diversity. The Advisory Council notes that, when the Universal Declaration was first drawn up and when the international legal system for the protection of human rights was being developed, there was extremely widespread support in the form of cooperation by representatives of extremely diverse states and cultural backgrounds. That support has become even broader over the years; NGOs have played an important part here. It has become increasingly clear that human rights norms are compatible with the leading ethical, religious and philosophical traditions. They have now been accepted, both ethically and legally, by all the UN member states. The argument that human rights are a purely Western concept is therefore untenable. The Advisory Council can see no reason whatever to embrace the ultimate implications of relativism. Over-emphasis on cultural differences conceals the overwhelming similarities between the various cultures in matters of human rights. The Advisory Council does, however, acknowledge the value of the more moderate relativist position which calls for tolerance of differences in the specific

application of human rights. These differences are primarily attributable to the subsidiary nature of international human rights instruments, which must always be applied in a different social, cultural, political and economic context. States have no latitude when it comes to implementing some human rights, but do have such latitude in the case of others. However, the universality of human rights means that such latitude in policy matters is always controlled latitude, for which states can be called to account by the international community.

III Specific policy issues

In order to gain a clearer picture of the nature and extent of the problems connected with the universality of human rights and cultural diversity, this chapter will look more closely at a number of specific topics. In a human rights policy, as elsewhere, choices must constantly be made. The issues raised in what is mainly a political debate are often placed and discussed in a particular cultural context. For the purposes of this report, the Advisory Council has decided to review (if only briefly) a number of the most frequently arising issues, with reference both to specific rights and to more general topics which have repeatedly played an important part in the debate. This chapter will discuss in turn the right to freedom of expression, issues concerning the right to freedom from discrimination (with particular reference to women's rights), the right not to be subjected to torture and other forms of degrading treatment or punishment, the friction between civil and political rights and economic, social and cultural rights, the right to housing, and the issue of collective rights. In each case specific attention will be paid to the position to be adopted by the Netherlands and the policy instruments to be deployed.

III a. Freedom of expression

One area in which the issue of cultural diversity plays an important part in day-to-day practice is the extent of freedom of opinion and freedom of expression.

Article 19 of the Universal Declaration states this classic human right in the following terms:

> 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

This freedom of individuals to express their opinions without interference has subsequently been reaffirmed in numerous declarations and conventions.[10] Article 19 ICCPR, for instance, states the right to hold opinions without interference and the right to freedom of expression (including the right to gather, receive and impart information and ideas of any kind whatsoever). Article 10 of the European Convention states that everyone has the right to freedom of expression, including the freedom 'to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

Free exchange of ideas is of crucial importance to the vitality and pluriformity of any society. The freedom to express views is inherent in the democratic decision-making process, and is essential to individual self-fulfilment. People cannot develop and fulfil themselves socially in accordance with their own wishes if they have no opportunity to express themselves.

Freedom of expression is not absolute. Censorship is in any event prohibited. However, it is also fairly generally accepted that certain expressions of opinion may be so damaging

10 For a list of relevant international norms and a description of the issues, see Advisory Committee on Human Rights and Foreign Policy, Vrijheid van informatie ('Freedom of information'), Advisory Report No. 4, The Hague, Ministry of Foreign Affairs, October 1986.

that they can, or indeed must, be prohibited. The Dutch Constitution therefore empowers the legislator to set limits. These limits are then specified in the Criminal Code, which prescribes that expressions of opinion which pose a threat to the country (such as the publication of state secrets), are obscene (such as certain kinds of pornography) or incite people to hatred or discrimination on grounds of race, origins or belief are against the law. Defamation of character, slander and libel are also deemed to be offences.

International conventions also permit restrictions to be imposed on the freedom of expression. For example, the European Convention states that exercise of the freedom of expression implies certain duties and responsibilities and may therefore be subjected to certain formalities, conditions, restrictions or sanctions which are laid down by law and are necessary in a democratic society in the interests of protecting national security, territorial integrity or public safety, preventing crime or public disorder, protecting public health or morals, protecting the reputations or rights of others, preventing the dissemination of confidential information, or preserving the authority and impartiality of the judiciary. Similar provisions are to be found in Article 19 ICCPR.

As indicated in Section II d, such provisions, with their rather vague references to such things as 'public safety' and 'morals', clearly allow states a certain degree of latitude in making policy. In practice, however, the interests of freedom of expression must always be weighed in each specific case against other significant interests of society. If it is decided to curtail the freedom of expression, such curtailment must be as limited as possible. It is fairly generally accepted that prohibitions should be imposed only with extreme caution. This is true generally, but also, for example, with regard to the freedom to gather information during disasters. In practice, making such choices is an extremely difficult matter. A typical dilemma here concerns the question of whether or not to prohibit racist parties in the Netherlands. At first sight, prohibiting such parties would appear to solve the problem. The party in question ceases to exist as a legal entity. However, supporters of such a party will almost certainly not alter their opinions merely as a result of the prohibition, and will seek other ways to express their opinions. In such cases, even those who are in favour of prohibiting such parties as a last resort agree that views which are perceived to be harmful should preferably be fought with arguments and information rather than prohibition. In the European context, where a large number of states have adopted the European Convention, account must be taken, when assessing such restrictions, of the latitude which the European Court has declared that states are entitled to, but which is also subject to control by the Court. This latitude is determined by, among other things, differences in the cultures, religions and histories of the states concerned.

In practice, then, any attempt to invoke cultural (and particularly religious) differences as grounds for restricting the right of individuals to express their opinions will have to be assessed on its merits. The basic principle here must be tolerance of and respect for other people's opinions. A well-known recent example of a conflict between religious conviction and the right to freedom of expression is the commotion over Salman Rushdie's book 'The Satanic Verses'. In many countries the prohibition of blasphemy constitutes accepted grounds for curtailing the freedom of expression. If the courts find that blasphemy has taken place, any further dissemination of the text is prohibited. In this case, however, the Iranian religious authorities also issued a so-called 'fatwa' calling for the author to be killed. Such a call to have someone killed for expressing an opinion is generally deemed unacceptable, whatever cultural or religious justification may be given for it. This view is shared by the Advisory Council. Not only is the punishment disproportionate, but it was not determined by means of a proper procedure in accordance with international judicial standards.

The right to freedom of expression cannot be monopolised and must be protected against all ideologies, Western or otherwise, which seek to defend the traditions of certain communities by excluding divergent views about the value or significance of those traditions. In this connection, the growth of monopolies in the publishing and printing sector[11] is a disturbing development. Calls to prohibit or censor modern communication media such as the Internet, or to prohibit expressions of opinion which conflict with the official interpretation of a particular culture or religion, are also quite common. In most cases this is difficult to reconcile with freedom of expression, and is instead mostly intended to strengthen rulers' positions and shield them from criticism. The basic principle should, in fact, be tolerance of and respect for different opinions. In order for individuals to fulfil themselves, it is important for them to belong to national, religious, cultural or other communities; however, such communities are only sustainable if they guarantee elementary, classical human rights, tolerate clashes of opinion, and respect minority views.

Finally, the Advisory Council is unable to accept the notion that freedom of expression is a 'luxury' which only countries which have achieved a certain standard of socioeconomic development can afford. Not only is the argument that limitation of political freedom and civil rights helps to promote economic, social and cultural rights unsupported by the facts, but it also provides an undesirable pretext for gagging those who hold different opinions. Freedom of expression is essential to an open, plural society. Such a fundamental right must not be curtailed. However, this does not mean that it may not be subject to any restrictions whatsoever. Restrictions are permissible if the exercise of this right leads to violation of human rights; a good example of this is the use of modern communication media to disseminate racist ideas. In the opinion of the Advisory Council, the guiding principle should always be that freedom of expression must be weighed against other significant interests of society in each specific case. Although 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 must be as limited as possible and, as the Advisory Council has already emphasised, must be open to external assessment.

III b. Women and human rights

Another aspect of the implementation of human rights in which cultural diversity plays a large part is the issue of equal rights for women. At first sight this may seem surprising, for ever since the UN Charter was first drawn up the phrase 'for all without distinction as to ... sex' has been included wherever human rights and fundamental freedoms have been mentioned. This inclusive notion of human rights -reinforced by the complementary principle of freedom from discrimination- can be found in every major human rights document, including the Universal Declaration and the two UN Covenants of 1966.

Nevertheless, discrimination on grounds of sex, both *de jure* and *de facto,* has proved an extremely persistent phenomenon in many countries of the world, including the Netherlands. This is one reason why, mainly at the instigation of women's organisations, a separate Convention on the Elimination of Discrimination Against Women (CEDAW) was drawn up in 1979. This Convention defines the term 'discrimination' extremely broadly, embracing both public and private life, and requires states to take legal and other action to eliminate discrimination against women. This Convention has been ratified by the great majority of states.[12] However, it is largely formulated in terms of obligations upon states, which

11 In the West, such monopolies are mainly based on commercial considerations. In many developing countries, there is often *de facto* monopolisation by the state or the ruling party.

makes it difficult to invoke the Convention before national courts. It is therefore extremely regrettable that CEDAW still makes no provision for an optional individual or collective complaint procedure or an investigation procedure. Although negotiations on this are taking place in 1998, the Convention so far includes only a reporting procedure (important though this certainly is).

Yet the above shortcomings are not the main reasons why this Convention is not being properly upheld. The main reason is that a large number of the states which are party to it have made reservations, mainly on cultural or religious grounds, which largely undermine its potential impact. The effect of these reservations, which have mostly been made by countries with a predominantly Islamic population, is to give priority to Islamic law (the *sharia*) wherever CEDAW conflicts with it.

In the 1990s, again as a result of efforts by women's organisations, some progress has been made regarding *de facto* and *de jure* equal rights for women. In this connection, reference may be made to the Final Declaration and Plans of Action of the World Conference on Human Rights, the Fourth World Conference on Women (Beijing, 1995), the Declaration on the Elimination of Violence against Women (1993), the appointment of a Thematic Special Rapporteur on Violence against Women (1994) by the UN Commission on Human Rights, and the increasing attention paid to women's rights by the UN human rights organs. However, progress is extremely slow and often runs into cultural barriers, for example on the issue of female circumcision. As regards the latter, it is encouraging that all states now acknowledge mutilating forms of female circumcision to be a violation of human rights.

The implementation of equal rights for women, taking differences between the two sexes into account, constitutes an essential area of responsibilities and obligations for all states, both individually and reciprocally. Current international law quite clearly places an obligation on every state to eliminate any discriminatory laws and regulations immediately. This also applies, for example, to a country such as Afghanistan, where the Taliban regime has made discriminatory practices against women part of its policy. It is much more difficult for states -including the Netherlands- to put an end to *de facto* discriminatory practices in their societies. Such practices are often based on long-standing traditions and religious considerations. Altering such patterns necessitates a major change in mentality on the part of both government and citizens. Dutch foreign policy should continue to support states which promote *de facto* and *de jure* equal rights for women. This particularly applies to health, education and information programmes in the field of development cooperation. More specifically, in cases where governments are pursuing deliberately discriminatory policies, support should be explicitly given to local NGOs which are endeavouring to promote women's rights and improve their legal position. Where possible and acceptable in the light of the present report, this must be done within the parameters of arguments and modalities prevailing in the culture concerned.

The international community, too, has an important part to play in this area. It is therefore vital that the Dutch government should continue, within the UN and other relevant international organisations, to work for the implementation of equal rights for all people without exception (the 'inclusiveness' of human rights). One way to do this is to urge states which are not yet party to CEDAW to sign it. In addition, states which are party to CEDAW but have not yet taken action to implement it at national level should be urged to do so as a matter of priority. Another way would be to provide continued support for efforts to ensure that the Protocol to CEDAW (which provides for individual and collective

12 As of 31 May 1997, a total of 160 states were party to the Convention.

rights of complaint and an investigation procedure) is concluded, adopted and ratified as soon as possible. Efforts could also be made to encourage supervisory committees set up under the terms of human rights conventions to pay explicit attention to the specific problems that arise in implementing women's rights; this could be done during the discussion of the committees' annual reports by the General Assembly. Within UN human rights organs, such as the Commission on Human Rights, the standing policy of devoting extensive attention to these issues should be continued.

In various countries, as mentioned earlier, there are cultural and religious obstacles to the implementation of women's rights; one example is the continued existence of mutilating forms of female circumcision. The Advisory Council recommends the government to continue, through its human rights policy, to help ensure that such obstacles are eliminated as quickly as possible. The credibility of Dutch efforts in this area will, of course, be enhanced if the Netherlands itself fully upholds the principle of equal treatment. Unless non-legal measures such as health care, education and information programmes are applied, it will be difficult to strike a social balance and legal instruments will prove largely ineffective. That is why the Advisory Council also recommends that the government should continue, through both bilateral and multilateral programmes, to provide explicit support (directly or indirectly) for NGOs which play a crucial part in this area. In supporting NGOs which defend women's rights, as has been emphasised above, reference should be made to arguments and modalities prevailing in the culture concerned.

III c. The prohibition of torture and cruel, inhuman and degrading treatment or punishment

The issue of cultural diversity has also played an important part in the debate as to how the prohibition of torture and cruel, inhuman and degrading treatment or punishment should be interpreted. The prohibition of torture as such is seldom disputed. During a lecture at the Aspen Institute on 18 October 1997, the UN Secretary General Kofi Annan expressed this in the following cogent terms:

> 'You do not need to explain the meaning of human rights to an Asian mother or African father whose son or daughter has been tortured or killed. They understand it -tragically- far better than we ever will.'

Article 5 of the Universal Declaration explicitly prescribes that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This prohibition has subsequently been incorporated not only into numerous international conventions and declarations[13], but also into the legislation of many countries around the world. Although there nowadays appears to be a global consensus regarding the prohibition of torture, theory and practice turn out to diverge considerably. A glance at the annual reports by the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Annual Reports of Amnesty International and the State Department Report is enough to reveal that torture still occurs in many countries. The commonest definition of torture can be found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It reads as follows:

13 See, for example, Article 5 of the Universal Declaration, Article 7 ICCPR, Article 3 of the European Convention, Article 6 of the African Charter, Article 5(2) of the American Convention, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the four Geneva Conventions, as well as the UN Code of Conduct for Law Enforcement Officials and the UN principles of medical ethics relevant to the role of health personnel.

'...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'[14]

What is striking here is that the terms 'cruel or inhuman treatment or punishment' are not further defined. The general idea here was that torture is considered an intensified form of cruel or inhuman treatment. The core of the definition is the requirement that the pain or suffering must be intentionally inflicted and that the involvement of public officials (in an active or acquiescing capacity) must be demonstrable. A striking feature of this definition is that pain and suffering arising from lawful sanctions are not deemed to be torture. This has been described by the former Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Professor P. H. Kooijmans, as an 'unfortunate product of an excessive readiness to compromise', one which is frequently invoked by countries claiming the right to interpret and apply this norm in a culturally diverse manner.

A number of countries choose, on cultural and/or religious grounds, to interpret the scope of the prohibition of torture and cruel, inhuman and degrading treatment in their own way. This is particularly, although not solely, the case in fundamentalist theocracies, where the state is deemed to represent divine will and the possibility of imposing such penalties is part of the *sharia*, which has been declared the law of the land. It should be noted that several countries made a declaration regarding the final wording of the Convention. At the time when the Convention was adopted, Italy, the Netherlands, the United Kingdom and the United States made it clear that punishments must be 'lawful' under both national and international law. It should likewise be noted that some countries which have incorporated into their legislation the possibility of imposing such punishments also lay down such stringent procedural conditions that the punishments can scarcely ever be carried out in practice. There are also countries which either do not avail themselves of the possibility of imposing or carrying out such punishments or else carry them out symbolically or in a more lenient form.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1984[15], requires states to take specific action to combat and prevent torture. In order to speed up this process, the UN Commission on Human Rights also decided, just a year later, to appoint a Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. The reason it did so was that it often takes years for conventions to come into force, and also that not all countries were expected to sign such a convention. It was also feared that some countries which had expressed the intention of signing the convention would choose to make far-reaching reservations.

14 See Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

15 The Convention came into force on 26 June 1987. 104 states are party to it (source: E/CN.4/1998/104 dated 20 February 1998).

The extent of the prohibition of torture and cruel, inhuman or degrading treatment or punishment has been determined in stages by international and regional forums. The UN Committee on Human Rights has issued two *general comments*[16] indicating that the prohibition on cruel and inhuman treatment and punishment extends to corporal punishment. These *general comments* also make it clear that this includes chastisement for educational or disciplinary purposes. The problem regarding the authority of such statements is, of course, that only states which are party to the ICCPR can be required to comply with this interpretation of its articles. Countries such as Iran and Sudan, which impose corporal punishment in accordance with *sharia* legislation, are party to the ICCPR and can therefore be called to account. In the case of countries which are not party to the Covenant, things are more awkward. Back in the early 1970s the Commission on Human Rights commented on the inhumanity of corporal punishment in Namibia. In 1984, following amputations in Sudan, the UN Subcommission urged all governments which used amputation as a punishment to adopt forms of punishment which complied with Article 5 of the Universal Declaration. In the European context, the extent of the prohibition of torture and cruel, inhuman or degrading treatment or punishment is clearer as a result of decisions reached by the European Court in various cases. Corporal punishment is also prohibited.[17] What is striking here is that decisions reached in an essentially European forum have since been regularly used by courts in, for example, African countries to combat attempts to introduce legislation providing for corporal punishment.

To sum up, it can be said that, in the light of the aforementioned global and regional developments, the prohibition of torture and cruel, inhuman or degrading treatment or punishment should be acknowledged as a universal human right, irrespective of cultural or religious traditions. It can also be stated that certain forms of punishment are not acceptable on either legal or moral grounds.[18] In the opinion of the Advisory Council, the Dutch government should therefore also call to account those countries which invoke cultural or religious traditions as grounds for violating this human rights norm. This applies not just generally, but also to forms of cruel, inhuman or degrading treatment or punishment which are categorised as 'lawful sanctions'. In such cases, the Netherlands should consistently abide by the clear declaration it made on the subject when ratifying the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

III d. The friction between civil and political rights and economic, social and cultural rights

A more general subject of discussion, both in bilateral relations between various states and in multilateral relations, is the friction between civil and political rights and economic, social and cultural rights.

The Universal Declaration covers both civil and political and economic, social and cultural rights. Although not integrally included in the Declaration, the two types are 'grouped

16 See *general comment* 7(16), UN Doc. A/37/40 (1982) and *general comment* 20(44), UN Doc. A/47/40 (1992).

17 See, for example, the decision in the matter of Tyrer vs. UK (1978), in which the administration of three strokes with a cane was declared to be an inhuman punishment.

18 In this connection, see also Advisory Council on International Affairs: 'De doodstraf en de Rechten van de Mens, *recente ontwikkelingen*' ('The death penalty and human rights, *recent developments*') (Advisory Report No. 3), The Hague: Ministry of Foreign Affairs.

together' in the preamble by the phrasing borrowed from President Roosevelt's speech (see Section II c above). The inclusion of economic, social and cultural rights in the Universal Declaration did not lead to any major disagreements in the UN Commission on Human Rights at the time. The relevant proposal was adopted almost in passing. Such disagreements as did exist mainly concerned the issue of whether economic, social and cultural rights should or should not be formulated as obligations upon governments, in accordance with the major conventions drawn up in this area by the ILO since the First World War. After 1948, this difference in approach became more apparent in the debate on whether the Universal Declaration could be translated into legally binding provisions. This debate, which ultimately lasted some eighteen years, was to lead to the adoption by the UN General Assembly, in 1966, of two separate covenants on civil and political and economic, social and cultural rights.

The fundamental significance of economic, social and cultural rights has since been reaffirmed many times, notably at the two aforementioned World Conferences on Human Rights. The Vienna Declaration and Plan of Action state that the countries of the world should think in terms of implementing the Universal Declaration in its entirety, and describe the various rights as 'indivisible, interdependent and interrelated'. Both categories of rights are equally important and should therefore be treated 'in a fair and equal manner, on the same footing, and with the same emphasis'. It has already been mentioned that the debate on the universality of human rights has continued since 1993. To this it may be added that various countries, particularly in Asia and Africa, have claimed that, although Western human rights policy in principle assumes the universal equality of all types of rights, in practice it one-sidedly emphasises the upholding of civil and political rights. This approach, say the same countries, creates a division which is hard to reconcile with, for example, the Vienna agreements. Such objections must be examined on their merits.

However much Western countries advocate global respect for and implementation of economic, social and cultural rights, the one-sidedness referred to above does appear to exist. In this connection it is often pointed out that many economic, social and cultural rights are formulated as obligations upon states, and it is emphasised that such rights can only be implemented gradually. This report will not dwell on these points in detail, since the Dutch government has already shown itself -for example in its response to a report on this issue by the Advisory Committee on Human Rights and Foreign Policy,[19]- to be aware of this tendency towards one-sidedness and has explicitly stated that it will work to help achieve global implementation of, and respect for, economic, social and cultural rights. At the same time, it must be acknowledged that implementing certain economic, social and cultural rights is a costly business for governments. The degree of implementation will depend, upon other things, on the socioeconomic capabilities of the country in question. This may mean that complete implementation can only be achieved after some time. Calls for the West to make greater efforts to encourage respect for and implementation of economic, social and cultural rights are therefore understandable in a number of cases.

In the Advisory Council's view, it is very important for the debate on universality that a visible, credible balance be struck in the attention paid to the two types of human rights. What this particularly means is that Western countries, while continuing to pay attention

19 See Advisory Committee on Human Rights and Foreign Policy: Economische, sociale en culturele mensenrechten ('Economic, social and cultural human rights') (Advisory Report No. 18) and the response to this report (CM/609/95 dated 24 July 1995), The Hague: Ministry of Foreign Affairs.

to civil and political rights, must remain willing to focus their human rights policy on respect for and implementation of economic, social and cultural rights and to demonstrate that willingness by taking extensive action. For example, they can endeavour to ensure that such rights play the part in government policy that is assigned to them under the terms of the Universal Declaration, the ICESC, the Final Document of the Vienna Conference, etc. More specific steps could include those suggested by the former advisory bodies on human rights and development cooperation in various reports on this and related topics. These recommend procedures which would permit gradual implementation to be monitored. They also propose that, in certain circumstances, financial support should be used to make the international community share responsibility for implementing these rights, and recommend strengthening the position of NGOs. Development cooperation is an important instrument here.[20] In this connection it is encouraging to note that recently, during the current session of the Commission on Human Rights, the Dutch government explicitly stated its willingness to 'engage in a truly constructive dialogue' on economic, social and cultural rights in the UN context, unhampered by existing prejudices.[21]

At the same time, it must be emphasised that the countries referred to earlier should continue to be called to account for the way in which they uphold civil and political rights. All too often, especially in this debate, the argument is heard that if the right to education, food and health care and other economic, social and cultural rights are assured, civil and political rights will be respected and upheld almost as a matter of course.[22] This line of reasoning is in many cases unsupported by the facts. There are quite a few countries where increasing prosperity has not been accompanied by greater civil and political freedom. In replying to such reasoning, which was used in the past by states such as Chile and South Africa and is nowadays found in such countries as China, Indonesia, Iraq, Nigeria, Malaysia and Singapore, the Netherlands should avoid lapsing into the typical polarisation referred to earlier and should instead adopt a balanced approach. It is important to recognise here that implementation of civil and political rights may provide a means of achieving economic, social and cultural rights, since freedom of expression, assembly and association can enable organisations and individuals to actively promote the implementation of these rights.

In addition, if earlier agreements and commitments in the field of human rights, such as the obligations incurred by the countries of the world at the various international summit conferences (the 1995 World Summit for Social Development, the Fourth World Conference on Women in Beijing in 1995, and the World Conference on Human Settlements HABITAT II in Istanbul in 1996), are fulfilled and the aforementioned measures are consistently incorporated into human rights policy, this will greatly enhance the credibility of human rights policy and help to maintain the legitimacy of the concept of human rights, especially among citizens of Third World countries.

20 For more specific recommendations see, *inter alia*, Advisory Committee on Human Rights and Foreign Policy: Indigenous peoples (Advisory Report No. 16), Economic, social and cultural human rights (Advisory Report No. 18) and Collective rights (Advisory Report No. 19), The Hague: Ministry of Foreign Affairs. See also the Advisory Letter on Indigenous Peoples from the National Advisory Council for Development Cooperation, The Hague: Ministry of Foreign Affairs.

21 Speech by the Dutch foreign minister Hans van Mierlo to the Commission on Human Rights in Geneva on 19 March 1998, entitled 'Fifty years of the Universal Declaration of Human Rights and the realisation of economic, social and cultural rights.'

22 Cf. footnote 1.

However, such a transformation will not be easy to achieve. This is partly because the debate on the subject is often conducted in simplistic terms. For example, it is often conducted in terms of the contrast between North and South, or between industrialised and Third World countries. An added problem is that the Western world is by no means unanimous on these matters. For evidence of this one need only look at the differences in approach by certain members of the European Union and the United States. The latter country, in particular, is not known internationally as being in favour of treating both types of human rights equally; this is apparent from such things as its failure to ratify the ICESC and its activities in international forums, which focus on the implementation of civil and political rights while disregarding economic, social and cultural rights. In the opinion of the Advisory Council, the Dutch government will therefore constantly need to ask itself to what extent it can go along with the United States in the debate on these issues. Precisely in order to avoid being accused of one-sidedness, the government will in certain situations have to distance itself from views expressed by the US in international forums.

III e. The right to housing

By way of illustration, this section will look more closely at one specific right in the economic, social and cultural category: the right to housing. As is the case with most other economic, social and cultural rights, this right imposes both negative and positive obligations upon governments.

The right to housing has recently been a bone of contention.[23] In this connection one may point to American views which were expressed on the subject prior to the HABITAT II conference in Istanbul in 1996. The American government denied that the right to housing was a right at all. The Dutch government, for its part, believed that the right to housing should be unambiguously acknowledged and reaffirmed as a human right - which the conference eventually did by consensus. Indeed, the right to housing is enshrined in numerous international conventions; see, for example, Article 11 (1) ICESC, Article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 (2) (h) CEDAW, and Article 27 (3) of the International Convention on the Rights of the Child.

There is therefore no doubt that the right to housing is a universally acknowledged right, although in practice it will in many respects turn out to be only gradually achievable (as regards the positive obligations arising from it). A country's economic situation is bound to play an important part here, as can be seen for example in India, the Philippines and many parts of Africa. The scope for enforcing this right at international level, and in most cases even at national level, remains limited for the time being. It is women that suffer most from inadequate observance of this right, owing to discrimination, poverty and their often inferior status.[24]

The right to housing also implies a duty on the part of governments to refrain from violating the integrity of the home. In practice, this right is violated on a wide scale. Instances of such violations in times of armed conflict, internal struggle or inter-ethnic violence in the former Yugoslavia, Rwanda, Burundi and South Africa under the apartheid regime

23 In this connection see, *inter alia*, the progress reports by the Special Rapporteur on Adequate Housing, Rajindar Sachar, UN Doc. E/CN.4/Sub.2/1994/20 en E/CN.4/Sub.2/1995/12.

24 See Mignon Senders, 'Women and the Right to Adequate Housing', Netherlands Quarterly of Human Rights, Vol. 16, No. 2, June 1998, pp. 175-200.

speak for themselves. Another well-known example of the violation of this right is the destruction of houses in Israel and the occupied territories. Less well-known, but no less distressing, examples are the forced displacement of indigenous peoples and other population groups to make room for economic activities. In the opinion of the Advisory Council, such violations of the right to housing should be emphatically and consistently condemned. They cannot be justified by invoking cultural factors.

Like so many other rights, the right to housing is stated only in general terms. In a *general comment* of 1991, the Committee on Economic, Social and Cultural rights (ESC committee) defined this right in greater detail, indicating a number of points which should always be taken into account and should be specifically referred to in the periodic reports to the Committee on the implementation of the ICESC. These include protection of the home, availability of facilities, services and materials, infrastructure, affordability, habitability, availability and location, and cultural appropriateness.

One striking feature of this list of aspects of the right to housing is that the final aspect, 'cultural appropriateness', gives states latitude to take the local culture into account when implementing the right to housing. The term 'cultural appropriateness' is explained as follows in the *general comment:*

> 'The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernisation in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed and that they ensure, *inter alia*, modern technological facilities, as appropriate.'

Here the Committee rightly acknowledges that all elements of a universal human rights norm need not be implemented uniformly in all states. In other words, when implementing the right to housing, states have a certain degree of latitude in the light of the cultural background of the country in question. In practice, as mentioned above, reports must be made to the ESC Committee on how states make use of the latitude which they have been given. While acknowledging existing cultural diversity, this can help specify more closely the various aspects of the right to housing in various societies, states and cultures.

The above example concerning the right to housing can be applied, *mutatis mutandis*, to other economic, social and cultural rights. Besides economic factors, cultural factors therefore also have an important part to play in the implementation of such rights. Allowing states a certain degree of latitude helps to reinforce the universality of such norms. In the opinion of the Advisory Council this is a positive development, provided that states continue to be called to account for their use of this latitude in international forums such as the ESC Committee.

III f. Collective rights

To conclude this chapter, this section will examine the recurring controversial debate in international forums as to the desirability of adding to the existing catalogue of rights. This debate mainly focuses on the issue of collective (human) rights.

It has already been emphasised in this report that human rights primarily exist for the protection of the individual against, and by, the state. This is apparent, for example, from the first sentence of the preamble to the Universal Declaration:

'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...'

The subsequent listing of human rights is always in terms of individual rights. Common phrasings are 'everyone has the right to' or 'is entitled to' ('all the rights and freedoms set forth in this Declaration', Article 2), ('life, liberty and security of person', Article 3), or 'no-one shall' ('be held in slavery or servitude', Article 4).

The main purpose of civil and political rights, in particular, is to afford the individual person protection against abuse of power by the state. The fact that certain rights are solely or mainly exercised by collectivities does not detract from this. A well-known example is Article 20 of the Universal Declaration:

'Everyone has the right to freedom of peaceful assembly and association.'

At least two people are needed in order to exercise this right, but it continues to be stated in individual terms. The same has always applied to the rights of minorities, which are collectivities *par excellence*. Article 27 ICCPR, for example, refers not to 'minorities' but to 'persons belonging to ... minorities'. At the time a deliberate decision was made to state the rights listed in that article in individual terms. States were afraid that minorities might otherwise derive from the article rights which might prove disadvantageous to the state (and the ruling majority).

An exception to the rule that rights are stated in individual terms is the common Article 1 of the two human rights Covenants of 1966, which mentions both the right to self-determination and the right to natural resources. In particular, the wording of the right to self-determination raises quite a few questions regarding both the object and the subject of that right. Those who drew up the two covenants in 1966 refrained from stating the consequences of the right, as well as from defining the term 'people'. Another text which is worth mentioning in this connection, the African Charter on Human Rights and Peoples' Rights, lists a number of peoples' rights, such as the right to existence, the right to natural resources and the right to development. Here again, the term 'people' was not defined, as the parties signing the Charter were afraid that all kinds of groups would declare themselves to be 'peoples' and make demands which would be considered disadvantageous by existing states. Those who drew up the Charter simply assumed that states and the people living within their boundaries coincided.

The view that human rights are primarily individual rights has prevailed in Western countries for many years and largely still does. The Dutch government subscribed to this view in a document entitled *De Rechten van de Mens in het Buitenlands Beleid* ('Human Rights and Foreign Policy'), published in 1979. The document defined human rights as 'those elementary rights which are deemed essential to the development of the individual'. This view, with its focus on the individual, appears to be one of the main differences between Western and non-Western conceptions of human dignity. In 1993, speaking on collective rights, the Indonesian foreign minister, Ali Alatas, called for a balance to be sought between the rights of the individual and the rights of the community:

'Indonesian culture as well as its ancient well-developed customary laws have tradition-

25 Statement by Mr. Ali Alatas, Foreign Minister of Indonesia, at the World Conference on Human Rights in Vienna on 14 June 1993.

ally put high priority on the rights and interests of the society or nation, without however in any way minimising or ignoring the rights and interests of individuals and groups.[25]

This raises a number of questions. Is the contrast expressed here real, or only apparent - a veiled way of putting other interests first? The question of who exactly should formulate the 'rights and interests of the society or nation', and what those rights are, also remains unanswered. How certain is it that they are the 'true' rights and interests of society, namely the rights and interests which society considers important and whose value is not determined by the ruling elite? There is, for example, a difference in countries between the views held at village level and those which the government considers 'collective'. The question is thus to what extent human rights norms are publicly supported and applied, rather than to what extent they are accepted as such.

In practice there is both an increasing interest in individual rights among non-Western players and an increasing acceptance of the concept of collective rights, and recognition of a number of those rights, by Western countries. The latter include not only the right to self-determination but also, for example, the rights of indigenous peoples. There are also regular calls for recognition of the rights of ethnic, religious and linguistic minorities, in addition to recognition of the rights of members of such minorities: see the reports by the Advisory Committee on Human Rights and Foreign Policy on indigenous peoples and national minorities.[26] The latter report mentions a number of examples and examines them in detail. Subjects discussed include recognition of the distinctive lifestyles of the Roma, the funding of cultural institutions for the Hungarian minority in Slovakia, and the use of various minority languages in the Caucasus and Bulgaria. The denial of such rights to members of minorities, as is happening today in such places as the former Yugoslavia and Rwanda, has led to a call to reinforce the guarantees for the collective rights of minorities in international instruments.

The issue of collective rights is discussed in detail in a report issued by the Advisory Committee on Human Rights and Foreign Policy in May 1995. After defining the scope of the discussion, the report looks at (among other things) the bearers of collective rights[27], the relationship between collective and individual rights, and a number of specific collective claims. It also identifies criteria which are considered to be of relevance in recognising and assessing the assignment of collective rights: (1) they must have an object which determines the substance of the right; (2) they must have a subject (bearer) who can invoke the right; (3) they must be addressed to a duty-bearer against whom they can be invoked; (4) the claim must be essential to a dignified existence; (5) the claim should not be one which can be individualised; and (6) the claim must reinforce the exercise of individual human rights, and in any event should not undermine existing human rights.[28]

These criteria were used to assess various collective claims which have been highlighted

26 See: Advisory Committee on Human Rights and Foreign Policy, Indigenous peoples (Advisory Report No. 16), and National minorities, with specific reference to Central and Eastern Europe (Advisory Report No. 23), The Hague: Ministry of Foreign Affairs.

27 In this report the Committee takes the view that states, 'mankind' and the 'international community' cannot be regarded as the bearers of collective rights within the meaning of the report.

28 See Advisory Committee on Human Rights and Foreign Policy: Collective Rights (Advisory Report No. 19), The Hague: Ministry of Foreign Affairs.

in the international debate, including rights to external and internal self-determination, a distinctive culture, development, protection from genocide, natural resources, and protection of the environment. As a result of this assessment, the then Advisory Committee on Human Rights and Foreign Policy acknowledged a group's right to be protected from genocide and the right to internal self-determination as collective rights. It regarded the right to protection of the environment as a collective right 'in the course of formation'. The Committee's position with regard to other claims, such as the right to development, was more cautious. This position was largely determined by the question of the relationship between collective and individual rights. The key issue here was whether collective rights should be allowed to undermine individual rights, or whether the latter should always prevail. One possible requirement is that collective rights should always reinforce the exercise of individual rights. To this extent, then, collective human rights are subordinated to individual ones. The Committee took the view that collective rights should in no circumstances be allowed to undermine individual rights. The idea here was that whatever has already been achieved in the field of human rights should in any event be preserved. Anything which undermines individual human rights detracts from their universality. In the context of this report the Advisory Council subscribes to these views, which were first stated in 1995.

One of the collective rights which has played an important part in the universality debate in recent years is the right to development referred to above. Third World countries attached great importance to full recognition of this right, whereas many Western states were inclined to reject it for the reasons explained earlier. However, the position has begun to change since the World Conference on Human Rights in 1993. Thus, for example, the following phrase was incorporated by consensus into the Vienna Declaration and Plan of Action:

> 'The World Conference on Human Rights reaffirms the right to development (...) as a universal and inalienable right and as an integral part of fundamental human rights' (par. I, 10).

The customary phrase that man is the central subject of development was added to this. It was also prescribed that implementation of the right to development implied the development at national level of policies designed to give meaning to that right. In this connection it is interesting to note that, in its implementation review of the results of the Vienna conference, under the heading 'the right to development', the Netherlands said it was pleased to see that the focus was no longer on a conceptual, abstract debate about the right, but on its implementation. This shift of emphasis is in keeping with developments which have taken place at UN level in recent years regarding the right to development. Also worth mentioning in this connection are the particular attention paid to this right by the Third Committee of the General Assembly and the Commission on Human Rights in successive resolutions[29], and above all the place this right occupies in the mandate and actions of the High Commissioner for Human Rights. On various occasions the present High Commissioner has made it clear that she takes the right to development extremely seriously and considers it a key concept on the path towards global implementation of human rights.

In general, the Advisory Council believes that the government should approach the international debate on collective rights in an open and positive manner, taking account of the cultural considerations that underlie the wish for recognition of collective human and other

29 See Resolutions 52/36 of 12 December 1997 and E/CN.4/1998/33 of 22 April 1998.

rights. Such considerations should not be rejected from the outset on the basis of our own conceptions of the individual nature of human rights. It should be possible for structural factors which stand in the way of full implementation of human rights to be discussed and made visible in international human rights forums (such as the UN Commission on Human Rights) so that efforts can be made to eliminate them. However, the Dutch government should see to it that the debate on collective rights is not used to justify failure to respect individual rights. In the opinion of the Advisory Council, any recognition of new or existing collective rights should only be accepted by the Netherlands if it leads to further reinforcement of universally acknowledged individual human rights. The government can use the criteria referred to earlier as guidelines in the international debate.

IV Conclusions and policy recommendations

In this report, the Advisory Council has looked at a number of points relating to the notion of cultural diversity and the universality of human rights. In answering the question of the relationship between cultural diversity and universality of human rights, the first thing to remember is that human rights are an expression of culture and that they must always be applied within a specific context. Although there are great similarities between the various cultures when it comes to human rights, acceptance of the universality of human rights norms does not mean that they have to be applied uniformly in all cases. The degree of latitude available to states largely depends on the amount of space which is left by international conventions and the associated supervisory mechanisms. It must therefore always be possible to call states to account for the way in which they apply human rights within their territories.

The important question of the meaning of the term 'universality of human rights' and its limits in practice points to the intercultural basis for human rights and the way in which this is reflected in international conventions. The Advisory Council notes that since 1948 there have been many developments leading to worldwide acceptance of human rights norms, in both an ethical and a legal sense. Over the years, representatives of extremely diverse states and cultural backgrounds have worked together to develop today's international legal system for the protection of human rights. The argument that human rights should be seen as a Western concept is not borne out by the facts. Support for human rights has grown more widespread over the years, and it has become increasingly clear that human rights norms are in principle compatible with the leading ethical, religious and philosophical traditions. The universality of human rights norms is therefore seldom disputed in the political arena.

There are various political and philosophical views on the relationship between universality and cultural diversity. The relativism espoused by such diverse currents of thought as post-modernism, communitarianism and multiculturalism should not, in the opinion of the Advisory Council, be carried to extremes. Both empirical and normative arguments are put forward to support this view. Over-emphasis on cultural differences fails to do justice to the considerable similarities between the various cultures when it comes to human rights. The moral caution preached by proponents of these currents of thought can lead to a moral paralysis which makes it impossible to pass critical judgement on situations and developments in one's own culture and in others.

A small number of states justify human rights violations in an unacceptable manner by invoking cultural diversity. Such justification often serves to shield their own societies against criticism, or to restrict the scope of a number of fundamental human rights in order, among other things, to strengthen the position of the political elite. This may be considered an improper invocation of cultural diversity by the state concerned.

Another frequently heard argument is that human rights are a 'luxury' which countries can only afford if they have achieved a certain standard of socioeconomic development. This view must be broadly rejected. Discrimination against women, torture or calls to kill inconvenient authors are unacceptable, whatever historical, cultural or religious justifications may be provided for them. However, this debate does point to the important problem of human rights whose implementation involves major financial expenditure. Countries with insufficient resources are hit disproportionately hard.

The Advisory Council emphasises the value of a more moderate relativist standpoint which calls for tolerance of differences in the specific implementation of human rights. The fact that human rights are universally accepted does not mean that they should always be uniformly applied. They must always be applied in a different cultural and socioeconomic context. The protection of human rights must primarily be given shape and meaning at national level. The international supervisory system is complementary, and in a number of cases allows states a certain degree of latitude in implementing human rights norms.

The extent of this latitude largely depends on the amount of room allowed by international conventions and the associated supervisory mechanisms. In the case of certain core rights -mainly those in the 'non-derogable' category- there can be no such latitude. In other cases, however, such latitude does exist. It may vary from one right to another, and even from one element of a right to another, depending on differences in culture. The importance of implementing the right completely must always be weighed against other significant interests of society. If it is decided to curtail, for example, freedom of expression, such curtailment must be as limited as possible and in accordance with international law.

The universality of human rights means that any latitude in making policy must always be controlled latitude. It must always be possible to call states to account, primarily at national level, but also in international judicial, semi-judicial and political forums. If such controlled latitude in making policy is accepted, this can help to enhance the universality of human rights. The Netherlands can play an important part in such supervision, especially since, by ratifying a very large number of human rights conventions and accepting complaint procedures, it has shown itself willing to submit its own human rights policy to external criticism.

There is a particular problem in the case of human rights whose implementation entails high costs for governments (as is the case with certain economic, social and cultural rights). The degree of implementation will depend, among other things, on the country's socioeconomic situation. This may mean that complete implementation can only be achieved after some time. Here again there is latitude, but it is scrutinised by the ESC Committee.

In order to have a smoothly functioning system of controlled latitude in policy matters, it is vital that all states become party to international human rights conventions and the accompanying optional protocols. Many countries have still failed to do so. They thereby make it impossible for their citizens to assert their internationally acknowledged human rights, and at the same time they escape the supervisory mechanisms established under international conventions. This is a serious obstacle to effective supervision of compliance by independent bodies. The Advisory Council calls on the government to support normative activities concerning optional protocols to the Convention on the Elimination of All Forms of Discrimination against Women and the ICESC and, in the course of bilateral and multilateral contacts, to systematically urge states which have not yet signed or ratified international human rights conventions to do so now.

A major problem is the selectiveness with which states respond to human rights violations. Such response, or lack of it, is sometimes politically motivated. This is true of countries in all parts of the world, and can seriously undermine the claim of universality. In order to make an effective contribution to the debate on human rights, the Advisory Council recommends the government, taking account of the comments made above with regard to latitude in policy matters, to apply similar standards to all countries in similar cases and to encourage other countries and international bodies in the field of human rights to act in the same spirit.

The relationship between and the equality of civil and political rights and economic social and cultural rights, and the issue of collective rights, have played a prominent part in the universality debate for many years. As regards the former, despite positive steps in this area since 1993, the Advisory Council feels that the government should make even greater efforts than at present to approach the two categories of rights equally, using the recommendations made on the subject by the former Advisory Committee on Human Rights and Foreign Policy and the National Advisory Council for Development Cooperation as guidelines. These recommend procedures which would permit gradual implementation to be monitored. They also propose that financial assistance be used to make the international community share responsibility for implementing these rights. Development cooperation is an important instrument here. At the same time, earlier agreements and commitments in the field of human rights must be consistently fulfilled. The fact that the Netherlands will sometimes have to distance itself from views expressed by friendly countries, such as the United States, can only enhance the credibility of its human rights policy and further increase public support for human rights.

In addition to being willing to encourage constructive dialogue within international organisations, the Netherlands must be prepared to call countries to account for their implementation of both categories of rights. In the opinion of the Advisory Council, this means that the Dutch government must make clear, in discussions with countries which justify such things as cruel or inhuman treatment or punishment, mutilating forms of female circumcision or serious curtailment of the freedom of expression by invoking cultural or religious traditions, that such violations of internationally accepted norms are unacceptable. The Dutch government must also continue to object to reservations to this effect which certain countries make to the relevant conventions. The government's policy of devoting extensive attention to such issues in multilateral forums must continue to be pursued and, where appropriate, reinforced by bilateral action.

It is possible that adding to the existing catalogue of human rights, for example by including collective rights, may enhance the intercultural nature of human rights, but this is by no means certain. This debate is currently focused on the issue of collective rights. The report on the subject by the Advisory Committee on Human Rights and Foreign Policy called for restraint in adding to the catalogue of human rights, owing in particular to the legal and technical problems that this would entail. The Advisory Council agrees with the Advisory Committee on Human Rights and Foreign Policy that collective rights can, in certain circumstances, encourage the development of cultural diversity, and recommends open and constructive involvement in the debate on the further development of such rights. In this way account can be taken of the cultural considerations which underlie the wish for recognition of collective rights. However, in the opinion of the Advisory Council, the government should see to it that the debate on collective rights is not used to justify violations of individual rights. Any recognition of new or existing collective rights should only be accepted if it leads to further reinforcement of universally acknowledged individual human rights.

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. In this connection, the Advisory Council believes that governments should take the fullest possible account of the experiences of citizens and victims of violations. One way to do this is to increase public support for the notion of universal human rights in various cultural and social settings. In this connection it is vital that citizens should know and be able to claim their rights. Action to promote consciousness-raising and educational programmes can make a major contribution here.

The Advisory Council therefore recommends the government to continue to provide explicit support, through both bilateral and multilateral programmes, for NGOs which play a crucial role in this area. More specifically, it recommends that Dutch foreign policy, particularly in the field of development cooperation, should continue to provide support for governments and NGOs which work to achieve *de facto* and *de jure* equal rights for women. In addition to support for legal measures (for example, legal assistance and measures relating to women's rights), there must be considerable scope for non-legal measures such as health care, education and information programmes. This can help to eliminate cultural obstacles to the implementation of human rights and to take advantage of cultural factors which encourage their observance.

Annex I

MINISTRY OF FOREIGN AFFAIRS
Bezuidenhoutseweg 67
P.O. Box 20061
2500 EB The Hague
Telephone 070-3486486
Telex 31326

Professor R.F.M. Lubbers
Chair, Advisory Council on International Affairs
P.O. Box 20061
2500 EB The Hague

Date: 17 June 1997 **Ref.**: DMD/BC - 224/97

Re: Advisory Council on International Affairs/
Request for advice on the universality
of human rights and cultural diversity

Universality of human rights and cultural diversity

A. Background

1. In the Vienna Declaration and Plan of Action adopted by the United Nations World Conference on Human Rights in 1993, the principle of the universality of human rights was reaffirmed and explicitly accepted by the international community. It was also confirmed that, within the framework established by the United Nations Charter, the promotion and protection of all human rights are matters which concern the international community as a whole and cannot solely be viewed in terms of national sovereignty. At the same time, it was accepted that national and regional characteristics and differing historical, cultural and religious backgrounds must be borne in mind with regard to the obligation of all states to uphold universal human rights.

2. The final documents of the UN world conferences held since the World Conference on Human Rights have also mentioned the relationship between universal human rights and cultural backgrounds. For example, the final document of the Fourth World Conference on Women in Beijing in 1995 included a statement that the significance of and full respect for various religious and ethnic values, cultural backgrounds and philosophical convictions of individuals and their communities should contribute to the full enjoyment by women of their human rights. In other words, it raised the issue of how a contribution can be made, from various cultural backgrounds, to ensuring respect for all the human rights of women.

3. Despite this international consensus on the universality of human rights, a number of governments invoke purportedly separate cultural or religious identities as a basis for disputing the universality of human rights or rejecting it outright. Such views are expressed in the debate on ‘Asian values’ and the political and sociocultural role of Islam. Important constants in this debate are the subordination of the individual to the community and the friction between such subordination and the obligation upon states, as laid down in international law, to guarantee the human rights of the individual. What this means in practice is that, on cultural grounds, a number of governments resist taking specific action to improve the human rights situation in their countries.

In the light of these developments, Dutch diplomatic efforts in the field of human rights will increasingly have to be aimed at defending the principle of the universality of human rights.

B. Policy issues

4. The Advisory Council on International Affairs is asked to comment on the relationship between culture and human rights, and more specifically on attempts to invoke separate cultural identities in relation to universal human rights. The Advisory Council is likewise asked to comment on effective instruments which can be used in Dutch human rights policy and broader international contacts in order to promote the implementation of human rights in a variety of cultural settings. The following issues may be examined in this connection:

• What is the meaning of the concept of universality of human rights, and where do its limits lie in practice? To what extent does the idea of human rights, and its enshrinement in international conventions, have a universal, intercultural basis? To what extent does the principle of universality permit human rights to be implemented in diverse ways, taking account of the cultural diversity which typifies the world?

• Can a meaningful distinction be made between real and purported cultural differences when human rights are invoked or violated? Can a meaningful distinction be made between proper attempts to uphold human rights and improper ones based on differences in power or cultural dominance?

• What international law and human rights considerations should play a decisive part in determining the extent of the international community's duty of legitimate care in promoting and protecting human rights, as enshrined in the goals and principles of the United Nations Charter? What significance should be assigned to cultural diversity in this connection? Can existing cultural diversity be grounds for restraint when it comes to the effective promotion and protection of human rights? How does such diversity contribute to the effective implementation of human rights?

• Can cultural differences be taken into account when determining the existence, nature and extent of human rights violations? Is it possible to find more or less objective criteria for this purpose?

• To what extent do international conventions and intergovernmental institutions in the field of human rights allow such rights to be implemented in a culturally diverse manner? Relevant concepts here include the 'margin of appreciation' doctrine developed by the European Court of Human Rights. Under this doctrine, the Court displays considerable restraint in cases where it is necessary to determine what is in accordance with morals. In this case, the Court accepts a certain degree of variation in the way human rights are implemented, without allowing this to detract from the universality of the rights covered by the European Convention for the Protection of Human Rights and Fundamental Freedoms. What criteria should such a 'margin of appreciation' satisfy? Should distinctions be made from one right to another? Is a similar approach to be found in other regional or global supervisory mechanisms? Can the United Nations apply differing standards when supervising the implementation of human rights, taking account of cultural differences?

• Can cultural differences be taken into account when determining how human rights violations should be criticised? Is criticism of human rights violations subject to cultural differences? How could a joint European approach to the protection and promotion of uni-

versal human rights take account of cultural differences? What opportunities are there for Dutch bilateral policy in this connection?

• How can people whose human rights are being violated by the invocation of separate cultural identity be made more aware of their rights?

• The determination and implementation of human rights are interrelated. Does adding to the existing catalogue of human rights enhance the intercultural nature of human rights or, on the contrary, encourage the non-observance of existing rights? Does the development of accountability for the implementation of existing economic, social and cultural rights help to uphold human rights as a whole, and does this reinforce the universal, intercultural nature of human rights?

• Are there opportunities to promote the observance of human rights in policy fields other than that of human rights, taking account of cultural diversity?

We would appreciate it if the Advisory Council on International Affairs could submit a report to us on these issues and any related matters. We are well aware of the complexity of the subject on which we are asking you to comment. Nevertheless, and in view of the importance of the subject in the aforementioned European and international debate, we would appreciate it if you could submit your report to us by 1 January 1998.

[signed]
MINISTER FOR FOREIGN AFFAIRS

[signed]
MINISTER OF DEFENCE

[signed]
MINISTER FOR DEVELOPMENT COOPERATION

Annex II

Table of various 'non-derogable' rights

Rights/freedom from	ICCPR	ECHR	ACHR	Gc[1]
– Life	X	X[2]	X	X[3]
– Imprisonment for debt	X			
– Torture and other ill-treatment[4]	X	X	X	X
– Slavery and servitude	X	X	X	X
– Retroactive penal laws	X	X	X	
– Recognition before the law	X		X	X
– Conscience and religion	X		X	X
– Marriage and family			X	X
– Children			X	
– Name			X	
– Nationality			X	
– Participation in government			X	
– Food, clothing, housing, medical care				
– Limited property				
– Security and integrity of person				
– Discrimination				X[5]
– Access to court and fair trial				
– Protection of minorities and their own cultural identity				X
– Arbitrary arrest or detention				X
– Presumption of innocence				X

X: 'non-derogable' rights
ICCPR: International Covenant on Civil and Political Rights
ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms
ACHR: American Convention on Human Rights
Gc: *General comment* No. 24 by the UN Committee on Human Rights.

1. CCPR/C/21/Rev.1/Add.6 dated 11 November 1994: *General comment* concerning reservations made to international conventions.
2. Except for lawful actions in wartime.
3. The right not to be 'arbitrarily' deprived of one's life. Pregnant women and children may not be executed.
4. The 'non-derogable' status of this right is also emphasised in Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also the Inter-American Convention for the Prevention of Torture and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
5. On the basis of nationality, race and religion.

Annex III

ABBREVIATIONS

Advisory Council	Advisory Council on International Affairs
ACHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ESC committee	Committee on Economic, Social and Cultural rights
ICCPR	International Covenant on Civil and Political Rights
ICESC	International Covenant on Economic, Social and Cultural Rights
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
European Court	European Court of Human Rights
ILO	International Labour Organisation
NGOs	Non-governmental organisations
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
Universal Declaration	Universal Declaration of Human Rights