How to Reconcile between Human Rights and Counter-Terrorism?

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Themes

- role of human rights protection and promotion in building and maintaining societies without terrorism

- 'causes' of terrorism and the relevance of human rights in addressing them

- how human rights constraints on counter-terrorism measures contribute towards successful counter-terrorism

- how human rights failures become counterproductive in the fight against terrorism

- from a presumed conflict between human rights and counter-terrorism to the rejection of the metaphor of 'striking a balance' and towards the recognition of and reliance upon the mutually supportive nature of human rights and counter-terrorism

UN GA Global Counter-Terrorism Strategy

- **GA Resolution 60/288** (September 2006): looks like a "to do list" but reflects strategic thinking

  - … reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights **are not conflicting goals, but complementary and mutually reinforcing**, …

  - …**addressing the conditions conducive to the spread of terrorism**, including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism:

The Four Pillars of the Strategy

I. Addressing conditions conducive to the spread of terrorism (= 'root causes')

II. Preventing and combating terrorism

III. Capacity-building at state and UN level

IV. Respecting human rights and rule of law as the fundamental basis of the fight against terrorism

- => Human rights are both one pillar and an ingredient in all the other pillars

'Conditions conducive'

- Note how strongly human rights (violations) figure in the list
  - «lack of the rule of law,
  - violations of human rights,
  - ethnic, national and religious discrimination,
  - political exclusion,
  - socio-economic marginalization and
  - lack of good governance»
  - … together with some political signals

How to prevent terrorism?

- The question about "root causes"/ "conditions conducive"
  - Causality is hard to prove; correlation much easier
  - Many governments denounce every effort to explain/understand terrorism, as amounting to its justification
  - Efforts to understand must be combined with a clear moral condemnation of terrorism as a tactic, whatever is the cause
- Human rights promotion as a strategy in building societies without terrorism
  - All human rights to all
  - Combating discrimination, exclusion, marginalization
  - Full realization of economic, social and cultural rights
  - Inclusion, participation, empowerment

Promotion of ESC rights as a CT strategy

- Addressing conditions conducive to the spread of terrorism
- Addressing exclusion and marginalization, including through securing effective access to education
- ESC rights in development cooperation
- Empowerment, nondiscrimination, women's rights

Causes of terrorism

Type of cause	Examples	Relationship to Human Rights	Whose Human Rights?
Structural causes	Deep divisions in society, poverty, exclusion and denial of participation	Long-term promotion of all human rights to all is a strategic cornerstone	Everyone's, including those of victims of terrorism and victims of counter-terrorism
Facilitating causes	Money, networks, explosives, guns, communication (including online)	Limitations to human rights are needed to counteract these causes	Terrorists' but also everybody else's human rights as collateral damage
Triggering causes	Personal or family experience of abuse or humiliation. But: a global village	Human rights violations as the immediate triggering cause	Members of groups from where terrorists are recruited, including families

8

The 2018 Strategy Implementation Report

- Degree of strategic thinking less impressive
- More a Christmas wishlist than a to-do-list
- Appears to be driven by those who prioritise Pillars II and III
  - Combating terrorism (facilitating causes)
    - Shifting from explaining why people become attracted to terrorism to depicting such people as evil conspirators
  - Capacity-building (often self-serving)
    - Is about powers of states and IGOs

'Balancing' vs 'Reconciling'

- The discussion on causes of terrorism and building societies without terrorism is largely non-legal, even if legal concepts are important in defining the conclusions

- The much needed critique of the much used metaphor of 'balancing' is primarily a responsibility of lawyers, including legal scholars and rights theorists

Terrorism as the exception to Law

- M. Scheinin and M. Vermeulen: Unilateral exceptions to international law (EHRR)

- Various constructions about exceptions and a rejection of many of them

- -> The proper framework:

  a) <u>derogation</u> from some human rights during a state of emergency that threatens the life of a nation (very rarely)

  b) <u>permissible limitations</u> to human rights (routinely)

Scheinin & Vermeulen, 'Unilateral exceptions'

a) Denial of the applicability of human rights law during armed conflict

b) Denial of status as protected persons under international humanitarian law

c) The United Nations Charter as lex superior

d) Denial of attribution to an individual state of action by intergovernmental organisations

e) Denial of extraterritorial effect of human rights (treaties)

f) Reservations to treaties

g) Persistent objection to custom

h) Derogation during times of emergency

i) Overly broad use of permissible limitations or restrictions

j) Withdrawal from human rights treaties

# Some findings in Scheinin & Vermeulen

- No reservations refer to terrorism, and only very few are even relevant in the context (a handful on fair trial, plus UK and France affirming primacy of the UN Charter)

- Persistent objection to custom has lost its significance (US & Israel; strong overlap with jus cogens norms)

- 10 states had derogated from the ICCPR with explicit or implicit reference to terrorism, most of them for a limited duration (except Israel)

- Spillover of the balancing metaphor from rights that do allow for permissible limitations to absolute human rights

- *Jus cogens* norms are unaffected by any of the exceptions

- Due to the two Covenants of 1966, human rights are not subject to unilateral withdrawal from human rights treaties – but their international monitoring by and large is!

# Human rights affected in the fight against terrorism
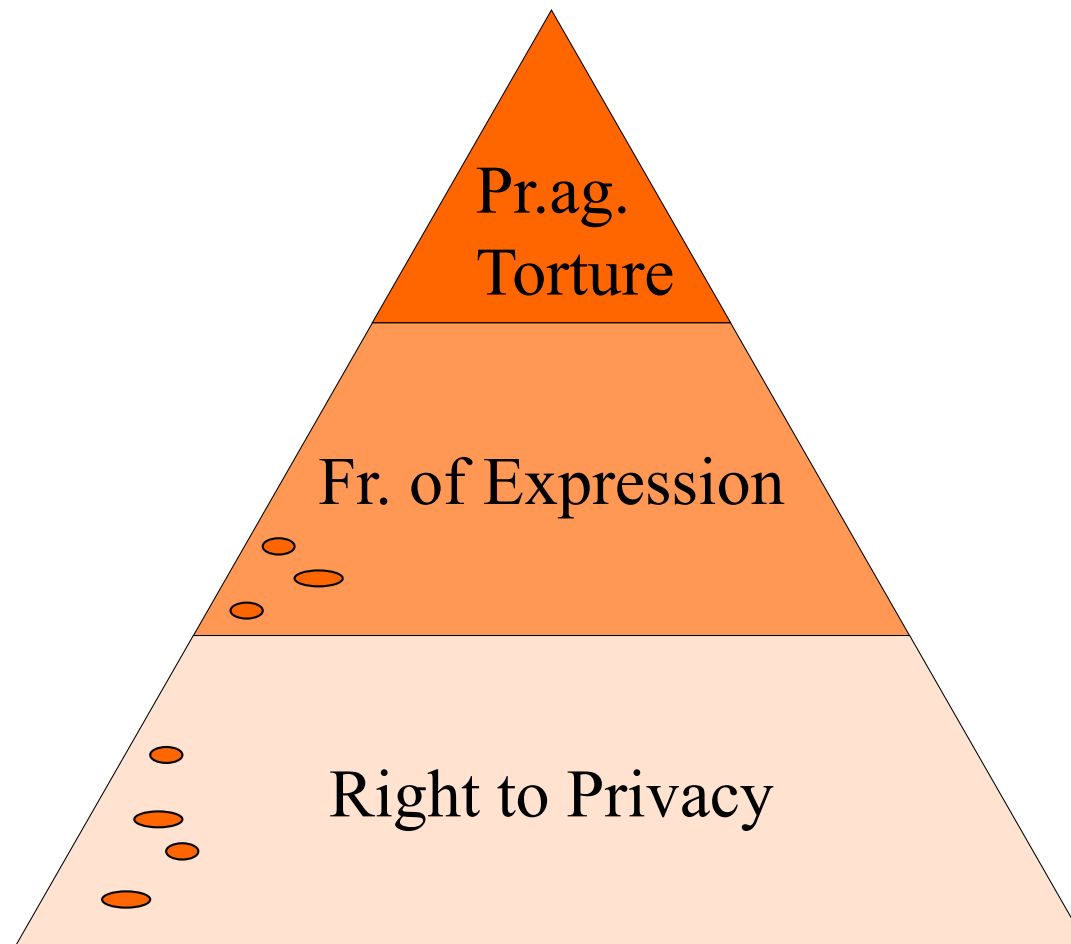
The limitations paradigm: 'Balancing'

- The metaphor about 'balancing' between security and rights has become very common

- Carries the risk that the balance will always (or at least too often) be struck to the detriment of the individual, in the abstract

- Erodes the distinction between absolute (jus cogens or non-derogable) and other rights

- Misses the valuable distinction between rules and principles as two types of legal norms

- Results in too much of judicial deference in respect of the executive, or the domestic level

Posner and Vermeule: the tradeoff thesis
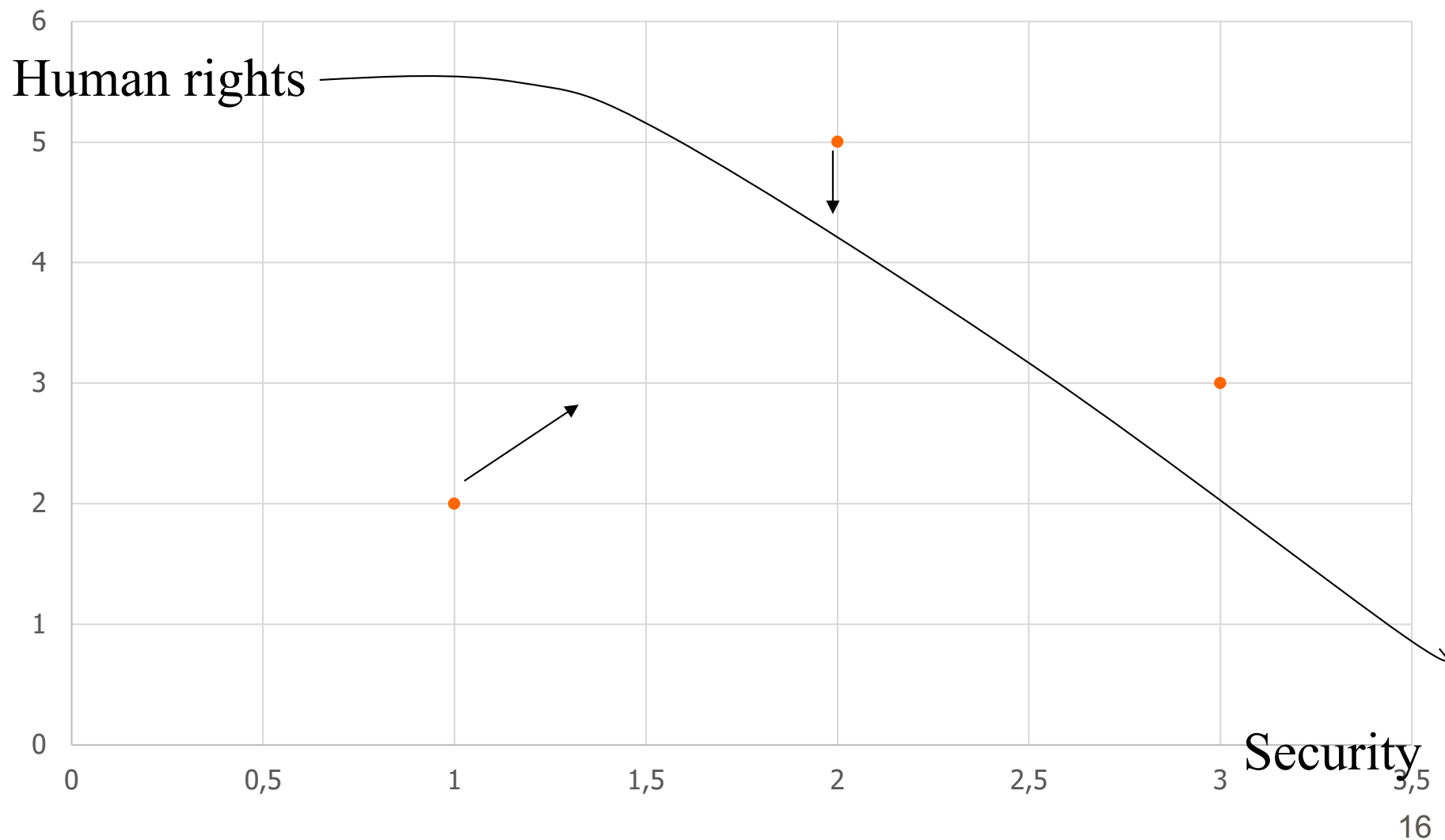
Law is the balance
(A/HRC/16/51, paragraph 12)

- "Through the careful application of human rights law it is possible to respond effect-ively to the challenges involved in the countering of terrorism while complying with human rights. There is no need in this process for a balancing between human rights and security, as the proper balance can and must be found within human rights law itself. Law is the balance, not a weight to be measured."
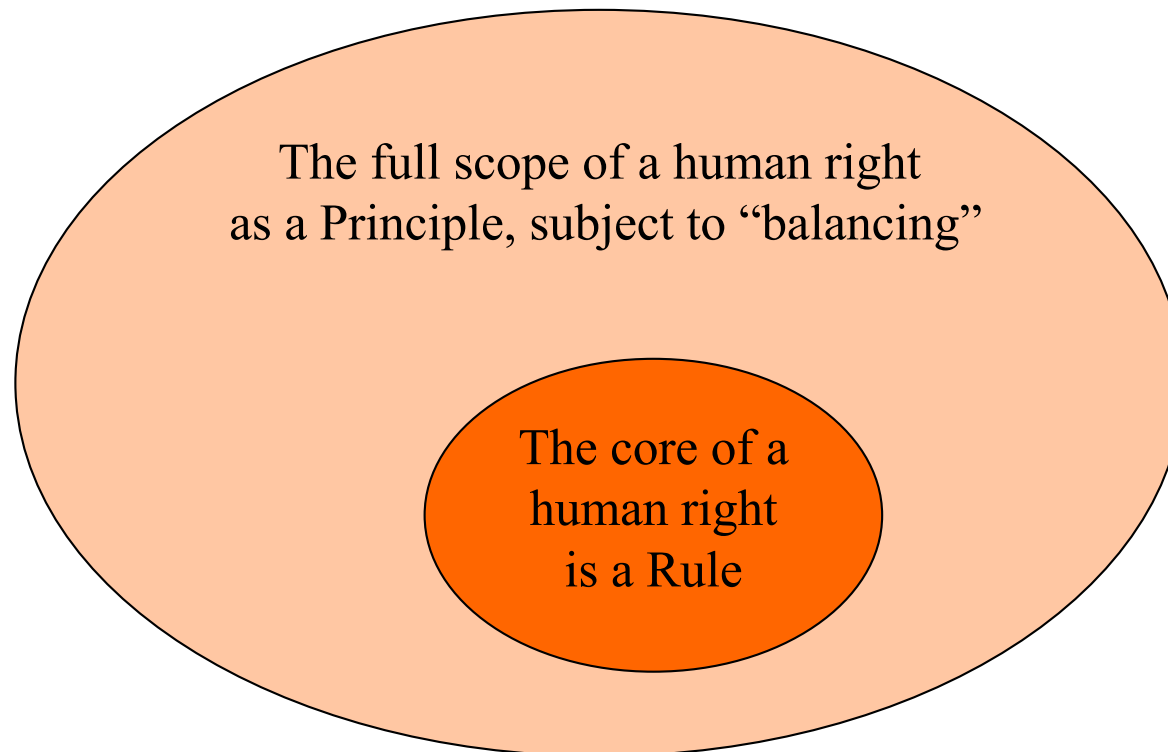
Towards a proper limitations test

1) Provided by the law
2) Inviolability of the essence of any HR
3) Necessary in a democratic society
4) No unfettered discretion
5) Serving a legitimate aim not enough; must be necessary for reaching it
6) Proportionality: appropriateness, least intrusive, proportionate to the interest
7) Consistent with other human rights
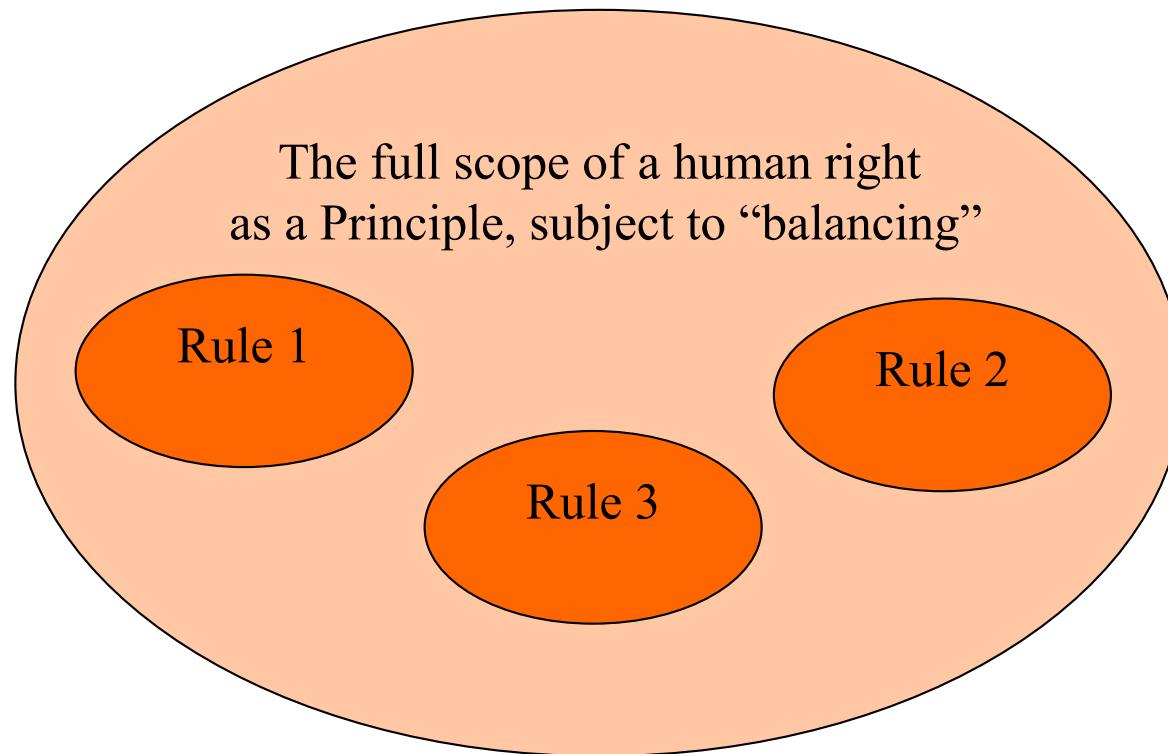
The essential core of all human rights

- HRCttee GC 27 para 13: "the restrictions must not impair the essence of the right"

- EU Charter of Fundamental Rights, art 52.1: "Any limitation … must … respect the essence of those rights and freedoms."

- How to identify and define the core?
  - A matter of treaty interpretation
  - Freedom of expression: administrative censorship
  - Essential core of privacy: a) sensitive data; b) confidential relationship; c) means of intrusion

Every human right has a core

The full scope of a human right
as a Principle, subject to "balancing"

The core of a
human right
is a Rule

… or more than one 'core'

The full scope of a human right
as a Principle, subject to "balancing"

Rule 1

Rule 2

Rule 3

Absolute rights: the core has wide scope

The core of a human right is a Rule that has such a wide scope that it covers the scope of the right -> no room is left for 'balancing'

Rules and Principles

- Ronald Dworkin and Robert Alexy
- Principles are norms which require that something be realized to the greatest extent possible, given the legal and factual possibilities; optimization requirements; can be satisfied to varying degrees
- Rules are norms which are always either fulfilled or not; if a rule applies then the requirement is to do exactly what it says
- A genuine dichotomy: every legal norm (all things considered) is either a rule of a principle

Rules and Principles according to Alexy

- Two logically distinct categories of norms
- Conflicts between rules: determining which rule is valid and applicable to a certain set of facts. Rules and exceptions.
- Competition between principles: determining the relative weights of the competing principles in the circumstances of the case
- The combined model of rules and principles. Weighing of principles results in a rule based on the weightier principle

Alexy's Weight Formula for Competing Principles

$$WP_{i, j+k}C = (IP_iC.WP_iA.RP_iC) : (SP_jC.WP_jA.RP_jC + SP_kC.WP_kA.RP_kC)$$

- Weight of principle P_i in relation to competing principles P_j and P_k in circumstances C
- I = intensity of interference (serious, moderate, low, intuitively corresponding to 4, 2 and 1)
- S = importance of satisfying the competing principle (s, m, l)
- WPA = abstract weight of a principle (s, m, l)
- RPC = reliability of empirical assumptions (s, m, l)
- Alexy's own "solution" to stalemate situations

Why a Balancing Model is Inappropriate?

- Alexy's Postscript: "too little and too much"

- In practice Alexy reduces the operation of German constitutional rights into principles; a collision can always be resolved through weighing, by refining the scales

- Hidden assumption: in a constitutional system with a strong Constitutional/Supreme Court there will always be a possibility to do the weighing in a concrete case = no need to declare absolute rules

- In order not to deliver the wrong message to weaker systems, absolute rights (prohibition of torture) or core elements of human rights should not be addressed through weighing even in a stable constitutional system

- International human rights is a much more open system = there is a need to identify core areas as rules (red lines)

26

SURVEILLE

Surveillance:
Ethical Issues,
Legal Limitations,
and Efficiency

Article 3 - Duration and *start date* of the *project*

The duration of the *project* shall be 39 months from 1st February 2012 (hereinafter referred to as the "*start date*").

An FP7 Project funded by the European Commission under SEC-2011.6.1-5

SURVEILLE (Surveillance: ethical issues, legal limitations, and efficiency)

- This was an EU-funded FP7 project in 2012-2015
- Aimed at multidisciplinary and multidimensional assessment of the merits and risks of a wide range of surveillance technologies
  - Law, ethics, engineering, economics
  - Scoring of technological "usability" (including cost-efficiency) 0-10
  - Scoring of ethical risks (traffic lights)
  - Scoring of the severity of the human rights intrusion 0-16
    - (0-4) x (0-4) x (0-1)
  - Scenario-based approach: ordinary trans-border crime, international terrorism, urban security
- Resulted in a methodology that was endorsed in a European Parliament resolution of 29 October 2015
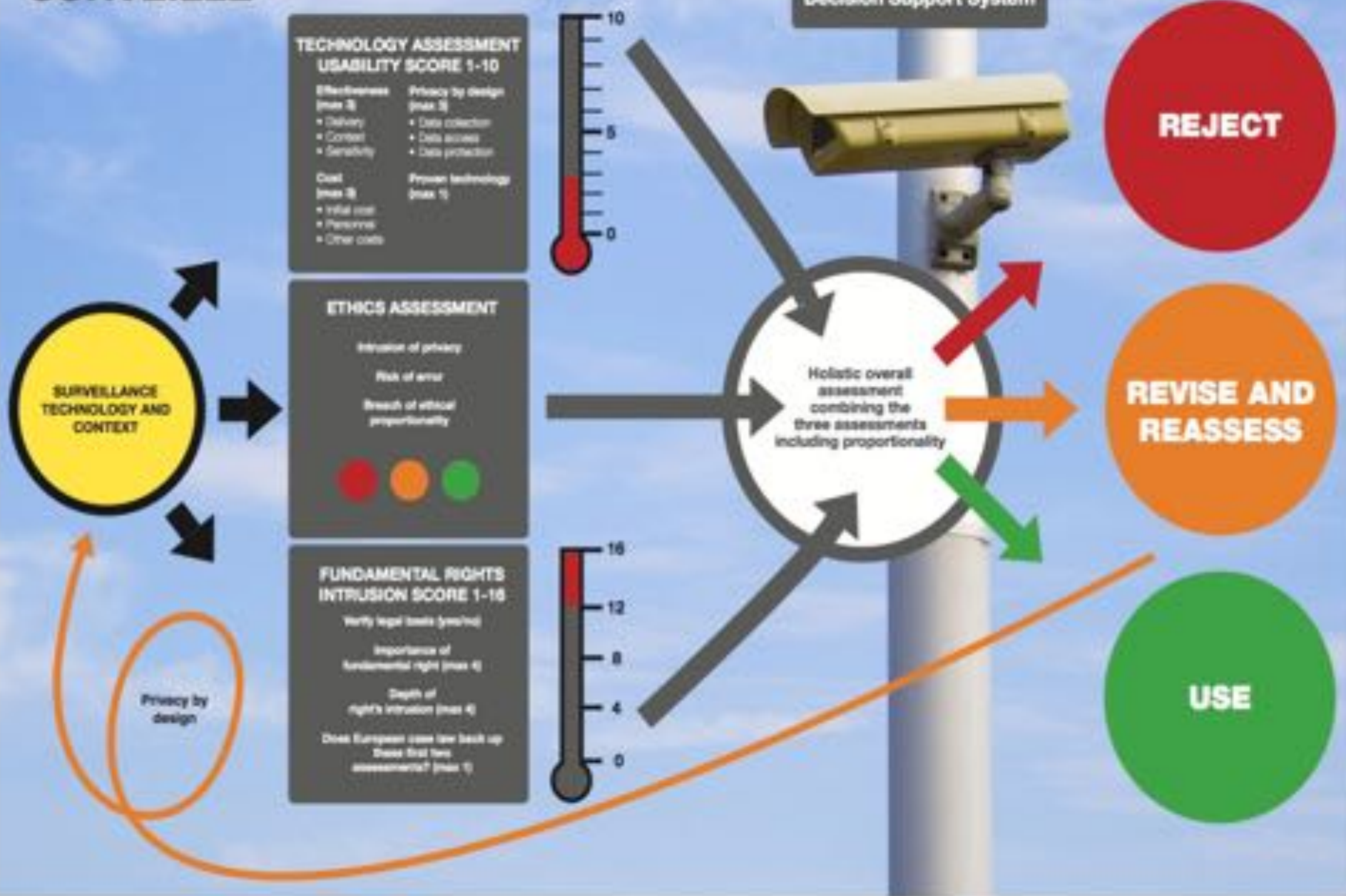
SR Best Practice Report (A/HRC/16/51)

- The notion of "best practice" appears both in SC resolution 1624 and in the mandate of the Special Rapporteur: a "carrot"

- Compare: the Chapter VII "stick" and violation-oriented special rapporteurs

- Practice of this Special Rapporteur: identification of best practice in thematic and country reports

Concept of best practice

- "Best practice refers to legal and institutional frameworks that serve to promote and protect human rights and the rule of law in all aspects of counter-terrorism. Best practice refers not only to what is required by international law, including human rights law, but also includes principles that go beyond these legally binding obligations."

Three criteria for best practice (A/HRC/16/51)

a) "a credible claim that the practice is an existing or emerging practice, and/or one that is required by, or has been recommended by or within, international organizations, international treaties or the jurisprudence of international, regional or domestic courts;

b) the practice relates to and promotes the effective combating of terrorism; and

c) the practice complies with human rights and/or promotes the enjoyment of human rights and fundamental freedoms."

Advantages of best practice

- also softer methods of persuasion are needed in order to reach true compliance, commitment and optimal performance in countering terrorism;

- resolving the tension between counter-terrorism and human rights through a pragmatic method of dialogue and learning; it is safer - both for human rights and for counter-terrorism - to look for broadly applicable solutions, rules of thumb that work;

- explicit combination of law and policy: policy-makers cannot be reduced to mere messenger boys who pass the issue to the judiciary for the application of "better law" and then sit and wait

10 areas of best practice

- 39. In the present compilation of 10 areas of best practice in countering terrorism, the Special Rapporteur has sought primarily to identify legislative models that he considers appropriate for the effective countering of terrorism in full compliance with human rights. Beyond such models, best practices could also be identified in other forms, such as training programmes, the allocation of resources and, above all, the adoption of national counter-terrorism strategies. Such strategies need to go beyond good laws and require a comprehensive approach, rooted in human rights and addressing also conditions conducive to the spread of terrorism, in line with the Global Counter-Terrorism Strategy adopted by the General Assembly.

34