of its efforts, as reflected in appropriate 'outcome' indicators. While such a focus recognizes an implicit linkage between the intent of a State party, its efforts in meeting those commitments and the consolidated outcomes of those efforts, the linkage may not always translate into a direct causal relationship between indicators for the said three stages in the implementation of a human right. This is because human rights are indivisible and interdependent such that outcomes and the efforts behind the outcomes associated with the realization of one right may, in fact, depend on the promotion and protection of other rights. Moreover, such a focus in measuring the implementation of human rights supports a common approach to assessing and monitoring civil and political rights, as well as economic, social and cultural rights. [The Expert Consultation organized by OHCHR, in Geneva, 29 August 2005, agreed that a common approach to assess and monitor civil and political rights and economic, social and cultural rights was feasible as well as desirable and that such an approach could be built around the use of structural-process-outcome indicators.] Finally, the adopted framework should be able to reflect the obligation of the duty-holder to *respect*, *protect* and *fulfil* human rights. Each of these aspects is discussed here.

Indicators for substantive human rights

Identifying attributes 14. As a starting point, for each human right there is a need to translate the narrative on the legal standard of the right into a limited number of characteristic attributes that facilitate the identification of appropriate indicators for monitoring the implementation of the right. Such a step is prompted first by the analytic convenience of having a structured approach to read the normative content of the right. Often, one finds that the enumeration of the right in the relevant articles and their elaboration in the concerned general comments are quite general and even overlapping, not quite amenable to the process of identifying indicators. By identifying the major attributes of a right, the process of selecting suitable indicators or clusters of indicators is facilitated. Secondly, in identifying the attributes the intention is to take a step closer to operationalizing the human rights standards. Thus, in articulating the attributes one arrives at a categorization with a terminology that is clear and, perhaps, more 'tangible' in facilitating the selection of indicators. Finally, to the extent feasible, for all substantive rights, the attributes have to be based on an exhaustive reading of the legal standard of the right and identified in a mutually exclusive manner.

15. Consider the case of the right to life, following this approach and taking into account primarily article 6 of the ICCPR and general comment No. 6 of the Human Rights Committee on the right to life (1982). Four attributes of the right to life, namely 'arbitrary deprivation of life'; 'disappearances of individuals'; 'health and nutrition' and 'death penalty' were identified. Similarly, in the case of the right to food, based on article 11 of ICESCR and general comment No. 12 of the Committee on Economic, Social and Cultural Rights on the right to adequate food (1999), 'nutrition'; 'food safety and consumer protection'; 'food availability'; and 'food accessibility' were identified as the relevant attributes. [It may be argued, for instance, in case of most economic, social and cultural rights to adopt a generic approach to the identification of attributes based on the notion of 'adequacy', 'accessibility'; 'availability'; 'adaptability' and 'quality'. While such an approach may not be feasible for most civil and political rights, even in case of the economic, social and cultural rights it may not be easy to follow consistently.] Attributes, in case of the right to judicial review of detention, were primarily based on ICCPR, article 9, and general comment No. 8 of the Human Rights Committee on the right to liberty and

security of persons (1982). For the right to health, the attributes were based on ICESCR, article 12, and general comment No. 14 of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health (2000); general recommendation No. 24 (article 12 of CEDAW on women and health, 1999) of the Committee on the Elimination of Discrimination against Women; general comments No. 3 on HIV/AIDS and the rights of the child (2003) and No. 4 on adolescent health and development in the context of the Convention on the Rights of the Child, (2003) of the Committee on the Rights of the Child. In addition, relevant articles from the Universal Declaration of Human Rights and all conventions, based on the chart of congruence in the substantive provisions of the seven core international human rights treaties, were also used for reading the normative content of these four rights.

Configuring indicators for human rights attributes 16. In the second stage, a configuration of structural, process and outcome indicators is identified for the selected attributes of a human right. A key concern in proposing such a configuration of indicators is to bring to the fore an assessment of steps taken by the State parties in addressing its obligations – from intent to efforts, and on to outcomes of those efforts.

17. *Structural indicators* reflect the ratification/adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned. They capture the intent or acceptance of human rights standards by the State in undertaking measures for the realization of the human right concerned. Structural indicators have to focus foremost on the nature of domestic law as relevant to the concerned right – whether it incorporates the international standards – and the institutional mechanisms that promote and protect the standards. Structural indicators also need to look at the policy framework and indicated strategies of the State as relevant to the right. Some of the structural indicators may be common to all human rights and there may be others that are more relevant to specific human rights or even to a particular attribute of a human right.

18. *Process indicators* relate State policy instruments to milestones that become outcome indicators, which in turn can be more directly related to the realization of human rights. State policy instruments refer to all such measures including public programmes and specific interventions that a State is willing to take in order to give effect to its intent/acceptance of human rights standards to attain outcomes identified with the realization of a given human right. By defining the process indicators in terms of a concrete cause-and-effect relationship, the accountability of the State to its obligations can be better assessed. At the same time, these indicators help in directly monitoring the progressive fulfilment of the right or the process of protecting the right, as the case may be for the realization of the right concerned. Process indicators are more sensitive to changes than outcome indicators. Hence they are better at capturing progressive realization of the right or in reflecting the efforts of the State parties in protecting the rights.

19. *Outcome indicators* capture attainments, individual and collective, that reflect the status of realization of human rights in a given context. It is not only a more direct measure of the realization of a human right but it also reflects the importance of the indicator in assessing the enjoyment of the right. Since it consolidates over time the impact of various underlying processes (that can be captured by one or more process indicators), an outcome indicator is often a slow-moving indicator, less sensitive to capturing momentary changes than a process indicator. For example, life expectancy or mortality indicators could be a function of the immunization of a population, education or public health awareness of the population, as well as availability and accessibility of individuals to adequate nutrition.

20. In using the framework of structural, process and outcome indicators, the objective is to consistently and comprehensively cover indicators that can reflect the intent and outcome aspect of the realization of human rights. In the final analysis, it may not matter if an indicator is identified as a process or outcome indicator so long as it captures relevant aspect(s) of an attribute of a right or the right in general. Working with such a configuration of indicators simplifies the selection of indicators; it encourages the use of contextually relevant information; it facilitates a more comprehensive coverage of the different attributes or aspects of the realization of the right; and, perhaps, it also minimizes the overall number of indicators required to monitor the realization of the concerned right in any context. Secondly, though there is no one-to-one correspondence between the three categories of indicators and States' obligations to respect, protect and fulfil human rights, an appropriate combination of structural, process and outcome indicators, particularly the process indicators could help in assessing the implementation of the three obligations. [This is particularly so if one is using socio-economic and other administrative data (see para. 24) for inferring the implementation of the three kinds of obligations. For instance, though an outcome indicator may reveal the overall failure of the State party in meeting the three obligations, it may not be able to distinguish which of the three obligations are indeed violated. For example, this could be the case with high-mortality rate. In case of the process indicators it may be easier to identify the specific obligations that are being violated. However, if we consider events-based data on human rights violations (see para. 25) given the nature and methodology for collection of relevant information, it may be the easiest way to derive indicators that capture specifically the violations to respect, protect or fulfil.] Thirdly, process and outcome indicators may not be mutually exclusive. It is possible that a process indicator for one human right can be an outcome indicator in the context of another right. For instance, the proportion of the population below a minimum level of dietary energy consumption may be an outcome indicator for the right to adequate food and a process indicator for the right to life. The guiding concern being that for each right, or rather an attribute of a right, it is important to identify at least one outcome indicator that can be closely related to the realization/enjoyment of that right/attribute. In other words, the selected outcome indicator should sufficiently reflect its importance in the realization of that right. The process indicators are identified in a manner that they reflect the effort of the duty-holders in meeting or making progress in attaining the identified outcome. Having said this, there is an attempt in the illustrated list of indicators to use a consistent approach to differentiate process indicators from outcome indicators. Fourthly, the selection of all indicators has to be primarily guided by the empirical evidence on the use of those indicators. If identified indicators do not fare well on the criteria of empirical relevance, they will not be useful as monitoring tools.

Indicators for cross-cutting norms 21. The indicators that capture the cross-cutting human rights norms or principles do not necessarily relate exclusively to the realization of any specific human right. But they are meant to capture the extent to which the process to implement and realize human rights is, for instance, participatory, inclusionary, empowering, non-discriminatory, accountable or, where required, supported by international cooperation. While some of these cross-cutting norms could guide the process of identifying indicators itself, some could be reflected in the choice of data and its disaggregation in defining an indicator and some others could be reflected in the choice of indicators on specific human rights standards, such as the right to take part in public affairs, or rights related to personal liberty, security and remedy. In reflecting the human rights norms on non-discrimination and

equality in the selection of structural, process and outcome indicators, a starting point is to seek disaggregated data by prohibited grounds of discrimination, such as sex, age, disability, ethnicity, religion, language, social, economic, regional or political status of people. Thus, for instance, if the indicator on the proportion of accused persons seeking and receiving legal aid is broken down by ethnic groups, it would be possible to capture some aspect of discrimination faced by ethnic groups or minorities in accessing justice in a given country. In other instances, the norm of effective remedies and procedural guarantees could be addressed as a 'procedural right' that has a bearing on the realization of a specific 'substantive right', hence is defined in reference to that substantive right. Also, compliance with the norm on non–discrimination in the context of the right to education, as a substantive right, could be captured using an indicator like the proportion of the girls in school-age groups enrolled in school to the proportion of the boys in the same age group enrolled in school. More important, in reflecting the norm on non-discrimination and equality, the emphasis is on indicators that capture the nature of access, and not just availability, to such goods and services that allow an individual to realize his/her rights. Similarly, in the case of the human rights norm of participation the attempt could be to reflect whether the vulnerable and marginalized segments of the population in a country have had a voice in the selection of indicators included in the reporting procedure of the State, or the extent to which they have participated in identifying measures that are being taken by the duty-holder in meeting its obligations.

22. At a more aggregate level, one could consider indicators such as the Gini coefficient, which reflects the distribution of household consumption expenditure/income to assess whether the development process in a country is encouraging participation, inclusion and equality in the distribution of returns from development. Indicators on work participation rates and educational attainment of the population, in general, and of specific groups, in particular (for instance, women, minorities and other social groups) could help in providing an assessment of the extent to which the norms on empowerment are being respected and promoted by the duty-bearer. In reflecting the role of international cooperation in the implementation of human rights, particularly for some economic and social rights, indicators on the contribution of donors, as well as the share of aid/technical cooperation in the efforts of the recipient country to implement the concerned right have to be included. Finally, the first steps in the implementation of the cross-cutting norm on accountability are already being taken as one translates the normative content of a right into quantitative indicators. Indeed, the availability of information sensitive to human rights and its collection and dissemination through independent mechanisms using transparent procedures demonstrates the existence of accountability and reinforces it. Moreover, as noted earlier, by identifying a process indicator as a measure that links State effort to a specific 'policy action – milestone relationship', the framework takes an important step in enhancing State accountability in implementing human rights. Ultimately, the reflection of cross-cutting human rights norms in the list of illustrative indicators is to be seen in terms of the configuration of suggested indicators and the totality of the framework, and not necessarily in terms of individual indicators for each of these norms.

III. Methodological framework

23. To be useful in monitoring the implementation of human rights treaties, quantitative indicators have to be explicitly and precisely defined, based on an acceptable methodology of data collection, processing and dissemination, and have to be available on a regular basis. The main methodological issue relates to data sources and generating mechanisms, criteria for

selection of indicators and the amenability of the framework to support contextually relevant indicators.

Sources and data-generating mechanisms

Socio-economic and other administrative statistics 24. Socio-economic statistics (for short) refers to quantitative information compiled and disseminated by the State through its administrative records and statistical surveys, usually in collaboration with national statistical agencies and under the guidance of international and specialized organizations. In the context of the treaty-body system, this category of indicators is of primary importance given the commitment of States, as parties to international human rights instruments, to report on their compliance. Socio-economic statistics enlighten issues not only related to economic, social and cultural rights, but also to civil and political rights, such as issues of the administration of justice and the rule of law (e.g. executions carried out under death penalty statutes; prison populations; and incidence of violent crimes). The use of a standardized methodology in the collection of information, be it through census operations, household surveys or through civil registration systems, and usually with reasonable reliability and validity, makes indicators based on such a methodology vital for the efforts to bring about greater transparency, credibility and accountability in human rights monitoring. However, in the context of human rights assessment, in general and monitoring undertaken by treaty bodies, in particular, it is in most instances essential to make use of information collected by non-governmental sources to supplement socio-economic statistics.

Events-based data on human rights violations 25. Events-based data (for short) consists mainly of data on alleged or reported cases of human rights violations, identified victims and perpetrators. Indicators, such as the alleged incidence of arbitrary deprivations of life, enforced or involuntary disappearances, arbitrary detention and torture, are usually reported by NGOs and are also processed in a standardized manner by United Nations special procedures. In general, such data may underestimate the incidence of violations and may even prevent valid comparisons over time or across regions, yet it may provide relevant indications to the treaty bodies in undertaking their assessment of the human rights situation in a given country. Though recent attempts have shown that this method can also be applied for monitoring the protection of economic, social and cultural rights, it has been mainly and most effectively used only for monitoring the violation of civil and political rights. Moreover, the information that is compiled through the use of events-based data methods often supplements the information captured through socio-economic statistics. In many other instances, particularly when there is a systematic denial or deprivation of human rights, event–based data is a substitute for the socio-economic statistics. It is necessary, therefore, to identify and use indicators based on these methods of information collection in a complementary manner. [There are at least two other data-generating mechanisms, namely household perception and opinion surveys, and data based on expert judgments that have been widely used in human rights assessments. However, both these methods have limitations (such as lack of objectivity and consistency in the data generated over time) that make them less useful in the compliance assessment of State parties with international human rights instruments.]

Criteria for the selection of quantitative indicators 26. The foremost consideration in adopting a methodology for identifying and building human rights indicators, or for that matter any

set of indicators, as addressed in the discussion on the conceptual framework, is its relevance and effectiveness in addressing the objective(s) for which the indicators are to be used. Most other methodological requirements follow from this consideration. In the context of the work undertaken by the treaty bodies in monitoring the implementation of human rights, quantitative indicators should ideally be:

Relevant, valid and reliable;

Simple, timely and few in number;

Based on objective information and data-generating mechanisms;

Suitable for temporal and spatial comparison and following relevant international statistical standards; and

Amenable to disaggregation in terms of sex, age and other vulnerable or marginalized population segments.

One other consideration, namely the opportunity cost of the compilation of relevant information on an indicator could be useful in selecting indicators for use in human rights assessments.

27. It is worthwhile to note that, although disaggregated data is essential for addressing human rights concerns, it is not practical or feasible always to undertake disaggregation of data at the desired level. Disaggregation by sex, age, regions or administrative units may, for instance, be less difficult than by ethnicity, as the identification of ethnic groups often involves objective (e.g. language) and subjective (e.g. self-identity) criteria that may evolve over time. The production of any statistical data also has implications for the right to privacy, data protection and confidentiality issues, and will, therefore, require appropriate legal and institutional standards ...

Contextual relevance of indicators 28. The contextual relevance of indicators is a key consideration in the acceptability and use of indicators among potential users engaged in monitoring the implementation of human rights. Countries and regions within countries differ in terms of their social, economic and political attainments. They differ in the level of realization of human rights. These differences are invariably reflected in terms of differences in development priorities. Therefore, it may not be possible to always have a universal set of indicators to assess the realization of human rights. Having said that, it is also true that certain human rights indicators, for example those capturing the realization of some civil and political rights, may well be relevant across all countries and their regions. Others that capture the realization of economic or social rights, such as the right to education or housing, may have to be customized to be of relevance in different countries. But even in the latter case, it would be relevant to monitor the core content of the rights universally. Thus, in designing a set of human rights indicators, like any other set of indicators, there is a need to strike a balance between universally relevant indicators and contextually specific indicators, as both kinds of indicators are needed. The approach outlined in the preceding section permits such a balance between a core set of human rights indicators that may be universally relevant and, at the same time, it presents a framework that encourages a more detailed and focused assessment on certain attributes of the relevant human right, depending on the requirements of a particular situation.

The Committee on the Rights of the Child emphasized in particular the empowering impact of collecting data on children's rights, particularly if this is done through participatory processes:

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) (CRC/GC/2003/5, 27 November 2003), paras. 48–50:

F. Data collection and analysis and development of indicators

Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation. The Committee reminds States parties that data collection needs to extend over the whole period of childhood, up to the age of 18 years. It also needs to be coordinated throughout the jurisdiction, ensuring nationally applicable indicators. States should collaborate with appropriate research institutes and aim to build up a complete picture of progress towards implementation, with qualitative as well as quantitative studies. The reporting guidelines for periodic reports call for detailed disaggregated statistical and other information covering all areas of the Convention. It is essential not merely to establish effective systems for data collection, but to ensure that the data collected are evaluated and used to assess progress in implementation, to identify problems and to inform all policy development for children. Evaluation requires the development of indicators related to all rights guaranteed by the Convention.

The Committee commends States parties which have introduced annual publication of comprehensive reports on the state of children's rights throughout their jurisdiction. Publication and wide dissemination of and debate on such reports, including in parliament, can provide a focus for broad public engagement in implementation. Translations, including child-friendly versions, are essential for engaging children and minority groups in the process.

The Committee emphasizes that, in many cases, only children themselves are in a position to indicate whether their rights are being fully recognized and realized. Interviewing children and using children as researchers (with appropriate safeguards) is likely to be an important way of finding out, for example, to what extent their civil rights, including the crucial right set out in article 12, to have their views heard and given due consideration, are respected within the family, in schools and so on.

Indicators are generally considered useful for a number of reasons. As noted by the United Nations Development Program (UNDP) in the *Human Development Report 2000*, indicators can: guide policy-making and evaluation and help monitor progress; help identify unintended impacts of laws, policies and practices; help identify which actors have an impact on the realization of rights and whether these actors comply with their obligations; give early warning about potential violations, prompting preventive action; enhance social consensus on trade-offs to be made in the face of resource constraints; shed light on issues that might otherwise be neglected or silenced (UNDP, *Human Development Report 2000*, chapter 5, 'Using Indicators for Human Rights Accountability'). Yet, the same report also notes that statistics need to be handled with care:

United Nations Development Programme (UNDP), *Human Development Report 2000* (Oxford University Press, 2000), p. 90 (box 5.1.):

The powerful impact of statistics creates four caveats in their use:

- Overuse – Statistics alone cannot capture the full picture of rights and should not be the only focus of assessment. All statistical analysis needs to be embedded in an interpretation drawing on broader political, social and contextual analysis.
- Underuse – Data are rarely voluntarily collected on issues that are incriminating, embarrassing or simply ignored. One European social worker in the 1980s, complaining about the lack of data on homeless people, remarked, 'Everything else is counted – every cow and chicken and piece of butter.' Even when data are collected, they may not be made public for many years – and then there may be political pressure on the media not to publicize the findings.
- Misuse – Data collection is often biased towards institutions and formalized reporting, towards events that occur, not events prevented or suppressed. But lack of data does not always mean fewer occurrences. Structural repression is invisible when fear prevents people from protesting, registering complaints or speaking out.
- Political abuse – Indicators can be manipulated for political purposes to discredit certain countries or actors. And using them as criteria for trade or aid relationships would create new incentives to manipulate reporting.

3.2 The use of indicators by the Committee on Economic, Social and Cultural Rights and the IBSA methodology for monitoring compliance with economic and social rights

An even more ambitious view is that indicators could be used by the Committee on Economic, Social and Cultural Rights to breathe new life into its monitoring of the implementation of the International Covenant on Economic, Social and Cultural Rights, by a process through which each State party would identify its priorities with the Committee, and set well-defined objectives to be achieved by the time of the submission of its next report. The methodology is referred to as 'IBSA' since it involves four steps: (a) the choice of appropriate *indicators*; (b) the choice, at national level, of *benchmarks*, i.e. objectives to be realized within a defined time framework; (c) *scoping*, i.e. the discussion of those benchmarks between the Committee and the State concerned, with a view both to adopting objectives ambitious enough and to being realistic; (d) *assessment*, following the expiration of the time-period concerned, taking as a departure point whether the benchmarks agreed upon have been achieved. Already in its first general comment, the Committee on Economic, Social and Cultural Rights had referred to the usefulness of benchmarks being adopted by States parties to the Covenant, in order to enable monitoring of progress towards time-bound targets (see General Comment No. 1, *Reporting by State Parties* (1989), para. 6). This is also what the Committee on Economic, Social and Cultural Rights refers to, more explicitly, in the following general comments:

Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)* (E/C.12/2000/4, 11 August 2000), paras. 57–8:

Right to health indicators and benchmarks

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the ongoing work of WHO and the United Nations Children's Fund (UNICEF) in this field. Right to health indicators require disaggregation on the prohibited grounds of discrimination.

58. Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of scoping with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of article 12. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.

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. 53–4:

Indicators and benchmarks

53. To assist the monitoring process, right to water indicators should be identified in the national water strategies or plans of action. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under articles 11, paragraph 1, and 12. Indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party's territorial jurisdiction or under their control. States parties may obtain guidance on appropriate indicators from the ongoing work of WHO, the Food and Agriculture Organization of the United Nations (FAO), the United Nations Centre for Human Settlements (Habitat), the International Labour Organization (ILO), the United Nations Children's Fund (UNICEF), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the United Nations Commission on Human Rights.

54. Having identified appropriate right to water indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator [see E. Riedel, 'New Bearings to the State Reporting Procedure: Practical Ways to Operationalize Economic, Social and Cultural

Rights – the Example of the Right to Health' in S. von Schorlemer (ed.), *Praxishandbuch UNO. Die Vereinten Nationen im Lichte globaler Herausforderungen* (Heidelberg: Springer Verlag, 2002), pp. 345–58. The Committee notes, for example, the commitment in the 2002 World Summit on Sustainable Development Plan of Implementation to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.] During the periodic reporting procedure, the Committee will engage in a process of 'scoping' with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of the right to water. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered (see General Comment No.14 (2000), para. 58). Further, when setting benchmarks and preparing their reports, States parties should utilize the extensive information and advisory services of specialized agencies with regard to data collection and disaggregation.

This methodology was first conceptualized in 2002 primarily by Eibe Riedel, a member of the Committee on Economic, Social and Cultural Rights, in a partnership between the University of Mannheim and the international NGO FIAN (Foodfirst Information and Action Network), using the right to adequate food as an example. Riedel provides the following summary of the four steps involved and of the advantages of the approach:

Eibe Riedel, 'The IBSA Procedure as a Tool of Human Rights Monitoring', paper prepared for a joint project between the chair of Professor Riedel and FIAN international (no date):

With regard to the first step, human rights indicators involve the State Party acceptance of relevant indicators as agreed upon through close cooperation with NGOs and relevant specialized agencies that contribute to the effective mainstreaming of human rights in their respective domains.

The next step, national benchmarks, are subsequently set by States Parties which enable a differentiated approach to the vastly differing situations in which most countries find themselves.

The third step, scoping, involves a discussion with the Committee of the State Party established benchmarks, in order to arrive at a consensus about them.

The previous three steps form the basis for the final assessment step that occurs during the dialogue stage between the State Party and the Committee in preparation for the drafting of the latter's Concluding Observations.

The advantage of this four-step IBSA-procedure lies in the truly cooperative and interactive spirit between States Parties, the Committee, specialized agencies, and NGOs wherein a more focussed and meaningful discussion can take place. This new approach is premised on the

assumption that article 2(1) of the Covenant places an unequivocal legally binding duty on all States Parties, the intensity of which is balanced against the objective situation in which States Parties find themselves. Here, while all States must strive to realize all Covenant rights, poorer countries' obligations depend on an assessment of their specific country situations. For example, with reference to the Millennium Development Goals (MDG)-indicator 'Proportion of population with access to improved sanitation', while State Party A, belonging to the group of least developed nations, may have to demonstrate that its percentage of population with access to such a sanitation improved from 50% to 60% during a given reporting period, State Party B, belonging to the group of the most highly developed countries may have to demonstrate that its literacy rate improved from 92% to 95% during that same reporting period. At the subsequent State reporting period five years later, if State A, on assessment by the Committee proved to have reached only a 52% level of improved sanitation, 8% short of the benchmarked 60%, certain mitigating factors may be taken into consideration. Here, had State Party A allocated more resources to food care, or a natural disaster beset the nation upsetting State Party resource allocations, the Committee might still be inclined to praise the State Party A for its progress under difficult circumstances. On the other hand, during the same reporting period, had State Party B achieved an 96% improved sanitation in the absence of mitigating factors, although objectively achieving a much more substantial gain than State Party A, the Committee would still be free to criticize State Party B for not fulfilling its set benchmark. Although, at first glance, the aforesaid example may appear to impose a double standard, this is not the case as, in fact, it simply means that in setting benchmarks, realistic targets have to be agreed, and once agreed, are critically assessed at the next reporting stage. In essence, this means that both States Parties A and B owe fulfilment obligations. However, should they fall short of their benchmarked goals, the onus is on each State Party to prove why these targets were not or could not be met.

This exercise involves the prioritization of a constructive dialogue over an adversarial violations approach. Within this context, only in situations where a State Party wilfully violated its Covenant duties, or obligations, would the Committee in fact, recommend effective measures to redress the grievances caused by such violations.

... These benchmarks will be recruited from all the different categories of indicators, that is outcome benchmarks, structural benchmarks and process benchmarks. Particularly well suited for the benchmarking are the outcome indicators with their result-oriented character. On the other hand, it can be doubted that structural and process benchmarks would be helpful for the monitoring process. These doubts are based on the fact that many structural and process indicators are not obligatory by themselves, the state having a margin of discretion as how to realize the esc-rights. But this discretion requires that the state identifies goals (benchmarks) and the legislative intent (structural benchmarks), and the implementation effort (process benchmarks), and the journey is the reward.

... In cases where benchmarked targets are not met, the Committee can examine State Party reasons for such non-fulfilment. In such circumstances, civil strife and natural catastrophes undoubtedly will act as mitigating factors. It will be interesting to differentiate between the three categories of indicators: If the state has failed to meet structural benchmarks (e.g. because it did not implement a scheduled consumer protection law), the state will hardly be able to exculpate itself, as these structural measures are mostly resource-independent. The non-compliance with set process benchmarks, by contrast, will more often be approved by the Committee, as the assessment has to take into consideration the often resource-intensive

aspect of these benchmarks. Finally, the Committee has to undertake a critical assessment of the outcome benchmarks. For instance, it may be very difficult to criticize a State's noncompliance of a particular outcome situation, if the state has met its structural and process obligations. A comprehensive assessment also requires to take the factors into account that the state can not or can only influence with a great difficulty.

... The IBSA process thus has a Janus-type appearance: it looks back, in order to assess the past reporting period; it looks forward, in order to target future developments in the fuller realization of rights. Looking back, it may force the State party to candidly assess for itself, why certain targets were not met, or could not be met, and this will enable the State party to set realistic new benchmarks for the next reporting period.

3.3 Indicators in the Inter-American system

On 16 November 1999, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (O.A.S. Treaty Series No. 69 (1988)) entered into force. Although the Protocol lists a number of social and economic rights which the States parties undertake to observe, this is subject to a progressivity clause, making the implementation of the rights dependent on the available resources: the parties 'undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol' (Art. 1). In addition, only the right to form and join trade unions (Art. 8(a)) and the right to education (Art. 13) may be adjudicated through the filing of individual petitions (Art. 19(5)). All the rights listed are the subject of reporting by the States parties to the Protocol, however: the reports submitted by States are transmitted to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture in order that they be examined, together with information provided by specialized organizations of the Inter-American system. In their annual reports submitted to the OAS General Assembly, the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture include a summary of the information received from the States parties to the Protocol and the specialized organizations concerning the measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and their general recommendations.

Inter-American Commission on Human Rights (IACHR), Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights (OEA/Ser/L/V/II.129 Doc. 5, 5 October 2007):

[Article 19 of the Protocol of San Salvador provides that States parties shall submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set

forth in the Protocol. The Standards for the preparation of the periodic reports mentioned in Article 19 of the Protocol of San Salvador, adopted by the General Assembly of the OAS (Res. AG/RES. 2074 XXXV-O/05 of 7 June 2005), provide for the drawing up of 'guidelines and rules' for the design of reports in accordance with a system of progress indicators. This is in conformity with the idea that 'particular attention has been given to the principle of progressiveness of economic, social, and cultural rights (ESCR), understood as the adoption of public policy that recognizes ESCR as human rights, whose full realization, generally speaking, cannot be rapidly achieved and which, therefore, require a process in which each country moves at a different pace toward achieving the goal. Except as warranted in extreme cases, this principle regards regressive measures as invalid and excludes inaction.']

28. In addition to quantitative indicators, the IACHR considers it important that the evaluation include a number of qualitative indicators, which this document refers to as qualitative signs of progress. Qualitative dimensions are included in the proposed model for the purposes of description and interpretation. Qualitative signs of progress differ from quantitative indicators in that they do not start from a predetermined category or from an established (statistical) measurement scale, but examine the interpretation of a situation by the social actor and the meaning that they attribute to the phenomenon under evaluation, which are critical for interpreting the facts. Accordingly, these dimensions can be included in the evaluation process and, though less visible, are, nevertheless, absolutely essential for monitoring purposes. Thus, with respect to the right to health, an indicator is the number of doctors per inhabitant, and a qualitative sign of progress is public perception of the health system's accessibility.

29. The IACHR has defined three types of indicators and qualitative signs of progress based on the indicators model proposed in the framework of the UN in the aforementioned 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments'. These categories of indicators and signs are: i) structural; ii) process-related; and, iii) outcome-related.

30. Structural indicators seek to determine what measures the State would be able to adopt to implement the rights contained in the Protocol. Put another way, they collect information in order to evaluate how the State's institutional apparatus and legal system are organized to perform the obligations under the Protocol: if it has in place – or has adopted – measures, legal standards, strategies, plans, programs, or policies, or created public agencies to implement those rights. Although structural indicators merely inquire about the existence or not of measures, they can sometimes include information that is relevant for understanding some of their main characteristics, such as, for example, whether or not standards are in operation, or the rank or jurisdiction of a particular government agency or institution.

31. Process indicators seek to measure the quality and extent of state efforts to implement rights by measuring the scope, coverage, and content of strategies, plans, programs, or policies, or other specific activities and interventions designed to accomplish the goals necessary for the realization of a given right. These indicators help to monitor directly the application of public policies in terms of progressive realization of rights. Process indicators can also offer information on shifts in the quality or coverage of social services or programs over a given time. Whereas structural indicators do not normally need a reference base (they usually elicit a yes/no answer), process indicators depend on reference bases or goals that are usually figures or percentages, and, therefore, will have a more dynamic and evolutionary component than structural indicators.

32. Outcome indicators seek to measure the actual impact of government strategies, programs, and interventions. To some extent they are an indication of how those government

measures impact on the aspects that determine how effective a right recognized in the Protocol is. Thus, they offer a quantitatively verifiable and comparable measurement of the performance of the State in terms of the progressive realization of rights. An improvement in outcome indicators may be a sign of the adequacy of the measures adopted and of progressive improvements towards full realization of rights. However, to form a definitive opinion in this respect, a review of the specific measures adopted is necessary; a decline in outcome indicators may be due to circumstances not attributable to the actions of the State, while an improvement may be caused by fortuitous factors. Accordingly, particular attention should be given to process indicators.

33. Since time consolidates the effects of various underlying processes (which can be measured by one or more process indicators), outcome indicators are usually slow indicators and less sensitive to momentary changes than process indicators ...

34. In order to improve the possibility of analysis and better organize information collected in the process, we suggest dividing it into three categories: i) incorporation of the right; ii) state capabilities; and, iii) financial context and budgetary commitment.

35. The first category is the incorporation of the right in the legal system, in the institutional apparatus, and in public policy. The idea is to collect relevant information on how the right recognized in the Protocol is incorporated in the domestic law books and in public policy and practice. On one hand is the level of the provisions that recognize it, as well as their effectiveness and statutory rank. The right may be recognized in the Constitution, in laws, in jurisprudence or in government programs or practices. The idea, too, is to collect information on the scope of that recognition, that is the degree of precision with which the basic obligations of the State or minimum enforceable standards are defined; also, an indication as to the persons who are individually or collectively possessed of that right; the conditions for its exercise, for example, if it is considered an effective right and can be demanded directly from the government authorities and, as appropriate, enforced by the courts, or if it is not directly enforceable. Finally, what guarantees or appeal procedures are available in the event of a violation of the respective obligations?

36. Another aspect that is important to explore is what social services or policies has the State established for implementation or realization of the rights contained in Protocol? Sometimes programs or services create benefits of a welfare nature and do not recognize the existence of rights. The extent to which a right is a part of the logic and meaning of public policy is an aspect usually measured through process indicators.

37. An example of a structural indicator of the incorporation of a right is, if the right has been included in the Constitution, is it effective or not? A process indicator on the incorporation of a right is if relevant jurisprudence exist on its enforceability; or the scope and coverage of public policies enacted as implementation measures for that right.

38. The second category has to do with state capabilities. This category describes a technical-instrumental and distributive aspect of government resources within the state apparatus. That is, it entails a review of how and according to what parameters government (and its various branches and departments) deals with different socially problematized issues; in particular, how it establishes its goals and development strategies; and under what parameters the implementation of the rights contained in the Protocol is inscribed therein. It entails reviewing the rules of play within the state apparatus, interagency relations, task allocation, financial capacity, and the skills of the human resources that must carry out the allotted tasks. To provide an example, a structural indicator of state capacity is the existence of specific government

agencies for the protection or implementation of a social right. A structural indicator may also be used to examine competencies and functions. A process indicator on state capacity endeavors to determine the scope and coverage of the programs and services implemented by those agencies. A process indicator on state capacity could also measure changes in the quality and scope of those interventions over a period of time.

39. The purpose of including state capabilities as a category in the indicators is to collect information on core aspects that serve to evaluate the extent to which the political will of the State is materialized. Their inclusion also serves to verify if the conditions are in place for effectively implementing, through public policy, a rights-based approach in the framework of the existing state structure. The aim of including this category is also to have a more accurate idea of the problems that the State faces for fulfilling its obligations, by making it possible in the evaluation to identify problems to do with policy decision-making as distinct from public administration problems.

40. An important aspect for measuring state capabilities is the existence of oversight, monitoring, and evaluation agencies for social services and programs within the state structure, as well as the capacity of the State to implement policies to combat corruption and patronage in the use of funds allocated to the social sector. The idea is also to collect information on the accessibility of social programs and services organized by the State by examining, for example, physical access, disclosure, and cultural pertinence.

41. Another aspect that the proposed indicators on state capabilities are designed to capture has to do with fragmentation in the different levels of the government administration and in different social services. The provision of goods and services connected with social rights overall is administered by different levels of government. Decentralization of social services and policies can allow a greater measure of flexibility and adaptation to regional realities and local needs. That said, it can also entail numerous coordination problems. The problem stems, therefore, from a lack of clarity in the definition and distribution of areas of responsibility among different government agencies and, on occasion, among different governments at the national, regional, provincial, and local level. [The study on access to social rights adopted by the European Committee for Social Cohesion identifies a number of the main 'fragmentation' problems connected with health and other social rights: (i) lack of co-ordination among different political spheres; (ii) insufficient information about responsibilities and functions at the national, regional, and local levels (this is the case with social and welfare services and can also occur in the areas of health, employment, and housing services); (iii) insufficient independence permitted to local administrations in the use of resources, as well as insufficient participation in decision-making, implementation, and resource-mobilization processes; (iv) monitoring and implementation of policies at the national level inadequate to ensure equitable nationwide provision: see European Committee for Social Cohesion, 'Access to Social Rights in Europe', Strasbourg, May 2002.] Added to the foregoing is the customary fragmentation in social services themselves due to deficient coordination and lack of communication among agencies as well as the absence of comprehensive policies and adequate record-keeping.

42. In a similar vein, another category to include in the measurement and evaluation process is the basic financial context, which has to do with the actual amount of state funds available for public social spending and how it is distributed, whether it be measured in the usual manner (as a percentage of gross domestic product for each social sector) or by means of an alternative mechanism. In that connection, included in the same category is budgetary commitment, which

makes it possible to assess the importance that the State accords to the right in question. This information also complements the measurement of state capabilities. The importance of measuring this category stems from the fact that if a State institutes a public spending policy that entails a cutback in the area of social infrastructure (for instance, health care and sanitation), apart from acting as a regressive measure, it will have the effect of transferring the costs of care directly to families, and within the family to women.

43. However many categories are included and no matter how many conceptual aspects their analysis might seek to uncover, it will never be possible to encompass all of the issues that shape the effectiveness of a right. Therefore, it is advisable to limit the number of categories to those that are most relevant to the right under consideration and that match the compliance goals set. For that reason, it is advisable to review the availability of information for measurement. This is not a minor consideration given the difficulties in the region as regards access to information sources.

44. In conclusion, the information requested from the State on each right contained in the Protocol would be organized under a model composed of quantitative indicators and qualitative signs of progress arranged according to three types of indicators (structural, process, and outcome indicators), which would provide information on three conceptual categories (incorporation of the right, state capabilities, and financial context and budgetary commitment).

4 MEASURING THE OBLIGATION OF PROGRESSIVE REALIZATION

The tools described in this chapter – national strategies and action plans, framework laws, indicators and benchmarks – ultimately should serve to ensure that States comply with their obligation to fulfil human rights. As we have seen in section 1, the obligation to fulfil includes an obligation to facilitate (by pro-actively removing obstacles to the full enjoyment of the right by individuals), an obligation to promote (by providing individuals with the necessary information that ensures that they will be able to enjoy the right), and an obligation to provide (by delivering goods and services to individuals in situations where they are unable to provide for themselves). To the extent that the States face constraints, particularly budgetary constraints, in discharging this obligation, the right is subject to progressive realization. This is acknowledged by Article 2 para. 1 of the International Covenant on Economic, Social and Cultural Rights, according to which each State party 'undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

However, as noted by the Committee on Economic, Social and Cultural Rights, progressive realization should by no means be treated as a licence to remain passive:

Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The Nature of States Parties' Obligations* (Art. 2, para. 1, of the Covenant) (E/1991/23) (1990):

1. [W]hile the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties' obligations. One of these ... is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination ...'

2. The other is the undertaking in article 2 (1) 'to take steps', which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is 'to take steps', in French it is 'to act' ('s'engage à agir') and in Spanish it is 'to adopt measures' ('a adoptar medidas'). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant ...

9. ... The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

Nevertheless, uncertainty remains as to which efforts precisely may be expected from States facing a variety of constraints, including limited resources (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 (1994), 693–714). Indeed, some authors have taken the view that the idea of monitoring 'progressive realization' should be abandoned altogether, Audrey Chapman proposing that we instead substitute to this approach a 'violations approach', ensuring that States (a) do not take measures that infringe upon human rights, (b) do not maintain or adopt discriminatory policies, and (c) comply with the core content of each right (A. R. Chapman, '"Violations Approach" for Monitoring the International Covenant on

Economic, Social and Cultural Rights', *Human Rights Quarterly*, 18(1) (1996), 23–66; see further chapter 8, section 1.2.).

The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights were elaborated by a group of international law experts in 1986, soon after the Committee on Economic, Social and Cultural Rights was established under Resolution 17/1985 of the Economic and Social Council. These experts gave the following indications concerning the obligation to progressively implement the rights of the Covenant, 'to the maximum of available resources' of each State:

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986):

16. All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant.

17. At the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.

18. Legislative measures alone are not sufficient to fulfil the obligations of the Covenant. It should be noted, however, that article 2.1 would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.

19. States parties shall provide for effective remedies including, where appropriate, judicial remedies.

20. The appropriateness of the means to be applied in a particular State shall be determined by that State party, and shall be subject to review by the United Nations Economic and Social Council, with the assistance of the Committee. Such review shall be without prejudice to the competence of the other organs established pursuant to the Charter of the United Nations.

21. The obligation 'to achieve progressively the full realization of the rights' requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

22. Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2.2 of the Covenant.

23. The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.

24. Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by every one of the rights recognized in the Covenant.

'to the maximum of its available resources'

25. States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.

26. 'Its available resources' refers to both the resources within a State and those available from the international community through international co-operation and assistance.

27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant, attention shall be paid to equitable and effective use of and access to the available resources.

28. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.

'individually and through international assistance and co-operation, especially economic and technical'

29. International co-operation and assistance pursuant to the Charter of the United Nations (arts. 55 and 56) and the Covenant shall have in view as a matter of priority the realization of all human rights and fundamental freedoms, economic, social and cultural as well as civil and political.

30. International co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized (cf. article 28 of the Universal Declaration of Human Rights).

31. Irrespective of differences in their political, economic and social systems, States shall co-operate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences.

32. States parties shall take steps by international means to assist and co-operate in the realization of the rights recognized by the Covenant.

33. International co-operation and assistance shall be based on the sovereign equality of States and be aimed at the realization of the rights contained in the Covenant.

34. In undertaking international co-operation and assistance pursuant to article 2.1 the role of international organizations and the contribution of non-governmental organizations shall be kept in mind ...

[Violations of economic, social and cultural rights]

70. A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.

71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.

72. A State party will be in violation of the Covenant, *inter alia*, if:

It fails to take a step which it is required to take by the Covenant;

It fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;

It fails to implement without delay a right which it is required by the Covenant to provide immediately;

It wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

It applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;

It deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*;

It fails to submit reports as required under the Covenant.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were adopted in 1997, by a group of experts aiming to build on the Limburg Principles of 1986 in order to reflect the evolution of international law since that date.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997):

Margin of discretion

8. As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the 'progressive realization' provisions in article 2 of the Covenant as a pretext for non–compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.

Minimum core obligations

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights ... Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant.' Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

Availability of resources

10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25–28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

State policies

11. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or

impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

Gender discrimination

12. Discrimination against women in relation to the rights recognized in the Covenant, is understood in the light of the standard of equality for women under the Convention on the Elimination of All Forms of Discrimination against Women. That standard requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.

Inability to comply

13. In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligations for reasons beyond its control has the burden of proving that this is the case. A temporary closure of an educational institution due to an earthquake, for instance, would be a circumstance beyond the control of the State, while the elimination of a social security scheme without an adequate replacement programme could be an example of unwillingness by the State to fulfil its obligations.

Violations through acts of commission

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

(a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;
(b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
(c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
(d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;
(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;
(f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*;
(g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

Violations through acts of omission

15. Violations of economic, social and cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:

(a) The failure to take appropriate steps as required under the Covenant;
(b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;
(c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;
(d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
(e) The failure to utilize the maximum of available resources towards the full realization of the Covenant;
(f) The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;
(g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;
(h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;
(i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
(j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

The Committee on Economic, Social and Cultural Rights itself has provided little guidance on this issue. It considers that (a) 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party' (General Comment No. 3, para. 10); (b) although a State may in principle attribute its failure to meet at least its minimum core obligations to a lack of available resources, 'it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations' (para. 10); (c) 'even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances' (para. 11); (d) 'the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints' (para. 11); (e) 'even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes' (para. 12); finally, (f) since 'the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance, ... international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States [although it] is particularly incumbent

upon those States which are in a position to assist others in this regard' (paras. 13–14). These six principles are useful and important, but they remain insufficient to provide guidance to States as to what exactly is expected from them in the progressive realization of rights: at which speed should they proceed? which levels of resources should they commit? how should they arbitrate between the competing demands imposed on them, in a context of limited resources requiring prioritization?

In answering these questions, it is important not to confuse the means with the ends. National strategies and action plans, framework legislation, the setting of benchmarks and indicators to measure progress and improve accountability, are all useful – but they are procedural tools, and they are no substitute for complying with the substantive requirement laid down in the right itself. A State would not be complying with its obligations merely by adopting these instruments, if no progress is made in the everyday lives of the population under its jurisdiction: a violation of its obligations in such circumstances would be revealed by contrasting how much a State achieves as measured through structural indicators (measuring whether a State has set up the appropriate institutions and adapted its regulatory framework), with how well a State performs according to process or outcome indicators (focusing respectively on the policies effectively implemented and the results achieved). For the same reason, a State setting benchmarks and indicators to measure progress towards achieving these benchmarks would not be complying with its international obligations if the targets were set too low, or if, without appropriate justification, it failed to reach them. It is maintaining the link between procedural tools and substantive outcomes that constitutes the main difficulty facing process-based approaches to the definition of the content of the obligation of 'progressive realization' (such as, for instance, the approach proposed by K. G. Young, 'The Minimum Core of Economic and Social Rights: a Concept in Search of Content', *Yale Journal of International Law*, 33 (2008), 113). Indeed, this is why, in the IBSA methodology outlined above (section 3.2.), provision is made for 'scoping', as explained by Eibe Riedel:

Eibe Riedel, 'The IBSA Procedure as a Tool of Human Rights Monitoring', paper prepared for a joint project between the chair of Professor Riedel and FIAN international (no date), pp. 72–3:

As the process of benchmarking is undertaken by individual States Parties, it is highly desirable that a control mechanism exists to ensure that established goals are set neither too high nor too low. If national benchmarks [were] to be set too low, State Parties could avoid being held in breach of their ICESCR obligations, and could go so far as to claim [praise from the Committee on Economic, Social and Cultural Rights] for limited progress of little value. In order to avoid such undesirable consequences, State Party proposed benchmarks should be scoped, an objective that can be reached through a constructive State Party/Committee dialogue that strives towards reaching a consensus concerning said nationally set benchmarks. If the projected benchmarks were found to be overly modest, the Committee could ask for a State Party explanation, and could recommend benchmark reconsideration. As applied to the development of right to food benchmarks, the expertise of specialized agencies, such as the FAO, non-governmental

organizations, and national human rights commissions or institutes with special food rights expertise should be engaged to assist in this process. While in most instances, a cooperative spirit prevails between the Committee and the State Party, in extreme cases where benchmark consensus can not be reached, the treaty body might set an elevated benchmark more in line with State Party Covenant obligations. In practice, the constructive dialogue approach of the [Committee on Economic, Social and Cultural Rights] will seek consensus with the State party, to avoid unnecessary conflict.

At the same time, another risk – in some way a reverse of the latter – would be to consider that a failure by the State to meet its international obligations simply follows from the fact that the outcomes are not satisfactory. The lack of resources, or other factors (both internal and external, such as weather-related events, civil strife, or the imposition of economic sanctions by other States), may play a role in explaining that the results are not achieved. Hence, we need to devise methods to take into account these constraints, while not relieving a State from its obligations both to achieve the fullest possible realization of human rights within these constraints, and to put its best efforts into removing these constraints as soon as possible.

A useful attempt in this direction is the causality analysis proposed by Eitan Felner. Felner proposes to use quantitative data, combined with qualitative information, in order to move from outcomes (economic and social rights deprivations and disparities of outcome) (step #1 of the three-steps approach), to the identification of the 'main determinants of these outcomes so as to identify the policy responses that can reasonably be expected of the state' (step #2), and finally (in step #3) to the assessment of the extent to which 'deprivations, disparities and lack of progress can be traced back to failures of government policy' (E. Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability', *Sur – International Journal on Human Rights*, 9 (2008), 109–46 at 116). The use of outcome indicators is thus useful, and in particular it serves to identify whether a State complies with the core minimum content of each right, with the requirement of non-discrimination, of whether it is making progress or is instead retrogressing over time. But the information collected through outcome indicators is only a departure point. The following two steps move from the situation of the right-holder to the question whether the State has failed to discharge its human rights obligations:

Eitan Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability', *Sur – International Journal on Human Rights*, (2008), 109–46 at 126:

Imagine for instance that during Step #1 of the proposed methodological framework, one finds that in the focus country, a large proportion of girls are dropping out of school, while most boys complete primary school. If in Step #2, one finds that customs and social norms may be influencing parents' decisions not to send girls to school, then in Step #3, one should see whether

the government has made efforts to counteract these entrenched social norms that have proven to be useful in other circumstances. This could include legislative reforms such as marriage rights and inheritance, or public awareness campaigns about the benefits of girls' education. But in Step #2, one may find that the primary reason that many parents are not sending their girls to school is not due to cultural or social norms, but rather due to economic reasons. For example, in that country, educated boys can expect to receive more future income than equally educated girls, and poor households without the means to send all their children to school, thus choose to send boys rather than girls. In such a case, during this step, one should assess whether governments have made specific efforts to change labor market circumstances, so that it does not discriminate against women, and so that opportunities and advantages faced by all children at given levels of education and achievement are broadly equal.

Such a causality analysis should make it possible to identify which deprivations of social and economic rights (as measured by outcome indicators) are attributable to a failure of the State to comply with its obligations, and which are instead the result of a lack of capacity of the State. Indeed, the final stage of the analysis (step #3) should enable the identification of 'cases in which the government had the capacity to deal with some of the determinants of specific deprivations and inequalities identified in Step #2, but failed to do so' (at 122). This of course requires what may reasonably be expected from the State to be clarified. Felner proposes a variety of methods to achieve this, including (a) the reference to internationally agreed benchmarks; (b) cross-country comparisons, between countries of the same region or at the same level of development; and (c) budget analysis:

Eitan Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability', *Sur – International Journal on Human Rights*, 9 (2008), 109–46 at 123 and 127:

[Cross-country comparisons could be achieved by] comparing the levels of goods and services in the focus country with those of other countries in the same region. For instance, if the focus country has a much lower proportion of immunization rates, fewer hospital beds per 1,000 people, lower proportion of people with access to an improved water source, lower percentage of textbooks per pupil, or higher pupil-teacher ratio than most of the countries in the region, it would suggest that these levels are insufficient given its level of development, and that the focus country has failed to ensure the availability of these essential services in sufficient quantity. Similar to the cross-country comparisons of outcome indicators made in Step #1, cross-country comparisons over time can also useful for assessing whether the progress the focus country made has been bigger or smaller than that of other countries in same region.

[In order to evaluate whether the State commits sufficient resources to the fulfilment of human rights, Felner proposes what he calls a 'basic framework of expenditure and resource allocation ratios' to analyze expenditure patterns, based on the UNDP's proposals for the evaluation of public funding on human development. He notes that] these ratios could also be a powerful monitoring tool allowing human rights advocates to identify when: a government

devotes insufficient resources to an area related to a specific right, such as education, health, food security, etc; a government appears not to raise sufficient revenues to be able to adequately fund the competing needs the state has; within a sector related to ESC rights, a government allocates disproportionately little resources to those budgetary items that should be a priority, in that they could have more impact on ensuring minimum essential levels of rights enjoyment in areas related to core elements of the right to health, education etc (e.g. disproportionate spending on tertiary versus primary education, or on metropolitan hospitals as opposed to rural primary health care services).

There at least three advantages to this approach – apart from the evident fact that it allows monitoring the obligation of progressive realization, thus giving a content to the obligation to fulfil that goes beyond a purely procedural dimension. First, the approach allows for a highly contextualized analysis. Even when the levels of deprivation in certain areas (such as health, education or food) are identical across various countries, different recipes will correspond to their respective conditions. An inductive approach, taking outcomes as a departure point and moving backwards along the causality chain, adequately reflects the need to avoid prescriptive approaches, based on a presumption that there are certain policies valid across time and geography to address social and economic deprivation. Second, the approach rightly does not take lack of resources as a given, which per definition it would not be possible for the State to reverse. For the same reasons, in measuring resources available, GDP per capita is more appropriate (although it remains a very crude indicator) than the public budget, because it is the duty of the State to raise taxes (without increasing inequalities of income) in order to ensure the fulfilment of rights that require resources. Third, the approach does not underestimate the validity of the use of quantitative indicators (measuring socio-economic deprivation) either for the purpose of comparing evolutions at different times (in order to measure whether progress is made or whether a State has been retrogressing), or for the purposes of cross-country comparisons (in order to set an appropriate benchmark for States, based on what other States in a similar situation or from the same region achieve, under similar conditions). These advantages are also present in the 'index of economic and social rights fulfillment' developed by Fukuda-Parr and others (S. Fukuda-Parr, T. Lawson-Remer and S. Randolph, 'An Index of Economic and Social Rights Fulfillment: Concept and Methodology', *Journal of Human Rights*, 8, Issue 3 (2009), 195), in which economic and social rights fulfilment is measured either as a ratio between the extent of rights enjoyment (x), and State resource capacity (y), or on the basis of the position achieved by a country along an Achievement Possibility Frontier (APF), which 'determines the maximum level of achievement possible ... on each ESR indicator at a given per capita income level, based on the highest level of the indicator historically achieved by any country at that per capita GDP level'. While it is not possible here to enter into the methodological debates such use of quantitative methods in measuring the degree of achievement of human rights give rise to, it is clear that these represent some of the most promising efforts in this area, in which important advances can be expected over the next few years.

5.1. Questions for discussion: tools for discharging the obligation to fulfil human rights

1. Are the tools described in this chapter applicable both to economic, social and cultural rights, and to civil and political rights, as implied by the 2006 Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies? The view has been expressed that civil and political rights entail for their effective implementation considerable resources and thus may be subject to progressive realization: F. Jhabvala has argued, for instance, that 'ensuring the free exercise of civil and political rights will often involve significant State intervention and the incurring of considerable public expenditure in order to establish a system of courts, to train police and other public officials, and to establish a system of safeguards against potential abuses of rights be State officials themselves' (F. Jhabvala, 'On Human Rights and the Socio-Economic Context', *Netherlands International Law Review* 31 (1984), 149 at 163). Note that this position not only would appear to apply to the 'fulfil' component of States' obligations, but also to the 'respect' and 'protect' components, for the full range of human rights. Do you agree? To which extent should socio-economic conditions be taken into account in assessing whether a State complies with its human rights obligations?
2. Does the 2006 Brazilian Law establishing SISAN seem appropriate to fulfil all the functions identified for a framework law by Arjun Sengupta? Or are elements missing? What should the role of courts be in the implementation of such a framework law?
3. Is there a risk that, with the adoption of a national strategy concerning the realization of one right in particular, or/and the adoption of a framework law relating to that right, other rights get comparatively neglected, and that fewer resources be earmarked for their realization? Would the adoption of a strategy or/and framework law concerning only one right contradict the idea of indivisibility, interdependence, and equal importance of all human rights? Arjun Sengupta takes the view that: 'It is not necessary that the programmes included in [a] framework legislation should cover all rights. But it is important that they encompass a number of rights which are closely interdependent, together with a provision that in the process of realisation of these rights, no other rights are violated. If our concern is mostly with the right to food, it will be useful to combine it with at least the right to health, the right to education, the right to sanitation and clean water, as well as the right to an adequate standard of living and employment established for the food producers and consumers' (A. 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). Do you agree?
4. The Committee on the Rights of the Child seems to favour the adoption of a national strategy for the realization of children's rights, grounded in the Convention on the Rights of the Child. Is this appropriate? What are the disadvantages of such a strategy, as compared to more global national human rights action plans cutting across all rights?
5. In its 2007 Guidelines addressed to the States parties to the Protocol of San Salavador on economic, social and cultural rights, the Inter-American Commission on Human Rights proposes that States develop separate indicators on: (i) incorporation of the right; (ii) state capabilities;

and (iii) financial context and budgetary commitment. Is this an appropriate way of measuring the obligation to take steps towards progressive realization of economic, social and cultural rights? How should the information on financial context and budgetary commitment be evaluated for such an evaluation to be meaningful?

6. The allocation of resources across different areas (*inter alia*, health, education, housing, agriculture, social protection, public security, communications, national defence) requires trade-offs that are in principle trusted to the democratic process. Is this compatible with the adoption of a national strategy for the realization of a right such as the right to health or the right to education, or even with the adoption of a national human rights action plan cutting across all rights? Is participation of civil society in the drafting of such strategies or action plans a substitute for parliamentary processes? Is giving leadership in the prepartion of a national strategy or action plan to the parliament appropriate, as was done in the case of Lithuania? Generally, do national strategies or action plans empower parliament? Do they empower the government, enhancing its ability to impose its agenda in the name of fulfilling human rights? Or do they empower courts? What impact, generally, does the adoption of such strategies or action plans have on the relationship between different branches of government? Does it make any difference whether the strategy or action plan is codified into a framework law? Does it make any difference whether it is set according to a process defined in a framework law, as illustrated by the Brazilian 2006 law establishing SISAN?
7. What differentiates a national human rights action plan from other plans (such as 'five-year action plans') guiding governmental action? Which conditions should be fulfilled for a national human rights action plan to qualify as such?
8. If the full realization of human rights requires international assistance and co-operation and, more generally, an enabling international environment, should the international community agree on 'international strategies', for example, for the realization of the right to food or the right to health? Consider the brief discussion earlier on the Millennium Development Goals in chapter 2, section 2.4. What would make such an international strategy, or action plan, for the realization of human rights at global level, different from the MDGs?
9. How can monitoring compliance with the obligation progressively to realize rights 'to the maximum of available resources' be compatible with democratic self-determination? The 2006 Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies suggest that, without necessarily pre-determining which priorities should be set at one particular moment in time, a human rights approach 'cautions against making trade-offs whereby one right suffers a marked decline in its level of realization', which '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' since, in principle, any additional resources required in order to realize the rights which are given priority '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)'. Is this an acceptable limit to what may be decided through democratic decision-making? (This issue is explored in greater depth in chapter 8.)

6

Derogations in Time of Public Emergency

INTRODUCTION

A number of human rights instruments contain provisions which allow States to adopt measures suspending the enjoyment of these rights to the extent strictly required by situations of emergency, for instance in the event of an armed conflict, internal or international, or following a natural disaster (see S. R. Chowdhury, *Rule of Law in a State of Emergency: the Paris Minimum Standards of Human Rights Norms in a State of Emergency* (London: Pinter Publishers, 1989); J. Fitzpatrick, *Human Rights in Crisis: the International System for Protecting Rights During States of Emergency* (Philadelphia, Penn.: University of Pennsylvania Press, 1994); J. Oraá, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992); R. Higgins, 'Derogations under Human Rights Treaties', *British Yearbook of International Law*, 48 (1976–77), 281; T. Buergenthal, 'To Respect and Ensure: State Obligations and Permissible Derogations' in L. Henkin (ed.), *The International Bill of Rights: the Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 72–91; C. Schreuer, 'Derogation of Human Rights in Situations of Public Emergency', *Yale Journal of World Public Order*, 9 (1982), 113; A.-L. Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague: Martinus Nijhoff, 1998)).

The relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) (Art. 4), the American Convention on Human Rights (ACHR) (Art. 27) and the European Convention on Human Rights (ECHR) (Art. 15), present clear similarities (for convenience, these clauses are reproduced in box 6.1.). The Paris Minimum Standards of Human Rights Norms in a State of Emergency, the result of work done by experts within the International Law Association in 1976–84 primarily under the leadership of S. R. Chowdhury (see the presentation by R. B. Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency', *American Journal of International Law*, 79 (1985), 1072–81) and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (UN doc. E/CN.4/1985/4 and *Human Rights Quarterly*, 6 (1984), 3), also the result of the work of independent experts, may also guide the interpretation of these clauses.

These provisions list six conditions for a State to be authorized to adopt measures derogating from their obligations under the cited instruments: a public emergency threatening the life of the nation must exist; the measures adopted must be strictly required by the exigencies of the situation; they must not entail a discrimination 'on the ground of race, colour, sex, language, religion, or social origin' (Art. 4(1) ICCPR and Article 27(1) ACHR, although the ECHR is silent on this condition); the measures derogating from these instruments may only be allowed to the extent that they are not inconsistent with the other obligations of the State concerned under international law; the derogation may not justify the suspension of certain guarantees, which are defined as 'non-derogable'; and the derogation must be notified to the other States parties to the instrument concerned.

Box 6.1. Provisions relating to derogations in human rights instruments

International Covenant on Civil and Political Rights, Art. 4:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from [Art. 6 (right to life), Art. 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), Art. 8, paragraphs 1 and 2 (prohibition of slavery, slave trade and servitude), Art. 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), Art. 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), Art. 16 (the recognition of everyone as a person before the law), and Art. 18 (freedom of thought, conscience and religion)] may be made under this provision. [The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in Art. 6 of that Protocol.]
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

American Convention on Human Rights, Article 27.
Suspension of Guarantees:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present

Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

European Convention on Human Rights, Article 15:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

The function of derogation clauses in the three human rights instruments which include them is not to exonerate the State from complying with human rights in the face of certain emergency situations. Quite to the contrary, these clauses serve to define carefully under which conditions certain guarantees may be (in part) suspended. In other words, as stated by the Siracusa Principles, 'derogation from rights recognized under international law in order to respond to a threat to the life of the nation is not exercised in a legal vacuum. It is authorized by law and as such it is subject to several legal principles of general application' (para. 61). A number of consequences follow:

Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1985), paras. 62–64:

62. A proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation in order to determine to what extent, if any, it poses a threat to the life of the nation. A proclamation of a public emergency, and consequent derogations from Covenant obligations, that are not made in good faith are violations of international law.

63. The provisions of the Covenant allowing for certain derogations in a public emergency are to be interpreted restrictively.

64. In a public emergency the rule of law shall still prevail. Derogation is an authorized and limited perogative in order to respond adequately to a threat to the life of the nation. The derogating state shall have the burden of justifying its actions under law.

This chapter examines the conditions under which States may rely on the derogation mechanism, and it provides a number of illustrations of how courts have evaluated measures adopted by States seeking to derogate from their human rights obligations. The United Kingdom's derogation to Article 5(1) ECHR, following the terrorist attacks on New York and Washington on 11 September 2001, offers a spectacular example, to which frequent reference will be made. The United Kingdom derogated from Article 5 ECHR in anticipation of the adoption of sections 21–3 of the Anti-terrorism, Crime and Security Act 2001, which provided for the potentially indefinite detention of foreign nationals the Home Secretary suspects of involvement in international terrorism and whom he/she is unable to deport owing to a well-founded fear of persecution in the country of origin and the inability to secure a third country of destination (see box 6.2.). The derogation was ultimately found to be incompatible with the requirements of the ECHR both by the House of Lords in 2004 and by the European Court of Human Rights in 2009, in what is sometimes referred to as the *Belmarsh Detainees* case.

Box 6.2. Derogation in the context of counter-terrorist measures: the derogation by the United Kingdom to Art. 5(1) ECHR

Following the 11 September 2001 attacks on New York and Washington, the United Kingdom adopted the Anti-terrorism Crime and Security Act 2001, which received Royal Assent on 14 December 2001, and the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644). This Derogation Order, adopted pursuant to section 14 of the Human Rights Act 1998, found that 'There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.' The Derogation Order also recalled the *Chahal* case law of the European Court of Human Rights, imposing an absolute prohibition on deportation of foreign nationals whenever substantial grounds have been shown for believing

that the individual concerned would face a real risk of being subjected to treatment contrary to Article 3 ECHR if removed to another State (chapter 3, section 2.2.), implying that there were certain individuals found in the United Kingdom who, while representing a threat to the national security of the United Kingdom, might not be deported in accordance with this case law. The Derogation Order recognized that the extended power in the new legislation to detain a person against whom no action was being taken with a view to deportation might be inconsistent with Article 5(1)(f) ECHR. Indeed, this provision allows for the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition, which presupposes that removal from the national territory is a realistic possibility and that it is effectively pursued. The United Kingdom concluded that it was necessary to derogate from the ECHR in this respect. On 18 December 2001, the Secretary-General of the Council of Europe was formally notified, through a '*note verbale*', that the United Kingdom intended to derogate from Article 5(1) ECHR. Corresponding steps were taken to derogate from Article 9 of the International Covenant on Civil and Political Rights.

1 FIRST CONDITION: A PUBLIC EMERGENCY WHICH THREATENS THE LIFE OF THE NATION

1.1 What is a public emergency threatening the life of the nation?

In order for a derogation to be admissible, the situation must constitute a 'public emergency which theatens the life of the nation'. In its General Comment No. 29 on Article 4 of the International Covenant on Civil and Political Rights, the Human Rights Committee noted:

Human Rights Committee, General Comment No. 29, *Derogations during a State of Emergency* (Art. 4), (CCPR/C/21/Rev.1/Add. 11) (24 July 2001), para. 3:

Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.

By reference to Article 4 ICCPR, the Siracusa Principles state the following, under the heading 'Public Emergency which Threatens the Life of the Nation':

Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1985), paras. 39–40:

39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

(a) affects the whole of the population and either the whole or part of the territory of the State, and
(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.

It is doubtful, however, whether Article 4 ICCPR implies a requirement that the danger 'affects *the whole of the population* and either the whole or part of the territory of the State' (emphasis added). In fact, this may be in contradiction with the statement by the Human Rights Committee that derogation measures must be limited in scope, also as regards 'geographical coverage ... of the state of emergency and any measures of derogation resorted to because of the emergency' (see below).

Lawless v. *Ireland*, the first case adjudicated by the European Court of Human Rights, was concerned with very low-level IRA terrorist activity in Ireland and Northern Ireland in 1954–57. The Irish Government derogated from Article 5 ECHR in July 1957 in order to permit detention without charge or trial and the applicant was detained between July and December 1957. Applying Article 15 of the European Convention on Human Rights, the European Court of Human Rights initially noted the following:

European Court of Human Rights, *Lawless* v. *Ireland* (No. 3), judgment of 1 July 1961:

[T]he natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed. Having thus established the natural and customary meaning of this conception, the Court must determine whether the facts and circumstances which led the Irish Government to make their Proclamation of 5 July 1957 come within this conception. The Court, after an examination, finds this to be the case; the existence at the time of a 'public emergency threatening the life of the nation' was reasonably deduced by the Irish Government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating

outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.

The requirement that the emergency should affect the whole population was again repeated in the *Greek* case (1969) (12 *Yearbook of the ECHR* 1), when the Government of Greece failed to persuade the European Commission of Human Rights that there had been such a public emergency threatening the life of the nation justifying derogation. In para. 153 of its opinion the Commission said: 'Such a public emergency may then be seen to have, in particular, the following characteristics: (1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.' However, in later cases the European Court of Human Rights adopted a more flexible position. In *Ireland* v. *United Kingdom*, the Court emphasized that the national authorities are in principle better placed than an international court to evaluate which measures are required by the emergence of a particular situation, thus inaugurating a doctrine about the 'margin of appreciation' which has since played a central role in its jurisprudence.

European Court of Human Rights (Plenary), *Ireland* v. *United Kingdom*, judgment of 18 January 1978, Series A No. 25, para. 207:

It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.

In *Ireland* v. *United Kingdom*, the Court also considered that the 'public emergency' justifying a derogation could affect only part of the national territory, referring in that case to 'a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties [of Northern Ireland] and the lives of the province's inhabitants' (para. 212).

The question of whether there indeed existed a 'public emergency threatening the life of the nation' was also raised in the context of the derogation measures adopted by the United Kingdom following the 11 September 2001, terrorist attacks (see box 6.2.). In December 2002, the United Kingdom responded as follows to the Concluding Observations of the Human Rights Committee, which the Committee adopted on 29

October 2001 on the United Kingdom's fourth and fifth combined report presented pursuant to Article 40 ICCPR:

Comments by the Government of the United Kingdom of Great Britain and Northern Ireland on the reports of the United Kingdom (CCPR/CO/73/UK) and the Overseas Territories (CCPR/CO/73/UKOT) (CCPR/CO/73/UK/Add. 2 and CCPR/CO/73/UKOT/Add. 2, 4 December 2002):

We believe the measures contained in [the Anti-terrorism Crime and Security Act 2001] both respect and meet the United Kingdom's international human rights obligations.

Terrorism represents a grave and fundamental threat to the national security of the United Kingdom and the safety of its citizens. This is a threat that needs to be addressed without compromising the integrity of those international obligations.

Article 4 of the International Covenant on Civil and Political Rights permits States to derogate under certain conditions from certain of their obligations under the Covenant in time of public emergency which threatens the life of the nation the existence of which is officially proclaimed.

2. Article 4 (1) of the Covenant

(a) Is there a public emergency? We believe that there is a public emergency threatening the life of the nation. On 30 July 2002, the Special Immigration Appeals Commission in the case of *A and others* v. *Secretary of State for the Home Department* found it was 'satisfied that what has been put before us in the open generic statements and the other material in the bundles which are available to the parties does justify the conclusion that there does exist a public emergency threatening the life of the nation within the terms of Article 15 [of the ECHR]. That the risk has been heightened since 11 September is clear, but we do not regard that description as in any way inconsistent with the existence of an emergency within the meaning of Article 15 ECHR. The United Kingdom is a prime target, second only to the United States of America, and the history of events both before and after 11 September 2001 as well as on that fateful day does show that if one attack were to take place it could well occur without warning and be on such a scale as to threaten the life of the nation.'

As regards the closed evidence also before the Special Immigration Appeals Commission, the Commission said: 'We have considered the closed material. Suffice to say that it confirms our view that the emergency is established.'

...

7. Developments since Royal Assent 14 December 2001

(a) Individuals detained Eleven individuals have been detained in total since the Act received Royal Assent. Two of these have since left the United Kingdom voluntarily. The nine remaining in detention have all lodged appeals against the certification and against the decision to deport. All have brought actions challenging the lawfulness of the derogation that underpins the detention power in the Act.

(b) The SIAC hearings These were heard at the end of July and the SIAC judgement on 30 July [2002] recognized that, in the light of the 11 September attacks, there is a public emergency threatening the United Kingdom. SIAC also held that the powers of detention in the Anti-terrorism, Crime and Security Act 2001 are a necessary and proportionate response to that emergency in ECHR terms.

While the UK Special Immigration Appeals Commission (SIAC) found that the detention powers provided under the Anti-terrorism Crime and Security Act 2001 were a necessary and proportionate response to the terrorist threat, it also took the view that the detention powers were discriminatory on grounds of national origin against foreign nationals. The UK Government appealed that holding. On 25 October 2002, the Court of Appeal (Lord Woolf C.J., Brooke and Chadwick L.JJ.) allowed the appeal ([2002] EWCA Civ 1502, [2004] Q.B. 335). The nine detainees in turn appealed to the House of Lords, which delivered its judgment on 16 December 2004. Again, the House of Lords addressed the question of whether there existed a 'public emergency' in the meaning required by Article 15 ECHR or Article 4 ICCPR for derogation powers to be exercised. One of the Lords (Lord Hoffmann) answered in the negative in his opinion, stating: 'This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.' This view was not shared by the majority:

House of Lords (United Kingdom), A. *(F.C.) and others (F.C.) (Appellants)* v. *Secretary of State for the Home Department (Respondent), X. (F.C.) and another (F.C.) (Appellants)* v. *Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, leading opinion by Lord Bingham of Cornhill:

[Public emergency]

20. The appellants did not seek to play down the catastrophic nature of what had taken place on 11 September 2001 nor the threat posed to western democracies by international terrorism. But they argued that there had been no public emergency threatening the life of the British nation, for three main reasons: if the emergency was not (as in all the decided cases) actual, it must be shown to be imminent, which could not be shown here; the emergency must be of a temporary nature, which again could not be shown here; and the practice of other states, none of which had derogated from the European Convention, strongly suggested that there was no public emergency calling for derogation. All these points call for some explanation.

21. The requirement of imminence is not expressed in article 15 of the European Convention or article 4 of the ICCPR but it has ... been treated by the European Court as a necessary condition of a valid derogation. It is a view shared by the distinguished academic authors of the Siracusa Principles, who in 1985 formulated the rule (applying to the ICCPR): '54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.'

In submitting that the test of imminence was not met, the appellants pointed to ministerial statements in October 2001 and March 2002: 'There is no immediate intelligence pointing

to a specific threat to the United Kingdom, but we remain alert, domestically as well as internationally'; and '[I]t would be wrong to say that we have evidence of a particular threat.'

22. The requirement of temporariness is again not expressed in article 15 or article 4 unless it be inherent in the meaning of 'emergency'. But the UN Human Rights Committee on 24 July 2001, in General Comment No. 29 on article 4 of the ICCPR, observed in para 2 that: 'Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.'

This view was also taken by the parliamentary Joint Committee on Human Rights, which in its Eighteenth Report of the Session 2003–2004 (HL paper 158, HC 713, 21 July 2004), in para 4, observed: 'Derogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary. According to the Government and the Security Service, the UK now faces a near-permanent emergency.'

It is indeed true that official spokesmen have declined to suggest when, if ever, the present situation might change.

23. No state other than the United Kingdom has derogated from article 5. In Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe resolved (para. 9) that: 'In their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights.' It also called on all member states (para. 12) to: 'refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the rights and liberties guaranteed under its Article 5 (right to liberty and security)' ...

The Committee of Privy Counsellors established pursuant to section 122 of the 2001 Act under the chairmanship of Lord Newton of Braintree, which reported on 18 December 2003 (Anti-terrorism, Crime and Security Act 2001 Review: Report, HC 100) attached significance to this point: '189. The UK is the only country to have found it necessary to derogate from the European Convention on Human Rights. We found this puzzling, as it seems clear that other countries face considerable threats from terrorists within their borders.' It noted that France, Italy and Germany had all been threatened, as well as the UK.

24. The appellants submitted that detailed information pointing to a real and imminent danger to public safety in the United Kingdom had not been shown. In making this submission they were able to rely on a series of reports by the Joint Committee on Human Rights. In its Second Report of the Session 2001–2002 (HL paper 37, HC 372), made on 14 November 2001 when the 2001 Act was a Bill before Parliament, the Joint Committee stated (in para. 30): 'Having considered the Home Secretary's evidence carefully, we recognise that there may be evidence of the existence of a public emergency threatening the life of the nation, although none was shown by him to this Committee.'

It repeated these doubts in para. 4 of its Fifth Report of the Session 2001–2002 (3 December 2001). In para. 20 of its Fifth Report of the Session 2002–2003 (HL paper 59, HC 462, 24 February 2003), following the decisions of SIAC and the Court of Appeal, the Joint Committee noted that SIAC had had sight of closed as well as open material but suggested that each House might wish to seek further information from the Government on the public emergency issue. In its report of 23 February 2004 (Sixth Report of the Session 2003–2004, HL Paper 38, HC 381), the Joint Committee stated, in para. 34: 'Insufficient evidence has been presented to Parliament to make it possible for us to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation.'

It adhered to this opinion in paras. 15–19 of its Eighteenth Report of the Session 2003–2004 (HL Paper 158, HC 713), drawing attention (para. 82) to the fact that the UK was the only country

out of 45 countries in the Council of Europe which had found it necessary to derogate from article 5. The appellants relied on these doubts when contrasting the British derogation with the conduct of other Council of Europe member states which had not derogated, including even Spain which had actually experienced catastrophic violence inflicted by Al-Qaeda.

25. The Attorney General, representing the Home Secretary, answered these points. He submitted that an emergency could properly be regarded as imminent if an atrocity was credibly threatened by a body such as Al-Qaeda which had demonstrated its capacity and will to carry out such a threat, where the atrocity might be committed without warning at any time. The Government, responsible as it was and is for the safety of the British people, need not wait for disaster to strike before taking necessary steps to prevent it striking. As to the requirement that the emergency be temporary, the Attorney General did not suggest that an emergency could ever become the normal state of affairs, but he did resist the imposition of any artificial temporal limit to an emergency of the present kind ... Little help, it was suggested, could be gained by looking at the practice of other states. It was for each national government, as the guardian of its own people's safety, to make its own judgment on the basis of the facts known to it. Insofar as any difference of practice as between the United Kingdom and other Council of Europe members called for justification, it could be found in this country's prominent role as an enemy of Al-Qaeda and an ally of the United States. The Attorney General also made two more fundamental submissions. First, he submitted that there was no error of law in SIAC's approach to this issue and accordingly, since an appeal against its decision lay only on a point of law, there was no ground upon which any appellate court was entitled to disturb its conclusion. Secondly, he submitted that the judgment on this question was pre-eminently one within the discretionary area of judgment reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament.

26. The appellants have in my opinion raised an important and difficult question, as the continuing anxiety of the Joint Committee on Human Rights, the observations of the Commissioner for Human Rights and the warnings of the UN Human Rights Committee make clear. In the result, however, not without misgiving (fortified by reading the opinion of my noble and learned friend Lord Hoffmann), I would resolve this issue against the appellants, for three main reasons.

27. First, it is not shown that SIAC or the Court of Appeal misdirected themselves on this issue. SIAC considered a body of closed material, that is, secret material of a sensitive nature not shown to the parties. The Court of Appeal was not asked to read this material. The Attorney General expressly declined to ask the House to read it. From this I infer that while the closed material no doubt substantiates and strengthens the evidence in the public domain, it does not alter its essential character and effect. But this is in my view beside the point. It is not shown that SIAC misdirected itself in law on this issue, and the view which it accepted was one it could reach on the open evidence in the case.

28. My second reason is a legal one. The European Court decisions in *Ireland* v. *United Kingdom* (1978) 2 EHRR 25; *Brannigan and McBride* v. *United Kingdom* (1993) 17 EHRR 539; *Aksoy* v. *Turkey* (1996) 23 EHRR 553 and *Marshall* v. *United Kingdom* (10 July 2001, Appn. No. 41571/98) seem to me to be, with respect, clearly right. In each case the member state had actually experienced widespread loss of life caused by an armed body dedicated to destroying the territorial integrity of the state. To hold that the article 15 test was not satisfied in such circumstances, if a response beyond that provided by the ordinary course of law was required,

would have been perverse. But these features were not, on the facts found, very clearly present in *Lawless* v. *Ireland* (No 3) (1961) 1 EHRR 15 ... If ... it was open to the Irish Government in Lawless to conclude that there was a public emergency threatening the life of the Irish nation, the British Government could scarcely be faulted for reaching that conclusion in the much more dangerous situation which arose after 11 September.

29. Thirdly, I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety. As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called 'relative institutional competence'. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum ...

Nevertheless, in its judgement of 16 December 2004, the House of Lords found that section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with Articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status (see below). It therefore issued a quashing order in respect of the Human Rights Act 1998 (Designated Derogation) Order 2001, and made a declaration under section 4 of the Human Rights Act 1998. However, this declaration of incompatibility made by the House of Lords was not binding on the parties to the litigation. Except for those who had elected to leave the United Kingdom or were released on bail on conditions amounting to house arrest, those detained under the provisions of the 2001 Act remained in detention, and they were not entitled, under domestic law, to compensation in respect of their detention. As a result, eleven persons detained under the 2001 Act lodged an application to the European Court of Human Rights on 21 January 2005.

On 11 March 2005, part 4 of the 2001 Act was repealed. It was replaced with a regime of control orders provided for by the Prevention of Terrorism Act 2005, imposing various restrictions on individuals, regardless of nationality, reasonably suspected of being

involved in terrorism. In accordance with this legislative change, the applicants before the Court who remained in detention were released on 10–11 March 2005 and immediately made subject to control orders under the Prevention of Terrorism Act 2005. On 11 August 2005, following negotiations commenced towards the end of 2003 to seek from the Algerian and Jordanian Governments assurances that the applicants would not be ill-treated if returned, the Government notified its intention to deport to these countries seven of the eleven individuals whose applications were pending before the European Court of Human Rights (six to Algeria and one to Jordan). These applicants were taken into immigration custody pending their removal to Algeria and Jordan: the decision of the House of Lords following the appeals lodged against those procedures is presented in chapter 3 (section 2.2., b).

The European Court of Human Rights delivered its judgment on 19 February 2009. The following excerpts concern the derogation notified by the UK Government, which the House of Lords had already found invalid in December 2004, prompting the European Court of Human Rights to remark that 'in the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable' (para. 174). The position of the Court on the question of whether the United Kingdom was facing a 'public emergency threatening the life of the nation' is the following:

European Court of Human Rights (GC), *A. and others* v. *United Kingdom* (Appl. No. 3455/05), judgment of 19 February 2009:

Whether there was a 'public emergency threatening the life of the nation'

175. The applicants argued that there had been no public emergency threatening the life of the British nation, for three main reasons: first, the emergency was neither actual nor imminent; secondly, it was not of a temporary nature; and, thirdly, the practice of other States, none of which had derogated from the Convention, together with the informed views of other national and international bodies, suggested that the existence of a public emergency had not been established.

176. The Court recalls that in [*Lawless* v. *Ireland* (No. 3), judgment of 1 July 1961, §28], it held that in the context of Article 15 the natural and customary meaning of the words 'other public emergency threatening the life of the nation' was sufficiently clear and that they referred to 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'. In the *Greek Case* (1969) 12 YB 1, §153, the Commission held that, in order to justify a derogation, the emergency should be actual or imminent; that it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the

Convention for the maintenance of public safety, health and order, were plainly inadequate. In *Ireland* v. *United Kingdom*, judgment of 18 January 1978, §§205 and 212, the parties were agreed, as were the Commission and the Court, that the Article 15 test was satisfied, since terrorism had for a number of years represented 'a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants' ...

177. Before the domestic courts, the Secretary of State adduced evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence was adduced before SIAC. All the national judges accepted that the danger was credible (with the exception of Lord Hoffmann, who did not consider that it was of a nature to constitute 'a threat to the life of the nation'). Although when the derogation was made no al'Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was 'imminent', in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted bombings in London in July 2005 to have been very real. Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. The Court is not precluded, however, from having regard to information which comes to light subsequently (see, *mutatis mutandis*, *Vilvarajah and others* v. *United Kingdom*, judgment of 30 October 1991, §107(2), Series A No. 215).

178. While the United Nations Human Rights Committee has observed that measures derogating from the provisions of the ICCPR must be of 'an exceptional and temporary nature' ..., the Court's case law has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a 'public emergency' within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al'Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not 'temporary'.

179. The applicants' argument that the life of the nation was not threatened is principally founded on the dissenting opinion of Lord Hoffman, who interpreted the words as requiring a threat to the organised life of the community which went beyond a threat of serious physical damage and loss of life. It had, in his view, to threaten 'our institutions of government or our existence as a civil community' ... However, the Court has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the 'nation' and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman.

180. As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While

it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency.

181. On this first question, the Court accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation.

1.2 The need for an official proclamation of a state of emergency

Article 4 of the International Covenant on Civil and Political Rights adds that the existence of the public emergency justifying the derogation must be 'officially proclaimed'. In its General Comment No. 29, the Human Rights Committee noted that such official proclamation 'is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4' (para. 2). It has sometimes been considered that such an official proclamation necessarily has to be done in writing, in the form of an official publication (*Law Society of Lesotho* v. *Minister of Defence and Internal Security*, Supreme Court of Lesotho, [1988] L.R.C. (Const.), 226).

The requirement of an official proclamation of the state of emergency is explicitly stated neither in the European Convention on Human Rights nor in the American Convention on Human Rights. However, in his 2002 opinion on the 2001 UK derogation from Article 5 para. 1 ECHR, Mr Alvaro Gil Robles, the Commissioner for Human Rights of the Council of Europe, took the view that derogations should be subjected to parliamentary scrutiny by the national parliament concerned, and that this had implications both as to the sequence and as to the information to be provided to the parliament:

Opinion of the Council of Europe Commissioner for Human Rights on certain aspects of the United Kingdom 2001 derogation from Art. 5 para. 1 of the European Convention on Human Rights, Opinion 1/2002 of 28 August 2002, CommDH(2002)7, paras. 5–12 and 14–23:

5. The Convention does not expressly require an effective domestic scrutiny of derogations under Article 15, and the Court has not yet had occasion to pronounce on the matter. The requirement is, however, easily discerned.

6. The Court has repeatedly emphasised the close relationship between democracy and the rights guaranteed by the Convention, stating, for instance, that 'democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it' [*United Communist Party of Turkey and others* v. *Turkey*, judgment of 30 January 1998, Reports 1998–I, para. 45].

7. The separation of powers, whereby the Government's legislative proposals are subject to the approval of Parliament and, on enactment, review by the courts, is a constitutive element of democratic governance.

8. Effective domestic scrutiny must, accordingly, be of particular importance in respect of measures purporting to derogate from the Convention: parliamentary scrutiny and judicial review represent essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures.

9. It is, furthermore, precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations. This is, indeed, the essence of the principle of the subsidiarity of the protection of Convention rights.

10. This opinion is not concerned with the judicial review of derogations.

11. The parliamentary scrutiny of derogations is consistent with the Constitutional norms of several European countries regarding the use of emergency powers. Declarations of different types of emergencies typically require simple or qualified parliamentary majorities, or are subject, along with the related measures, to subsequent parliamentary confirmation.

12. The formal requirement of the parliamentary approval of derogations is not on its own sufficient, however, to guarantee an independent assessment of the existence of an emergency and the necessity of the measures taken to deal with it. It is clear that the effectiveness of the parliamentary scrutiny of derogations depends in large measure on the access of at least some of its members to the information on which the decision to derogate is based.

[Applying the considerations above to evaluate the adequacy of the procedure followed in the United Kingdom with respect to derogations (see box 6.2.), the Commissioner for Human Rights noted:]

14. The Human Rights Act [1998, which incorporates the rights guaranteed by the Convention into United Kingdom domestic law] outlines in sections 14 and 16 the procedure for derogating from Convention rights for the purposes of domestic law. The Secretary of State responsible designates the derogation through a statutory instrument in the form of an Order in Council, which must subsequently be included in Schedule 3 of the Act. The order designating the derogation comes into effect immediately, but expires after a period of 40 days unless both Houses pass a resolution approving it. A designation order may be made in anticipation of a proposed derogation.

15. The Home Secretary first announced proposals to combat the 'the threat from international terrorism' on 15th October 2001. On 11th November 2001 the Human Rights Act 1998 (Designated Derogation) Order 2001 was made by the Home Secretary. It came into effect two days later. The Designated Derogation Order was debated in Parliament on 19th November and approved on 21st November 2001. The first draft of the Anti-terrorism, Crime and Security Bill 2001 was laid before Parliament on 12th November 2001 and received Royal Assent on 13th December 2001. The Secretary-General of the Council of Europe was informed of the United Kingdom's derogation by Note verbale on 18th December 2001.

16. It is clear from the related chronology that the United Kingdom Parliament enjoyed, in principle, two separate occasions on which to scrutinise the derogation in question; firstly, on approving the Derogation Order and, secondly, when passing the derogating provisions of the Anti-terrorism, Crime and Security Bill. (The United Kingdom Parliament exercises no control over the notification of the Secretary General of the Council of Europe of a derogation from the Convention, which, as a treaty obligation, remains a crown prerogative. However, in so far as the United Kingdom Parliament is required to approve the derogating measures themselves this would not appear to be problematic, especially when, as is desirable, the notification of the Secretary-General occurs only after the passage of the relevant Act).

17. It is to be noted that the derogation was designated for the purposes of domestic law in anticipation, not merely, as is provided for by section 14(6) of the Human Rights Act, of the United Kingdom's derogation from its obligations under the Convention, but prior also to the enactment of the legislation necessitating the derogation, in this case, even, before the proposed Bill had been laid before Parliament. Two related problems would appear to arise in respect of this chronology.

18. It is not clear, firstly, that this sequence is consistent with the legal nature of derogations. A derogation is made in respect of certain measures that would otherwise infringe rights guaranteed by the Convention and is constituted by its formal announcement (under the Convention, through notification of the Secretary-General of the Council of Europe) in relation to those measures. Indeed the Court has shown some flexibility with regards to the timing of notifications, accepting delays of up to two weeks following the adoption of the measures in question, suggesting that the derogation comes into force not on notification but on promulgation. This is unsurprising since it is only the measures themselves that can define the scope of the derogation. Indeed, the notification or, for the purposes of domestic law, the designation of a derogation will, on its own, be of no legal consequence. The effect of the procedure adopted in respect of the United Kingdom derogation was, therefore, oddly, to invert the formal requirement; instead of the order sanctioning the measures, the measures confirmed the order.

19. There is, secondly, a risk that this sequence will undermine the effectiveness of the parliamentary scrutiny of the derogation. A designated derogation comes into effect immediately, and, therefore, unless the measures themselves have been examined beforehand, prior to any scrutiny whatsoever. The United Kingdom parliament must, however, subsequently approve the order. Parliament's ability to scrutinise the necessity of the derogation at this stage, might appear, in this case, to have been limited by the fact that the derogating measures had not yet been finalised. Indeed, the first draft of the proposed Bill was laid before Parliament only the day after the designated derogation was made, the House of Commons, having, furthermore, only one week to consider the Bill before being asked to approve the order. It is true that the designated derogation has no effect until the enactment of the attendant measures. However, the practice of designating a derogation prior to the debating of the derogating measures risks not only eliminating an effective scrutiny of the order itself, but also potentially reducing the urgency of a detailed scrutiny of the subsequent measures. This will especially be the case where the derogation order enables the Secretary of State to make a declaration of compatibility in respect of the Bill he wishes to put forward. In effect, two small parliamentary hurdles are substituted for one large one.

20. The Commissioner is of the opinion, therefore, that it would be both more coherent and provide a greater guarantee of effective parliamentary scrutiny if, as a general rule, derogations

were designated for the purposes of domestic law – and the Secretary-General notified – only after the measures requiring them have been promulgated.

21. In the instant case, the Commons' debates of 19th November suggest that its members were well acquainted with the proposed provisions of the Anti-terrorism, Crime and Security Bill, reasonably precise indications of which were, in any case, already available since 15th October. Nor do the debates during the subsequent passage of the Bill reveal an absence of concern over the real necessity of taking the significant step of derogating from Convention rights. What the latter debates do reveal, however, is that several members of Parliament felt insufficiently informed as to the extent of the threat and unable to assess, therefore, whether it constituted a public emergency and whether the relevant provisions of the Bill were strictly required.

22. An effective parliamentary scrutiny presupposes an informed and independent assessment. The information relevant to proposed derogations is likely, however, to be of a sensitive and perhaps publicly undisclosable nature. Whilst it might, under such circumstances, be acceptable to restrict parliamentary access to such information, the failure to disclose any information at all, where it is maintained that such information exists, is manifestly incompatible with the requirement of the democratic control of executive authority which is of particular importance in respect of measures limiting rights guaranteed by the Convention.

23. One mechanism amongst many might be to make the information warranting the derogation available to a specially constituted ad hoc Committee. The Committee, made up, perhaps, of selected representatives from a limited number of concerned parliamentary Committees, could, in turn, report their assessments to both Houses. One might have included, for example, in respect of the derogation in question, the Home Affairs Committee, the Joint Committee on Human Rights and the Joint Committee on Statutory Instruments. It is to be noted in this respect that special parliamentary commissions competent to examine classified information exist in several Council of Europe member States for the control of secret services.

2 SECOND CONDITION: THE NECESSITY REQUIREMENT

Only measures which are strictly required by the exigencies of the situation may be covered by a derogation. Under the International Covenant on Civil and Political Rights, the position of the Human Rights Committee is expressed as follows:

Human Rights Committee, General Comment No. 29, *Derogations during a State of Emergency* (Art. 4), UN Doc. CCPR/C/21/Rev.1/Add. 11 (2001), paras. 4–5:

[The requirement that any measure adopted under cover of a derogation be strictly required by the exigencies of the situation] relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant [see for instance, Arts. 12 and 19 of the Covenant]. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover,

> the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.
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> [T]his condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.

The implication of this is that, in practice, notifying a derogation will only rarely present a significant advantage for the government concerned: as regards rights which are not absolute, i.e. which may be restricted in the public interest under the usual conditions of legality and necessity (or proportionality), the degree of scrutiny exercised by courts will be essentially similar, whether the measure is adopted under a derogation or whether it is presented as a mere limitation (under non-exceptional circumstances) to the right concerned.

A similar requirement exists under the European Convention on Human Rights. In the case of *Brannigan and McBride* v. *United Kingdom*, the applicants, supported by Liberty and Amnesty International acting as third-party intervenors to the proceedings, requested that the European Court of Human Rights control the validity of the United Kingdom's derogation. The applicants were put into detention in January 1989. This occured shortly after the United Kingdom had notified a derogation to the Convention, following the Court's judgment of 29 November 1988 in the case of *Brogan and others* (judgment of 29 November 1988, Series A No. 145–B). Under the Prevention of Terrorism (Temporary Provisions) Act 1974, a person arrested on reasonable suspicion of involvement in acts of terrorism could be detained by police for an initial period of forty-eight hours and, on the authorization of the Secretary of State for Northern Ireland, for a further period or periods of up to five days. In *Brogan*, the European Court of Human Rights had found this to be in violation of Article 5(3) of the Convention, according to which a person arrested upon suspicion of having committed an offence 'shall be brought promptly before a judge or other officer authorised by law to exercise judicial powers'. The UK derogation was notified on 23 December 1988 under Article 15 of the Convention. The relevant part of declaration made by the United Kingdom read:

Following [the *Brogan and others* judgment], the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government were examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view. Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge, for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government have availed themselves of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.

As regards the necessity requirement, the Court noted the following:

European Court of Human Rights, *Brannigan and McBride* v. *United Kingdom* (Appl. Nos. 14553/89 and 14554/89), judgment of 25 May 1993:

41. The applicants argued that it would be inconsistent with Article 15 para. 2 if, in derogating from safeguards recognised as essential for the protection of non-derogable rights such as Articles 2 and 3, the national authorities were to be afforded a wide margin of appreciation. This was especially so where the emergency was of a quasi-permanent nature such as that existing in Northern Ireland. To do so would also be inconsistent with the *Brogan and others* judgment where the Court had regarded judicial control as one of the fundamental principles of a democratic society and had already – they claimed – extended to the Government a margin of appreciation by taking into account ... the context of terrorism in Northern Ireland ...

43. The Court recalls that it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities (see the *Ireland* v. *United Kingdom* judgment of 18 January 1978, Series A No. 25, pp. 78–79, para. 207).

Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision (*ibid.*). At the same time, in exercising its supervision the Court must

give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.

44. Although the applicants did not dispute that there existed a public emergency 'threatening the life of the nation', they submitted that the burden rested on the Government to satisfy the Court that such an emergency really existed.

45. It was, however, suggested by Liberty and others in their written submissions that at the relevant time there was no longer any evidence of an exceptional situation of crisis. They maintained that reconsideration of the position could only properly have led to a further derogation if there was a demonstrable deterioration in the situation since August 1984 when the Government withdrew their previous derogation. For the Standing Advisory Commission on Human Rights, on the other hand, there was a public emergency in Northern Ireland at the relevant time of a sufficient magnitude to entitle the Government to derogate.

46. Both the Government and the Commission, referring to the existence of public disturbance in Northern Ireland, maintained that there was such an emergency.

47. Recalling its case law in *Lawless* v. *Ireland* (judgment of 1 July 1961, Series A No. 3, p. 56, para. 28) and *Ireland* v. *United Kingdom* (Series A No. 25, p. 78, para. 205) and making its own assessment, in the light of all the material before it as to the extent and impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom ..., the Court considers there can be no doubt that such a public emergency existed at the relevant time.

It does not judge it necessary to compare the situation which obtained in 1984 with that which prevailed in December 1988 since a decision to withdraw a derogation is, in principle, a matter within the discretion of the State and since it is clear that the Government believed that the legislation in question was in fact compatible with the Convention (see paragraphs 49–51 below).

Were the measures strictly required by the exigencies of the situation?

(a) General considerations 48. The Court recalls that judicial control of interferences by the executive with the individual's right to liberty provided for by Article 5 is implied by one of the fundamental principles of a democratic society, namely the rule of law (see the above-mentioned *Brogan and others* judgment, Series A No. 145–B, p. 32, para. 58). It further observes that the notice of derogation invoked in the present case was lodged by the respondent Government soon after the judgment in the above-mentioned *Brogan and others* case where the Court had found the Government to be in breach of their obligations under Article 5 para. 3 by not bringing the applicants 'promptly' before a court.

The Court must scrutinise the derogation against this background and taking into account that the power of arrest and detention in question has been in force since 1974. However, it must be observed that the central issue in the present case is not the existence of the power to detain suspected terrorists for up to seven days – indeed a complaint under Article 5 para. 1 was withdrawn by the applicants ... – but rather the exercise of this power without judicial intervention.

(b) Was the derogation a genuine response to an emergency situation? 49. For the applicants, the purported derogation was not a necessary response to any new or altered state of affairs but was the Government's reaction to the decision in *Brogan and others* and was lodged merely to circumvent the consequences of this judgment.

50. The Government and the Commission maintained that, while it was true that this judgment triggered off the derogation, the exigencies of the situation have at all times since 1974 required

the powers of extended detention conferred by the Prevention of Terrorism legislation. It was the view of successive Governments that these powers were consistent with Article 5 para. 3 and that no derogation was necessary. However, both the measures and the derogation were direct responses to the emergency with which the United Kingdom was and continues to be confronted.

51. The Court first observes that the power of arrest and extended detention has been considered necessary by the Government since 1974 in dealing with the threat of terrorism. Following the *Brogan and others* judgment the Government were then faced with the option of either introducing judicial control of the decision to detain under section 12 of the 1984 Act or lodging a derogation from their Convention obligations in this respect. The adoption of the view by the Government that judicial control compatible with Article 5 para. 3 was not feasible because of the special difficulties associated with the investigation and prosecution of terrorist crime rendered derogation inevitable. Accordingly, the power of extended detention without such judicial control and the derogation of 23 December 1988 being clearly linked to the persistence of the emergency situation, there is no indication that the derogation was other than a genuine response.

(c) Was the derogation premature? 52. The applicants maintained that derogation was an interim measure which Article 15 did not provide for since it appeared from the notice of derogation communicated to the Secretary-General of the Council of Europe on 23 December 1988 that the Government had not reached a 'firm or final view' on the need to derogate from Article 5 para. 3 and required a further period of reflection and consultation. Following this period the Secretary of State for the Home Department confirmed the derogation in a statement to Parliament on 14 November 1989 ... Prior to this concluded view Article 15 did not permit derogation. Furthermore, even at this date the Government had not properly examined whether the obligation in Article 5 para. 3 could be satisfied by an 'officer authorised by law to exercise judicial power'.

53. The Government contended that the validity of the derogation was not affected by their examination of the possibility of judicial control of extended detention since, as the Commission had pointed out, it was consistent with the requirements of Article 15 para. 3 to keep derogation measures under constant review.

54. The Court does not accept the applicants' argument that the derogation was premature.

While it is true that Article 15 does not envisage an interim suspension of Convention guarantees pending consideration of the necessity to derogate, it is clear from the notice of derogation that 'against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced'. However it remained the Government's wish 'to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer' ...

The validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found of ensuring greater conformity with Convention obligations. Indeed, such a process of continued reflection is not only in keeping with Article 15 para. 3 which requires permanent review of the need for emergency measures but is also implicit in the very notion of proportionality.

(d) Was the absence of judicial control of extended detention justified? 55. The applicants further considered that there was no basis for the Government's assertion that control of