

Exchange of views concerning human rights impact assessments in crisis situations, 8 March 2023



Bonavero
Institute
of Human
Rights



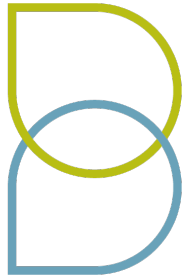
Martin Scheinin, British Academy Global Professor

- 1997-2004 Member of the UN Human Rights Committee; main author of General Comment No. 29 on states of emergency
- 2006-2012 Chair of the expert consultations that resulted in the OHCHR Guide on human rights indicators
- 2005-2011 UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
- 2012-2015 Leader of the FP7 project SURVEILLE that assessed a range of surveillance technologies for their security benefit, human rights impact, moral hazards and cost
- 2020-2021 Research on assessing the human rights conformity of national strategies in combating COVID-19

Emergency, proclamation, notification, derogation, measures that derogate



Bonavero
Institute
of Human
Rights



- Emergency: a **factual situation** that threatens the (normal) life of the nation and is officially **proclaimed** as a **state** of emergency (or equivalent)
- Consequence: for purposes of human rights law, the emergency justifies a **derogation** from some but not all human rights obligations of the state
 - HRCtee General Comment No. 29, para. 4: derogation does **NOT** mean suspension of human rights as the requirements of necessity and proportionality remain in place, even if their goalposts move
- Follows: it is for **domestic law** to secure a legal basis for all measures taken under the justification provided by the derogation and its notification
- International **monitoring** will remain in place to assess the derogation and any measures taken pursuant to it

4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement 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.² 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. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.³

Table 12

Illustrative indicators on violence against women (Universal Declaration of Human Rights, arts. 1-5 and 16)

	Sexual and reproductive health and harmful traditional practices	Domestic violence	Violence at work, forced labour and trafficking	Community violence and abuse by law enforcement officials	Violence and (post)-conflict and emergency situations
Structural	<ul style="list-style-type: none"> International human rights treaties relevant to the elimination of discrimination against women, including all forms of violence against women, ratified by the State without reservations Date of entry into force and coverage of the principle of non-discrimination between men and women and prohibition of all forms of violence against women in the constitution or other forms of superior law Date of entry into force and coverage of domestic law(s) criminalizing violence against women, including rape, domestic violence, trafficking, traditional harmful practices, stalking and sexual abuse of children Date of entry into force and coverage of legal act instituting an independent oversight body with specific mandate to protect women against violence (e.g., accredited NHRI) Time frame and coverage of policy or action plan for the elimination of discrimination and all forms of violence against women and including data collection and dissemination programme Number of registered or active NGOs and full-time equivalent employment (per 100,000 persons) involved in the protection of women against violence 				
	<ul style="list-style-type: none"> Time frame and coverage of policy to eliminate harmful traditional practices, including female genital mutilation, early or forced marriage, honour killing or maiming and foetal sex determination Legally stipulated minimum age for marriage 	<ul style="list-style-type: none"> Date of entry into force and coverage of legislation criminalizing marital rape and incest Date of entry into force and coverage of legislation protecting gender equality and women's ability to leave abusive relationships (e.g., equal inheritance, asset ownership, divorce) 	<ul style="list-style-type: none"> Time frame and coverage of policy or programme against sexual harassment in the workplace Time frame and coverage of policy to combat trafficking, sexual exploitation and forced labour and provide protection and access to remedy for victims 	<ul style="list-style-type: none"> Date of entry into force and coverage of legislation defining rape in relation to a lack of consent rather than use of force Time frame and coverage of policy to combat community violence and abuse by police forces 	<ul style="list-style-type: none"> Time frame and coverage of policy or programme to prevent or address sexual violence in conflict, post-conflict or emergency situations Time frame and coverage of special measures for participation of women in peace processes
Process	<ul style="list-style-type: none"> Proportion of received complaints on all forms of violence against women investigated and adjudicated by the national human rights institution, human rights ombudsperson or other mechanisms and the proportion of these responded to effectively by the Government Proportion of public social sector expenditure on national awareness-raising campaign on all forms of violence against women (including harmful traditional practices) and on national prevention programme integrated into school curriculum Number of perpetrators of violence against women (including harmful traditional practices, domestic violence, trafficking, sexual exploitation and forced labour) arrested, adjudicated, convicted and serving sentences (by type of sentence) 				
	<ul style="list-style-type: none"> Proportion of women of reproductive age using or whose partner is using contraception and effective preventive measures against sexually transmitted diseases (e.g., HIV/AIDS)* Unmet need for family planning* Number of safe and unsafe abortions per 1,000 women of reproductive age Proportion of women whose age at marriage is below 18 years** Proportion of managerial and other leader positions (e.g., religious leader) occupied by women 	<ul style="list-style-type: none"> Proportion of women reporting forms of domestic violence to law enforcement officials or initiating legal action Number of available places in shelters and refuges per 1000 population (urban and rural) Number of adopted restraining orders Proportion of men and women who think that abuse or violence against women is acceptable or tolerable 	<ul style="list-style-type: none"> Proportion of and frequency of business organizations inspected for conformity with labour standards Proportion of migrants working in the sex industry Proportion of informal sector workers (e.g., domestic workers) shifted to formal sector employment 	<ul style="list-style-type: none"> Proportion of new recruits to police, social work, psychology, health (doctors, nurses and others), education (teachers) completing a core curriculum on all forms of violence against women Proportion of victims of rape who had access to emergency contraception or safe abortion, prophylaxis for sexually transmitted infections/HIV Proportion of sexual crimes (e.g., rape) reported to the police (population survey) Proportion of formal investigations of law enforcement officials for cases of violence against women resulting in disciplinary action or prosecution 	<ul style="list-style-type: none"> Proportion of health staff trained in medical management and support for victims of sexual and other violence Proportion of victims of sexual and other violence accessing appropriate medical, psychosocial and legal services Proportion of reported cases of sexual or other violence where victims (or related third parties) initiated legal action Proportion of expenditure on relief and emergency assistance devoted to women and child welfare
Outcome	<ul style="list-style-type: none"> Proportion of women subjected to female genital mutilation** Sex ratio at birth and age 5-9 years Maternal mortality ratio* and proportion of deaths due to unsafe abortions 				
	<ul style="list-style-type: none"> Proportion of women who have experienced physical and/or sexual violence by current or former partner in the past 12 months / during lifetime** Proportion of women subjected to psychological and/or economic violence by their intimate partner** 	<ul style="list-style-type: none"> Proportion of women who have experienced physical and/or sexual violence by current or former partner in the past 12 months / during lifetime** Proportion of women subjected to psychological and/or economic violence by their intimate partner** 	<ul style="list-style-type: none"> Reported cases of women/men victims of trafficking (within and across countries), sexual exploitation or forced labour Proportion of working women who have been victims of sexual abuse/harassment in the workplace 	<ul style="list-style-type: none"> Proportion of women/men who report feeling unsafe in public places or limiting their activities because of safety or harassment Proportion of women who have experienced physical violence or rape / sexual assault during the past year [lifetime]** 	<ul style="list-style-type: none"> Reported cases of death, rape (attempted or completed) and other incidents of violence against women that occurred in conflict, post-conflict or emergency situations
<ul style="list-style-type: none"> Femicide rates (e.g., murder by intimate partner, sexual murder, killing of prostitutes, honour killing, female infanticide, dowry deaths) Proportion of women who have experienced physical, sexual and psychological violence during the past year [lifetime], by severity of violence, relationship to the perpetrator and frequency** Proportion of victim-survivors of physical, sexual or mental violence, included trafficking and forced labour, who received assistance, compensation and rehabilitation services Suicide rates by sex 					

All indicators should be disaggregated by prohibited grounds of discrimination, as applicable and reflected in metadata sheets

* MDG-related indicators

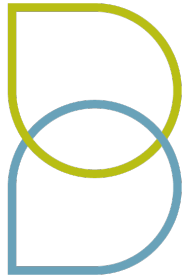
** UNECE indicator

IV > Illustrating the Framework - Indicators for Some Rights

Two underlying bigger challenges



Bonavero
Institute
of Human
Rights



- **Epistemic challenge** and a shift in judicial/legal assessment
 - a) The (digital) information age -> it has become possible to move from rhetorics, persuasion, intuition and 'judicial truth' to measurement, quantification and certainty about the material truth. Are we ready for it?
 - b) If so, establishing the truth about human rights impact must be seen as an **interdisciplinary** exercise relying on **multidisciplinary** expertise
- **Precautionary principle**: it is necessary to be prepared, in a situation of crisis, for the worst realistic scenario
 - a) Be it terrorism or a pandemic, human rights will be on **both sides of the equation**
 - b) Action must be immediate, and the precautionary principle affects the equation in favour of the positive obligation to protect the right to life
 - c) Human rights assessment will need to be comprehensive and holistic

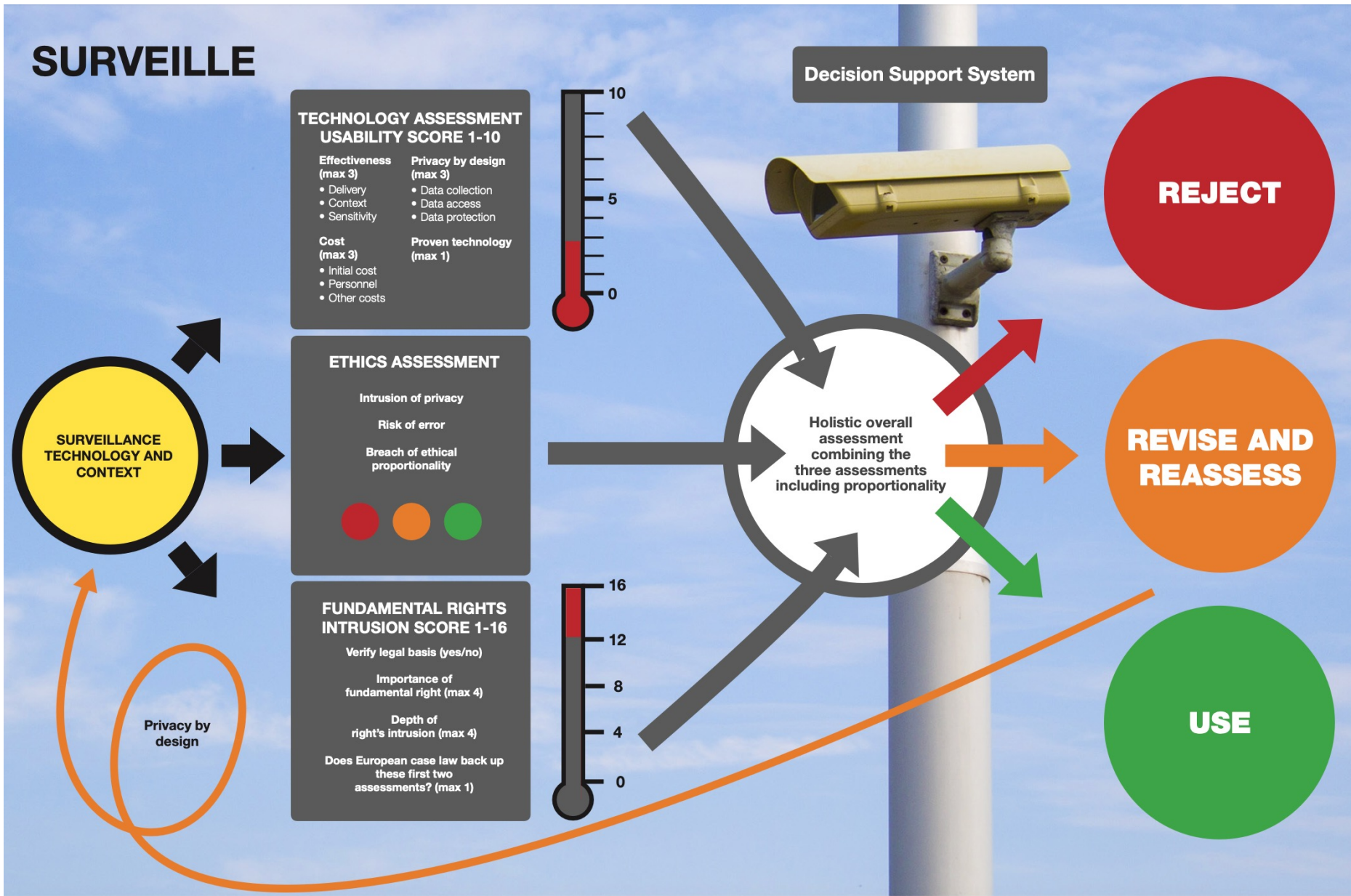
SURVEILLE

Usability score reflects the legitimate aim of safety or security. Arithmetic scale 0-10, with 0.5 point increments

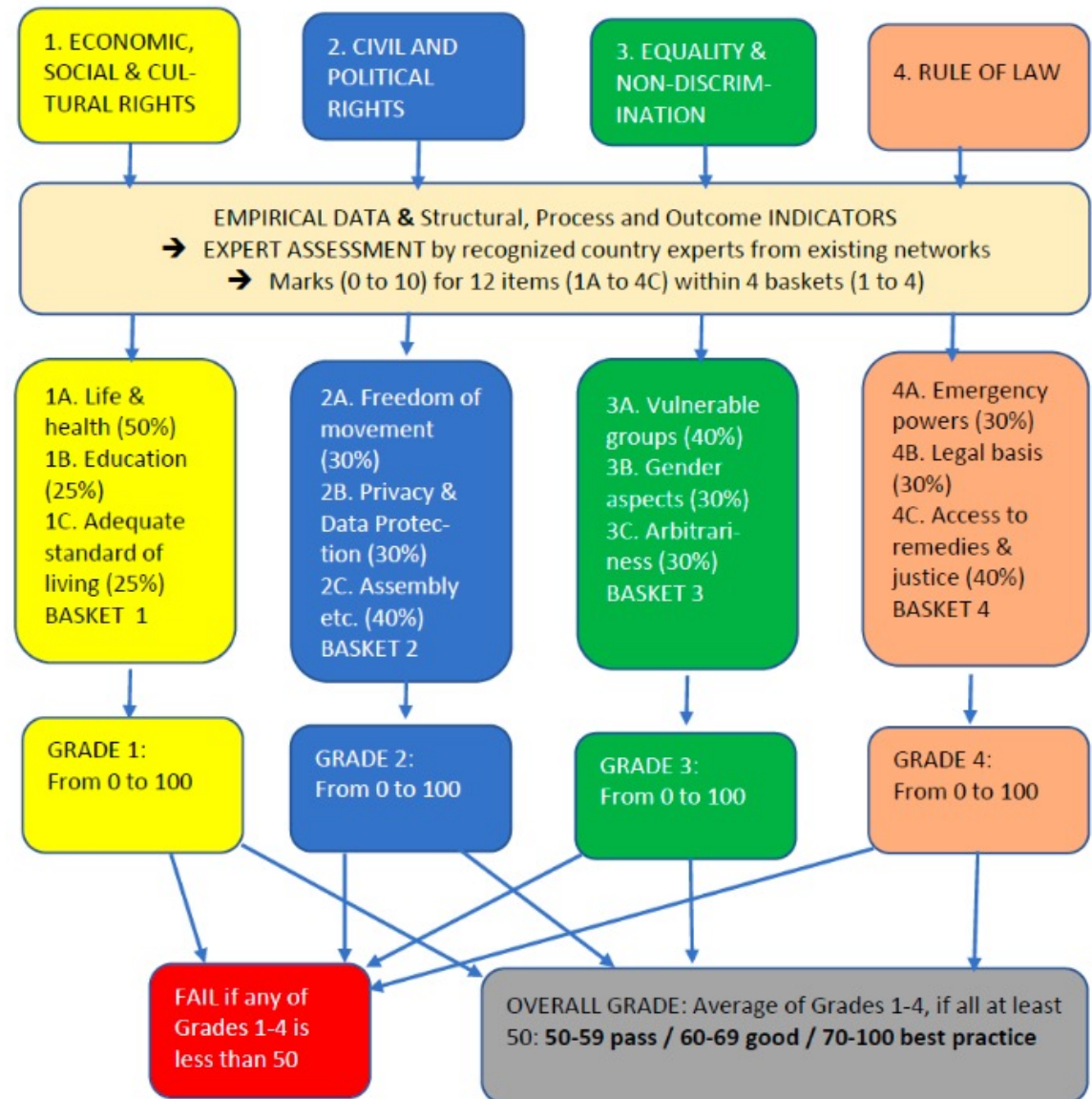
Ethics assessment does not seek to quantify or to pass judgment (pass or fail) but to provide warning lights

Human rights assessment applies Robert Alexy's triadic scale 1, 2, 4 and multiplication. Note that the maximum score 16 is higher than the maximum usability score 10, reflecting the inviolable essence

Note privacy by design loop



- A passing grade requires a passing mark from all four baskets (see bottom left red box)
- All human rights are included, with equal weight (as 4 baskets)
- Among human rights, the right to life (item 1A) has the greatest weight, 0.5 x 25%)
- The permissible limitations test is explicit in basket 2 that covers civil and political rights while basket 1 focuses on positive obligations
- Equality and nondiscrimination are represented as basket 3
- Issues related to derogation and the exercise of emergency powers are covered in basket 4

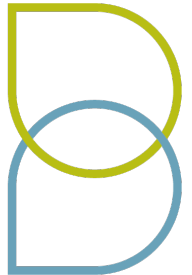


Ideas for a toolkit

(a set of tools in a logical order)



Bonavero
Institute
of Human
Rights



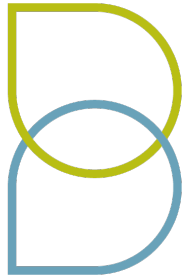
1. Include **ALL state obligations** under **ALL human rights** of **ALL people** (interdependence and indivisibility of human rights)
 - a) This is NOT about 'civil liberties' and negative human rights obligations only
 - b) The right to life; economic, social and cultural rights; nondiscrimination; the right to security of the person are also human rights, and the envisaged impact of emergency measures upon their enjoyment matters
 - c) Give due attention to the positive human rights obligations of the state
2. As human rights will often be on **both sides of the equation**, there is a need for **reconciliation** (instead of prioritization or abstract 'balancing'):
3. During a crisis, human rights assessment is needed in **three phases**

Ideas for a toolkit

(a set of tools in a logical order)



Bonavero
Institute
of Human
Rights



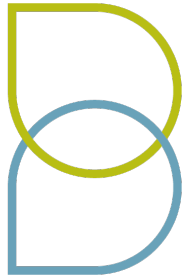
1. Keep in mind **ALL state obligations** under **ALL human rights** of **ALL people**
2. As human rights will often be on **both sides of the equation**, there is a need for **reconciliation** (instead of prioritization or abstract 'balancing'):
 - a) No compromising of **nonderogable rights**
 - b) Remember that every human right has a nonderogable **essential core**
 - c) **Necessity**: Reduce intrusions to those that deliver significant and measurable results towards the legitimate aim and that cannot be substituted by a less intrusive alternative without losing that benefit; only then is an intrusion necessary
 - d) **Proportionality**: After passing the necessity test, also check that the measured human rights intrusion remains proportionate to the actual measured benefit obtained -> every step (a to d) provides an independent reason to **reject** a measure
3. During a crisis, human rights assessment is needed in **three phases**

Ideas for a toolkit

(a set of tools in a logical order)



Bonavero
Institute
of Human
Rights



1. Keep in mind **ALL state obligations** under **ALL human rights** of **ALL people**
2. As human rights will often be on **both sides of the equation**, there is a need for **reconciliation** (instead of prioritization or abstract 'balancing'):
3. During a crisis, human rights assessment is needed in **three phases**
 - a) **Derogation** as creation of legal permissibility for intrusion (i.e., providing legality). Guided by the precautionary principle and limited by the principles of necessity and proportionality. Not what is necessary to do but what powers are necessary to have!
 - b) Human rights **intrusive measures** are introduced pursuant to such powers: restriction of liberty or other form of reduced enjoyment of HR. Guided by principles of legality, necessity and proportionality. All four steps (2.a-d) are needed
 - c) Individual application and effects of the measures are subject to **monitoring and remedies** to secure compliance with the principles of legality, necessity and proportionality