Individual as right-holder	State as duty-bearer
(a1) The right-holder may choose to sacrifice his/her right, or to trade it off against other advantages: there is a right to 'autonomy' or to 'self-determination'	(a2) The State is prohibited from imposing on the right-holder a form of paternalism that the right-holder has a right to refuse: this restricts the extent of the State's obligation to protect
(b1) The right-holder has no right to 'autonomy' or to 'self-determination' to invoke against the State; nor does he/she have a right to be protected against his/her choice to waive his/her human rights	(b2) The State may choose to extend its protection to the right-holder, even where this implies opposing the right-holder's choice to waive his/her right; but the State is under no obligation to do so
(c1) The right-holder has a right to be protected by the State, also from the consequences of his/her choices, unless this imposes an unreasonable burden on the State	(c2) The State's obligation to protect extends to situations where individuals waive their rights, although such an obligation to protect should be understood reasonably

the model of the right to property, in that the recognition of an individual's human rights does not entail a correlative recognition of the right of the individual to sell, exchange, or sacrifice the rights they have been granted. On the other hand, certain forms of State paternalism, even when purportedly justified in the name of protecting the human rights of those on whom it is imposed, may constitute an unacceptable restriction to their individual freedom. The 2002 judgment of the European Court of Human Rights in the case of *Pretty* v. *United Kingdom*, presented below (see also chapter 1, section 3), provides a good illustration of the nature of the arguments exchanged at this level of the debate.

Human rights courts have been more explicit when examining claims by the State that the 'free choice' of the individual limits the scope of the obligation to protect imposed on the State. Such claims by the State can be made in one of the three situations distinguished above (although in a slightly different form). They have been generally treated with suspicion: although not dismissed as simply irrelevant – in that sense, human rights bodies do consider that the choices of the individual do matter, and that they may influence the scope of the State's obligation to protect – the conditions which the 'consent' of the individual to the sacrifice of his/her rights must satisfy in order to be taken into consideration have been gradually clarified, to ensure that, to the extent that such consent plays a role in defining the scope of the obligation to protect, it will not be abused. This is illustrated by the important judgment delivered on 13 November 2007 by the Grand Chamber of the European Court of Human Rights in the case of *D.H. and others* v. *Czech Republic* (see further below).

European Court of Human Rights (4th sect.), *Pretty* v. *United Kingdom* (Appl. no. 2346/02), judgment of 29 April 2002:

[The applicant is a 43-year-old woman suffering from motor neurone disease (MND), a progressive neuro-degenerative disease of motor cells within the central nervous system which is associated with progressive muscle weakness affecting the voluntary muscles of the body. No treatment is available. As a result of the progression of the disease, death usually

occurs as a result of weakness of the breathing muscles, in association with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and pneumonia. The life expectancy of Ms Pretty, at the advanced stage of the disease, is very poor. However her intellect and capacity to make decisions are unimpaired. As she is frightened and distressed at the suffering and indignity that she will endure if the disease runs its course, she very strongly wishes to be able to control how and when she dies and thereby be spared that suffering and indignity. However, she is prevented by her disease from ending her life without assistance. It is, however, a crime to assist another to commit suicide (section 2(1) of the Suicide Act 1961). Contacted by her solicitor, the Director of Public Prosecutions (DPP) refused to give an undertaking not to prosecute the applicant's husband should he assist her to commit suicide in accordance with her wishes. Before the Court, the applicant alleges that this results in a violation of a number of rights under the Convention, including Article 2, which guarantees the right to life, Article 3, which prohibits the infliction of inhuman and degrading treatments and punishments, and Article 8, which protects the right to respect for private life.]

[The right to life (Art. 2 of the Convention)]

38. The text of Article 2 expressly regulates the deliberate or intended use of lethal force by State agents. It has been interpreted however as covering not only intentional killing but also the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life (*McCann and others* v. *United Kingdom* [judgment of 27 September 1995, Series A No. 324], §148). The Court has further held that the first sentence of Article 2 §1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B.* v. *United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998–III, p. 1403, §36). This obligation extends beyond a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; it may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (*Osman* v. *United Kingdom* judgment of 28 October 1998, *Reports* 1998–VIII, §115; *Kılıç* v. *Turkey*, No. 22492/93, (Sect. 1) ECHR 2000–III, §§62 and 76). More recently, in the case of *Keenan* v. *United Kingdom*, Article 2 was found to apply to the situation of a mentally ill prisoner who disclosed signs of being a suicide risk (at §91).

39. The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that 'the right to life' guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example, in the context of Article 11 of the Convention, the freedom of association was found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise (see the *Young, James and Webster* v. *United Kingdom* judgment of 13 August 1981, Series A No. 44, §52, and *Sigurður A. Sigurjónsson* v. *Island* judgment of 30 June 1993, Series A No. 264, pp. 15–16, §35). Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without

a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

40. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe ...

41. The applicant has argued that a failure to acknowledge a right to die under the Convention would place those countries which do permit assisted suicide in breach of the Convention. It is not for the Court in this case to attempt to assess whether or not the state of law in any other country fails to protect the right to life. As it recognised in the case of *Keenan*, the measures which may reasonably be taken to protect a prisoner from self-harm will be subject to the restraints imposed by other provisions of the Convention, such as Articles 5 and 8 of the Convention, as well as more general principles of personal autonomy (see §91). Similarly, the extent to which a State permits, or seeks to regulate, the possibility for the infliction of harm on individuals at liberty, by their own or another's hand, may raise conflicting considerations of personal freedom and the public interest that can only be resolved on examination of the concrete circumstances of the case (see, *mutatis mutandis*, *Laskey, Jaggard and Brown* v. *United Kingdom* judgment of 19 February 1997, *Reports* 1997–I). However, even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the Convention, that would not assist the applicant in this case, where the very different proposition – that the United Kingdom would be in breach of its obligations under Article 2 if it did not allow assisted suicide – has not been established.

42. The Court finds that there has been no violation of Article 2 of the Convention.

[The right to respect for private life (Art. 8 of the Convention)]

61. As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (*X. and Y.* v. *Netherlands* judgment of 26 March 1985, Series A No. 91, p. 11, §22). It can sometimes embrace aspects of an individual's physical and social identity (*Mikulić* v. *Croatia*, No. 53176/99 [Sect. 1], judgment of 7 February 2002, §53). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see e.g. the *B.* v. *France* judgment of 25 March 1992, Series A No. 232–C, §63; the *Burghartz* v. *Switzerland* judgment of 22 February 1994, Series A No. 280–B, §24; the *Dudgeon* v. *United Kingdom* judgment of 22 October 1991, Series A No. 45, §41, and the *Laskey, Jaggard and Brown* v. *United Kingdom* judgment of 19 February 1997, *Reports* 1997–1, §36). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz* v. *Switzerland*, Commission's report, *op. cit.*, §47; *Friedl* v. *Austria*, Series A No. 305–B, Commission's report, §45). Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.

62. The Government have argued that the right to private life cannot encapsulate a right to die with assistance, such being a negation of the protection that the Convention was intended to provide. The Court would observe that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically

or morally harmful or dangerous nature for the individual concerned. The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, even where the conduct poses a danger to health, or arguably, where it is of a life-threatening nature, the case law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the scope of Article 8 §1 and requiring justification in terms of the second paragraph (see, for example, concerning involvement in consensual sado-masochistic activities which amounted to assault and wounding, the above-cited *Laskey, Jaggard and Brown* judgment and concerning refusal of medical treatment, No. 10435/83, Commission decision of 10 December 1984, DR 40, p. 251).

63. While it might be pointed out that death was not the intended consequence of the applicants' conduct in the above situations, the Court does not consider that this can be a decisive factor. In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 §1 of the Convention. As recognised in domestic case law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life ...

64. In the present case, though medical treatment is not an issue, the applicant is suffering from the devastating effects of a degenerative disease which will cause her condition to deteriorate further and increase her physical and mental suffering. She wishes to mitigate that suffering by exercising a choice to end her life with the assistance of her husband. As stated by Lord Hope, the way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected ...

65. The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity ...

67. The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 §1 of the Convention. It considers below whether this interference conforms with the requirements of the second paragraph of Article 8.

2. Compliance with Article 8 §2 of the Convention

68. An interference with the exercise of an Article 8 right will not be compatible with Article 8 §2 unless it is 'in accordance with the law', has an aim or aims that is or are legitimate under that paragraph and is 'necessary in a democratic society' for the aforesaid aim or aims (see the *Dudgeon* v. *United Kingdom* judgment of 22 October 1981, Series A No. 45, p. 19, §43).

69. The only issue arising from the arguments of the parties is the necessity of any interference, it being common ground that the restriction on assisted suicide in this case was

imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others.

70 According to the Court's established case law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is 'necessary in a democratic society', the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake.

71. The Court recalls that the margin of appreciation has been found to be narrow as regards interferences in the intimate area of an individual's sexual life (see *Dudgeon* v. *United Kingdom*, *op. cit.*, p. 21, §52; *A.D.T.* v. *United Kingdom* No. 35765/97 (Sect. 3) ECHR 2000–IX, §37). Though the applicant has argued that there must therefore be particularly compelling reasons for the interference in her case, the Court does not find that the matter under consideration in this case can be regarded as of the same nature, or as attracting the same reasoning.

72. The parties' arguments have focussed on the proportionality of the interference as disclosed in the applicant's case. The applicant attacked in particular the blanket nature of the ban on assisted suicide as failing to take into account her situation as a mentally competent adult who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision, and therefore cannot be regarded as vulnerable and requiring protection. This inflexibility means, in her submission, that she will be compelled to endure the consequences of her incurable and distressing illness, at a very high personal cost.

73. The Court would note that although the Government argued that the applicant, as a person who is both contemplating suicide and severely disabled, must be regarded as vulnerable, this assertion is not supported by the evidence before the domestic courts or by the judgments of the House of Lords which, while emphasising that the law in the United Kingdom was there to protect the vulnerable, did not find that the applicant was in that category.

74. Nonetheless, the Court finds, in agreement with the House of Lords and the majority of the Canadian Supreme Court in the *Rodriguez* case, that States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals (see also the above-mentioned *Laskey, Jaggard and Brown* case, §43). The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy. The law in issue in this case, section 2 of the 1961 Act, was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures.

75. The applicant's counsel attempted to persuade the Court that a finding in this case would not create a general precedent or any risk to others. It is true that it is not this Court's role under Article 34 of the Convention to issue opinions in the abstract but to apply the Convention to the

concrete facts of the individual case. However, judgments issued in individual cases establish precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases.

76. The Court does not consider therefore that the blanket nature of the ban on assisted suicide is disproportionate. The Government have stated that flexibility is provided for in individual cases by the fact that consent is needed from the DPP to bring a prosecution and by the fact that a maximum sentence is provided, allowing lesser penalties to be imposed as appropriate. The Select Committee report indicated that between 1981 and 1992 in 22 cases in which 'mercy killing' was an issue, there was only one conviction for murder, with a sentence for life imprisonment, while lesser offences were substituted in the others and most resulted in probation or suspended sentences ... It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.

77. Nor in the circumstances is there anything disproportionate in the refusal of the DPP to give an advance undertaking that no prosecution would be brought against the applicant's husband. Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law. In any event, the seriousness of the act for which immunity was claimed was such that the decision of the DPP to refuse the undertaking sought in the present case cannot be said to be arbitrary or unreasonable.

78. The Court concludes that the interference in this case may be justified as 'necessary in a democratic society' for the protection of the rights of others and, accordingly, that there has been no violation of Article 8 of the Convention.

European Court of Human Rights (GC), *D.H. and others* v. *Czech Republic* (Appl. No. 57325/00), judgment of 13 November 2007:

[The applicants are eighteen Czech nationals of Roma origin who were placed in special schools (*zvláštní školy*) for children with learning difficulties considered unable to follow the ordinary school curriculum. Such placements required, *inter alia*, the consent of the child's legal representative. The following excerpts deal with the issue of parental consent. For a fuller treatment of the case, see chapter 7, section 3.1.]

202. As regards parental consent, the Court notes the Government's submission that this was the decisive factor without which the applicants would not have been placed in special schools. In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify an acceptance of the difference in treatment, even if discriminatory, in other words a waiver of the right not to be discriminated against. However, under the Court's case law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent (*Pfeifer and Plankl* v. *Austria*, judgment of 25 February 1992, Series A No. 227, §§37–38) and without constraint (*Deweer* v. *Belgium*, judgment of 27 February 1980, Series A No. 35, §51).

203. In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism and special schools where the majority of the pupils were Roma.

204. In view of the fundamental importance of the prohibition of racial discrimination (see *Nachova and others* [v. *Bulgaria*, judgment of 16 July 2005], §145; and *Timishev* v. *Russia*, Nos. 55762/00 and 55974/00, §56), the Grand Chamber considers that ... no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest (see, *mutatis mutandis*, *Hermi* v. *Italy* [GC], No. 18114/02, §73).

The position of the Court in *D.H. and others v. Czech Republic* concerning the question of waiver appears to have been heavily influenced by the amicus brief submitted to the Court by the International Federation for Human Rights (FIDH), following the leave to intervene granted by the President of the Court. Referring to *Wilson, National Union of Journalists and others v. United Kingdom,* the brief emphasized that 'the freedom left to the individual to waive a right recognized by the Convention may result, for all the individuals confronted to the same choice, in a specific vulnerability, such that the possibility of waiver should not exonerate the State from the obligations imposed by the Convention'. The FIDH noted:

International Federation for Human Rights, Observations submitted to the European Court of Human Rights in the case of *D.H. and others* v. *Czech Republic* (Appl. No. 57325/00), in accordance with Article 44 para. 2 of the Rules of the Court (12 October 2006) [unofficial translation from the French original]:

In a situation such as that presented to the Court in *Wilson, National Union of Journalists and others* v. *United Kingdom*, it is *the freedom left to workers to negotiate individual employment contracts*, including restrictions to the freedom of association rights consented to against benefits not extended to unionized workers, that led the Court to a finding of violation of Article 11 of the Convention. Thus, it is the fact that non-unionized workers waived their freedom of association rights that resulted in a vulnerability for all the workers employed in the same undertaking. The waiver by one worker of his/her freedom of association [thus affects] all the workers, by the incentives it creates and the resulting pressure exercised on these workers ... In *D.H. and others v. Czech Republic*, the 'freedom' of the parents of the applicants to choose

whether or not to place their children in special schools or to require that they have access to the general educational system, creates a situation in which the choice of each parent depends on the choices made by all the other parents similarly situated: it is perfectly possible ... that all the parents of Roma children prefer an integrated form of education for their children, but that, given their uncertainty about the choice of the other parents in this same situation, they still prefer the 'security' of special educational establishments, which the Roma parents choose by a large majority, to the risk of placing their child in the general educational system, in which he/she could be isolated and harassed.

[The FIDH therefore urged the Court to take into account the context in which the parents of Roma children were asked to consent to their child being placed in special schools. That context, they recalled, is one of historically perpetuated segregation.] In this circumstance, the choice of the parents of Roma children cannot be analyzed as a choice between integrated education or the placement of children in special schools: the choice is, rather, between (a) placing children in schools where [the children will be treated with hostility and risk being harassed] and (b) placing children in special schools where the Roma children form an overwhelming majority, and where they therefore will not be subject to the same kind of prejudice. It would therefore be incorrect to state that the parents of the applicants have opted for the special educational system, rather than for an integrated system: in reality, they have chosen the lesser of two evils, in the absence of a real possibility to benefit from a truly integrated educational system, in which Roma children would be truly welcome, and in which their specific needs would be taken into account.

[The FIDH referred in this respect to the case of *Green et al.* v. *County School Board of New Kent County et al.*, 391 U.S. 430 (1968). In *Green*, the US Supreme Court found the Equality Clause of the Fourteenth Amendment to the United States Constitution to be violated in a situation where a 'freedom-of-choice' plan adopted to implement the desegregation prescribed by *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) failed to produce a truly integrated system, because the choices of parents under this plan were tainted by the legacy of racial segregation. They cited P. Gewirtz, 'Choice in Transition: School Desegregation and the Corrective Ideal', *Columbia Law Review*, 86 (1986), 728 at 749, who provided the following explanation: 'because choices are interdependent, ignorance about the simultaneous choices of others is likely to lead both blacks and whites to choose to remain in their separate schools. If ... most blacks will be reluctant to attend a previously white school unless they are convinced that a significant number of other blacks will also attend, and if most whites will be reluctant to attend a previously black school absent other whites, uncertain information is not outcome-neutral. Rather, we can predict a "replication of the status quo" – a segregated pattern.']

Another remarkable aspect of *D.H. and others* is its reference to the 1980 judgment adopted by the European Court of Human Rights in the *Deweer* case. Indeed, this judgment acknowledged with a particular clarity the dangers associated with presenting an individual with an alternative, where the benefits associated with one branch so clearly outweigh the benefits associated with the other that the 'freedom to choose' of the right-holder becomes purely formal, and even fictitious. The *Deweer* case also illustrates what might be referred to as an equivalent to the 'unconstitutional conditions' doctrine in international human rights law (for recent important contributions on this issue in US constitutional law, see in particular R. A. Epstein, 'Foreword – Unconstitutional

Conditions, State Power, and the Limits of Consent', *Harvard Law Review*, 102 (1989), 4; K. M. Sullivan, 'Unconstitutional Conditions', *Harvard Law Review*, 102 (1989), 1413; C. R. Sunstein, 'Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)', *Boston University Law Review*, 70 (1990), 593; for earlier but influential contributions, see M. Merrill, 'Unconstitutional Conditions', *University of Pennsylvania Law Review*, 77 (1929), 879; R. L. Hale, 'Unconstitutional Conditions and Constitutional Rights', *Columbia Law Review*, 35 (1935), 321). Even when the State makes offers which individuals are free to accept or to refuse, or provides advantages which could be altogether denied, the State is bound to comply with the requirements of human rights: it may therefore not make the acceptance of such offer or the enjoyment of such advantages conditional upon sacrificing certain human rights. In the jurisprudence of the Human Rights Committee, the cases of *Waldman* and *Gauthier* illustrate this. These cases are presented in chapter 7 concerning discrimination (sections 1.1. (*Waldman*), and 2.1. (*Gauthier*)). In the case law of the European Court of Human Rights, cases concerning employment in the public sector (such as *Dahlab*, presented above in chapter 3, section 3.5.) also provide an illustration of this position. The *Deweer* case also is an instructive example:

European Court of Human Rights, *Deweer* v. *Belgium* (Appl. No. 6903/75), judgment of 27 February 1980:

[The applicant is a retail butcher in Louvain. On 18 September 1974, his shop was the subject of a visit by an official in the Economic Inspectorate General. This official found an infringement of the Ministerial Decree of 9 August 1974 'fixing the selling price to the consumer of beef and pig meat'. In addition to imprisonment of one month to five years and a fine of 3,000 to 30,000,000 BF (section 9 para. 1), offenders were liable under this legislation to various criminal and administrative sanctions (sections 2 par. 5, 3, 7, 9 par. 2–6, 10, 11 and 11 *bis*), including the closure of the offender's business. On 30 September, citing the gravity of the facts, the Louvain procureur du Roi (Attorney General) ordered the provisional closure of the applicant's shop within forty-eight hours from notification of the decision. The closure was to come to an end either on the day after the payment of a sum of 10,000 BF by way of friendly settlement or, at the latest, on the date on which judgment was passed on the offence; Mr Deweer had eight days in which to indicate whether he accepted the offer of settlement. While agreeing to the friendly settlement proposed, Mr Deweer wrote to the procureur du Roi: 'I reserve all my rights to take action against the Belgian State before the civil courts, in particular for the restitution of this sum plus damages ... I have therefore paid the amount of the friendly settlement for the sole purpose of limiting the damage suffered by me; for the prejudice resulting from the closure of my establishment as from today until the eventual hearing of the case before the criminal court might be far in excess of 10,000 BF and the civil court might then draw certain conclusions from the fact I had not mitigated my loss.' However, following the payment of the sum of 10,000 BF, Mr Deweer did not bring any action before the civil courts for restitution of money paid over without cause and for damages; nor did he apply to the Conseil d'État for a declaration of annulment of the Decree of 9 August 1974. As a result of the payment, no criminal proceedings were brought against Mr Deweer, since payment of the fine by way of settlement had barred any such proceedings.

Mr Deweer claims to be the victim of 'the imposition of a fine paid by way of settlement under constraint of provisional closure of his establishment'. The claim is based on Article 6 par. 1 of the Convention, which states that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.']

48. Under Article 6 par. 1, Mr Deweer had the right to a fair trial (see the *Golder* judgment of 21 February 1975, Series A No. 18, p. 18, par. 36) before 'an independent and impartial tribunal established by law', incorporating a 'hearing' followed by 'determination of [the] criminal charge against him' ... Before the trial court, the applicant would therefore have been entitled not only to rely ... on his good faith or the additional costs incurred by a butcher buying on the hoof ... but also to plead that the Decree of 9 August 1974 was contrary to the Constitution or incompatible with Community law ... Mr Deweer would in addition have enjoyed the benefit of the guarantees in paragraphs 2 and 3 of Article 6.

49. ... By paying the 10,000 BF which the Louvain procureur du Roi 'required' by way of settlement ..., Mr Deweer waived his right to have his case dealt with by a tribunal.

In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, *inter alia*, of fines paid by way of composition. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention ...

Nevertheless, in a democratic society too great an importance attaches to the 'right to a court' ... for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (ordre public) of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for particularly careful review ... Absence of constraint is at all events one of the conditions to be satisfied; this much is dictated by an international instrument founded on freedom and the rule of law (see the above-mentioned *Golder* judgment, pp. 16–17, par. 34) ...

50. ... the Commission expressed the opinion that there was constraint in the present case: it considered that the applicant waived the guarantees of Article 6 par. 1 only 'under the threat of [the] serious prejudice' that the closure of his shop would have caused him.

51. (a) The Government's first submission was as follows: the offer of settlement made to Mr Deweer on 30 September 1974 amounted in law to no more than a 'proposal for a friendly settlement' which he could quite well have rejected; 'in accepting the offer and acting upon it on 2 October', the applicant, 'by paying a relatively modest sum, succeeded in avoiding the risk of receiving a sentence which might have been more severe than this fine paid by way of settlement' and 'which might, if appropriate, have been accompanied by a court order for the closure of the establishment' ...

Furthermore, the Government maintained, the Commission's reasoning is inconsistent. Whereas the procedure followed in the circumstances is stated at paragraph 57 of the report to be in breach of the Convention for the reason that it was tainted with constraint, paragraphs 55 and 59 contain the recognition that settlement of criminal cases is legitimate. In a sense, so the argument continued, that kind of settlement 'always takes place under some form of "constraint" and under the "threat" of more or less "serious" prejudice'; thus, criminal proceedings represent, 'for the majority of those' against whom they are taken 'or likely to be taken, something to be

feared' and, in very many instances, 'a sufficiently serious "threat" to encourage [them] ... to forgo' the trial of their case by a court of law.

(b) The Court points out that while the prospect of having to appear in court is certainly liable to prompt a willingness to compromise on the part of many persons 'charged with a criminal offence', the pressure thereby brought to bear is in no way incompatible with the Convention: provided that the requirements of Articles 6 and 7 are observed, the Convention in principle leaves the Contracting States free to designate and prosecute as a criminal offence conduct not constituting the normal exercise of one of the rights it protects ...

Moreover, the applicant was probably scarcely apprehensive about criminal prosecution since it was not unlikely that prosecution would result in an acquittal ... The 'constraint' complained of by the applicant was to be found in another quarter, namely in the closure order of 30 September 1974.

This order was due to come into effect forty-eight hours after notification of the decision of the procureur du Roi and it could have remained in force until the date on which the competent court passed judgment on the offence ... In the meantime, that is possibly during a period of months, the applicant would have been deprived of the income accruing from his trade; he would nonetheless have incurred the risk of having to continue to pay his staff and of not being able to resume business with all his former customers once his shop reopened ... Mr Deweer would have suffered considerable loss as a consequence.

The Louvain procureur du Roi did admittedly offer Mr Deweer a means of avoiding the danger, namely by paying 10,000 BF in 'friendly settlement' ... This solution certainly represented by far a lesser evil. As the Government rightly pointed out, the sum in question was only slightly above the minimum amount – 3,000 BF – of 'the fine laid down by law', whereas under section 11 par. 1 of the 1945/1971 Act it could have been more than the maximum, namely 30,000,000 BF ... Accordingly, as the Delegates observed, there was a 'flagrant disproportion' between the two alternatives facing the applicant. The 'relative moderation' of the sum demanded in fact tells against the Government's argument since it added to the pressure brought to bear by the closure order. The moderation rendered the pressure so compelling that it is not surprising that Mr Deweer yielded ...

53. The Government finally stressed that 'the Commission admitted' that 'the outright closure' of the shop would have been reconcilable with the Convention, even though 'so radical a solution would certainly have cost the applicant more than 10,000 [Belgian] francs'. From this premise, they described the logic of the reasoning followed in the report as 'curious', submitting that, 'still according to the Commission', the breach of Article 6 stemmed in substance from a 'favour' granted to Mr Deweer, namely the offer of a settlement whereby the procureur du Roi was to adopt a solution milder, more flexible and less burdensome than closure. In this way, claimed the Government, an 'absurd conclusion' was reached.

The Court recalls that it is limiting its examination to the combined use of the two procedures ...; it has no intention of ruling whether a closure order unaccompanied by any offer of settlement would have been compatible with the Convention.

... Besides, in the area of human rights he who can do more cannot necessarily do less. The Convention permits under certain conditions some very serious forms of treatment, such as the death penalty (Article 2 par. 1, second sentence), whilst at the same time prohibiting others which by comparison can be regarded as rather mild, for example 'unlawful' detention for a brief period (Article 5 par. 1) or the expulsion of a national (Article 3 par. 1 of Protocol No. 4). The fact

that it is possible to inflict on a person one of the first-mentioned forms of treatment cannot authorise his being subjected to one of the second-mentioned, even if he agrees or acquiesces ...

54. To sum up, Mr Deweer's waiver of a fair trial attended by all the guarantees which are required in the matter by the Convention was tainted by constraint. There has accordingly been breach of Article 6 par. 1 ...

2.5 Respect for conflicting human rights as a limit to the scope of the obligation to protect

In discharging its duty to protect human rights, the State will frequently be led to impose restrictions to other, conflicting human rights (in the specific context of the obligation to protect from discrimination, see also chapter 7, section 2.3.). However, despite a renewed interest in legal theory for the issue of conflicting rights, there is no agreed upon methodology as to how such conflicts should be solved (for important recent contributions on this issue, see R. Alexy, 'Balancing Constitutional Review and Representation', *International Journal of Constitutional Law* (2005), 572–81; R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), pp. 47–8; S. Greer, 'Balancing and the European Court of Human Rights: a Contribution to the Habermas-Alexy Debate', *Cambridge Law Journal*, 63(2) (2004), 412–24; for examinations of the practice of courts, see L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press, 2007), and the essays collected in E. Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp-Oxford-Portland: Intersentia-Hart, 2008)). As we have seen, 'balancing' is questionable as a metaphor, and it is too vague if it is to serve as a methodology in the context of adjudication (see box 3.2., chapter 3). The main alternative options seem to be (a) to affirm a priority of the State's obligation to respect over its obligation to protect, so that the scope of the obligation to protect would be limited by the State's obligation not to impose disproportionate interferences with other human rights; (b) to recognize a broad margin of appreciation to national and non-judicial (i.e. executive and legislative) authorities in addressing situations of conflicting rights, leading to a 'hands-off' attitude of the courts in such situations, particularly if they are international courts; and (c) to develop judicial techniques that can solve conflicts between rights, beyond the vague, and largely empty, reference to the need to 'balance' the rights against one another. This section offers a brief overview of the issues raised under each of these different options.

(a) Affirming the priority of the obligation to respect over the obligation to protect

A first approach is to consider that the obligation to protect should also be secondary to the obligation to respect, the implication being that the conflict should always be settled in favour of a minimum degree of State intervention in inter-individual relationships. As we have seen, the *Osman* judgment, for instance, limits the scope of the positive obligations imposed on the States parties to the European Convention

on Human Rights to the adoption of measures which do not result in disproportionate restrictions being imposed on other protected rights (see para. 116 of the judgment). The tendency to prioritize the obligation to respect over the obligation to protect has been questioned recently in the following terms, in the context of the adoption of counter-terrorism measures:

Stefan Sottiaux, *Terrorism and the Limitations of Rights. The European Convention on Human Rights and the United States Constitution* (Oxford: Hart Publishing, 2008), pp. 8–9:

It would be difficult to maintain that the state's positive obligation to protect the rights of its citizens is less important than its negative obligation to respect those rights. The former duty is as firmly grounded in human rights law as the latter: both stem from the same fundamental legal guarantees. To attach more weight to the state's negative obligation to respect than to its positive obligation to protect would boil down to introducing a hierarchy between the rights occurring on the different sides of the balance, and there is no place in modern human rights law for such a hierarchy. The conflict between liberty and security in the context of terrorism is one between two equally significant human rights values, one of which cannot take precedence over the other. As Richard Posner recently noted, 'One is not to ask whether liberty is more or less important than safety. One is to ask whether a particular security measures harms liberty more or less than it promotes safety' [R. A. Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency*, Oxford University Press, Oxford, 2006, at pp. 31–32].

(b) Deferring to the evaluation of other authorities

Another tendency of courts in conflicting rights situations has been procedural in nature. Conflicting rights situations are, almost by definition, highly controversial. It is therefore not surprising if human rights courts – particularly international courts – have generally tended to adopt a relatively 'hands-off' approach, deferring to the appreciation made by other branches of government or by the national authorities as to how such situations should be solved. This has been explicit in particular in the jurisprudence of the European Court of Human Rights. The Court suggested in *Chassagnou and others* v. *France* that it would as a matter of principle allow a wide margin of appreciation to be enjoyed by States in situations of conflicting rights (Eur. Ct. H.R. (GC), *Chassagnou and others* v. *France*, judgment of 29 April 1999, §113). In addition, States parties to the European Convention on Human Rights are generally considered to enjoy a broader margin of appreciation where their positive obligations are concerned – since they are to choose the means which achieve the result prescribed by the Convention – than in the area of negative obligations; and cases implying the imposition of positive obligations, i.e. requiring that States intervene in relationships between private parties, are typically cases in which situations of conflicts of rights occur. Finally, the margin of appreciation will be particularly wide in areas where, in the absence of a uniform European conception of the implications of the Convention,

the solutions adopted at national level are widely divergent. This has guided the attitude of the Court, for instance, where the protection of the rights of others in relation to attacks on the religious convictions of a segment of the population lead to restrictions being imposed on freedom of expression (Eur. Ct. H.R., *Otto-Preminger-Institut* v. *Austria*, judgment of 20 September 1994, §49, and Eur. Ct. H.R., *Murphy* v. *Ireland*, judgment of 10 July 2003, §67; Eur. Ct. H.R., *Wingrove* v. *United Kingdom*, judgment of 25 November 1996, §53); or where different aspects of freedom of association conflict with one another (see, e.g. Eur. Ct. H.R., *Gustafsson* v. *Sweden*, judgment of 25 April 1996, §45). All three rationales explaining the reliance on the doctrine of the 'national margin of appreciation' were present in *Odièvre* v. *France*, where the Court was confronted with a conflict between the child's right to know its origins and the mother's interest in keeping her identity secret:

European Court of Human Rights (GC), *Odièvre* v. *France* (Appl. No. 42326/98), judgment of 13 February 2003:

Ms Odièvre was born in 1965 to a mother who requested that the birth be kept secret in a form she completed at the Health and Social Security Department when abandoning her. She was subsequently placed with the Child Welfare Service at the Health and Social Services Department (*Direction de l'action sanitaire et sociale* – the DASS). A full adoption order was made on 10 January 1969 in favour of Mr and Mrs Odièvre. On 27 January 1998 the applicant applied to the Paris *tribunal de grande instance* for an order for the 'release of information about her birth and permission to obtain copies of any documents, birth, death and marriage certificates, civil-status documents and full copies of long-form birth certificates'. She was told that she should address herself to the administrative courts and that, in any case, the application would be denied, since the French Law of 8 January 1993, which confirmed the system of anonymous births which had been traditional in the French legal system also introduced new provisions concerning the secret abandonment of children, and stipulated for the first time that choosing to give birth in secret had an effect on the determination of filiation, as Articles 341 and 341–1 of the Civil Code created an estoppel defence to proceedings to establish maternity: where a child had been secretly abandoned, there was no mother in the legal sense of the word. Following a number of reports about problems emerging from the 1993 legislation, however, the Law of 22 January 2002 was adopted. Without calling into question the right to give birth anonymously, this law allows arrangements to be made for disclosure of identity subject to the mother's and the child's express consent being obtained. And it abolishes the parents' right to request confidentiality under Article L. 224–5 of the Social Action and Families Code. The 2002 Law provides for the establishment of a National Council for Access to Information about Personal Origins entrusted with facilitating access to information about personal origins. The Council shall acceed to the request of the child or his representatives to be informed about the identity of his/her natural mother (a) if it already has in its possession an express declaration waiving confidentiality in respect of the mother's identity; (b) if the mother's wishes have been verified and she has not expressly stated that she wishes to keep her identity secret; (c) if one of its members or a person appointed by it has been able to obtain the mother's express consent without interfering with her private life; (d) if the mother has died, provided that she has not expressed a contrary intent following a request for access to information about the child's

origins. In such cases, one of the members of the Council or a person appointed by it shall advise the mother's family and offer it assistance.]

41. The applicant complained that France had failed to ensure respect for her private life by its legal system, which totally precluded an action to establish maternity being brought if the natural mother had requested confidentiality and, above all, prohibited the Child Welfare Service or any other body that could give access to such information from communicating identifying data on the mother.

42. In the Court's opinion, people 'have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development'. With regard to an application by Mr Gaskin for access to the case records held on him by the social services – he was suffering from psychological trauma as a result of ill-treatment to which he said he had been subjected when in State care – the Court stated: '... confidentiality of public records is of importance for receiving objective and reliable information, and ... such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.' (*Gaskin*, judgment of 7 July 1989, Series A No. 160, p. 20, §49; see also *M.G.* v. *United Kingdom*, No. 39393/98, §27, 24 September 2002)

In [*Mikulić* v. *Croatia*, judgment of 7 February 2002, Appl. No. 53176/99] the applicant, a 5-year-old girl, complained of the length of a paternity suit which she had brought with her mother and the lack of procedural means available under Croatian law to enable the courts to compel the alleged father to comply with a court order for DNA tests to be carried out. The Court weighed the vital interest of a person in receiving the information necessary to uncover the truth about an important aspect of his or her personal identity against the interest of third parties in refusing to be compelled to make themselves available for medical testing. It found that the State had a duty to establish alternative means to enable an independent authority to determine the paternity claim speedily. It held that there had been a breach of the proportionality principle as regards the interests of the applicant, who had been left in a state of prolonged uncertainty as to her personal identity (§§64–66).

43. The Court observes that Mr Gaskin and Miss Mikulić were in a different situation to the applicant. The issue of access to information about one's origins and the identity of one's natural parents is not of the same nature as that of access to a case record concerning a child in care or to evidence of alleged paternity. The applicant in the present case is an adopted child who is trying to trace another person, her natural mother, by whom she was abandoned at birth and who has expressly requested that information about the birth remain confidential.

44. The expression 'everyone' in Article 8 of the Convention applies to both the child and the mother. On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life. The child's vital interest in its

personal development is also widely recognised in the general scheme of the Convention (see, among many other authorities, *Johansen* v. *Norway*, judgment of 7 August 1996, *Reports* 1996–III, p. 1008, §78; *Mikulić*, No. 53176/99, §64; and *Kutzner* v. *Germany*, No. 46544/99, §66, ECHR 2002–I). On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied. In the present case, the applicant's mother never went to see the baby at the clinic and appears to have greeted their separation with total indifference ... Nor is it alleged that she subsequently expressed the least desire to meet her daughter. The Court's task is not to judge that conduct, but merely to take note of it. The two private interests with which the Court is confronted in the present case are not easily reconciled; moreover, they do not concern an adult and a child, but two adults, each endowed with her own free will.

In addition to that conflict of interest, the problem of anonymous births cannot be dealt with in isolation from the issue of the protection of third parties, essentially the adoptive parents, the father and the other members of the natural family. The Court notes in that connection that the applicant is now 38 years old, having been adopted at the age of four, and that non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which brought up the applicant, and her natural father and siblings, each of whom also has a right to respect for his or her private and family life.

45. There is also a general interest at stake, as the French legislature has consistently sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system.

In these circumstances, the full scope of the question which the Court must answer – does the right to know imply an obligation to divulge? – is to be found in an examination of the law of 22 January 2002, in particular as regards the State's margin of appreciation.

46. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring 'respect for private life', and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *X and Y* v. *Netherlands* [judgment of 26 March 1985, Series A No. 91: see above, section 1.2. in this chapter], p. 12, §24).

47. The Court observes that most of the Contracting States do not have legislation that is comparable to that applicable in France, at least as regards the child's permanent inability to establish parental ties with the natural mother if she continues to keep her identity secret from the child she has brought into the world. However, it notes that some countries do not impose a duty on natural parents to declare their identities on the birth of their children and that there have been cases of child abandonment in various other countries that have given rise to renewed debate about the right to give birth anonymously. In the light not only of the diversity of practice to be found among the legal systems and traditions but also of the fact that various means are being resorted to for abandoning children, the Court concludes that States must be afforded a margin of appreciation to decide which measures are apt to ensure that the rights guaranteed by the Convention are secured to everyone within their jurisdiction.

48. The Court observes that in the present case the applicant was given access to non-identifying information about her mother and natural family that enabled her to trace some of her roots, while ensuring the protection of third-party interests.

49. In addition, while preserving the principle that mothers may give birth anonymously, the system recently set up in France improves the prospect of their agreeing to waive confidentiality, something which, it will be noted in passing, they have always been able to do even before the enactment of the law of 22 January 2002. The new legislation will facilitate searches for information about a person's biological origins, as a National Council for Access to Information about Personal Origins has been set up. That council is an independent body composed of members of the national legal service, representatives of associations having an interest in the subject matter of the law and professional people with good practical knowledge of the issues. The legislation is already in force and the applicant may use it to request disclosure of her mother's identity, subject to the latter's consent being obtained to ensure that her need for protection and the applicant's legitimate request are fairly reconciled. Indeed, though unlikely, the possibility that the applicant will be able to obtain the information she is seeking through the new Council that has been set up by the legislature cannot be excluded.

The French legislation thus seeks to strike a balance and to ensure sufficient proportion between the competing interests. The Court observes in that connection that the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests. Overall, the Court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.

Consequently, there has been no violation of Article 8 of the Convention

Joint dissenting opinion of Mr Wildhaber, Sir Nicolas Bratza, Mr Bonello, Mr Loucaides, Mr Cabral Barreto, Mrs Tulkens and Mr Pellonpää:

4. As regards *compliance* with Article 8, this is a situation in which there are competing rights or interests: on the one hand, the child's right to have access to information about its origins and, on the other, the mother's right, for a series of reasons specific to her and concerning her personal autonomy, to keep her identity as the child's mother secret. Other interests may also come into play, such as the need to protect the health of mother and child during pregnancy and at the birth, and the need to prevent abortion or infanticide.

5. In the instant case, while reiterating that Article 8 does not merely compel States to abstain from arbitrary interference but that 'in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life' (see paragraph 40 of the judgment), the Court found that the applicant's complaint was not so much that the State had interfered with her rights under the Convention, but that it had not complied with its duty to act. In other words, 'the substance of the [applicant's] complaint is not that the State has acted but that it has failed to act' (see *Airey* v. *Ireland*, judgment of 9 October 1979, Series A No. 32, p. 17, §32). In these circumstances, the Court had to examine whether the State was in breach of its positive obligation under Article 8 of the Convention when it turned down the applicant's request for information about her natural mother's identity. Its task was not therefore to verify whether

the interference with the applicant's right to respect for her private life was proportionate to the aim pursued but to examine whether the obligation imposed on the State was unreasonable having regard to the individual right to be protected, even if there are similarities between the principles applicable in both cases as regards the balance to be struck between the rights of the individual and of the community (see *Keegan* v. *Ireland*, judgment of 26 May 1994, Series A No. 290, p. 19, §49, and *Kroon and others* v. *Netherlands*, judgment of 27 October 1994, Series A No. 297-C, p. 56, §31).

6. In order to decide that issue, the Court must examine whether a fair balance has been struck between the competing interests. It is not, therefore, a question of determining which interest must, in a given case, take absolute precedence over others. In more concrete terms, the Court is not required to examine whether the applicant should, by virtue of her rights under Article 8, have been given access to the information regarding her origins, whatever the consequences and regardless of the importance of the competing interests or, conversely, whether a refusal of the applicant's request for the information in question was justified for the protection of the rights of the mother (or, for instance, for the protection of the rights of others or in the interests of public health). It must perform a 'balancing of interests' test and examine whether in the present case the French system struck a reasonable balance between the competing rights and interests.

7. That is the nub of the problem. As a result of the domestic law and practice, no balancing of interests was possible in the instant case, either in practice or in law. In practice, French law accepted that the mother's decision constituted an absolute defence to any requests for information by the applicant, irrespective of the reasons for or legitimacy of that decision. In all circumstances, the mother's refusal is definitively binding on the child, who has no legal means at its disposal to challenge the mother's unilateral decision. The mother thus has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance. This, therefore, is not a multilateral system that ensures any balance between the competing rights. The effect of the mother's absolute 'right of veto' is that the rights of the child, which are recognised in the general scheme of the Convention (see *Johansen* v. *Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996–III, and *Kutzner* v. *Germany*, No. 46544/99, ECHR 2002–I), are entirely neglected and forgotten. In addition, the mother may also by the same means paralyse the rights of third parties, in particular those of the natural father or the brothers and sisters, who may also find themselves deprived of the rights guaranteed by Article 8 of the Convention. In view of these considerations, we cannot be satisfied by the majority's concession that 'the applicant was given access to non-identifying information about her mother and natural family that enabled her to trace some of her roots while ensuring the protection of third-party interests' (see paragraph 48 of the judgment) ...

17. With regard to striking a fair balance between the competing interests, we consider the approach adopted by the Court in *Gaskin* v. *United Kingdom* (judgment of 7 July 1989, Series A No. 160, p. 20, §49), which it followed in *M.G.* v. *United Kingdom* (No. 39393/98, 24 September 2002) to be relevant. 'In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible

with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.'

18. If the system of anonymous births is to be retained, an *independent authority* of that type should have the power to decide, on the basis of all the factual and legal aspects of the case and following adversarial argument, whether or not to grant access to the information; such access may in appropriate cases be made conditional, or subject to compliance with a set procedure. In the present situation, in the absence of any machinery enabling the applicant's right to find out her origins to be balanced against competing rights and interests, blind preference was inevitably given to the sole interests of the mother. The applicant's request for information was totally and definitively refused, without any balancing of the competing interests or prospect of a remedy.

The Court arrived at a conclusion of non-violation in *Odièvre*, essentially, on the basis that the French authorities had been aware of the conflicting interests at stake, and had taken sufficient care in balancing these interests against one another. This is a procedural solution, based on institutional considerations linked both to the division of tasks between courts and other branches of government, and to the relationship of an international court to domestic authorities. However, it provides little guidance to those authorities as to how they should arbitrate situations of conflicting rights presented to them.

(c) Developing judicial techniques that can solve conflicts between rights: 'practical concordance' and beyond

One influential proposal on how to adjudicate issues of conflicting rights was put forward by the German constitutional lawyer Konrad Hesse (*Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, twentieth edn (Heidelberg: C. F. Müller, 1995), §172). Hesse suggests reliance on the principle of 'practical concordance' in such situations. The notion appears in a number of decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht*) (see T. Marauhn and N. Ruppel, 'Balancing Conflicting Human Rights: Konrad Hesse's Notion of '*praktische Konkordanz*' and the German Federal Constitutional Court' in E. Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp-Oxford-Portland: Intersentia-Hart, 2008), p. 273). In situations of conflicting rights, the doctrine of 'practical concordance' seeks to avoid, to the fullest extent possible, sacrificing one right against the other. Instead, it posits, a compromise should be sought between the rights in conflict which will respect their respective claims, by 'optimizing' each of the rights against the other. This idea already represents a significant progress from the metaphor of 'balancing': whereas the 'balancing' of one

right against another should lead to preferring the right with the highest 'value' (or the most important 'weight'), above the other, the principle of 'practical concordance' instead rejects the very idea that this may be a desirable outcome: in substance, it acknowledges that it is inappropriate to set aside one claim simply because a competing claim appears, in the particular circumstances of a case, to deserve to be recognized more weight. However, 'practical concordance' thus understood may not be going far enough:

Olivier De Schutter and Françoise Tulkens, 'Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution' in E. Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp-Oxford-Portland: Intersentia-Hart, 2008), pp. 169–216:

Despite the advance it represents, the principle of practical concordance shares with the idea of 'balancing' two characteristics which seem to us potentially contestable. First, it shares with the methodology of 'weighing the scales' the idea that the judge has a privileged access to where the equilibrium is to be found: in the final instance, it will be for the judge to decide whether or not the rights in conflict have been reconciled to the fullest extent possible, without any of the two rights in conflict having been completely sacrificed to the other. Second, and more importantly, it lacks any constructivist dimension: just like the process of 'balancing' does not include the need to search for ways to transform the context in which the conflict has arisen, the idea of a 'practical concordance' does not take into account the need to develop imaginative solutions to limit the conflict and to avoid its recurrence in the future. But it is precisely the development of such solutions which we require: the identification of adequate solutions on an *ad hoc* basis, where conflicts emerge which are presented to the judge, needs to be complemented by the establishment of mechanisms which will allow for a permanent search for devices which will contribute to avoid the repetition of the conflict in the future ...

Practical concordance ... is most useful not as a rule helping us to identify where, on a scale going from the total sacrifice of one right to the total sacrifice of a competing right, we should locate ourselves. Rather, it should be seen as an objective to be achieved by an exercise in institutional imagination. We must ask, not only how the conflict should best be solved where the objective is to minimize the negative impacts on any of the competing rights, but also how the conflict can be avoided altogether, or lessened, by transforming the background conditions which made the conflict possible.

[In this context, the role of courts should be], first, to identify the responsibility of the State authorities in creating and maintaining the background conditions which made the conflict of rights 'inevitable' ...; second, ... to progressively formulate rules which may serve to guide the States parties in the future, where certain regimes are proven to allow for this 'practical concordance' between competing rights to be effective. Moreover, in order to identify which background conditions may explain the conflict between rights, and what it would mean, therefore, to modify such conditions, it may be crucial to compare the situation of conflict emerging in one jurisdiction with similar situations which have occurred in other jurisdictions, and how they were solved in such cases. Such comparisons may help identifying which conditions might be created to either lessen the conflict between rights, or even to remove it altogether, by making the appropriate institutional changes, which will allow these conflicting rights to be reconciled with one another's requirements.

In order to illustrate this position, the authors rely on a number of examples, including the dissenting opinion expressed in her judicial capacity, by one of the authors, in the case of *Odièvre* v. *France* (reproduced above in this section, under b)). Indeed, by insisting on the possibility of setting up an independent authority empowered to decide upon requests emanating from persons born in conditions of anonymity, and to provide access to information about those persons' biological parents on the basis of an examination of all relevant circumstances, the joint dissenting opinion expressed in *Odièvre* in fact suggests it may be possible to move beyond the conflict by an 'exercise in institutional imagination', that may precisely avoid having to 'blindly' sacrifice one right against the other.

Another illustration is sought in *Öllinger* v. *Austria*. In that case, the applicant had notified the Austrian police that he intended to hold a meeting at the Salzburg municipal cemetery in front of the war memorial, on All Saints Day, in order to commemorate the Salzburg Jews killed by the SS during the Second World War. However, the date and place of the meeting coincided with the assembly of a group commemorating the SS soldiers killed in the Second World War, and Mr Öllinger had refused to give an undertaking that his meeting would not disturb that gathering, which he considered illegal. Thus, on the basis that the disturbances which would predictably occur on the site were likely to offend the religious feelings of members of the public visiting the cemetery, the applicant was denied the authorization to hold the commemorative meeting he intended: indeed, since the commemoration meeting held for the SS soldiers during the Second World War was considered by the Salzburg Federal Police Authority to be a popular ceremony, it did not require authorization under the Austrian Assembly Act. The European Court of Human Rights took the view that this was a violation of Mr Öllinger's freedom of assembly:

European Court of Human Rights (1st sect.), *Öllinger* v. *Austria* (Appl. No. 76900/01), judgment of 29 June 2006, paras. 34–50:

34. The Court notes at the outset that the present case is one concerned with competing fundamental rights. The applicant's right to freedom of peaceful assembly and his right to freedom of expression have to be balanced against the other association's right to protection against disturbance of its assembly and the cemetery-goers' right to protection of their freedom to manifest their religion.

35. As regards the right to freedom of peaceful assembly as guaranteed by Article 11, the Court reiterates that it comprises negative and positive obligations on the part of the Contracting State.

36. On the one hand, the State is compelled to abstain from interfering with that right, which also extends to a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote (see *Stankov and the United Macedonian Organisation Ilinden*, [judgment of 2 October 2001], §86, and *Plattform 'Ärzte für das Leben'* v. *Austria*, judgment of 21 June 1988, Series A No. 139, p. 12, §32). If every probability of tension and heated exchange between opposing groups during a demonstration was to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, §107).

37. On the other hand, States may be required under Article 11 to take positive measures in order to protect a lawful demonstration against counter-demonstrations (see *Plattform 'Ärzte für das Leben'*, cited above, p. 12, §34).

38. Notwithstanding its autonomous role and particular sphere of application, Article 11 of the Convention must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of freedom of assembly and association enshrined in Article 11 (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, §85). In this connection it must be borne in mind that there is little scope under Article 10 §2 for restrictions on political speech or on debate on questions of public interest (*ibid*., § 88; see also *Scharsach and News Verlagsgesellschaft* v. *Austria*, No. 39394/98, §30, ECHR 2003–XI).

39. Turning finally to Article 9 of the Convention, the Court has held that, while those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism, the responsibility of the State may be engaged where religious beliefs are opposed or denied in a manner which inhibits those who hold such beliefs from exercising their freedom to hold or express them. In such cases the State may be called upon to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs (see *Otto-Preminger-Institut* v. *Austria*, judgment of 20 September 1994, Series A No. 295–A, p. 18, §49).

40. In the present case, the Salzburg Federal Police Authority and the Salzburg Public Security Authority considered the prohibition of the applicant's assembly necessary in order to prevent disturbances of the Comradeship IV commemoration meeting, which was considered a popular ceremony not requiring authorisation under the Assembly Act. They had particular regard to the experience of previous protest campaigns by other organisers against the gathering of Comradeship IV, which had provoked vehement discussions, had disturbed other visitors to the cemetery and had made police intervention necessary.

41. The Constitutional Court dismissed this approach as being too narrow. It observed that the prohibition of the intended meeting would not be justified if its sole purpose were the protection of the Comradeship IV commemoration ceremony. It went on to say that the prohibition was nevertheless justified or even required by the State's positive obligation under Article 9 to protect persons manifesting their religion against deliberate disturbance by others. In arriving at that conclusion, the Constitutional Court had particular regard to the fact that All Saints' Day was an important religious holiday on which the population traditionally went to cemeteries to commemorate the dead and that disturbances caused by disputes between members of the assembly organised by the applicant and members of Comradeship IV were likely to occur in the light of the experience of previous years.

42. The Court notes that the domestic authorities had regard to the various competing Convention rights. Its task is to examine whether they achieved a fair balance between them.

43. The applicant's assembly was clearly intended as a counter-demonstration to protest against the gathering of Comradeship IV, an association which undisputedly consists mainly of former members of the SS. The applicant emphasises that the main purpose of his assembly was to remind the public of the crimes committed by the SS and to commemorate the Salzburg Jews murdered by them. The coincidence in time and venue with the commemoration ceremony of Comradeship IV was an essential part of the message he wanted to convey.

44. In the Court's view, the unconditional prohibition of a counter-demonstration is a very far-reaching measure which would require particular justification, all the more so as the

applicant, being a member of parliament, essentially wished to protest against the gathering of Comradeship IV and, thus, to express an opinion on a issue of public interest (see, *mutatis mutandis*, *Jerusalem* v. *Austria*, No. 26958/95, §36, ECHR 2001–II). The Court finds it striking that the domestic authorities attached no weight to this aspect of the case.

45. It is undisputed that the aim of protecting the gathering of Comradeship IV does not provide sufficient justification for the contested prohibition. This has been clearly pointed out by the Constitutional Court. The Court fully agrees with that position.

46. Therefore, it remains to be examined whether the prohibition was justified to protect the cemetery-goers' right to manifest their religion. The Constitutional Court relied on the solemn nature of All Saints' Day, traditionally dedicated to the commemoration of the dead, and on the disturbances experienced in previous years as a result of disputes between members of Comradeship IV and members of counter-demonstrations.

47. However, the Court notes a number of factors which indicate that the prohibition at issue was disproportionate to the aim pursued. First and foremost, the assembly was in no way directed against the cemetery-goers' beliefs or the manifestation of them. Moreover, the applicant expected only a small number of participants. They envisaged peaceful and silent means of expressing their opinion, namely the carrying of commemorative messages, and had explicitly ruled out the use of chanting or banners. Thus, the intended assembly in itself could not have hurt the feelings of cemetery-goers. Moreover, while the authorities feared that, as in previous years, heated debates might arise, it was not alleged that any incidents of violence had occurred on previous occasions.

48. In these circumstances, the Court is not convinced by the Government's argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors.

49. Instead, the domestic authorities imposed an unconditional prohibition on the applicant's assembly. The Court therefore finds that they gave too little weight to the applicant's interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV, while giving too much weight to the interest of cemetery-goers in being protected against some rather limited disturbances.

50. Having regard to these factors, and notwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the Austrian authorities failed to strike a fair balance between the competing interests.

This has elicited the following comment:

Olivier De Schutter and Françoise Tulkens, 'Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution' in E. Brems (ed.), Conflicts Between Fundamental Rights (Antwerp-Oxford-Portland: Intersentia-Hart, 2008), pp. 169–216 at pp. 205–6:

The main problem in the eyes of the Court, we would submit, is not solely that the diverse interests at stake were not recognized an adequate 'weight' [by the Austrian authorities]. It is

also that, instead of identifying how the conflict could be avoided – by organizing the separation of the two groups on the premises, by deploying a police force –, the police authorities simply chose to prioritize certain interests above the others, *without seeking to modify the background conditions which may create the conflict in the first place*. They took the conflict they were faced with as 'necessary', where in fact it might have been construed as 'accidental' and as having its source, in part, in the unwillingness of the local authorities to deploy the police forces which would have been required to ensure that the competing claims at stake could have been satisfied simultaneously.

4.1. Questions for discussion: the State duty to apply human rights in private relationships

1. In the light of the regime of the obligation to protect, as described in section 2, what are the real stakes of the discussion in the previous section 1 of this chapter concerning the difference between the imputability to the State of the acts of non-State actors, and the failure of the State to discharge its obligation to protect?
2. An alternative to strengthening the State's obligation to protect, it might be argued, would be to impose on non-State actors direct obligations under international human rights law. In recent years, the desirability of each of these two options has been debated particularly in the context of attempts to strengthen the responsibilities of transnational corporations towards human rights (see box 4.1.). What are the advantages and disadvantages of each approach? Are they mutually exclusive or could they be complementary?
3. In section 2.1., we have contrasted three models through which international human rights could be applied to private relationships: these are (i) by 'direct application', (ii) by 'indirect application', or (iii) by the adoption of domestic legislation through which the human rights are protected from the potential infringements by private initiatives. In his discussion of this issue, A. Barak adopts a different typology, not including the latter model, but including the 'judiciary model'. This model, he writes, 'begins with the assumption that ... human rights are protected only against the State'. The State, however, includes the judiciary: 'Accordingly, the judiciary is prohibited from developing the common law or granting relief in a specific case in a way that violates a constitutional human right. Thus, under this model, if A is obligated to B not to sell his products to C on racial grounds and A breaches this obligation, B will not be entitled to a remedy of specific performance or damages against A. The reason for this is that if the court orders A to fulfill his obligations towards B, it will be violating C's right to equality, a right he holds against the State' (A. Barak, 'Constitutional Human Rights and Private Law' in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) p. 13 at p. 25). A typical example, albeit in domestic constitutional law, is the case of *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), in which the US Supreme Court considered that the judicial enforcement of racially restrictive covenants would constitute 'State action' for the purposes of applicability of the Equality Clause of the Fourteenth Amendment of the United States Constitution. Hence,

no remedies would be available to parties complaining about the non-execution of such a covenant, although the Court does acknowledge that the provisions of the Bill of Rights appended to the Constitution only protect against the State: '[Since the Fourteenth Amendment] erects no shield against merely private conduct, however discriminatory or unlawful ... the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment would not have been violated.' How different is the 'judiciary model' from the 'direct application' and 'indirect application' models? Is the 'judiciary model' a useful one to consider (Barak himself believes not)? Consider in this respect the case of *Pla and Puncernau*, decided in 2004 by the European Court of Human Rights (section 2.3.). Is this case applying the 'judiciary model', as implied by the dissenting opinions of Judges Sir Nicolas Bratza and Garlicki? Or is it a compromise between this model and one which defers to the autonomy of will of private parties?

4. Consider the following statement of the Canadian Supreme Court about the relationship between the Canadian Charter of Rights and Freedoms and private law: 'Where ... private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply ... [T]his is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants, whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another' (*Retail, Wholesale & Department Store Union, Local 580* v. *Dolphin Delivery* (1987) 33 D.L.R. (4th) 174, 199 (SCC)). To which of the three models contrasted in section 2.1. does this correspond, assuming internationally recognized human rights are treated like the Canadian Charter of Rights and Freedoms in relationship to private law? What are the advantages and disadvantages of this model?
5. Consider the cases of *X and Y* v. *Netherlands* and *Vo* v. *France*, decided respectively in 1985 and in 2004 by the European Court of Human Rights (see section 1.2. and section 2.1. respectively). What are the arguments in favour of or against imposing on States parties to human rights instruments that they protect human rights in private relationships by criminal law sanctions, rather than simply by civil law remedies? Are there arguments against the use of criminal law sanctions?
6. In *E and others* v. *United Kingdom* (presented in section 2.3.) the Court remarks that, under Article 3 ECHR, any failure by the State to 'take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State'. In *Younger*, the Court finds 'too speculative' the argument that the suicide of the son of the applicant could have been averted if he had been able to see a medical practitioner on the morning of the suicide, but at the same time considers that it would not be required from the applicant to prove that the measure would have had a 'real possibility' of changing the outcome. Where should the threshold lie? Is a mere

possibility, even remote, of the measure which the State has failed to adopt changing the outcome, sufficient?

7. In section 2.4., it has been stated that freedom of contract is not generally treated as having a normative status equivalent to a human right – indeed, human rights instruments do not usually refer to freedom of contract, which therefore human rights bodies generally treat as subordinate to considerations based on human dignity and equality. Are there arguments in favour of a different approach, however? Which arguments may be advanced in support of treating the individual's autonomy of will on a par with human rights?

5

The Progressive Realization of Human Rights and the Obligation to Fulfil

INTRODUCTION

The obligation to fulfil requires the State to adopt appropriate legislative, administrative and other measures towards the full realization of human rights. The implication is that the realization of human rights must become the object of a policy aimed at improving them. Not only must policies in place not violate human rights, and take them into account as a transversal concern (a requirement referred to as mainstreaming); in addition, policies must be put in place explicitly in order to make progress towards fulfilling them. Human rights require, in that sense, appropriate policy-making.

This chapter is divided into four sections. Section 1 describes the general principles that should guide States in seeking to achieve the progressive realization of human rights by discharging their obligation to fulfil. The focus is particularly on economic and social rights, but the principles apply equally to civil and political rights, which also require, for their implementation, the provision of resources (whether human, financial, natural, technological, or informational: for a slightly different list, see R. E. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights', *Human Rights Quarterly*, 16, No. 4 (1994), 693 at 703–13). Section 2 then examines the usefulness of framework laws and action plans in the realization of human rights, and section 3 discusses the use of indicators and benchmarks in monitoring progress with the objective of full realization.

The tools described in sections 2 and 3 are procedural in nature. The insistance on these tools in much of the recent scholarship in human rights, particularly as regards economic and social rights such as the right to health, to education, or to food, stems from the need to impose concrete obligations on States to 'take steps' towards the progressive realization of rights that, because of the resources required for their implementation, may not be achievable immediately in all their dimensions: since neither the precise level of commitments nor the precise speed at which progress should be made can be determined without taking into account the capacity of each State and the level of development achieved, we should at least (so the reasoning goes) impose

on States to set up mechanisms that ensure that they move in the right direction, and that they do so as swiftly as possible. The adoption of national strategies, the transposition of such strategies into framework laws, the setting of quantified and time-bound objectives through the establishment of benchmarks, and the monitoring of progress through indicators, are all instrumental to that purpose. At the same time, however, such tools should not be treated as ends in themselves: they should remain linked to the substantive obligations, i.e. to whether the outcomes of whichever strategies are in place are satisfactory. Section 4 seeks to examine how that link can be maintained.

1 THE PRINCIPLE

The 2006 Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies contain a number of useful recommendations about the components of a policy aimed at the full realization of human rights:

Office of the High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (2006), paras. 49–61:

49. The recognition that the full realization of some human rights may have to occur in a progressive manner, over a period of time due to resource constraints, has two implications for policy. First, it allows for a time dimension in the strategy for human rights fulfilment, making the setting of targets and benchmarks an indispensable element of strategies for human rights fulfilment. Second, it allows for setting priorities among different rights and considering trade-offs among them, since the constraint of resources may not permit a strategy to pursue all rights simultaneously, or with equal vigour.

50. The recognition of a time dimension and the need for considering trade-offs and prioritization are common features of all approaches to policymaking. The distinctiveness of the human rights approach is that it imposes certain conditions on those features that the duty-bearers are required to respect. The conditions on the time dimension are aimed at ensuring that the State does not defer or relax the efforts needed to realize human rights. The conditions on trade-offs and prioritization are aimed at ensuring that all trade-offs conform to the human rights norms.

51. In cases where a right cannot be realized immediately due to resource constraints, the State must begin immediately to take steps to fulfil the rights in question as expeditiously as possible. The human rights approach requires that steps taken by States satisfy the following conditions.

52. First, the State must acknowledge that with a serious commitment to poverty reduction it may be possible to make rapid progress towards the realization of many human rights even within an existing resource constraint. Thus, it may be possible to improve the efficiency of resource use – for example, by scaling down expenditures on unproductive activities and by reducing spending on activities whose benefits go disproportionately to the rich.

53. Second, to the extent that the realization of human rights may be contingent on a gradual expansion in the availability of resources, the State is required, as an immediate step, to develop and implement a time-bound plan of action. The plan must spell out when and how the State hopes to arrive at the realization of rights.

54. Third, as the realization of some human rights may take considerable time, the plan must set benchmarks (i.e. intermediate targets) corresponding to each ultimate target. As a prerequisite of setting targets and benchmarks, the State should identify appropriate indicators, so that the rate of progress can be monitored and, if progress is slow, corrective action can be taken. Indicators should be as disaggregated as possible for each subgroup of the population living in poverty.

55. Fourth, the targets, benchmarks and indicators must be set in a participatory manner, ... so that they reflect the concerns and interests of all segments of the society. At the same time, appropriate accountability mechanisms must be set up, ... so as to ensure that the State commits itself fully to realizing the agreed targets and benchmarks.

56. With regard to trade-offs and prioritization, the human rights approach does not in itself offer any hard and fast rules as to which rights are to be given priority. The act of prioritization has to be context-specific, as circumstances differ from country to country. However, the human rights approach imposes certain conditions on the process and substance of prioritization.

57. The *process* of setting priorities must involve effective participation of all stakeholders, including the poor. Value judgements will inevitably enter into the process of setting priorities, but the rights-based approach demands that they should do so in an inclusive and equitable manner. This implies that the process of resource allocation must permit all segments of society, especially the poor, to express their opinions with regard to priorities. It also implies that just institutional mechanisms must be put in place so that potentially conflicting opinions can be reconciled in a fair and equitable manner.

58. The *substance* of prioritization refers to the basis on which priorities are to be decided and the manner in which resources are to be allocated to the rights that have been accorded priority. The following principles must guide the substance of prioritization.

59. First, no right can be given precedence over others on the grounds of intrinsic merit, because from the human rights perspective all rights are equally valuable. However, strategies to ensure effective protection of all human rights may prioritize certain types of intervention on practical grounds. For example, a country may decide to give priority to a right that has remained especially under-realized compared to others, or to a right whose fulfilment is expected to act as a catalyst towards the fulfilment of other rights, or to a right which a country may feel especially well equipped to deal with in view of its traditions or experience.

60. Second, while prioritization entails trade-offs between rights, in an important way the human rights approach circumscribes the nature of such trade-offs. In particular, the principle of equality and non-discrimination rules out any trade-offs which would result in or exacerbate unequal and discriminatory outcomes, e.g. giving priority to providing health and education services to the more affluent parts of society, rather than to the most disadvantaged and marginalized groups. The human rights approach also cautions against making trade-offs whereby one right suffers a marked decline in its level of realization. Such trade-offs would need to be subject to the most careful consideration and to be fully justified by reference to the totality of human rights. In practice, this puts a restriction on the manner in which resources are allocated in favour of the rights that have been accorded priority at any point in time. Additional resources required in order to realize these rights should, as a rule, not be extracted by reducing the level of resources currently allocated to other rights (unless reduced allocation of resources can be offset by increased efficiency of resource use). Instead, as more resources become available to a country over time, increased share of the incremental resources should be

allocated to those rights previously allocated fewer resources. In other words, trade-offs should normally be made only in the allocation of incremental resources. For example, if a State decides to accord priority to the right to education, it should devote more of its resources to education than to other spheres such as food and housing, rather than reducing the level of resources allocated to other rights in a way that might lead to retrogression of those rights.

61. Third, notwithstanding the recognition that resource constraints negatively affect a State's ability to implement its human rights obligations, the international human rights system specifies some core obligations that require States to ensure, with immediate effect, certain minimum levels of enjoyment of various rights. Core obligations must be treated as binding constraints to the allocation of resources, i.e. no trade-offs are permitted with regard to them. These obligations must be met before allocating resources to other purposes. For example, a State has a core obligation, derived from the rights to life, food and health, to ensure that all individuals within its jurisdiction are free from starvation. Therefore, even if the full enjoyment of the right to food – in all its dimensions – may be achieved only progressively over a period of time, the pain of starvation must be removed immediately.

In what is the most comprehensive description of the obligation to fulfil available to date, the UN Committee on Economic, Social and Cultural Rights stated in its General Comment on the right to water:

Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* (E/C.12/2002/11, 20 January 2003), paras. 25–9:

The obligation to *fulfil* can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, *inter alia*, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.

To ensure that water is affordable, States parties must adopt the necessary measures that may include, *inter alia*: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially

disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations. Such strategies and programmes may include: (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta; (c) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water; (e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity; (f) increasing the efficient use of water by end-users; (g) reducing water wastage in its distribution; (h) response mechanisms for emergency situations; (i) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.

Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources. In accordance with the rights to health and adequate housing (see General Comments No. 4 (1991) and 14 (2000)) States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.

This description highlights adequately two characteristics of the obligation to fulfil. First, it is dynamic: since it aims towards the full realization of the right – and not merely towards avoiding interfering with the right, or towards adopting measures to ensure that private actors will not thus interfere – it is necessarily open-ended and implemented progressively. Second, the implications of the obligation are primarily procedural: what is required from States is that they set up procedures which will monitor the fulfilment of the right; that they adopt action plans or national strategies; and that they ensure, through such devices, that steps are being taken which develop the right further, making it more effective – available, accessible, acceptable and adaptable to changing needs.

One important tool for the implementation of the obligation to fulfil human rights is the adoption of framework legislations or national strategies or action plans. This is discussed in section 2. The development of indicators and the setting of benchmarks also are essential tools for the progressive realization of human rights. Apart from their contribution to public debate, indicators may serve for self-assessment by State authorities. They also facilitate the task of monitoring bodies. And they may help identify instances of discrimination or retrogression in the fulfilment of any particular right. Section 3 describes this in more detail. Section 4 then addresses the question of the relationship of these tools to the substantive obligations of States in the progressive realization of human rights, particularly insofar as they face budgetary constraints and competing priorities and resources.

2 FRAMEWORK LAWS AND ACTION PLANS

2.1 Framework laws

Framework laws transpose into legislative commitments policies that aim at the fulfilment of human rights. This not only improves these policies at the operational level, by clearly allocating responsibilities across different branches of government, by setting precise time-bound targets (benchmarks) to be achieved, and by encouraging permanent evaluation and thus improvement of the measures taken to reach the targets set. It also improves the legitimacy of such policies, if framework laws are adopted through participatory mechanisms or are discussed in parliamentary assemblies. Most importantly, framework laws ensure accountability: at a minimum, they oblige different public authorities to explain their choices, and if they do not take the measures expected from them, to offer a proper justification for any delays or failures to take such measures; at best, they invest individual right-holders with what Amartya Sen has referred to as 'metarights' – rights to have policies adopted that aim at the realizing of rights.

Amartya K. Sen, 'The Right Not to be Hungry' in P. Alston and K. Tomasevski (eds.), *The Right to Food* (Leiden: Martinus Nijhoff, 1984), p. 69 at 70–1:

A metaright to something x can be defined as the right to have policies p(x) that genuinely pursue the objective of making the right to x realisable. As an example, consider the following 'Directive Principle of State Policy' inserted in the Constitution of India when it was adopted in 1950: 'The state shall, in particular, direct its policy towards securing … that the citizens, men and women equally, have the right to an adequate means of livelihood.' The wording was careful enough to avoid asserting that such a right already exists, but saying only that policy should be directed to making it possible to have that as a right. If this right were accepted, then the effect will not be to make the 'right to adequate means of livelihood' real – even as an abstract, background right – but to give a person the right to demand that policy be directed towards securing the objective of making the right to adequate means a realisable right, even if that objective cannot be immediately achieved. It is a right of a different kind: not to x but to p(x) …

It is not difficult to see why metarights of this kind have a particular relevance for economic aims such as the removal of poverty or hunger. For many countries where poverty or hunger is widespread, there might not exist any feasible way whatsoever by which freedom from them could be guaranteed for all in the very near future, but policies that would rapidly lead to such freedom do exist. The metaright for freedom from hunger is the right to such a policy, but what lies behind that right is ultimately the objective of achieving that freedom.

In its General Comment No. 15 of 2002 on *The Right to Water*, the Committee on Economic, Social and Cultural Rights notes: 'States parties may find it advantageous to adopt framework legislation to operationalize their right to water strategy. Such legislation should include: (*a*) targets or goals to be attained and the time-frame for their achievement; (*b*) the means by which the purpose could be achieved; (*c*) the intended collaboration with civil society, private sector and international organizations; (*d*) institutional responsibility for the process; (*e*) national mechanisms for its monitoring;

and (*f*) remedies and recourse procedures' (at para. 50). The same recommendation is made, for instance, in General Comment No. 12 (1999) on *The Right to Food*. Arjun Sengupta has summarized the components of such a framework law:

Arjun Sengupta, 'The Right to Food in the Perspective of the Right to Development' in W. B. Eide and U. Kracht (eds.), *Food and Human Rights in Development* (Antwerp–Oxford: Intersentia–Hart, 2007), vol. II, 'Evolving Issues and Emerging Applications', p. 107 at p. 131:

1. The targets for the different levels of achievement of the rights over a period of time, will have to be fixed in terms of the indicators of those rights to be realized in phases. The fixing of these targets must follow from an intensive consultation between the stakeholders, the State Party and the civil society organisation, following the human rights principles of equity, non-discrimination and participation.
2. A programme has to be worked out by the State authorities to realise these rights, using their interdependence and by assignment of the direct and indirect duties to all the agents including the State administration at different levels.
3. Mechanisms have to be established to review and monitor each of these agents' performance in terms of their assigned duties, and for that purpose appropriate legislations may have to be enacted when the duties may be directly related to the outcomes of the targets. For this, institutions may have to be created when the existing institutional arrangements are not adequate for the task.
4. With appropriate legislation, part of these rights and their components can be fully justiciable, with a Court of Law deciding on the extent of responsibilities of the different agents and recommending corrective actions.
5. The institutional mechanisms set up in addition to the administrative procedures should monitor and review the programme in the light of the performance of the different duty-holders, and make recommendations about corrective actions which would be binding on the different agents. Again, such a procedure could be carried out with full participation of all the stakeholders and the civil society organisations at the different levels of implementation of the rights.
6. A procedure must be set up, consistent with human rights standards, to revise the targets periodically in order to secure the rights through progressive realisation.

Writing in the context of the right to food, S. Khoza outlines the benefits of framework legislations as follows:

Sibonile Khoza, 'The Role of Framework Legislation in Realising the Right to Food: Using South Africa as a Case Study of this New Breed of Law' in W. B. Eide and U. Kracht (eds.), *Food and Human Rights in Development* (Antwerp–Oxford: Intersentia–Hart, 2005), vol. I, 'Legal and Institutional Dimensions and Selected Topics', pp. 187–204 at pp. 196–7:

Managing a complex process. Implementing the right to food ... involves a complex process. Access to food is multi-dimensional and cross-sectoral in nature requiring legislative and

other measures in many sectors pertaining to the right. Framework law provides a useful tool in ensuring comprehensiveness and better coordination in the conception and implementation process of national strategies and policies.

Instructing role players and ensuring accountability. Framework law allocates specific responsibilities to different spheres and departments of government as well as to the public institutions such as Ombudsmen/Public Protectors. This ensures that specific government departments and agents bear express responsibility for implementing the right, and are held accountable for failure to do so.

Reinforcing human rights and democratic principles. The process leading to enacting framework law is grounded on human rights and democratic principles of transparency, participation, accountability and inclusivity. In this regard, it would demand the full participation of a wide range of sectors in addressing the currently inadequate measures, and at the same time, would command the holding of extensive public consultations to allow vigorous debates and submissions on the draft legislation.

Defining purpose and principles of law in respect of the right. Framework law provides for the description of its purpose and the governing principles. It would also provide a detailed description of the nature and scope of the right. It would identify the right-holder and duty-holder in respect of the ... entitlements. It arguably purports to confirm the judicial enforceability of the right and sets the remedial procedures that would enable people to claim their right.

Operationalizing the implementation process. Depending on the approach adopted to include the crucial elements, framework law could be seen as a transformed policy framework. By featuring such operational [elements] as benchmarks, indicators and time-framed targets and goals, framework law provides a systematic approach and viable tool for measuring and monitoring progress towards achieving the progressive realisation of the right.

Tangibly re-affirming government's commitment. By adopting framework legislation, government would be making a firm political and legislative statement that it is committed to realising the constitutional right to food progressively, and would ensure immediate access to basic food needs for those most vulnerable ...

The absence of framework legislation tends to have the opposite effects of maintaining a fragmented, and often weak and inadequate legislative system relating to the implementation of the right to sufficient food at the expense of people's basic needs, human dignity and life. Without such a law, there is also no assured way of measuring progress in and monitoring the implementation of the right.

One example of such a framework law is the Brazilian Law of 15 September 2006 establishing a National Food and Nutritional Security System (SISAN). In 2003, Brazil launched a multisectoral Zero Hunger programme, and it re-established the National Food and Nutritional Security Council (CONSEA), which had briefly functioned in 1993–5 but had been dismantled under the pretext of its mandate being incorporated under a broader poverty eradication strategy. SISAN was set up as a result of the need to improve the co-ordination of the variety of programmes set up under 'Zero Hunger', and to improve the accountability of the agencies responsible for implementing these programmes. It provides that it will be the task of an inter-ministerial taskforce to develop a National Policy and Plan on Food and Nutritional Security, which should

include guidelines, objectives, an identification of the resources needed for the implementation, and adequate monitoring and evaluation procedures. This national strategy should be set up in accordance with the guidelines agreed upon in CONSEA, which is composed of civil society organizations (representing two-thirds of its membership) and of governmental representatives (for the remaining third):

[Brazil] Law No. 11.346 of 15 September of 2006 establishing SISAN – National Food and Nutritional Security System – to guarantee the human right to adequate food and nutrition (Official Gazette of 18 September 2006) (unofficial translation):

Chapter 1. General provisions

Art. 1. This Law establishes the definitions, principles, guidelines, objectives, and composition of the National Food and Nutritional Security System – SISAN, through which the government, together with the organized participation of the civil society, shall formulate and implement policies, plans, programs, and actions which seek to guarantee the human right to adequate food.
Art. 2. Adequate food is a basic human right, inherent to human dignity and indispensable to the realization of the rights established by the Federal Constitution. The government shall adopt the policies and actions needed to promote and guarantee food and nutritional security for the population.

§1. The adoption of these policies and actions shall take into account environmental, cultural, economic, regional, and social dimensions.

§2. The government shall respect, protect, promote, provide, inform, monitor, supervise, and evaluate the realization of the human right to adequate food, as well as guarantee the mechanisms for its exigibility.

Art. 3. Food and nutritional security consists in the realization of the human right to regular and permanent access to good quality food, in sufficient quantity, without compromising the fulfillment other basic needs, having as its basis healthy nutritional habits that respect cultural diversity and that are environmentally, culturally, economically and socially sustainable.
Art. 4. Food and nutritional security comprises:

I. Expansion of access to food through its production, particularly via family and traditional farming, food processing, industrialization and commercialization, including international agreements; better food supply and distribution, including of water; job creation and redistribution of wealth;
II. The conservation of biodiversity and the sustainable use of resources;
III. The promotion of health, food, and nutrition for the population, including specific population groups and those more socially vulnerable;
IV. The guarantee of the biological, sanitary, nutritional, and technological qualities of the food, as well as its good use, which stimulates healthy food practices and lifestyles that respect the ethnic and racial diversity of the population;
V. The production of knowledge and the access to information; and
VI. The implementation of public policies and sustainable and participatory strategies of food production, commercialization and consumption, respecting the diverse cultural characteristics of the country.

Art. 5. The realization of the human right to adequate food and the attainment of food and nutritional security require respect for sovereignty, which confers to countries primacy in their decisions regarding the production and consumption of food products.
Art. 6. The Brazilian State shall make an effort to promote technical cooperation with foreign countries, thus contributing to the realization of the human right to adequate food worldwide.

Chapter II. The National Food and Security System

Art. 7. The realization of the human right to adequate food and the attainment of food and nutritional security will be made possible through SISAN, constituted by agencies and entities of the Federal Union, States, the Federal District and of municipalities, and private institutions, profitable or not, related to food and nutritional security and interested in integrating the System, provided that the applicable legislation is respected.

§1. The participation in SISAN to which this article refers shall obey the principles and guidelines of the System and will be defined based on the criteria established by the National Council for Food and Nutritional Security – CONSEA – and by the Inter-Ministerial Chamber for Food and Nutritional Security, to be created by the Federal Executive Power.
§2. The agencies which are responsible for the definition of the criteria to which §1 refers may establish distinct and particular requirements for the private and public sectors.
§3. The private or public agencies and entities which are part of SISAN shall work in an interdependent manner, but their autonomy to make decisions shall be preserved.
§4. The obligation of the State does not exclude the responsibility of those entities of the civil society that are part of SISAN.

Art. 8. SISAN shall be ruled by the following principles:

I. Universality and equity in the access to adequate food, without any kind of discrimination;
II. The preservation of autonomy and respect for the dignity of all;
III. Social participation in the formulation, execution, examination, monitoring, and control of the policies and plans on food and nutritional security in all spheres of the Government; and
IV. Transparency in the programs, actions, and public and private resources, and in the criteria for their concession.

Art. 9. SISAN is based on the following guidelines:

I. Promotion of the inter-sectorality of policies, programs, and governmental and non-governmental actions;
II. Decentralization of actions and articulation, under cooperation, among the spheres of the government;
III. Monitoring of the food and nutrition condition of the population, seeking to subsidize the management cycle of policies for the area in the different spheres of the government;
IV. Conjunction of immediate and direct measures which guarantee access to adequate food, through actions that improve the resources and means of autonomous subsistence of the population;
V. Articulation between budget and management; and
VI. Encouragement of research development and training of human resources.

Art. 10. SISAN seeks to formulate and implement policies and plans on food and nutritional security, motivate the integration of efforts between the government and civil society, as well as promote the examination, monitoring, and evaluation of food and nutritional security in the country.

Art. 11. SISAN is composed by:

I. The National Conference for Food and Nutritional Security, responsible for the recommendation to CONSEA of the guidelines and priorities of the National Policy and Plan on Food and Nutritional Security, as well as for the evaluation of SISAN;

II. CONSEA, which is responsible for the immediate advising of the President of the Republic, is in charge of:

(a) Arranging for the convocation of the National Conference for Food and Nutritional Security, periodically, not more than four years apart, as well as defining the parameters of its composition, organization, and operation, based on its own regulation;

(b) Suggesting to the Federal Executive Power, in view of the deliberations of the National Conference for Food and Nutritional Security, the guidelines and priorities of the Nation Policy and Plan on Food and Nutritional Security, including the budgetary requirements for its execution.

(c) Articulating, examining, and monitoring, in collaboration with other members of the System, the implementation and convergence of actions which are inherent to the National Policy and Plan on Food and Nutritional Security;

(d) Defining, in collaboration with the Inter-Ministerial Chamber for Food and Nutritional Security, the criteria and procedures of integration into SISAN;

(e) Instituting permanent mechanisms of articulation with related agencies and entities of food and nutritional security in the States, the Federal District, and municipalities, seeking to promote dialogue and the convergence of the actions which integrate SISAN;

(f) Mobilizing and supporting entities of civil society in the discussion and implementation of public actions for food and nutritional security;

III. The Inter-Ministerial Chamber for Food and Nutritional Security, composed of Ministers of State and Special Secretaries who are responsible for the portfolios related to the attainment of food and nutritional security, has the following responsibilities, among others:

(a) To elaborate, in view of the guidelines from CONSEA, the National Policy and Plan on Food and Nutritional Security, suggesting the guidelines, goals, basis of resources and tools to examine, monitor, and evaluate its implementation;

(b) To coordinate the execution of the Policy and of the Plan;

(c) To articulate the policies and plans of their related state agencies as well as those of the Federal District;

IV. Agencies and entities of food and nutritional security of the Federal Union, states, Federal District, and municipalities;

V. Private institutions, profitable or not, which are interested in integrating the System and respect the criteria, principles, and guidelines of SISAN.

§1. The National Conference for Food and Nutritional Security will be preceded by state, district, and municipal conferences, which shall be summoned and organized by related agencies and entities in the states, Federal District, and municipalities, from which the delegates to the National Conference will be chosen.

§2. CONSEA shall be composed based on the following criteria:

I. (one third) of governmental representatives constituted by Ministers of State and Special Secretaries responsible for the portfolios related to the attainment of food and nutritional security;

II. (two thirds) of civil society representatives chosen based on appointment criteria approved at the National Conference for Food and Nutritional Security; and

III. observers, including representatives of allied Federal Councils, international bodies, and of the Federal Public Ministry.

§3. CONSEA shall be presided over by one of its members, a civil society representative, appointed by collegiate jury, according to regulations, and chosen by the President of the Republic.

§4. The performance of advisers, and permanent and substitute members of CONSEA shall be considered of relevant public interest and non-remunerated service.

2.2 National strategies and action plans

Framework laws are simply one component of broader national strategies for the fulfilment of human rights, which aim to ensure their progressive realization. The area of the right to food probably offers the best illustration. The implementation of the right to food has been encouraged by the adoption in 2004, within the Council of the UN Organization for Food and Agriculture (FAO), of a set of Voluntary Guidelines which are concrete recommendations about how to operationalize the right to food at domestic level. Guidelines 3 and 7 relate, respectively, to the adoption of national strategies, and to the adoption of an appropriate legal framework:

Council of the FAO, Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (23 November 2004):

Guideline 3: Strategies

3.1 States, as appropriate and in consultation with relevant stakeholders and pursuant to their national laws, should consider adopting a national human-rights based strategy for the progressive realization of the right to adequate food in the context of national food security as part of an overarching national development strategy, including poverty reduction strategies, where they exist.

3.2 The elaboration of these strategies should begin with a careful assessment of existing national legislation, policy and administrative measures, current programmes, systematic identification of existing constraints and availability of existing resources. States should formulate the measures necessary to remedy any weakness, and propose an agenda for change and the means for its implementation and evaluation.

3.3 These strategies could include objectives, targets, benchmarks and time frames; and actions to formulate policies, identify and mobilize resources, define institutional mechanisms, allocate responsibilities, coordinate the activities of different actors, and provide for monitoring mechanisms. As appropriate, such strategies could address all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food. They could also address access to resources and to markets as well as parallel measures in other fields.

These strategies should, in particular, address the needs of vulnerable and disadvantaged groups, as well as special situations such as natural disasters and emergencies.

3.4 Where necessary, States should consider adopting and, as appropriate, reviewing a national poverty reduction strategy that specifically addresses access to adequate food.

3.5 States, individually or in cooperation with relevant international organizations, should consider integrating into their poverty reduction strategy a human rights perspective based on the principle of non-discrimination. In raising the standard of living of those below the poverty line, due regard should be given to the need to ensure equality in practice to those who are traditionally disadvantaged and between women and men.

3.6 In their poverty reduction strategies, States should also give priority to providing basic services for the poorest, and investing in human resources by ensuring access to primary education for all, basic health care, capacity building in good practices, clean drinking-water, adequate sanitation and justice and by supporting programmes in basic literacy, numeracy and good hygiene practices.

3.7 States are encouraged, *inter alia* and in a sustainable manner, to increase productivity and to revitalize the agriculture sector including livestock, forestry and fisheries through special policies and strategies targeted at small-scale and traditional fishers and farmers in rural areas, and the creation of enabling conditions for private sector participation, with emphasis on human capacity development and the removal of constraints to agricultural production, marketing and distribution.

3.8 In developing these strategies, States are encouraged to consult with civil society organizations and other key stakeholders at national and regional levels, including small-scale and traditional farmers, the private sector, women and youth associations, with the aim of promoting their active participation in all aspects of agricultural and food production strategies.

3.9 These strategies should be transparent, inclusive and comprehensive, cut across national policies, programmes and projects, take into account the special needs of girls and women, combine short-term and long-term objectives, and be prepared and implemented in a participatory and accountable manner.

3.10 States should support, including through regional cooperation, the implementation of national strategies for development, in particular for the reduction of poverty and hunger as well as for the progressive realization of the right to adequate food.

Guideline 7: Legal framework

7.1 States are invited to consider, in accordance with their domestic legal and policy frameworks, whether to include provisions in their domestic law, possibly including constitutional or legislative review that facilitates the progressive realization of the right to adequate food in the context of national food security.

7.2 States are invited to consider, in accordance with their domestic legal and policy frameworks, whether to include provisions in their domestic law, which may include their constitutions, bills of rights or legislation, to directly implement the progressive realization of the right to adequate food. Administrative, quasi-judicial and judicial mechanisms to provide adequate, effective and prompt remedies accessible, in particular, to members of vulnerable groups may be envisaged.

7.3 States that have established a right to adequate food under their legal system should inform the general public of all available rights and remedies to which they are entitled.

7.4 States should consider strengthening their domestic law and policies to accord access by women heads of households to poverty reduction and nutrition security programmes and projects.

Recent years have witnessed a growing interest in the adoption of national action plans, or strategies, in the field of human rights, as a means of bridging the gap between generous but vague norms set at international level and practical implementation (see, e.g. Office of the High Commissioner for Human Rights (OHCHR) Professional Training Series No.10, *Handbook on National Human Rights Plans of Action*, UN, 2002; United Nations Development Programme (UNDP), *A Desk Study of National Human Rights Action Plans* (UNDP Oslo Governance Centre, October 2003)). In April 2009, China adopted its first human rights action plan, covering 2009–10. The plan covers a wide range of human rights, including both economic, social and cultural rights, and civil and political rights, and it includes a series of commitments related to the implementation of China's international human rights obligations. The introduction explains the reasons that guided the adoption of the action plan and how it was developed:

National Human Rights Action Plan of China (2009–2010) (Information Office of the State Council of the People's Republic of China and Xinhua News Agency, 13 April 2009):

The Chinese government unswervingly pushes forward the cause of human rights in China, and, in response to the United Nations' call for establishing a national human rights action plan, has instituted the National Human Rights Action Plan of China (2009–2010) on the basis of painstakingly summing up past experience and objectively analyzing the current situation. The plan defines the Chinese government's goals in promoting and protecting human rights, and the specific measures it is taking to this end.

The plan was framed on the following fundamental principles: First, in pursuit of the basic principles prescribed in the Constitution of China, and the essentials of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, the plan is aimed at improving laws and regulations upholding human rights and advancing the cause of China's human rights in accordance with the law; second, adhering to the principle that all kinds of human rights are interdependent and inseparable, the plan encourages the coordinated development of economic, social and cultural rights as well as civil and political rights, and the balanced development of individual and collective rights; third, in the light of practicality and China's reality, the plan ensures the feasibility of the proposed goals and measures, and scientifically promotes the development of the cause of human rights in China.

The National Human Rights Action Plan of China (2009–2010) involves broad participation by the relevant government departments and all social sectors. The Chinese government has established the 'joint meeting mechanism for the National Human Rights Action Plan' for the purpose of working out a good plan. The Information Office of the State Council and Ministry of Foreign Affairs, two members of the 'joint meeting mechanism', take the responsibility of convening meetings. Other members include: Legislative Affairs Committee of the Standing Committee of the National People's Congress, Committee for Social and Legal Affairs of the Chinese People's Political Consultative Conference National Committee, Supreme People's Court, Supreme People's Procuratorate, National Development and Reform Commission, Ministry of Education, State Ethnic Affairs Commission, Ministry of Civil Affairs, Ministry of Justice, Ministry of Human Resources and Social Security, Ministry of Health, China Disabled Persons' Federation, and China Society for Human Rights Studies, altogether 53 organizations.

A group of experts from universities and research institutions ... also participated in the drafting and formulation of the plan. In the drafting and formulation process, joint meetings were held on many occasions to conduct thorough discussions with relevant government departments; several symposia were convened with representation from over 20 organizations, such as China Law Society, All-China Lawyers' Association, China Legal Aid Foundation, China Environmental Protection Foundation, Chinese Society of Education, China Women's Development Foundation, China Foundation for Poverty Alleviation, China Foundation for Disabled Persons, and China Foundation for Human Rights Development, to solicit suggestions for revisions through thorough discussions among social and non-governmental organizations, universities and research institutions, and other social sectors.

The National Human Rights Action Plan of China (2009–2010) is a document explaining the policy of the Chinese government with regard to the promotion and protection of human rights during the period 2009–2010, covering the political, economic, social and cultural fields. Governments and government departments at all levels shall make the action plan part of their responsibilities, and proactively implement it in line with the principle of 'each performing its own functions and sharing out the work and responsibilities'. All enterprises, public institutions, social and non-governmental organizations, press and media agencies, and the general public shall give vigorous publicity to this action plan, and expedite its implementation. Initiated by the State Council Information Office and the Ministry of Foreign Affairs, the 'joint meeting mechanism for the National Human Rights Action Plan', comprising legislative and judicial organs and departments under the State Council, is responsible for coordinating the implementation, supervision and assessment of the plan.

Lithuania is one of the relatively few developed countries which has adopted a human rights action plan. This process began in December 1999, initially under the leadership of a working group (the National HURIST Country Team, part of a joint UNDP–OHCHR human rights strengthening programme) established by decree of the Prime Minister of Lithuania in January 2000. This working group was chaired by the Chairman of the Parliamentary Committee on Human Rights. It also included senior public officials, NGO representatives and a UNDP Programme Officer. At the end of 2000, it was decided to hand over the political responsibility for developing the national human rights action plan (NHRAP) to the Parliamentary Committee on Human Rights, although the National HURIST Country Team continued to be involved and had to ensure the involvement of the relevant ministries and government agencies as well as civil society organizations in the development of the NHRAP. The preparation of the NHRAP entered its active phase in September 2001, after the strategy for its development was agreed upon. The Parliament finally approved the national action plan in November 2002. Tomas Baranovas, Programme Officer within the UNDP office in Lithuania in 1999–2003, prepared a report summarizing the conclusions drawn from this experience. He describes the process through which the national action plan was adopted, and the 'lessons learned':

Tomas Baranovas, Development of a National Human Rights Action Plan: the Experience of Lithuania, UNDP Oslo Governance Centre, December 2002:

The UNDP project was implemented in three phases. In the first phase (September 2001–March 2002), priority issues were identified through a participatory process. A baseline study on human rights in Lithuania was also developed and validated at the expert level. During the second phase (March 2002–June 2002), the baseline study on human rights in Lithuania was verified and corrected involving broad participation of the public, including five regional workshops and a national conference. In the third phase (July–October 2002), the National Human Rights Action Plan was drafted on the basis of the conclusions and recommendations of the baseline study on human rights in Lithuania as well as the results of the regional workshops and the national conference. The Action Plan was approved by the Parliament in November 2002. During the three phases, key roles were played by the Parliament, the Project Manager, the National HURIST Country Team and UNDP. Public information and awareness measures included a TV and radio campaign ...

A number of lessons may be drawn from the process of development of a National Human Rights Action Plan in Lithuania:

- The assignment of overall responsibility to an inter-agency working group did not prove to be an effective arrangement due to insufficient concentration of accountability and commitment for the task.
- The shift of political responsibility to the Parliament, which was considered to be 'closer to the people', assisted by an inter-agency working group, proved to be an effective management arrangement. It also ensured national political commitment at the highest level.
- Choosing public opinion as a primary basis for identifying priority human rights issues ensured broad-based public involvement in the process of development of the Action Plan.
- The decrease in intensity of UNDP's involvement in developing the Action Plan helped to strengthen the leadership and commitment of national entities.
- Lithuania's desire for raising its international standing in the area of human rights protection encouraged commitment to the Action Plan.
- Networking with international partners significantly facilitated the process.
- The 15 months allocated to the UNDP project proved to be too short to accommodate the participatory process.
- The linkage with other national development strategies proved to be effective in integrating a human rights approach with other national policies, although tensions between 'the voice of the people', as expressed in the Action Plan, and the 'regular' work of the ministries had to be dealt with.
- The personal commitment of stakeholders played a key role.
- The 1998 UNDP guidelines on Integrating Human Rights with Sustainable Human Development provided a conceptual framework to the process but did not serve as practical guidance because they do not elaborate on the development of NHRAPs.

The Lithuanian National Human Rights Action Plan was developed in a participatory manner, with involvement of the Parliament, government agencies and civil organizations at all stages of the process. Results of public opinion surveys were given a special emphasis. The methodology applied has laid the groundwork for the implementation of the Action Plan and a significant improvement in the human rights situation in Lithuania. It may also be of use to other countries wishing to develop a National Human Rights Action Plan.

The Committee on the Rights of the Child has also stressed the advantages of adopting a national action plan, or a strategy, for the implementation of children's rights. Among the advantages it sees is improved accountability (since governments commit to certain time-bound objectives), improved dissemination about the government's international obligations, and improved co-ordination across different branches of government:

Committee on the Rights of the Child, General Comment No. 5 (2003), *General Measures of Implementation of the Convention on the Rights of the Child* (Arts. 4, 42 and 44, para. 6) (UN Doc. CRC/GC/2003/5, 27 November 2003), paras. 27–39:

[Elements for a national strategy for the implementation of the rights of the child] The Committee believes that effective implementation of the Convention requires visible cross-sectoral coordination to recognize and realize children's rights across Government, between different levels of government and between Government and civil society – including in particular children and young people themselves. Invariably, many different government departments and other governmental or quasi-governmental bodies affect children's lives and children's enjoyment of their rights. Few, if any, government departments have no effect on children's lives, direct or indirect. Rigorous monitoring of implementation is required, which should be built into the process of government at all levels but also independent monitoring by national human rights institutions, NGOs and others.

A. Developing a comprehensive national strategy rooted in the Convention If Government as a whole and at all levels is to promote and respect the rights of the child, it needs to work on the basis of a unifying, comprehensive and rights-based national strategy, rooted in the Convention.

The Committee commends the development of a comprehensive national strategy or national plan of action for children, built on the framework of the Convention. The Committee expects States parties to take account of the recommendations in its concluding observations on their periodic reports when developing and/or reviewing their national strategies. If such a strategy is to be effective, it needs to relate to the situation of all children, and to all the rights in the Convention. It will need to be developed through a process of consultation, including with children and young people and those living and working with them. [M]eaningful consultation with children requires special child-sensitive materials and processes; it is not simply about extending to children access to adult processes.

Particular attention will need to be given to identifying and giving priority to marginalized and disadvantaged groups of children. The non-discrimination principle in the Convention requires that all the rights guaranteed by the Convention should be recognized for all children within the jurisdiction of States ...

To give the strategy authority, it will need to be endorsed at the highest level of government. Also, it needs to be linked to national development planning and included in national budgeting; otherwise, the strategy may remain marginalized outside key decision–making processes.

The strategy must not be simply a list of good intentions; it must include a description of a sustainable process for realizing the rights of children throughout the State; it must go beyond statements of policy and principle, to set real and achievable targets in relation to the full range

of economic, social and cultural and civil and political rights for all children. The comprehensive national strategy may be elaborated in sectoral national plans of action – for example for education and health – setting out specific goals, targeted implementation measures and allocation of financial and human resources. The strategy will inevitably set priorities, but it must not neglect or dilute in any way the detailed obligations which States parties have accepted under the Convention. The strategy needs to be adequately resourced, in human and financial terms.

Developing a national strategy is not a one-off task. Once drafted the strategy will need to be widely disseminated throughout Government and to the public, including children (translated into child-friendly versions as well as into appropriate languages and forms). The strategy will need to include arrangements for monitoring and continuous review, for regular updating and for periodic reports to parliament and to the public.

The 'national plans of action' which States were encouraged to develop following the first World Summit for Children, held in 1990, were related to the particular commitments set by nations attending the Summit. In 1993, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, called on States to integrate the Convention on the Rights of the Child into their national human rights action plans.

The outcome document of the United Nations General Assembly special session on children, in 2002, also commits States 'to develop or strengthen as a matter of urgency if possible by the end of 2003 national and, where appropriate, regional action plans with a set of specific time-bound and measurable goals and targets based on this plan of action ...' The Committee welcomes the commitments made by States to achieve the goals and targets set at the special session on children and identified in the outcome document, *A World Fit for Children*. But the Committee emphasizes that making particular commitments at global meetings does not in any way reduce States parties' legal obligations under the Convention. Similarly, preparing specific plans of action in response to the special session does not reduce the need for a comprehensive implementation strategy for the Convention. States should integrate their response to the 2002 special session and to other relevant global conferences into their overall implementation strategy for the Convention as a whole.

The outcome document also encourages States parties to 'consider including in their reports to the Committee on the Rights of the Child information on measures taken and results achieved in the implementation of the present Plan of Action'. The Committee endorses this proposal; it is committed to monitoring progress towards meeting the commitments made at the special session and will provide further guidance in its revised guidelines for periodic reporting under the Convention.

B. Coordination of implementation of children's rights In examining States parties' reports the Committee has almost invariably found it necessary to encourage further coordination of Government to ensure effective implementation: coordination among central government departments, among different provinces and regions, between central and other levels of government and between Government and civil society. The purpose of coordination is to ensure respect for all of the Convention's principles and standards for all children within the State jurisdiction; to ensure that the obligations inherent in ratification of or accession to the Convention are not only recognized by those large departments which have a substantial impact on children – education, health or welfare and so on – but right across Government, including for example departments concerned with finance, planning, employment and defence, and at all levels.

The Committee believes that, as a treaty body, it is not advisable for it to attempt to prescribe detailed arrangements appropriate for very different systems of government across States parties. There are many formal and informal ways of achieving effective coordination, including for example inter-ministerial and interdepartmental committees for children. The Committee proposes that States parties, if they have not already done so, should review the machinery of government from the perspective of implementation of the Convention and in particular of the four articles identified as providing general principles …

Many States parties have with advantage developed a specific department or unit close to the heart of Government, in some cases in the President's or Prime Minister's or Cabinet office, with the objective of coordinating implementation and children's policy. As noted above, the actions of virtually all government departments impact on children's lives. It is not practicable to bring responsibility for all children's services together into a single department, and in any case doing so could have the danger of further marginalizing children in Government. But a special unit, if given high-level authority – reporting directly, for example, to the Prime Minister, the President or a Cabinet Committee on children – can contribute both to the overall purpose of making children more visible in Government and to coordination to ensure respect for children's rights across Government and at all levels of Government. Such a unit can be given responsibility for developing the comprehensive children's strategy and monitoring its implementation, as well as for coordinating reporting under the Convention.

3 INDICATORS AND BENCHMARKS

Human rights indicators are data related to certain institutional or normative developments, to specific events, or to the situation existing within a particular territory or population, that are related to human rights standards (on human rights indicators, see generally G. de Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States* (Brussels: Bruylant, 2009), part III; M. Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Assessment', *Human Rights Quarterly*, 23 (2001), 1062; S. Hertel and L. Minkler, 'Economic and Social Rights: the Terrain' in S. Hertel and L. Minkler (eds.), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press, 2007); P. Hunt, *State Obligations, Indicators, Benchmarks and the Right to Education* (Background paper submitted to the Committee on Economic, Social and Cultural Rights), 16 July 1998, E/C. 12/1998/11; T. Landman, 'Measuring Human Rights: Principle, Practice, and Policy', *Human Rights Quarterly*, 26 (2004), 906; T. Landman and E. Carvalho, *Measuring Human Rights* (London: Routledge-Cavendish, 2009); K. Tomasevski, 'Indicators' in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff, 2001), pp. 389–403). Although they may build on development indicators (measuring the degree of social or economic 'development'), human rights indicators are therefore specific. Paul Hunt, a former UN Special Rapporteur on the right to health, emphasizes for instance that an indicator relating to the right to health 'derives from, reflects and is designed to monitor the realisation, or otherwise, of specific right to health norms, usually with a view to holding a duty bearer to account'; it therefore

owes its specific characteristics to '(i) its explicit derivation from specific right to health norms; and (ii) the purpose to which it is put, namely right to health monitoring with a view to holding duty-bearers to account' (*Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Mr Paul Hunt*, 10 October 2003, A/58/427, at para. 10; see also the updated set of indicators on the right to health proposed by Paul Hunt in his capacity as Special Rapporteur on the right to health, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Mr Paul Hunt*, 3 March 2006, E/CN.4/2006/48, Annex; and P. Hunt and G. MacNaughton, 'A Human Rights-Based Approach to Health Indicators' in M. Baderin and R. McCorquodale (eds.), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007), pp. 303–30, Annex). Yet, it is also this specificity of human rights indicators that makes them more complex than development indicators, since what needs to be measured is not only the level of deprivation of the right-holder, but also the extent to which the State is complying with its obligations as set out in human rights instruments, by making efforts towards the removal of obstacles to the full enjoyment of the right.

Human rights indicators can measure (a) whether a State has ratified the relevant international instruments, adapted its regulatory framework, and set up the institutional mechanisms, that should improve compliance with the right (*structural indicators*); (b) whether a State has taken the policy measures, and made the necessary budgetary commitments, to ensure effective implementation of the right (*process indicators*); and (c) whether a State is succeeding in its efforts to realize the right (*outcome indicators*). Indicators serve a number of purposes, including (i) guiding the adoption of appropriate policies, aimed at the full realization of human rights – for instance, where outcome indicators reveal that the efforts pursued are not succeeding, requiring that the State reorient its policies to improve their efficacy; (ii) monitoring compliance with the requirement of non-discrimination – which in turn requires that the indicators be broken down by population group and according to gender (see chapter 7, boxes 7.3. and 7.5. and section 4); (iii) improving accountabilty towards rights-holders; and (iv) facilitating monitoring by domestic and international bodies. While initially developed for use in the implementation of economic and social rights, indicators are now also recognized to be a useful tool in the implementation of civil and political rights, as illustrated by the examples in the table presented below.

This section examines the use of indicators in human rights monitoring (section 3.1.), with a particular emphasis on the Committee on Economic, Social and Cultural Rights and the IBSA (indicators – benchmarks – scoping – assessment) procedure for monitoring compliance witht the rights of the International Covenant on Economic, Social and Cultural Rights (section 3.2.), as well as on the use of indicators in the Inter-American system (section 3.3.). In chapter 7 (section 4), indicators are discussed further in the specific context of anti-discrimination policies.

Category of indicator	Structural indicators	Process indicators	Outcome indicators
What does it serve to measure?	Goodwill of the State in establishing an institutional and legal framework	Efforts made by the State in order to move from the framework to implementation	Results achieved: success in achieving objectives
How indicative is it of the State's compliance with its obligations?	Depends on the State	Requires maximum use of available resources	Depends on the State, but also on internal and external factors or constraints
Examples	• Ratification of international instruments • Legal recognition of the right • Empowering courts to monitor compliance • Adoption of a national strategy • Establishment of a national human rights institution	• Financing of policies aimed at implementing the right • Number of complaints filed • Proportion of the population reached by public programmes • Percentage of national budget going to education, health, etc.	• Reported cases of arbitrary deprivation of life • Percentage of undernourished population • Percentage of children attending school at different levels of education

3.1 General considerations on the role of indicators in human rights monitoring

Although they regularly call upon States to develop indicators in order to measure progress in the realization of human rights – particularly economic and social rights and the right to non-discrimination – the use of statistics by UN human rights treaty bodies has been mostly ad hoc and superficial (on the difficulties they encounter in this regard, see A. Chapman, 'The Status of Efforts to Monitor Economic, Social and Cultural Rights' in A. Minkler and S. Hertel (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, 2007), p. 143). The paper below follows a request of the chairpersons of the human rights treaty bodies to the Office of the High Commissioner for Human Rights to assist the treaty bodies in analysing statistical information in States parties' reports. It discusses how indicators could better inform the work of the UN human rights treaty bodies. It identifies a number of associated challenges.

Office of the High Commissioner for Human Rights, Report on Indicators for Monitoring Compliance with International Human Rights Instruments: a Conceptual and Methodological Framework (HRI/MC/2006/7, 11 May 2006):

Introduction

[I]n the context of the ongoing reform of the treaty bodies in general, and the reporting procedure in particular, it has been argued that the use of appropriate quantitative indicators for assessing the implementation of human rights – in what is essentially a qualitative and

quasi-judicial exercise – could contribute to streamlining the process, enhance its transparency, make it more effective, reduce the reporting burden and above all improve follow-up on the recommendations and concluding observations, both at the committee, as well as the country, levels.

3. Indeed, the demand for appropriate indicators is not only for monitoring the implementation of the human rights instruments by States parties, but indicators are also seen as useful tools in reinforcing accountability, in articulating and advancing claims on the duty–bearers and in formulating requisite public policies and programmes for facilitating the realization of human rights. In this attempt to make the reporting, implementation and monitoring of human rights treaties more effective and efficient, there is an understanding that one needs to move away from using general statistics, the relevance of which to such tasks is often indirect and lacks clarity, to using specific indicators that, while embedded in the relevant human rights normative framework, can be easily applied and interpreted by the potential users.

4. While the importance of quantitative indicators is reflected in the human rights normative framework, as well as in the States parties' reporting obligations, the use of such indicators in the reporting and the follow-up procedure of the treaty bodies have been limited. There are conceptual and methodological considerations that explain this. For quantitative indicators to be effective tools in monitoring the implementation of human rights, it is necessary that they be anchored in a conceptual framework that addresses the concerns and goals of that process. The need for an adequate conceptual basis lies in having a rationale for identifying and designing the relevant indicators and not reducing the exercise to a mere listing of possible alternatives. It is also important that such indicators are explicitly and precisely defined, based on an acceptable methodology of data collection and presentation, and are or could be available on a regular basis. Moreover, it is equally important that indicators be suitable to the context where they are applied. In the absence of these considerations being met, it may not be feasible or even acceptable to the States parties to use quantitative indicators in their reporting obligations to the treaty bodies. At the same time, it would be difficult for the committees to demonstrate the relevance and encourage the use of appropriate indicators in the reporting and follow-up process ...

I. Human rights indicators, notion and rationale

7. ... [H]uman rights indicators are specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights. Defined in this manner, there could be some indicators that are uniquely human rights indicators because they owe their existence to certain human rights norms or standards and are generally not used in other contexts. This could be the case, for instance, with an indicator like the reported number of extrajudicial, summary or arbitrary executions, or the number of victims of torture by the police and the paramilitary forces, or the number of children who do not have access to primary education because of discrimination exerted by officials. At the same time, there could be a large number of other indicators such as socio-economic statistics (e.g. UNDP's human development indicators) that could meet (at least implicitly) all the definitional requirements of a human rights indicator as laid out here. In all these cases, to the extent that such indicators relate to the human rights standards and are used for human rights assessment, it would be helpful to consider them as human rights indicators.

Quantitative and qualitative indicators 8. Indicators can be quantitative or qualitative. The first category views indicators narrowly as an equivalent of 'statistics' and the latter, a broader 'topical' usage, covering any information relevant to the observance or enjoyment of a specific right. In this paper the term 'quantitative indicator' is used to designate any kind of indicators that are or can be expressed in quantitative form, such as numbers, percentages or indices. Some commonly used quantitative indicators are enrolment rates for the school-age group of children, indicators on ratification of treaties, proportion of seats held by women in national parliament and reported number of enforced or involuntary disappearances. One also finds a widespread use of 'checklists' or a set of questions as indicators, which sometimes seek to complement or elaborate numerical information on the realization of human rights. In the agencies of the United Nations system and in the human rights community, many experts have often favoured such an interpretation of the word indicator. These two main usages of the word 'indicator' in the human rights community, do not reflect two opposed approaches. Given the complexity of assessing compliance with human rights standards, all relevant qualitative and quantitative information is potentially useful. [Human rights indicators could also be categorized as objective or subjective indicators. This distinction is not necessarily based on the consideration of using, or not using, reliable or replicable methods of data collection for defining the indicators. Instead, it is ideally seen in terms of the information content of the indicators concerned. Thus, objects, facts or events that can, in principle, be directly observed or verified (for example, weight of children and number of reported violent deaths) are categorized as objective indicators. Indicators based on perceptions, opinions, assessment or judgments expressed by individuals are categorized as subjective indicators.] Quantitative indicators can facilitate qualitative evaluations by measuring the magnitude of certain events. Reciprocally, qualitative information can complement the interpretation of quantitative indicators. Indeed, the choice of a particular kind of indicator in any assessment depends, in the first instance, on the requirements and the needs of the user. This paper essentially looks at quantitative indicators that by virtue of their definition, presentation and on account of their data–generating methodologies are particularly suitable for supporting the assessment of States parties' compliance with international human rights treaties.

Indicators in the international legal framework 9. The human rights monitoring mechanisms refer to a wide range of indicators (qualitative and quantitative) that are reflected in the human rights normative framework comprising the various international instruments, their elaborations through general comments, reporting guidelines and concluding observations. While some quantitative indicators are explicitly quoted in the human rights treaties, the general comments adopted by the treaty bodies specify the type and role of these indicators.

10. Quantitative indicators are explicitly quoted in provisions of international human rights treaties. In the International Covenant on Economic, Social and Cultural Rights, for instance, article 12 states that to achieve the full realization of the right to health 'the steps to be taken by the States parties shall include those necessary for the provision for the reduction of the stillbirth–rate and of infant mortality'. Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), on the right to education contains a provision for 'the reduction of female student drop-out rates' and article 14 of the ICCPR requires that in the case of criminal charges everyone has the right to be tried 'without undue delay'. Such references to quantitative indicators, in this case essentially to officially compiled statistics, contribute to the definition of the content of the concerned human right and help to reinforce its operational aspects.

11. The importance of indicators is also highlighted in general comments adopted by the treaty bodies as well as in their concluding observations on State parties' reports. For instance, the Human Rights Committee (HRC) called for statistics on the number and handling of complaints for victims of maltreatment to support its normative assessment of the realization of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In relation to the right to participate in the conduct of public affairs, the same committee asked for statistical information on the percentage of women in publicly elected office, including the legislature, as well as in high-ranking civil service positions and the judiciary. The Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have been quite systematic on their request for statistics and disaggregated data relevant to the assessment of the compliance with human rights standards. While the Committee against Torture appears, at first sight, to be less involved in indicators and statistics, it has been seeking evidences on patterns of gross human rights violations in countries concerned with the 'refoulement' of individuals.

From indicators to benchmarks 12. Benchmarks are indicators that are constrained by normative or empirical considerations to have a predetermined value. While the normative considerations may be based on international standards or political and social aspirations of the people, the empirical considerations are primarily related to issues of feasibility and resources. For instance, consider the indicator proportion of one-year-olds immunized against vaccine-preventable diseases; using a benchmark on this indicator may require fixing a specific value to the indicator, say, raising it to 90 per cent, or improving the existing coverage by 10 percentage points, so that the efforts of the implementing agency could be focused on attaining that value in the reference period. In the context of the compliance assessment of State parties, the use of a benchmark, as against an indicator, contributes to enhancing the accountability of the State parties by making them commit to a certain performance standard on the issue under assessment. The Committee on Economic, Social and Cultural Rights, in particular, has called for the setting of benchmarks to accelerate the implementation process. In the use of indicators for monitoring the implementation of human rights, the first step should be to have a general agreement on the choice of indicators. This should be followed by setting performance benchmarks on those selected indicators. [See *General Comment No. 14 on the Right to Health* and Eibe Riedel's IBSA framework proposing a four-step procedure covering indicators, benchmarks, scoping and assessment, discussed below in section 3.2.]

II. The conceptual framework

13. In outlining a conceptual framework for human rights indicators there are a number of interrelated aspects to be addressed. First, there is a need to anchor indicators identified for a human right in the normative content of that right, as enumerated in the relevant articles of the treaties and related general comments of the committees. Secondly, it is necessary to reflect cross-cutting human rights norms or principles (such as non-discrimination and equality, indivisibility, accountability, participation and empowerment) in the choice of indicators. Thirdly, the primary focus of human rights assessment (and its value-added) is in measuring the effort that the duty-holder makes in meeting his/her obligations – irrespective of whether it is directed at promoting a right or protecting it. At the same time, it is essential to get a measure of the 'intent or acceptance of' human rights standards by the State party, as well as the consolidation