THE HUMAN RIGHTS POLICY OF THE DUTCH GOVERNMENT

IDENTIFYING CONSTANTS IN A CHANGING WORLD

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Foreword

With the advent of a new government, the Advisory Council on International Affairs (AIV) pondered, as usual, the ways in which this might change the Netherlands' foreign policy. In addition, the AIV saw specific grounds for the preparation of this advisory report, when the new Minister of Foreign Affairs stated in an interview in the daily newspaper *De Volkskrant* that two pillars of his policy (security and the economy) could be defined as the 'most important', followed by a third – namely, human rights.[1] The wider reason for writing this advisory report, however, is that the world is in a process of permanent change, which at present involves considerable turbulence in and around the Middle East. Equally important are matters such as the growing self-assurance of countries whose economies are rapidly rising (and buying their way) to the top, the role of economic and social underdevelopment in the genesis of conflicts, the constant threat of attacks, and the changing role of non-state actors, including large sections of the media. These trends have prompted the AIV to reflect on how the government will be shaping its foreign policy in this constantly changing context, and what place it will assign to international law, especially on human rights.

The coalition agreement of the Rutte government states explicitly that existing international agreements will be respected. The AIV welcomes this assurance. However, several of the measures announced in the coalition agreement and the associated parliamentary support agreement, specifically in the areas of asylum and immigration, have been identified by the Meijers Committee – a committee of experts on international law on aliens and refugees and international criminal law – as being in conflict with conventions such as the European Convention on Human Rights (ECHR) and with European directives.[2] The AIV takes note of this situation, and will wait to see how events unfold in this area. At the same time it wishes to add, in a more general sense, that tensions within society, at global as well as national level, may all too easily foster the erosion of international law and the international legal order. Upholding and strengthening these cornerstones of the international system is vital, especially for a country whose Constitution includes a commitment to promote the international legal order. Furthermore, championing international law has been a constant in the Netherlands' foreign policy, from the Hague peace conferences to the country's present-day support for various international tribunals. For the tone and foundations we need only refer to Hugo Grotius and to Cornelis van Vollenhoven, with his thesis in 1898 on the *Scope and Content of International Law* and his seminal article 'De Roeping van Holland' ('Holland's Mission') in the journal *De Gids* (1910).[3] Over the years, it has frequently been pointed out that this tradition serves

1 'Diplomatie als rustiek tijdverdrijf is voorbij' ('The age of leisurely diplomacy is past'), interview with foreign minister Uri Rosenthal, *De Volkskrant*, 11 December 2010.

2 'Memorandum on immigration and asylum in the VVD-CDA Coalition Agreement of 30 September 2010', CM1016, Utrecht, 8 November 2010, at http://www.commissie-meijers.nl See also the follow-up memorandum issued at the request of the House of Representatives, CM1101, Utrecht, 31 January 2011.

3 On him and many others, see Nico J. Schrijver, 'A Missionary Burden or Enlightened Self-Interest? International Law in Dutch Foreign Policy', *Netherlands International Law Review*, vol. 57, no. 2 (2010), pp. 209-44.

the interests – both directly and indirectly – of the Netherlands, as a relatively minor actor with strong international economic ties.

This advisory report is intended as a reflection on the human rights policy pursued and announced in the first few months of the new government, and as input for the policy document on human rights policy that the government promised to send to the House of Representatives by 1 April this year. In these reflections, the AIV will focus on constants that it sees as important, irrespective of the government's political leanings. These constants follow from the Universal Declaration of Human Rights (1948) and the many other international legal obligations that the Netherlands has assumed since the Second World War, particularly in the realm of human rights.

In this report, the AIV will discuss, consecutively, the promotion of human rights 'in the narrow sense' (chapter I), human rights in relation to other policy areas (chapter II), human rights violations, peace processes, impunity (chapter III), civil society and the promotion and observance of human rights (chapter IV) and policy coherence (chapter V). The report concludes, in chapter VI, with a number of final remarks.

The report will *not* address specific action in the sphere of human rights that has been taken by the government in its new composition, such as in relation to the Dutch-Iranian national Zarah Bahrami or Nobel Laureate Liu Xiaobo. Nor will it discuss the subject of the effectiveness of European human rights policy in the wake of the Treaty of Lisbon, since the AIV has been asked for a separate advisory report on that subject, which will appear later this year. Rather, it will discuss the proposed and now visible and relevant foreign policy in the realm of human rights, emphasising the policy principles on which it is based. The AIV infers the contours of that policy, at present, primarily from the parliamentary debate on the foreign ministry's budget on 14 and 15 December 2010 and from a series of answers to MPs' written questions dealt with before and during the debate on the budget.[4] Although it should be noted, in relation to these sources, that the answers given to the House of Representatives are frequently based on the policy of the previous government and follow from earlier policy measures and undertakings, the answers quoted, in all cases, are those of the current government.

4 'Vaststelling van de begrotingsstaten van het ministerie van Buitenlandse Zaken (V) voor het jaar 2011', Parliamentary Papers 2010-2011, 32 500 V, no. 8, Report containing a list of questions and answers, adopted on 29 October 2010. Ibid., no. 61, Report of meeting to discuss a bill, adopted on 9 December 2010. 'Wijziging van de begrotingsstaten van het ministerie van Buitenlandse Zaken (V) voor het jaar 2010', Parliamentary Papers 32 565 V no. 3, Report containing a list of questions and answers, adopted on 13 December 2010. 'Kamerbrief inzake schriftelijke antwoorden naar aanleiding van de eerste termijn van uw Kamer tijdens de begrotingsbehandeling van Buitenlandse zaken', Parliamentary Papers 2010-2011, 32 500 V, 15 December 2010. 'Bijlage - Kamerbrief inzake schriftelijke antwoorden naar aanleiding van de eerste termijn van uw Kamer tijdens de begrotingsbehandeling van Buitenlandse Zaken', Written answers to questions asked by members of the House of Representatives, 15 December 2010. 'Kamerbehandeling van: het wetsvoorstel Vaststelling van de begrotingsstaten van het ministerie van Buitenlandse Zaken (V) voor het jaar 2011 (32500-V); het wetsvoorstel Slotwet en jaarverslag Ministerie van Buitenlandse Zaken 2009 (32360-V); het jaarverslag van Buitenlandse Zaken (32360-V, no. 3); het rapport bij het jaarverslag van Buitenlandse Zaken 2009 (32360-V, no. 4)', Reports, House of Representatives, 14 and 15 December 2010.

For readability's sake, the written parliamentary questions concerned will be quoted below without further references. In addition, the AIV decided not to refer back to its earlier advisory reports on the subjects discussed here, where relevant, but to try to detach its remarks from them and to keep its eyes open to the challenges of today's world, as much as possible. The AIV will of course be glad to substantiate any section of its remarks if desired.

This report has been issued at the AIV's own initiative and was prepared by its entire Human Rights Committee: Professor W.J.M. van Genugten (chair), Ms H.M. Verrijn Stuart (vice-chair), Professor K.C.J.M. Arts, Professor R. Fernhout, Professor C. Flinterman, Professor J.E. Goldschmidt, R. Herrmann, T.P. Hofstee, Professor M.T. Kamminga, Professor B.M. Oomen, Professor N.J. Schrijver and Professor W.M.F. Thomassen.

The advisory report was adopted by the AIV on 22 February 2011.

I The promotion of human rights in the narrow sense

I.1 Framework

In the debate in the House of Representatives on the Ministry of Foreign Affairs' budget, the Minister of Foreign Affairs, Uri Rosenthal, stated that he would distinguish three pillars of foreign policy: security, economic affairs and human rights. In response to a question from parliament, partly occasioned by the interview a few days earlier in the daily newspaper *De Volkskrant*, the foreign minister stated that the three pillars were 'equal in value'. He added that in the case of all three pillars, 'in other words, including the third', he would 'naturally' introduce his own points of emphasis. In his explanatory remarks in the House of Representatives, the foreign minister stated that the government would continue to provide staunch support for the protection of human rights:

> We make no concessions – I hope that the House has noticed as much in the past two months that I have been Minister – when people are afflicted by cruel regimes, such as those in Burma and Iran. We make no concessions in cases involving torture or involving capital punishment with a political motive. We take action against human rights offenders where possible. In the case of Iran, for instance, I myself took the initiative, in the framework of the EU and following similar action by the United States, to draw up a list of human rights offenders who are to be denied entry to the territory of the European Union. Conversely, human rights defenders deserve the unconditional support of this Dutch government, for their courage and their willingness to risk their necks in incredibly difficult situations. To be more precise: journalists, for instance, who . . . risk their lives in the streets of Baghdad, Moscow and Mombasa deserve equally to be given our support in every possible respect.

The foreign minister then added:

> . . . considerations of a moral nature are not incompatible with an approach based on promoting our interests. To put it in somewhat bookish terms: *raison d'humanité*, in the 21st century, is a fundamental part of *raison d'état*. The state cannot operate, in its international relations, without showing a high regard for international norms and values. In other words, promoting human rights is also in the Netherlands' interest. Championing respect for human rights and strengthening the rule of law help bring about a safe and peaceful world. Protecting human rights also benefits the trade and investment climate, and hence helps to create more opportunities for Dutch business.

The foreign minister is thus, early in his term of office, linking human rights to other policy areas, at this point specifically security and the economy. The AIV will return to this question below, under the heading 'Human rights in relation to other policy areas'. For the rest, the foreign minister also noted in his opening statement in the House of Representatives that for this human rights pillar too he strives to achieve 'an integrated approach, selectivity, effectiveness, and cooperation'. In his view, what counts is the result, which may sometimes be achieved by public action, and sometimes through silent diplomacy: 'I want to get a better picture than in the past of the effectiveness of efforts that can be made by the Netherlands in the sphere of human rights.' In addition, he said, 'I want to get rid of the idea that we shall always rush in, at any time and place, whenever we hear the phrase "human rights". We have to be selective . . . I want this

selectivity to be at the heart of our policy, so that we can achieve the maximum added value.'

I.2 Priorities and specific rights

The articulation of these basic principles prompted the AIV to reflect on what this selectivity would involve, first in relation to a choice of specific human rights. The Ministry's website now refers to a number of classical human rights. During the debate in parliament, the foreign minister also referred to the Netherlands' commitment to the ILO labour standards on child labour, forced labour, discrimination, and freedom of association. He also stated that the priority for promoting the acceptance of and equal rights for lesbian, gay, bisexual and transgender (LGBT) people and worldwide protection of their human rights will continue in effect. There will also be 'no change of policy regarding reproductive health'. In addition, the foreign minister and the minister for European Affairs and international cooperation, in response to questions from the House, expressed the government's concern with matters such as the right to clean water and good sanitation, the right to adequate health care, the right to education, the right to safe food, the rights of people – especially children – with a disability, the position of ethnic and religious minorities (in countries such as Iran and Pakistan) and the rights of indigenous peoples (such as the Mapuche in Chile). The government also dwelt at length on the significance of gender in the observance of human rights.

The examples presented here show that the government's policy includes substantive attention for the unity and indivisibility of civil, political and economic, social and cultural rights, although cultural rights receive relatively little attention. It also shares the views of previous governments on a 'third generation' human right such as the right to development: while rejecting as undesirable the notion of a legally binding instrument on this front, it favours the development of 'standards . . . designed to lead to implementation'. Both these points can be defined as constants.

Aside from these observations, the AIV is curious what points of emphasis the government intends to place *within* the separate categories of human rights, and in a geographical sense. In this connection the AIV wishes to start by recalling the first quotation given above, stating that the government makes 'no concessions in cases involving torture or involving capital punishment with a political motive'. The latter addition prompts the question – assuming that 'with a political motive' refers solely to 'capital punishment' – of how and in what situations the government intends to pursue the abolition of the death penalty, and the non-execution of this sentence where it has been imposed. After all, the right to life is one of the most essential of all human rights, and it would indeed rank first if an international ranking order existed of human rights. What is more, the right to life is widely regarded, at any rate within Europe, as an absolute right that may not be weighed up against other interests. The Dutch Constitution too is unequivocal on this point – 'Capital punishment may not be imposed' (article 114) – while the Council of Europe, with its 47 member states, is (in peacetime) a 'death penalty-free zone'. The AIV realises that the abolition of capital punishment worldwide has not yet become part of international law; only 73 states have signed and ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights on this subject. The government should nonetheless base its comments on capital punishment, in the AIV's view, on the principle that the death penalty must never be imposed and that it is incompatible with the right to life as enshrined in international and European human rights conventions. This also accords with the UN's wish to eventually banish the death sentence altogether. It is also important to remain watchful

in regard to the absolute ban on torture, especially after the revelations that even the security services of Western states were guilty of torture after the attacks on the Twin Towers.

The AIV is also very curious about the government's plans regarding the strengthening of existing human rights systems, including both the legal or semi-legal and the more political systems. In responding to written questions and during the parliamentary debates, the government scarcely addressed this organisational aspect – in part, no doubt, because there were not many questions about it.

With a view to further strengthening the existing legal and political mechanisms, the AIV recommends that the government:

- actively pursue, partly drawing on the Netherlands' experience in the early years of the UN Human Rights Council and its knowledge of the political forces at play, a thorough evaluation of the Council's performance, and in particular of its Universal Periodic Review (UPR). Proceeding on the assumption that the Council and its UPR have a global role to play, the Netherlands, together with its EU partners, should use this evaluation to formulate the minimum criteria to be met by the Council and the UPR in discussions of country situations, in order to meet European standards for objective, substantive assessments and practical action to promote respect for human rights;
- seek to improve the cooperation between the different UN human rights treaty bodies, perhaps with the ultimate goal of gradually merging the two major international human rights covenants. Such a merger would require removing several major obstacles, and it might be questioned whether this is an opportune time to open such negotiations in the current global political climate.[5] Any such intellectual exercise should be carried out while paying simultaneous attention to regional trends in Africa and the Arab world, where ideas on human rights have led in the past, or now appear to be leading, to separate conventions and courts;
- make haste to ratify those conventions and protocols that the UN has defined as core international human rights instruments, to which the Netherlands is not yet party: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities and the Optional Protocol to this convention, the International Convention for the Protection of All Persons from Enforced Disappearance, and the Optional Protocol to the Covenant on Economic, Social and Cultural Rights;
- lend its active support to the drafting of an Optional Protocol to the International Convention on the Rights of the Child to establish a right of petition and an investigation procedure;
- continue to give priority to supporting human rights defenders, NGOs that actively promote human rights, and the relevant international officials, such as the UN's many Special Representatives and Rapporteurs.

5 See Nico Schrijver, 'In afwachting van één wereldwijd mensenrechtenverdrag!' ('Towards a single global human rights covenant!'), *NJB*, 7 January 2011, pp. 15-16. On the pros and cons of such a merger, see AIV, 'The UN Human Rights Treaty System: Strengthening the System Step by Step in a Politically Charged Context', advisory report no. 57, The Hague, July 2007.

II Human rights in relation to other policy areas

II.1 Peace and security

As noted above, both before and during the parliamentary debate on the budget, the government placed special emphasis on the link between human rights and peace and security. In its response to questions from members of parliament and during the debate on the budget, for example, there were frequent references to the fight against terrorism, which must be conducted 'in accordance with international law and with respect for human rights'. The Minister for European Affairs and International Cooperation, Ben Knapen, also pointed out that it is 'important to consider the underlying causes of exclusion, conflicts and instability', in order to contribute, through peacebuilding, conflict prevention and state-building, 'to reducing friction between different groups' and to help prevent terrorist groups from exploiting the absence of state authority. Linking up to the existing policy on fragile states and precarious peace processes, the House also discussed the role of women in achieving lasting peace. In addition, the government referred in several places to the need to curb the possession of weapons of mass destruction (whether biological, chemical or nuclear), cluster munitions[6] and landmines. The AIV wishes to add that it would be appropriate for the government to play an active role in this area, for instance in relation to the presence of American nuclear weapons in the Netherlands.[7] Strictly speaking, these subjects do not fall under the specific heading of human rights. However, the use or abuse of such weapons would have an impact on human rights that should not be underestimated, ranging from deaths and serious injuries from landmines to the mass destruction of human life through the deployment of the other weapons.

The discussion on 'a new horizon for UN peacekeeping'[8] – to cite another example in the realm of peace and security – likewise does not immediately conjure up an association with human rights. Even so, wherever peace forces are active, it is important to pay close attention to ways in which they can help to promote respect for human rights, precisely because they operate in situations where human rights violations are often rampant. The government told the House that it would push for more detailed operational guidelines for the protection of civilians, specifically citing subjects such as preventing sexual violence against women during and after peace operations. The AIV recommends that the government pursue this line, by also:

6 By way of further illustration: on 18 January 2011 the Senate approved the ratification of the Convention on Cluster Munitions. Finance minister Kees De Jager subsequently refused to comply with the wish expressed by both houses of parliament to follow up this ratification with a ban on investment in companies that produce cluster munitions (letter of 28 January 2011).

7 On 22 February 2011, the Senate unanimously adopted a motion (Parliamentary Papers I 32500 V/ 32.500 X, H) stating that it wishes to hear from the government at the earliest opportunity what it plans to do to reduce the deployment of tactical nuclear weapons.

8 Department of Peacekeeping Operations and Department of Field Support, 'A New Partnership Agenda: Charting a New Horizon for UN Peacekeeping', New York, July 2009.

- stepping up the emphasis on observance of human rights by countries themselves and by those carrying out peace operations, including clear rules for collective and individual accountability as well as just compensation;
- continuing to pay attention to the growing contribution of private companies to military operations and the growing interest of private, commercial companies in war and armed conflicts, as well as to the question of what this means for the state responsibility of states that employ such companies and for these companies' independent responsibility for violations of human rights and international humanitarian law;
- continuing to play an active role in the further elaboration of the substance and implications of the Responsibility to Protect, paying attention to each of the three pillars of this concept (the primary responsibility of states to protect those within its territory; support by the international community to this end; and an effective response by the international community when a state fails to fulfil its responsibilities under the first pillar).

II.2 Development cooperation

The foreign minister took the opportunity of the debate in the House of Representatives on the letter to the House outlining development cooperation policy[9] to emphasise that development cooperation is part of the government's broader foreign policy, and that development cooperation, like other aspects of policy, should be linked to 'goals such as stability and security in the world, democratic content, the rule of law, good governance, and economic development and growth'. The AIV welcomed this assertion. Much of that debate too focused on human rights, both in the narrow sense and in relation to the context in which respect for human rights should be ensured.

This is not the place to discuss specific aspects of development cooperation, but it is appropriate to dwell on its connection to human rights. Examples include the link between human rights and the Millennium Development Goals and, more generally, the human rights based approach to development cooperation. The AIV will discuss this question at greater length in its forthcoming advisory report on 'the MDGs after 2015'. Many aspects of it were addressed during the parliamentary debate on the letter on development cooperation policy, ranging from clean drinking water and food security and safety (relevant to the right to clean drinking water and food, as recognised by the Netherlands), to climate change and environmental degradation (relevant in connection with the evolving right to a liveable and clean environment), the fight against HIV/AIDS (relevant to the right to adequate health care), and sexual and reproductive health. In addition, the consequences of the economic crisis for basic social services in developing countries came up several times, including a reference to the World Bank that the government said was partly meant to illustrate that 'where possible and useful' the Netherlands is continuing to act multilaterally. The Netherlands' contribution to the World Bank is to be cut, but the government will 'step cautiously' in its actions relating to 'this fine, authoritative institution' that has such a keen eye for those people in developing countries 'who frequently suffer more than others from the financial crisis'.

When outlining his policy, Mr Knapen spoke several times of the need to protect 'global public goods'. He frequently quoted with approval the report on development

9 Parliamentary Papers II 2010-2011, 32500 V, no. 15, 26 November 2010.

cooperation issued by the Advisory Council on Government Policy (WRR),[10] which states that 'we all stand to gain from global public goods' 'such as a stable climate, knowledge, and financial stability', and that international public goods are not about 'sharing or transferring cross-border consequences of domestic policy (spillovers or externalities), but about benefits for everyone in the world (in the case of global public goods) or in the region in question (in the case of regional public goods), which can only be realized or retained through specific action and cooperation'. All these facets may also help directly to promote human rights, at both national and international level.

The AIV wishes to observe that the proposed development cooperation policy is in many ways relevant to the promotion of human rights in developing countries. This is also crucial in the light of the Netherlands' treaty obligations in the area of international cooperation to promote human rights worldwide. In this connection, the AIV recommends that the government:

- make a serious effort to flesh out the concept of 'global public goods', paying special attention to both conceptual and practical aspects, which may help to effect 'the inherent dignity and the equal and inalienable rights of all members of the human family' (the opening sentence of the Universal Declaration of Human Rights) and other goals in the area of human rights under international law that the Netherlands has pledged to help attain, as formulated, for instance, in articles 55 and 56 of the UN Charter or a range of provisions in the various human rights conventions;
- examine more closely the ways in which international financial institutions such as the World Bank and the IMF and economic organisations such as the WTO could and should integrate aspects of human rights into their activities, while preserving their separate identities but without hiding behind the concept of 'self-contained regimes';[11]
- continue to make constructive contributions to the depoliticisation of the debate on the right to development and continue to put forward ideas on the development of guidelines and standards geared towards operationalising and implementing all human rights that are important to development.

II.3 Trade and the economy

During the budget debate in the House of Representatives, the government frequently referred to the interaction between strengthening the economies of partner countries and ensuring human rights. Both in the debate itself and in the documents submitted to the House, matters were raised such as the conditions that must be set for access to, the sustainable extraction of, and transparency of trade in raw materials. The debate also focused on preventing speculation on food markets and ensuring that support for business benefits developing countries (through economic development and poverty reduction).

The rationale behind the government's approach to the subject of the economy and human rights appears to be that trade opportunities stimulate productivity, that

10 Peter van Lieshout et al., *Less Pretension, More Ambition*: *Development Cooperation in Times of Globalization* (Amsterdam: Amsterdam University Press, 2010).

11 See e.g. Willem van Genugten, Paul Hunt and Susan Mathews (eds), *World Bank, IMF and Human Rights* (Nijmegen: Wolf Legal Publishers, 2003), and Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp: Intersentia, 2008).

increased productivity boosts prosperity, that prosperity leads to social stability, and that in stable situations, human rights – economic and social as well as classical – will flourish. In a general sense, the AIV would take little issue with this line of argument (as projected here onto the government), although it has been shown, for instance from the record of the EU-ACP Economic Partnership Agreements,[12] that free trade is not necessarily a good basis for developing markets. In addition, it can easily be shown that economic freedoms are perfectly compatible with an authoritarian regime, in which there is little respect, by definition, for political and civil rights – China and certain other 'Asian Tigers' being notable examples. There is no automatic positive correlation between economic growth and respect for human rights, or between prosperity and its even distribution among the entire population. Indeed, as long as a regime benefits from economic development and is not (or is no longer) held back by an ideological aversion to the free market, it can permit substantial economic freedoms without this leading to respect for classical human rights such as the right to freedom of association and assembly or freedom of the press. Clearly economic growth and lack of respect for human rights are perfectly compatible. Furthermore, it is often hard to assess the influence of improved standards of living on the level of democratisation in a society. The AIV would again point to China, its way of doing business with numerous African countries, and the effects this has on Africa.

Another topic raised during the debates in parliament was corporate social responsibility, again not least in developing countries. In the words of the development minister, 'The more this subject is discussed publicly, the more relevant, interesting and urgent it becomes for a company to do something about it. In that sense, the tide is fortunately moving some way in our direction, since enterprises see that it benefits them to do business responsibly. Not all of them, and not all at the same pace, but it is happening nonetheless.' The observation that 'the extraction of raw materials must not be detrimental to the local population' is followed by a reference to the progress made by civil society through the Kimberley Process (the certification scheme for diamond mining and trade). There was also discussion of the Guiding Principles for business and human rights that are currently being drafted by UN's Special Representative on this subject, the American John Ruggie, with a view to their adoption by the UN Human Rights Council in June 2011. In both the Ruggie Principles and the government's position on the Kimberley Process, the emphasis was on self-regulation and on changing behaviour by adopting international codes of conduct. There is much to be said for this approach, in the AIV's opinion, as long as governments ensure that effective legal fall-back mechanisms exist for cases in which self-regulation does not work – as, unfortunately, it often does not. More and more opportunities for such mechanisms are currently being created by the EU and within, say, Dutch criminal and private law. At the same time, there are large parts of the world where this does not apply.

The AIV recommends that the government:

- in its support for Ruggie's Guiding Principles, focus on strengthening the direct link in the Principles between companies and human rights ('horizontal effect'), on getting passages incorporated into the text that reflect the latest thinking on the extraterritorial

12 See e.g. <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/africa-caribbean-pacific/>, <http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138082.pdf> and <http://www.acp-eu-trade.org/>.

reach of human rights,[13] and on helping to put in place effective legal remedies that are accessible to NGOs. The draft Guiding Principles are very conservative in these areas, in the AIV's view. The AIV believes that more far-reaching measures are needed to create a situation in which the same rules apply to all relevant actors, including companies, when it comes to violations of human rights norms and the obligation to take responsibility for any material and non-material damage that is inflicted. The AIV sees the adoption of the Principles by the UN Human Rights Council as a step in a long process, which should not stop the Netherlands from imposing higher standards on its own enterprises.

- ask the Minister of Economic Affairs, Agriculture and Innovation to update the 2007 'Government Vision on Corporate Social Responsibility 2008-2011' and to incorporate into this update the experience he gained as foreign minister over the past several years.

13 See e.g. Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2009).

III Human rights violations, peace processes and impunity

III.1 Transitional justice

It was clear from the debate on the budget that upholding the rule of law and achieving justice in and after war situations remains a major constant in Dutch foreign policy. This subject merits separate attention here, even though parts of it could have been incorporated into earlier sections of this advisory report. The AIV pondered the question of whether any changes are to be expected in relation to this theme, since the government has sent the House of Representatives an update of its initial reaction to the AIV and Advisory Committee on Issues of Public International Law (CAVV) advisory report on transitional justice.[14] In its further response, the government repeated that where transitional justice is concerned, attention must be paid to socioeconomic justice, consolidating the rule of law, establishing a human rights culture, and the crucial contribution of women in this respect, and that this effort calls for 'a coherent and integrated approach and coordination between departments at the foreign ministry and between departments and diplomatic missions'. To this has now been added: 'and any other line ministries that might be involved'. This addition reflects the government's desire to foster 'an integrated approach to human rights, peace and security', an area in which the Netherlands is 'well placed', with The Hague as 'legal capital of the world' possessing 'clear added value'. The government further wishes to see 'to what extent it can further contribute, from a human rights perspective, to the concept of a just peace, in which the diverse elements of transitional justice are worked out in more detail. This will also call for coordination and cooperation between departments, embassies and other ministries.' This reiterates the pattern of interaction between policy areas. It means doing more to make an interesting concept operational; it may be noted that the scholarly literature on this subject displays a shift from conceptualisation to empirical studies on what does and does not work.[15]

The AIV would recommend that the government:

- in making policy choices in the area of transitional justice, and on numerous other themes and subjects, make evidence-based decisions as much as possible, for instance by using – in the case of transitional justice – the University of Wisconsin's large Transitional Justice Database. This shows, for instance, that transitional processes have a positive impact on democracy and human rights, provided that the

14 See AIV/CAVV, 'Transitional Justice: Justice and Peace in Situations of Transition', advisory report no. 65, The Hague, April 2009. The supplementary government response: 'Vaststelling van de begrotingsstaten van het Ministerie van Buitenlandse Zaken (V) voor het jaar 2011', Parliamentary Papers 2010-2011, 32 500 V, no. 125, Letter from the Minister of Foreign Affairs and the Minister for European Affairs and International Cooperation, 13 December 2010.

15 See e.g. the research groups headed by Professor Stephan Parmentier, Catholic University of Leuven, by Professor Diane Orentlicher, American University Washington, and Professor Leigh Payne, Tricia Olsen and Professor Andrew Reiter, University of Wisconsin.

mechanisms of legal proceedings and the granting of amnesty, and possibly truth and reconciliation commissions, are combined;[16]
- continue to recognise that while transitional justice processes depend on context, there are also constants, such as the often incidental attention to economic and social rights, which victims generally experience as utterly crucial and of immediate significance;
- bear in mind that in transitions, security should not be or remain the sole emphasis. Police-enforced order may ostensibly produce security, but it is not until the advent of an independent judiciary and a police and justice system that operate according to precepts of the rule of law, alongside a strong civil society, that people will truly feel safe. This also underscores the need for support and training courses in human rights for those working in the local justice and prison systems, and the importance of providing strong support for social responsibility in innovation and business;
- continue to involve women systematically in peace processes and peace negotiations. Women are not just victims of violent conflicts; they are frequently also active in resistance movements and are subsequently crucial to building peaceful and well-organised societies;
- continue to pay systematic attention to ensuring that violations of human rights or international humanitarian law committed in the transitional phase are dealt with adequately. The Netherlands should set a good example by ensuring that measures are taken to achieve redress for the victims if Dutch officials bear any portion of the responsibility for such actions, whether the events concerned took place in the recent or more distant past.

III.2 Criminal courts and universal jurisdiction

During and prior to the debate on the budget, various questions were asked about the government's policy intentions vis-à-vis the existing international criminal tribunals. For instance, the government was asked what should be done with the Rwanda and Yugoslavia tribunals, now that the ends of their respective mandates are in sight. In its answer, the government invoked the 'residual mechanism' (about which international agreements have since been concluded) and discussed matters such as the management of the archives and oversight of the witness protection programme. The AIV welcomed these remarks, and trusts that the government will do its utmost to facilitate the winding up of both tribunals in such a way that, in spite of the many problems they encountered and still encounter on a daily basis, they may go down in history as relatively successful courts.

Regarding the Yugoslavia tribunal (ICTY), the government was also asked whether actual and potential EU candidate countries are cooperating sufficiently with the Tribunal. The government discussed this in connection with the six-monthly report of ICTY Prosecutor Serge Brammertz to the UN Security Council: 'Mr Brammertz's report is particularly relevant to the EU accession prospects of countries in the Western Balkans. As you are aware, I believe that full cooperation with the ICTY should be a prerequisite for any step in the process of accession to the EU of the countries in this region. Mr Brammertz's

16 See Tricia Olsen, Leigh Payne and Andrew Reiter, Olsen, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace Press, 2010), and id., 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy', *Human Rights Quarterly* 32:4 (November 2010), pp. 980-1007.

report strengthens my views in this respect.'[17] Here too, in the AIV's opinion, there is little room for disagreement.

Members of parliament also asked the government a variety of questions relating to the current situation of the International Criminal Court (ICC). In its response, the government noted that relatively few countries in Asia are party to the ICC as yet, and that the Netherlands continues to strive to achieve more accessions and ratifications. This is the least it could do in the AIV's view, but for the rest, the AIV would observe that the answers relating to the Rwanda and Yugoslavia tribunals and the ICC give a clear picture of the tenor of the government's actions, which deserve support. The real areas of tension lie elsewhere, however, and impinge heavily on foreign policy. For the next several years, the question will constantly arise of how to strike a balance between initiating and sustaining peace processes and insisting on the criminal liability and actual prosecution of political and military leaders who, having played a role in inciting or using violence, are now involved in those peace processes. In the broad sphere of achieving peace while simultaneously seeking to punish those involved, the ICC has taken steps to date – such as the al-Bashir, Kony and Kenya cases – which have not always been appreciated, to put it mildly, most notably by African politicians. The Dutch government too has already had to deal with such tensions, for instance during the development minister's visit to Sudan in January 2011.

Other major obstacles to the ICC's work are selectivity and politicisation. The ICC should not be an instrument in the hands of political powers. However, this impression has been created, since all the arrest warrants issued by the Prosecutor have been against Africans. More important than this appearance of bias, however, is the fact that conditions elsewhere would also justify ICC proceedings. Examples include Colombia, where the criminal investigation into the outrages of recent decades is proceeding in a highly unsatisfactory fashion, and several other countries around the world.

The ICC's universal jurisdiction is under even more pressure, if possible, than its ongoing work. With the entry into force of the International Crimes Act of 2003 (WIM), the Netherlands set out a clear criminal law policy, based on carefully considered legislation. The WIM in its turn is based on obligations enshrined in the Rome Statute of the International Criminal Court, which is itself rooted in older international law – much of which the Netherlands helped to establish – in the fields of genocide, crimes against humanity and war crimes. The immunity of foreign government officials is regulated in the WIM – albeit largely on the basis of a judgment handed down by the International Court of Justice (*Arrest Warrant* case, 2002) and not on the basis of the ICC's Statute – and does not provide for any restriction of jurisdiction, but for a temporary restriction of the Public Prosecution Service's powers to prosecute. The point of this rule is to make it possible to maintain normal political and economic relations between countries. The AIV appreciates the reasoning behind this. At the same time, it wishes to emphasise that where such cases arise, the Dutch government must adhere to its own criminal justice system and that any erosion of the principles enshrined in the WIM may not only lead to undesirable publicity for the Netherlands, but may also undermine the tasks of the Public Prosecution Service and the judiciary. In such cases, the political and economic interests of the Netherlands or traditional ties of friendship must sometimes give way to the interests of the victims of serious violations of international criminal law.

17 Letter to parliament on the Report by ICTY Prosecutor Serge Brammertz to the UN Security Council, 7 December 2010.

The AIV recommends that the government:

- approach situations of this kind and the principle of universal jurisdiction from the criminal law perspective of prosecution for genocide, crimes against humanity and war crimes (and in the future: the crime of aggression), and put political considerations second. This hierarchy is in line with the Rome Statute of the International Criminal Court, which allows for the possibility of deferring prosecution if it can be shown that there are truly pressing reasons for doing so, and also reflects the views of the International Court of Justice;
- bear in mind that prosecution in the country of conflict or in the region is generally preferable to external intervention under the criminal law. Above all, the principle of complementarity should be upheld, for instance by giving material support to building the judicial system in the region. The Netherlands has much experience in this area;
- first and foremost, invest in fact-finding. As soon as a conflict erupts or threatens to erupt, a permanent, independent commission, supplemented on an ad hoc basis by people with specific expertise, should conduct a local fact-finding mission;
- within the political context in which the ICC necessarily operates, foster its role as a court that, if no adequate action is taken at national level (the principle of complementarity), will also subject persons from friendly and powerful states to criminal investigation and if necessary prosecution;
- foster an atmosphere in which the criminal prosecutions conducted by the ICC are watched critically. The ICC has outgrown its infancy and deserves to be monitored critically and seriously by the States Parties to the Rome Statute.

III.3 The situation in the Middle East

In many countries in the Middle East, human rights have long been trampled underfoot. The AIV cites Iraq, Iran and Yemen as examples here, but it might just as well have chosen Lebanon, Saudi Arabia and Syria. Many of these countries are absolute monarchies or 'presidential republics', with parliaments – where they exist – that function poorly, if at all. Much the same applies to the five countries of the Maghreb region, and across many countries in the eastern part of the Middle East. In many of these countries, a whole range of human rights are routinely violated, and economic prosperity sometimes obscures the lack of respect for civil and political rights and the absence of corresponding independent institutions based on the rule of law. Qatar appears to be a case in point.

International organisations such as the UN and the EU, human rights organisations such as Human Rights Watch and Amnesty International, and numerous other NGOs are constantly reporting on human rights violations in the region. The question arises of when the international community – in whatever composition, whether the UN as a whole, individual states, or regional organisations such as the EU or ASEAN – will decide that things have gone far enough. How far can governments go before human rights violations are met with serious action, whatever mild or severe form this may take? By putting the question in this way, the AIV does not wish to suggest that there is always an easy way forwards, with human rights as the sole lodestar. The region (however narrowly or widely defined) faces a number of security problems and has immensely economic potential. Consequently, one-sided support for human rights, whether supplemented or not by severe sanctions – such as breaking economic ties – in response to constant violations, is often neither a realistic option nor necessarily desirable. Nonetheless, the international community, individual states and regional organisations are compelled to constantly ask themselves a number of awkward questions: do we know enough about

what is going on in the Middle East? Do we know which reform-minded leaders are ready to step onto the stage, and how they can be supported without actually jeopardising their position? Do we do enough to help human rights defenders – that is, those who often place their lives on the line to try to change the system – to do their work and to protect them? Recent events in Tunisia and Egypt demonstrated clearly how cautiously foreign pressure must sometimes be stepped up to avoid creating the impression that the regime change is part of a Western agenda.

In the view of the AIV, all this revolves first and foremost around the recognition of the right of peoples to self-determination – one of the collective human rights identified by the International Court of Justice in its advisory opinion on Israel's wall by 14 votes to 1 as an *erga omnes* right – and around providing support for those forces that seek to establish a constitutional state based on the rule of law with equal rights for all, while refraining from excessive and illegitimate – or indeed illegal – interference with states' internal affairs. Since the 1993 World Conference on Human Rights, it has been widely accepted that the promotion and protection of human rights are 'a legitimate concern of the international community',[18] which implies that there are numerous opportunities to stand up for human rights, based on the concepts of universality and the universalisation of human rights as set down in the AIV's advisory report on this theme issued in 2008, and largely endorsed by the government.[19]

In the parliamentary debate on the budget, the discussion of the Middle East revolved largely around the situation in Israel and the Palestinian Territories. In response to numerous questions on this issue from the House, the government stated that the Netherlands, 'as announced in the coalition agreement, will invest more in its relationship with the State of Israel, and continues to support a comprehensive peace settlement between Israel and the Palestinians'. In this connection, the foreign minister added that 'there can be no doubt that the government's objective for the Middle East peace process is a two-state solution based on the pre-1967 borders'. This objective is 'unshakable', according to the government, which added that priority will be given to 'a balanced effort to achieve a peaceful and constructive negotiation process' including 'the recognition of Israel' and 'secure borders for Israel'. The government also emphasised that the settlements are illegal and constitute 'an obstacle in the quest for peace', that it is 'disappointing that the Israelis did not renew the moratorium on settlement building' and that it is not 'in Israel's interest to reject a moratorium'. Regarding the Netherlands' special ties with Israel, the government added that these can be viewed in two ways, 'namely in instrumental terms or on grounds of principle'. 'Instrumental' stands for 'the opportunities that can be expanded by a staunch cooperative relationship with Israel', which makes it easier to 'call upon Israel to honour its obligations' and 'foster the communication of difficult messages'. The phrase 'on grounds of principle' stands for 'the importance of resisting the tendencies to drive the State of Israel into a corner and even to delegitimise it' and to 'Israel-bashing', although the government added that opposing Israel-bashing should not imply opposing criticism of Israel. In response to a question, the foreign minister defined 'Israel-bashing' as 'the inordinate number of resolutions in the United Nations directed against Israel', the

18 A/CONF.157/23, 12 July 1993, Vienna Declaration and Programme of Action' para. 4.

19 See AIV, 'Universality of Human Rights: Principles, Practice and Prospects', advisory report no. 63, The Hague, November 2008. For the Government's response (of 24 March 2009): See website AIV <http://www.AIV-advice.nl>, report no. 63.

‘frequently inflammatory language in which these resolutions are couched’, and the fact that one hears nothing of ‘problems in other parts of the world, where the conflicts are in some cases just as fierce’.

Members of parliament also asked about bilateral and multilateral programmes related to the conflict between Israel and the Palestinians. In response, the government referred to several programmes that are also significant from a human rights perspective: ‘The Netherlands’ development cooperation programme in the Palestinian Territories is geared towards economic reconstruction, good governance (including human rights) and humanitarian aid. With this programme, the Netherlands seeks to promote . . . the creation of a viable, democratic and independent Palestinian State, which can coexist with Israel in peace and security.’

With regard to human rights violations committed during the exceedingly long transitional period leading to the full implementation of the two-state solution, the AIV believes that there are two key questions: First, how should these be tackled without prejudicing prospects of an enduring peace? Second, what action should be taken against human rights violations if one or both parties and/or their allies maintain that too much criticism jeopardises that enduring solution? Questions of this kind place the problem at the heart of the dilemmas that were also central to the AIV’s advisory report on transitional justice. The AIV shares the government’s premises with regard to the peace process in the Middle East, as articulated in the House of Representatives and widely endorsed there, but also urges it to assess human rights violations objectively on the basis of existing international law. The ‘even-handedness’ advocated by the government is in accordance with its relevant obligations under international law, and is also important because Dutch society too is of two (or more) minds regarding the peace process in the Middle East. It would also be unfortunate if the debate on the future of the peace process were to be sidetracked by real or imaginary bias on the part of the government. The debate on the Middle East already casts a shadow over numerous other debates. In this regard, the AIV trusts that the government will wherever necessary continue to take active advantage of both its friendly relations with Israel and its close involvement in Palestinian efforts to survive in order to effectively bring its final objective a step closer during its period in office.

The AIV would make the following recommendations:

- in relation to the Middle East in general, that the government contribute actively, through the EU and using all the economic and rule of law resources at its disposal along the lines described in this report, to the construction or reconstruction of the countries that are currently in the throes of revolution or in which the transition later appears to be stagnating;
- in relation to the Israeli-Palestinian conflict, where the parties involved have failed to investigate, or to investigate sufficiently, their own acts of violence and possible human rights violations, that the government insist on an international fact-finding mission and if necessary help prepare a criminal investigation. Especially where the Middle East is concerned, where a conflict is dragging on that makes itself felt throughout the world, it is crucial that Western countries should demonstrate that they do not apply double standards;
- given the lack of visible results of the investigations conducted by the parties to the conflict into the violations committed during Operation Cast Lead in the Gaza Strip, that the government exert itself, together with its EU partners and at the UN, to ensure follow-up to the Goldstone Report that does justice to the position that action

should be taken at international level if it becomes clear that the parties concerned have taken too little action at national level (complementarity). If this is the case, it would be appropriate to urge one or both parties, once again, to report in detail on the internal action that has been taken;

- that the government do more than at present to promote the development of the rule of law under the Palestinian Authority (PA). The Netherlands provides the PA with economic support and is helping to build its security system, but its efforts in relation to the judiciary and civil society seem to be lagging behind. Only as democratic states do the two parties to the conflict have a chance in the long term to coexist peacefully;
- that the government continue to give unconditional support to national and international civil society organisations that actively seek to achieve a peaceful solution to the impasse between Israel and the Palestinians, and to human rights defenders on both sides. International law should be the basis for action on all these points.

IV Civil society and the promotion and observance of human rights

The role of civil society in the promotion and observance of human rights was raised in numerous ways and from numerous vantage points in the debate on the budget. This applied both to human rights in the narrow sense and to human rights in relation to other policy areas mentioned above. In each case, the exchanges involved points of principle as well as practical action. The latter includes – to repeat some of the examples invoked in the government's responses – helping NGOs build the capacity of local women's organisations in developing countries, helping promote election coverage by independent media, supporting current and former political prisoners and their families, and reporting abuses and corruption. The examples are sufficiently well known and could easily be multiplied. As for the value in principle of action by civil society organisations, the government observed that their added value 'was absolutely beyond dispute' and that they are 'frequently far [better able] than government bodies to reach certain vulnerable groups in society' and through their roots in societies to do 'what a government cannot do'. In the AIV's view, these points cannot be emphasised strongly enough.

The government's emphasis on civil society organisations has a bearing – both in principle and in a purely practical sense – on the responsibility of individuals and their organisations, and, conversely, on the tasks of the state. If there is one area in which the role of the state has many different facets, it is that of human rights. The state must not only refrain from violations but is also indispensable to ensuring human rights, sometimes directly in the form of positive obligations and sometimes in a purely facilitating role. Thus, it is customary in the international arena to divide up the human rights responsibilities of states into 'layers of responsibilities': the 'obligations to respect, protect and fulfil human rights' that have become common currency. The AIV is broaching the theme of the state's role here because it plays a fairly crucial role in many of the current policy debates, and because the AIV believes that there are certain risks inherent to simply extending to the global stage views that may be applicable to the Netherlands.

Here too the point is to develop benchmarks that must be met to make human rights a responsible Dutch 'export product' in foreign policy. The question then arises of how a country such as the Netherlands, on the basis of the government's desire to reduce the role of the state, can help ensure that countries with which it cooperates are still encouraged to live up to their responsibilities in the realm of human rights. This advisory report is not the place for a theoretical discourse on this theme. The relationship between states and non-state actors is however highly topical in numerous areas, for instance in the trend towards having certain state tasks performed by other bodies, such as NGOs or commercial enterprises. The AIV believes that the primary emphasis should be on ensuring that state responsibilities defined under international law should not be privatised, which would lead to states' evading the consequences of the rules for state responsibility if the 'sub-contractor' is found to have violated international law. In its recent advisory report 'Combating Piracy at Sea: A Reassessment of Public and Private Responsibilities', the AIV dwelt at some length on this layered responsibility, including an assessment of practical problems and prevailing principles and rules under international law.

The AIV would recommend that the government:

- continue its cooperation with and support for NGOs, while recognising that many countries still lack a strong civil society. Such a civil society is crucial to the creation of bottom-up democracy and to ensuring that important, internationally recognised concepts, especially in the realm of human rights, can take root. The AIV would add that supporting NGOs will sometimes, if not often, mean providing less support to the governments with which they are at loggerheads, although in some circumstances it is possible for the two lines of action to coexist;
- continue to throw its weight behind programmes intended to build expertise in the field of human rights among occupational groups who are more frequently confronted with such issues, such as lawyers and doctors;
- urge the importance of human rights education, both in the Netherlands and elsewhere. Its efforts in this respect could be based on the World Programme on Human Rights Education and the Council of Europe's Charter on Education for Democratic Citizenship and Human Rights. Where the Netherlands is concerned, the national action plan for human rights education, which was promised to the UN in 2008, has yet to be drafted. In line with the second phase of the World Programme, the AIV advises the government to prioritise education for public servants and members of parliament.

V Policy coherence

As noted above, many of the various policy themes are interrelated, and the government plans to try harder than in the past to adopt an integrated approach. All this is particularly relevant in the field of human rights. It should be noted that former Minister of Foreign Affairs Maxime Verhagen – now involved as Minister of Economic Affairs, Agriculture and Innovation from a different angle in shaping a coherent human rights policy – stated at a meeting with the AIV's Human Rights Committee on 10 October 2009 that further recommendations on policy coherence would be welcome (in his words, 'formally unsolicited but not unwanted').

The AIV would note that a number of ministries are already involved in human rights policy in different ways. For example, the Ministry of Security and Justice is partly responsible for shaping policy on transitional justice, for enabling the international criminal courts to function and for tackling human trafficking. The Ministry of Social Affairs and Employment is responsible for ensuring compliance with the ILO human rights conventions, the Ministry of Economic Affairs, Agriculture and Innovation for corporate social responsibility and its human rights aspects and implications, and the Ministry of the Interior and Kingdom Relations for the development of the National Institute on Human Rights. The Minister for Immigration and Asylum Policy is responsible for the treatment of migrants and asylum seekers in accordance with internationally and regionally recognised human rights norms, and the Ministry of Defence for the integration of human rights perspectives and norms into UN and other peace operations. The Ministry of Defence, the Ministry of Security and Justice and the Ministry of the Interior and Kingdom Relations also frequently contribute to developing the security sector in these operations ('Security Sector Reform'). All this can also be observed, *mutatis mutandis* and in line with the steady advance of the humanisation of the international legal order,[20] at the four other ministries: the Ministry of General Affairs (by definition in numerous areas, since it is responsible for general government policy), the Ministry of Finance (for the impact of human rights on the policies, and their practical implementation, of the IMF, the World Bank, and other international financial institutions), the Ministry of Education, Culture and Science (*inter alia* for the universally recognised right to education and a range of other sociocultural rights, and, as the drafting and coordinating ministry with overall responsibility for gender equality), and finally the Ministry of Health, Welfare and Sport (for instance for the universally recognised right to proper health care, including access to such care).

In addition, virtually all the ministries are involved in the periodic reports to human rights organisations and the UN and Council of Europe monitoring bodies. All this raises the question, once again, of policy coherence and its advantages and practical limits. For the present, the AIV wishes simply to note the importance of continuing to pursue a coherent foreign policy, partly to prevent the government from finding itself tossed back and forth between a multiplicity of international developments, actors and constant changes of perspective, with different line ministries transmitting conflicting messages in different places. To quote from the WRR report on the desirable course to be followed

20 For recent structural trends in numerous areas of international law, see the *NJB*'s special issue on the theme of '65 years of global law' ('65 jaar wereldrecht': January 2010, Janneke Gerards and Nico Schrijver eds.).

in foreign policy, written under Mr Knapen's leadership, which the government repeatedly cited with approval during the debate in parliament:

> Can one still speak of . . . a Dutch foreign policy, when Dutch ministries and municipalities pursue autonomous foreign policies of their own, when the Netherlands' choices and actions outside its territory depend so heavily on the international structures in which it is embedded, when the global arena in which the Netherlands acts is populated by ever more state and non-state actors, and when the Netherlands is compelled to defend itself against problems and threats that go far beyond our national frontiers?[21]

Another section of this report refers to a decline in the function of the Ministry of Foreign Affairs, since 'most other ministries [pursue] their own foreign policy, sometimes in harmony with the traditional Ministry of Foreign Affairs, but sometimes without consulting it at all'.[22]

This brings the AIV to the most recent policy document on the Homogeneous Budget for International Cooperation (HGIS), which was launched in 1997 precisely to promote cooperation and harmonisation of the different ministries' international activities. The HGIS policy document for 2011 includes the following themes:[23] 'Strengthening the international legal order and respect for human rights', 'Promoting security and stability, effective humanitarian assistance and good governance', 'Increasing wealth and reducing poverty', 'Promoting human and social development' and 'Protecting and improving the environment'. The theme 'Strengthening the international legal order and respect for human rights' is accompanied by the following explanatory note:

> A strong international legal order is in the Netherlands' interests. Our prosperity is largely dependent on other countries. Our interests are therefore directly linked to the scope for sound and predictable business practices. That is one reason why we exert ourselves to promote respect for human rights worldwide: not only out of moral conviction, but also because consistent respect for human rights ultimately provides the best guarantee for a stable world. Promoting the international legal order is – uniquely – enshrined in the Dutch Constitution. We take our responsibility seriously. The Netherlands is an active and valued country in international forums.

This quotation brings together many things that have already been discussed in this advisory report, but the last sentence should not be overlooked. A country may secure appreciation from various sources: from other member states, from states with which the Netherlands does or does not have friendly ties, from NGOs (as informal fellow 'owners' of international forums) or from commercial enterprises (with the same rationale). What is more, appreciation can easily turn into its opposite, for instance if countries that are urged by the government to ratify human rights conventions retort that the Netherlands is itself trying to avoid applying certain conventions and directives, or

21 WRR, *Aan het buitenland gehecht: Over verankering en strategie van Nederlands buitenlandbeleid (*'Attached to the world: on the anchoring and strategy of Dutch foreign policy') (Amsterdam: Amsterdam University Press, 2010), pp. 30-31.

22 Ibid., p. 34.

23 Parliamentary Papers 2010-2011, 32503, no. 2, September 2010.

that it even refuses to discuss accession to a specific human rights convention (such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families mentioned above).

It is also fair to ask how well HGIS works. Appearances strongly suggest that the agreements about cooperation and harmonisation are more solid on paper than in reality. The WRR concludes, under the heading 'HGIS as an instrument', that HGIS is a 'budgetary concept' and 'a budgetary instrument with a high level of abstraction' and that the core objectives of foreign policy are 'so broad that everything will always fit somewhere'. The WRR also states that the 'formal, coordinating function of the Minister of Foreign Affairs within HGIS has hardly any significance in practice, as a result of the principle of ministerial equality' and that 'every ministry retains responsibility for its own expenditure and activities, including in communications with parliament', with the result that 'in the worst case, ministries get in each other's way, and in the best case, they do not trouble each other'.[24] The AIV endorses this damning description, while acknowledging that it could undoubtedly be qualified in various ways. It also agrees with the WRR that 'a clear and orderly classification can be . . . a useful instrument for translating strategic choices and priorities into budgets and action plans and for pursuing policy on that basis', and with the WRR's ensuing proposal of replacing 'vertical, ministerial budgets' with 'government-wide, horizontal decision-making', so that 'if strategic choices are outlined instead of details linked to specific ministries', the parliamentary debate on the Speech from the Throne could really be about 'the Netherlands in the world'.[25]

From a human rights perspective, the AIV would recommend that in the realm of policy coherence, the government:

- design a strong, standardised mechanism with overriding authority to improve the coordination of ministries' responses to critical comments by international monitoring bodies regarding elements of the Netherlands' human rights policy, examining them in the light of the government's general human rights policy in the wider sense. Responding effectively to criticism could also set an example to other countries and would give the Netherlands' words more weight in global contexts, both bilateral and multilateral;
- 'toe the same line' to the outside world as much as possible. A recent case that could serve as an example here was the government's response to questions in parliament about child labour in Turkish hazelnut harvesting, in which the Minister for Agriculture & Foreign Trade and the Minister of Foreign Affairs jointly discussed at length the international legal basis of Dutch policy on child labour;[26]
- develop a report, modelled on the annual report to the House of Representatives on the judgments of the European Court of Human Rights and their implications for the Netherlands, on the judgments of the Court of Justice of the European Union involving the Charter of Fundamental Rights, the ECHR or fundamental principles in the areas of asylum and migration;

24 *Aan het buitenland gehecht*, op.cit., pp. 106-107.

25 Ibid, p. 107.

26 'Beantwoording vragen kinderarbeid bij hazelnootpluk in Turkije' ('Answers to questions on child labour in Turkish hazelnut harvesting'), 14 December 2010.

- involve both Houses of the States-General as extensively and thoroughly as possible in any international negotiations on human rights, and where possible inform them as early as possible about such negotiations;
- make haste after the recent debate about it with the House of Representatives to establish a financially and in other respects independent human rights institute, in fulfilment of the Paris Principles (1991; adopted by the UN in 1992/3).[27]

27 For a recent discussion of this, see Lex van Almelo, 'College voor de rechten van de mens: Een geweten voor de overheid', *Mr.*, no. 1 (2011), pp. 14-21.

VI Final remarks

A number of policy recommendations have been set out above. Since they are included at the end of each block of text, in a distinct layout, the AIV considers it unnecessary to repeat them here. The AIV would, however, like to reflect on a number of themes that were mentioned only indirectly in the Parliamentary Papers consulted, and that are nonetheless key to a proper appreciation of the AIV's intentions and train of thought.

- The AIV was struck by the fact that during the parliamentary debates, the government frequently described human rights as 'moral obligations'. The AIV would point out that many of these obligations are laid down in legally binding international instruments or even peremptory law. In the AIV's view, it would be fitting for the government, given that it has on more than one occasion professed its staunch support for the international legal order, if it were to conduct debates both in national and international arenas on the basis of the accumulated body of international law and the related arguments based on law. To put it more strongly, promoting international law seems to be such an intrinsic characteristic of the Netherlands, that the government is, as it were, disavowing the very nature of our country if it does not conduct debates in this manner – though admittedly, arguments from international law are not at all times and in all places the last or only answer.[28]
- The connection between human rights and other policy areas is essential, as the government has argued strongly and the AIV has fully agreed. In the Netherlands' first major human rights policy document, published in 1979, human rights were described as 'an essential element' of Dutch foreign policy. In its policy conclusions, however, it adds that the government will exert itself to promote human rights 'without inflicting unacceptable damage on other values and interests that it is obliged to defend'.[29] So although this has a familiar ring to it in the light of recent parliamentary debates, there is nothing new about it. Similar views inspired previous governments to speak of the 'decompartmentalisation' of foreign policy, an idea, it may be recalled, that led among other things to the formation of the AIV. The many years of neglect of the role that the economy might play in promoting human rights can be explained in part by the East-West conflict, but also by the habit of thinking too often in terms of sectors or policy areas that at most touched tangentially. Something similar appears to apply to the present Dutch government, as discussed in this advisory report under the heading of 'Policy coherence'. In this context it should be noted that many who are active in the international economic and financial world still seldom think of protecting human rights in their day-to-day activities, nor are they keen on cooperating with human rights specialists, whom they view as moralistic and lacking in pragmatism. On that level, there is a great deal to be gained on many sides.

28 See also Willem van Genugten and Nicola Jägers, 'Land veroveren gaat niet vanzelf: over de permanente en inherente spanning tussen internationaal recht en (internationale) politiek', ('Ground is not gained so easily: on the permanent and inherent tension between international law and international politics'); forthcoming in the March issue of *Nederlands Juristenblad*; A. van Staden, *Between the Rule of Power and the Power of Rule: In Search of an Effective World Order* (Leiden/Boston: Martinus Nijhoff Publishers, 2007).

29 'De rechten van de mens in het buitenlands beleid' ('Human Rights in Foreign Policy'), Parliamentary Papers 1978-1979, 15571, nos. 1-2, pp. 6, 100.

- In formulating objectives for the Dutch government's human rights policy, the AIV might have chosen to take the 1979 policy document or later policy documents, such as the most recent one from 2007 ('Human Dignity for All'), as its fixed frame of reference. It decided against doing so, because times and political views change and should change. For instance, the 1979 document dwells at length on the subject of human rights and East-West relations, and although it does mention the role of NGOs it emphasises ways of protecting them against attacks by governments, while today these organisations play a far greater role, including – and especially – in efforts to ensure global observance of human rights. Furthermore, each new government has the right to set new priorities. Nonetheless, what this advisory report seeks to underscore is the importance of maintaining the core message of human rights policy documents as a constant factor in Dutch policy. Perusal of recent Parliamentary Papers suggests that on paper there may well be little change planned in the main contours of Dutch foreign policy in the area of human rights. The essential point is that in specific situations, human rights – in the narrow sense or in interaction with other policy areas – should be accorded at least as much importance as other aims, even if it is inconvenient in the short term.
- Finally, one's effectiveness in the outside world will be boosted if one's own actions can withstand scrutiny reasonably well: 'Practise what you preach.' This principle has been invoked briefly a number of times in the House of Representatives and in this advisory report, and was explicitly endorsed by the government during the debate on the budget. This is a principle that no one would spontaneously dispute. The question is how far it extends and when it is relevant. For example, the government's plans to review conventions and directives in the realm of asylum and migration prompt – objectively – the question of how this may affect the Netherlands' international credibility. This question cannot be answered as things stand, and the answer largely depends in any case on the perspective adopted. Even so, the AIV would advise the government, in shaping its domestic policies on asylum and migration – in all their diverse aspects, some of which potentially impinge on fundamental rights while others focus on improving integration and hence on promoting the interests of asylum seekers and migrants – to keep a sharp eye on how these policies affect the policy objective, to which the government has also expressed its commitment, of promoting the international legal order. Although these two lines of action may be compatible in a formal, legal sense, the AIV believes that the plans announced by the government in the sphere of asylum and migration will seriously impact on – and challenge – the external effectiveness and credibility of the government's human rights policy, and from this point of view deserve to be given continuous and serious attention.

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