

ADVISORY LETTER

FULL SPEED AHEAD

RESPONSE BY THE ADVISORY COUNCIL ON
INTERNATIONAL AFFAIRS

TO THE POLICY LETTER 'RESPECT AND JUSTICE FOR ALL'

No. 24, September 2013

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Foreword

In June 2013, the Minister of Foreign Affairs, in conjunction with the Minister for Foreign Trade and Development Cooperation, submitted a policy letter entitled 'Respect and Justice for All' to the House of Representatives. The AIV felt it should, in response, issue an advisory letter at its own initiative, in line with its previous practice.

The advisory letter was prepared by the AIV's Human Rights Committee, comprising: Professor W.J.M. van Genugten (chair), Ms H.M. Verrijn Stuart (vice-chair), Professor K.C.J.M. Arts, Professor M.S. Berger, Ms K.M. Buitenweg, Ms H.C.J. van den Burg, Ms G. Crijns, Professor E.J. Dommering, R. Herrmann, Professor E.M.H. Hirsch Ballin, T.P. Hofstee, Professor M.T. Kamminga, Professor E.J. Koops, Professor R.A. Lawson and Ms W.M.E. Thomassen. The executive secretary was J. Smallenbroek.

The AIV adopted this advisory letter on 6 September 2013.

Introduction

The AIV read the policy letter with a high regard both for the principles on which it is based and for the continuing quest for better ways and partnerships by which to promote respect for human rights all over the world. The AIV sees the words ‘[h]uman rights are the cornerstone of our foreign policy’ (section 1.1) as characteristic of the policy letter. These words place it in a tradition that began in 1979 with the policy document ‘Human Rights in Foreign Policy’ and has been reflected and developed in subsequent policy documents and letters on Dutch human rights policy. It is true that the 1979 policy document referred to promoting respect for human rights as an essential element of foreign policy rather than its cornerstone, but the spirit is the same. The government makes clear that its choice of words was no accident, even if that were possible, by saying for example that human rights are ‘the *cornerstone* of human dignity, freedom and development’ and constitute ‘the *basis* for open and free societies all over the world’ (summary, AIV’s italics in both cases). In the opinion of the AIV, the quotation from Max van der Stoep, who was Minister of Foreign Affairs many years before Frans Timmermans, is also apt, with its reference to the impossibility of divorcing efforts to promote national interests from ‘wider objectives, such as [...] the protection of human rights’ (section 1.2). The quotation ranks policy objectives and would definitely seem to have been used with that aim in mind.

At the same time the AIV does not regard the policy letter as evidence of single-issue thinking; on the contrary. By forging numerous links with other aspects of foreign policy, the letter testifies, in the AIV’s opinion, to a realistic view of international relations and international developments, even though many of the latter are touched on only briefly. The AIV regards this as understandable and correct: the policy letter is relatively short and does not claim to offer a solution to all situations – foreseen or otherwise – that may arise. It thus allows maximum scope to respond to new developments in thinking on human rights in large parts of the world and to create shifting coalitions to promote respect for human rights worldwide. In this endeavour the letter serves as a compass, not as the proverbial wagging finger. It also sets clear priorities, which the AIV also sees as positive. Moreover, as far as the AIV can estimate, the intentions it expresses appear realistic, despite the spending cuts, although the cutbacks will inevitably put pressure on this policy theme too.

The emphasis on credibility is a particularly prominent point. In the AIV’s view, the letter shows convincingly that internal credibility is a precondition for credible, effective external action (i.e. ‘practise what you preach’, although ‘practise what you stand for’ might be a more appropriate way to refer to championing human rights than ‘preaching’). In recent years this point has been raised more and more frequently in the government’s pronouncements about human rights and is – rightly – discussed separately in the letter. It is also reflected in the government’s intention to ‘assess the merits of recommendations or criticism of the Netherlands from international organisations and supervisory bodies’ and where necessary to make changes (section 2.4), and to help strengthen the rule of law in the member states of the European Union. Later this year, the AIV will issue a separate advisory report on this latter task, in response to a request from the government. The forthcoming ‘State of Human Rights’ report and associated national plan of action on human rights will also offer the government excellent opportunities to develop the principle of ‘practise what you preach’, for example in relation to ratifying human rights instruments (of which more later). The report and plan can also highlight the fields in which further action is required, particularly the areas in

which the Netherlands has received comments from international supervisory bodies in the past.

To guarantee respect for human rights in the real world of society and governance it is also essential for both members of the public and public officials to be aware of the value and importance of fundamental rights. To that end, the AIV believes that human rights education should be even more of a priority than it is already, in training for officials and in basic education, both in the Netherlands and elsewhere. Human rights education can also help to combat intolerance and discrimination, both of which surface time and again.

The policy letter states that the Dutch human rights award is changing in character and will focus on highlighting and promoting creative and innovative ideas on human rights. The AIV understands the government's wish to reconsider the nature of the award now that it has been presented five times. The government's answers to questions in the House of Representatives about the policy letter show that in future the award will still be given to human rights defenders. The AIV believes this is extremely important, since the boost given by a state award to people with the courage to run great personal risks by championing human rights cannot be overstated. The award can offer them protection and help them develop their activities further. In addition, in this form the award helps to improve observance of human rights. Moreover, continuing to present the award to human rights defenders will ensure that it does not become diluted or diffuse and hence in a few years unrecognisable.

One last preliminary remark. The policy letter states that there is 'a strong interministerial human rights consultative body', something which most likely distinguishes the Netherlands from a great many other countries. However, this wording overstates people's willingness to reach high-level interministerial consensus. In practice, consensus is entirely or partly unattainable in many areas, especially where human rights touch on financial or economic interests. Consultation and coordination are crucial, but in the end it is the outcome that matters. Embedding human rights requires constant vigilance and coordination, even within the Ministry of Foreign Affairs itself: different departments are concerned with human rights policy in the context of the UN, the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE) and the EU, while others focus attention on particular topics or countries. This calls for consistency and coherence and, indeed, for effective human rights consultation within the ministry and at interministerial level in order to raise the profile of human rights across the board. This is an ongoing task, and there is no shame in the fact that serious differences of opinion arise from time to time. That is as it should be in a mature democracy and it shows that human rights is an issue of substance.

In what follows the AIV will touch on five issues, proceeding from the same basis as the government and looking towards further action, which may help guarantee the external credibility of Dutch human rights policy.

Ratification of instruments

The introduction referred to the importance of internal credibility as a precondition for effective external action. In that light, the wording of the passage in section 2.4 on accession to human rights instruments is – surprisingly – remarkably cautious. If the Netherlands is to have a credible human rights policy it must commit itself not only to the principal human rights instruments but also to the associated protocols providing

for the right of individual petition. The AIV is pleased to note the announcement that the Netherlands is to ratify the UN Convention on the Rights of Persons with Disabilities, but there is no mention of the Convention's Optional Protocol on the right of individuals to submit communications. Although that protocol has been ratified by a large majority of EU member states, it has not yet even been signed by the Netherlands. The policy letter also states that the government is investigating the possible consequences of ratifying the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Third Optional Protocol to the UN Convention on the Rights of the Child, both of which concern communications procedures. The Netherlands signed the Optional Protocol to the ICESCR as long ago as 2009, thus arousing international expectations that ratification would follow shortly. The AIV believes that the Netherlands must avoid any appearance of reluctance to accept individual communication procedures, since that could give the impression that while the government wants to vaunt the fact that this country is party to human rights instruments, it would rather individuals could not enforce compliance through international bodies when domestic remedies fail. What is more, this sends the wrong signal to countries where the inability of individuals to do so is one aspect of many problems in the field of human rights.

Freedom of expression and internet freedom

The policy letter states that the Netherlands is unflagging in its efforts to promote freedom of expression, both online and offline (section 3.5). To the AIV, freedom of expression online means free access to and free public communication over the internet worldwide. Some countries restrict these freedoms or plan to do so. Accordingly, the Netherlands is right to devote unremitting efforts to this issue. Even now, the government could consider more explicit ways of promoting a global guaranteed human right of free access to crucial communication infrastructures and services like the internet. For the rest, the AIV agrees that communication freedoms and cyber security should be addressed together. This issue will be discussed at length in an AIV advisory report on internet freedom, to be issued at the beginning of 2014.

For the time being the AIV wishes to point out that the policy letter is wrong to omit the protection of the right to respect for electronic correspondence, i.e. confidential communication over the internet. The large-scale interception and monitoring activities of the US National Security Agency (NSA) and the security services in the EU that work with it (some more closely than others) have rightly prompted international consternation and debate. The AIV believes that the free flow of confidential communication via email, web applications or telecoms should be guaranteed worldwide in accordance with standards similar to those that apply in Europe under the European Convention on Human Rights (ECHR). Article 8, paragraph 2 of the ECHR provides that there shall be no interference by a public authority with the exercise of the right to respect for correspondence except such as is in accordance with the law and is necessary in a democratic society, for instance in the interests of national security or public safety.

Freedom of religion and belief

The AIV would observe that the impression has arisen in some quarters that freedom of religion and belief is no longer a major theme for the government. On reading the policy letter, it is clear that this impression is incorrect. Nevertheless, bilateral efforts are being narrowed down to too few countries. The AIV would advise the government – with a view to preventing civil conflicts – to put freedom of religion back on the agenda, in particular in the interests of peaceful and tolerant relations between different religions

groups and of personal freedom to make religious choices that diverge from the dominant belief system.

Human rights and development cooperation

The section on 'Human rights and development' states that '[i]t is difficult to protect economic, social and cultural rights if development lags behind' and that 'the advancement of civil and political rights undoubtedly makes a contribution to development' (section 3.7). The discussion of this subject touches on various factors, such as the connection between failing economies and development, while the list of action points refers to the government's four priorities in the field of human rights and development cooperation: food security, water, sexual and reproductive health and rights, and security and the rule of law. The AIV agrees with the government's chosen course, including the stress on a rights-based approach to development, but would argue in favour of certain changes in emphasis. For example, the consequences of 'poor infrastructure' are mentioned almost in passing, whereas its importance cannot be stressed enough. Many human rights violations could be prevented by legal and semi-legal institutions and government bodies that met such basic criteria as judicial independence and the absence of clientelism and corruption. It should also be borne in mind here that the civil right to robust, independent courts and such government bodies as an ombudsman and a court of audit requires substantial investment. The same is true of most economic, social and cultural rights, like the right to adequate health care – for example for the most vulnerable groups in society. Something similar applies to large-scale information and awareness-raising campaigns on human rights. In the AIV's view, these matters should all be given priority, because such campaigns, as the government rightly observes, are the foundation for many other things. Such priorities can also be a focus of the new policy emphasising the importance of economic growth and trade promotion as instruments of poverty reduction and development, as set out in the policy document 'A World to Gain: a New Agenda for Aid, Trade and Investment' by the Minister for Foreign Trade and Development Cooperation, Lilianne Ploumen. The same is true of other fundamental issues such as the current legal and social position of environmental migrants and tax avoidance by big companies through tax havens. Here, too, there is 'a world to gain'.

One important implication of a number of UN human rights instruments which is not mentioned in the policy letter is that governments are supposed to deploy the maximum available resources, first with a view to achieving development and respect for human rights within their own borders and second, where possible, in the interests of international development as well. In the opinion of many people, this should prompt a thorough review of MDG 8 – a global partnership for development – to set out the rights and obligations of developed and developing countries alike in greater detail and to hold governments more strictly to account at national and international level for their efforts to bring about development. The AIV believes that this too should be a priority for the government, again because it forms the foundation for many other things and failures in this area help enable worrying developments to continue unchecked.

Corporate social responsibility

The government states that 'human rights and corporate enterprise' is still a key theme, arguing that 'companies' supply chains are vulnerable to human rights violations' (section 3.8). The examples are well known, from Bangladesh to the Niger Delta. The government further states that the Netherlands 'promotes the comprehensive dissemination and

implementation of the UN's Guiding Principles on Business and Human Rights, adopted in 2011'. In this regard the government 'especially emphasises the importance of self-regulation by the companies concerned' and indicates what action it has taken and intends to take. These intentions will be reflected in the – delayed – National Action Plan.

The AIV agrees with the approach adopted by the government and looks forward to seeing the specifics in the Action Plan. However, at present one key element appears to be missing: what happens if self-regulation wholly or partly fails and enterprises do not adhere to the Guiding Principles? What happens if companies and industries do not provide the grievance and redress mechanisms (the 'remedy pillar' referred to in the Guiding Principles) that they are supposed to, in cooperation with government authorities or otherwise and coupled with the relevant international law, including the ILO's human rights conventions? The AIV takes the view that effective global legal, semi-legal and non-legal fall-back mechanisms must be put in place if self-regulation does not work. While it is true that developments of this kind are taking place, for example in the field of civil-law remedies at national level, this process is moving slowly and often requires patience and deep pockets on the part of the aggrieved parties. In addition to strengthening and simplifying legal proceedings, more thought could be given to more accessible arbitration options and well organised mediation procedures. Governments need not, of course, arrange all this themselves but they will, as a rule, be required to monitor publicly agreed international standards like those embodied in the Guiding Principles. Accordingly, the AIV agrees that self-regulation should be the starting point, but believes that more far-reaching measures will soon be necessary to ensure an efficient way of holding enterprises to their obligations whenever – despite their good intentions – things go wrong.

Concluding remarks

The AIV appreciates the government's upholding the tradition of conducting regular reviews of human rights policy in the light of changing circumstances and embodying the main outlines of that policy in a policy document or a letter to the House of Representatives. After all, the world is constantly changing, including the way states address human rights in practice and the way they report progress or defend lapses. All this calls for a clear-sighted perspective, with measured flexibility as a guide to practical activities. The AIV fully endorses the approach taken in the policy letter, shares the ambitions expressed in it and hopes that the government can achieve them, in the midst of numerous global tensions and despite the cutbacks that are affecting the Ministry of Foreign Affairs as well as other government departments.

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