THE WIDENING WEB OF CONTROL

A HUMAN RIGHTS ANALYSIS OF PUBLIC POLICY RESPONSES TO CRIME, SOCIAL PROBLEMS AND DEVIANCE

DRAFT REPORT
FEBRUARY 2010

SENT OUT: February 2010
COMMENTS BY: 22nd March 2010
COMMENTS TO: VIJAY NAGARAJ (naqaraj@ichrp.org)
The International Council on Human Rights Policy

The International Council on Human Rights Policy was established in Geneva in 1998 to conduct applied research into current human rights issues. Its research is designed to be of practical relevance to policy-makers in international and regional organisations, in governments and inter-governmental agencies, and in voluntary organisations of all kinds. The Council is independent, international in its membership, and participatory in its approach. It is registered as a non-profit foundation under Swiss law.
CONTENTS

INTRODUCTION ...................................................................................................................................................... 8

PART I: SOCIAL CONTROL AND HUMAN RIGHTS: AN INTRODUCTION .............................................................. 11

1. SOCIAL CONTROL AND HUMAN RIGHTS: AN INTRODUCTION ................................................................. 12
   1.1 WHAT IS SOCIAL CONTROL? .......................................................................................................................... 12
   1.2 CONTINUITY AND CHANGE IN SOCIAL CONTROL PRACTICES ............................................................... 12
   1.3 WHY SHOULD HUMAN RIGHTS ORGANISATIONS BE CONCERNED ABOUT SOCIAL CONTROL THEORY
       AND DEVELOPMENTS IN SOCIAL CONTROL? .................................................................................................. 14
   1.4 THE CONSTRUCTION OF SOCIAL PROBLEMS, CRIME AND DEVIANCE AND THEIR INTERFACE WITH HUMAN
       RIGHTS ......................................................................................................................................................... 16
   1.5 SOCIAL CONTROL AND LEGITIMATE RESTRICTIONS ON RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW ...
       Public morals .................................................................................................................................................. 20
       Public order .................................................................................................................................................. 22
       Public health ............................................................................................................................................... 23

CONCLUSION ............................................................................................................................................................ 23

PART II: THE WIDER POLITICAL CONTEXT AND MODALITIES OF CONTROL .................................................... 24

2. THE GOVERNANCE OF INSECURITY: NEO–LIBERALISM, PRIVATISATION AND TRANSNATIONALIZATION OF
   CONTROL ........................................................................................................................................................... 25
   2.2 PRIVATISATION AND WEBS OF GOVERNANCE .......................................................................................... 28
       Managerialism ............................................................................................................................................... 29
       Privatisation and private government .......................................................................................................... 30
   2.3 TRANSNATIONAL REGIMES AND POLICY TRANSFER REGIMES .................................................................. 31
       Policy transfer ............................................................................................................................................ 34
   2.4 THE IMPRINT OF RISK ON PUBLIC POLICY AND PUBLIC DISCOURSE ...................................................... 36
       Risk and public discourse ........................................................................................................................... 39

3. MODALITIES OF CONTROL – CRIMINALISATION, EXCLUSION AND SEGREGATION,
   SURVEILLANCE, AND THEIR HUMAN RIGHTS IMPLICATIONS ........................................................................... 42
   3.1 CRIMINALISATION ......................................................................................................................................... 42
       Pre-emptive controls ................................................................................................................................... 43
       Criminalisation through civil and administrative law ............................................................................... 44
       Lack of due process safeguards: summary justice? ...................................................................................... 46
   3.2 SEGREGATION AND EXCLUSION ............................................................................................................. 47
       Incarceration ............................................................................................................................................... 48
       Infectious disease control ........................................................................................................................... 51
       Segregation and exclusion in urban spaces ............................................................................................... 51
       Exclusion and control of migrants and non–citizens .................................................................................. 53
   3.3 SURVEILLANCE .......................................................................................................................................... 54
       The human rights implications of surveillance .......................................................................................... 58

INTRODUCTION TO PART III ................................................................................................................................... 61

4. SOCIAL CONTROL AND THE HUMAN RIGHTS DISCOURSE ........................................................................... 62
   4.1 SECURITY AND RIGHTS OR SECURITISATION OF RIGHTS? TOWARDS A MORE COHERENT HUMAN RIGHTS RESPONSE .. 63
   4.2 CITIZENSHIP, MIGRATION AND SOCIAL CONTROL ..................................................................................... 67
   4.3 SOCIAL AND ECONOMIC RIGHTS DISCOURSES ......................................................................................... 69
   4.4 PUBLIC HEALTH, INFECTIOUS DISEASES CONTROL AND HUMAN RIGHTS .................................................. 72
Acknowledgements

To be completed.
INTRODUCTION

1. This report on ‘social control and human rights’ is concerned with the human rights implications – some immediate, others long-term – of certain patterns of social control that emerge in public policy responses to crime, deviance and social problems. Though some of these patterns are not new, especially in wealthy industrialized democracies of the North where they have been theorized and researched, the human rights community has not always recognized them. In addition, they are increasingly being exported across the world and pose significant challenges and problems to human rights standards and values and merit attention from all those concerned with human rights.

2. The project focuses on six sites of public policy that have social control measures within them raising human rights concerns. A research paper was commissioned to cover each. The policy-contexts chosen were:
   - Policing and surveillance;
   - Punishment and incarceration;
   - Migrants and non-citizens;
   - Urban spaces and the poor;
   - Control of infectious diseases;
   - Social control of the Roma in Europe

3. The authors were drawn from a range of disciplines, some from the human rights world and others from academic disciplines including criminology, sociology, public health, and law. Their papers therefore reflect a range of perspectives and expertise.

4. At the end of July 2009, the authors of the research papers, the project’s Advisers, and a number of external experts met in London to discuss both the drafts of the Papers and the analytical foundations of this report. That discussion was extremely productive and underlined the value of adopting an inter-disciplinary approach and a broad contextual and comparative perspective.

5. This report (see ‘Structure’ below) does not summarise the Research Papers, though it naturally draws extensively on their arguments and the examples they provide, as well as the Council’s own wider research. Individual papers are referred to throughout by means of the authors’ name(s) in italics for e.g. Cahn; and, in the final publication, full versions of the papers will be provided in a CD-ROM that will accompany the report. In addition, Part III of the report refers to the conclusions of each paper.
6. Much social control theory and literature focuses on countries of the global North. While this project has actively sought to consider contexts in the South where policies of social control are having important impacts on human rights, it does likewise. It is evident too that the report does not explore every context of social control that is relevant. Much more could be said, for instance, about mental health\(^1\) or drug policy. It is also the case that the legal controls discussed in this report are implemented in the context of formal legal systems based in civil or common law, rather than customary or religious law-based systems (where social controls raise their own issues).\(^2\) While it makes no claim to be comprehensive, the report nevertheless offers a framework for analysis, a ‘way of looking’, that can be applied in other policy areas. Therefore notwithstanding the obvious differences across regions, countries, and local areas, hopefully this analysis can nevertheless be applied to different contexts.

**Structure of the report**

7. The report has three parts. **Part I** introduces the idea of social control and shows how the human rights regime intersects with it, in theory and practice. As such it seeks to clarify conceptually the themes that follow. It outlines some key continuities and changes in social control practices since the 1960s. Examining why social control perspectives are important for human rights, it goes on to provide an overview of the social construction of crime, social problems, and deviance, and discusses how human rights engage with these in law and practice, highlighting the legitimate restrictions on rights that human rights law permits.

8. **Part II** analyses the wider political context in which social control policies evolve, and developments in their modalities. The first chapter links the emergence of neo-liberalism as a dominant form of governance to the changing nature of formal social control. It addresses issues such as the rollback of welfare; privatization; and the rise of managerialism as a discourse. It goes on to consider the power of ideas of risk and danger, and the emergence of security as a powerful organising principle of governance in national and transnational regimes, and even permeating social relations more generally. The second chapter highlights specific forms of control – criminalisation; exclusion and segregation; and the growth of surveillance technology – which cut across the themes of the research papers. Drawing on the papers and other research, it analyses various modalities of social control and their human rights impacts.

9. The first three chapters of **Part III** consider the implications of preceding discussions for human rights thinking and practice. Drawing on the conclusions of the research papers

---

1 Note that Parmet refers in her paper to the similarities between civil commitment for mental illness with measures of isolation and coercive medication in response to the outbreak of infectious diseases.

and reflecting their suggestions of how human rights organisations might respond to social control measures in specific policy areas, the chapters discuss why human rights organisations may be overlooking some forms or impacts of social control; and how they could reorient their work to address such issues more adequately.
PART I: SOCIAL CONTROL AND HUMAN RIGHTS: AN INTRODUCTION
1. **SOCIAL CONTROL AND HUMAN RIGHTS: AN INTRODUCTION**

10. This introductory chapter discusses the following issues:
   - What is Social Control?
   - Social Control: Continuity and Change
   - Why should human rights organisations be concerned about social control theory and developments in social control?
   - The Construction of Social Problems, Crime and Deviance and their interface with human rights
   - Social Control and Legitimate restrictions on rights in international human rights law

1.1 **What is social control?**

11. “Social control” is an elusive concept. For the purposes of this report it is best understood as the organized ways in which a society responds to actions, people or ideas that in some way or another are regarded as deviant, troublesome, problematic, threatening or undesirable. The report focuses on those forms of social control that are deployed by the state, or other organized bodies authorized by the state such as professionals (doctors, social workers, urban planners, security experts) and private companies, and that target crime, deviance and social problems. It does not use “social control” in the universal or anthropological sense (i.e. including all the means and processes by which any group or society secures its members’ conformity to norms and expectations): too general and abstract for the project’s purpose, such a definition would include everything from instructing a child on correct table manners to enforcing the death penalty.

12. In this report, the social control perspective is employed to examine how social problems, crime and deviance are perceived and addressed, and to throw light on what this means for human rights regulations which are themselves socially constructed. The report therefore draws on insights from social control theory but is not itself an exercise in theory. Nor does it seek to comprehensively review the very rich literature that covers the areas that are addressed.

1.2 **Continuity and change in social control practices**

13. Social control may be broadly understood as the means through which a society regulates the individual and collective conduct of its members. More specifically, it secures compliance with established norms by preventing, adjudicating, remedying and sanctioning non-compliance. In addition, individuals or groups may be regulated by or subject to social controls, merely because their existence is perceived to be threatening or to lie outside the society’s norm; hence they are deviant, not for what they have done but because of their identity or because they possess traits that are considered within
their society to be risky or dangerous. Non-compliant behaviour or status, or its consequences, may be considered criminal, deviant, or a social problem, or even as a human rights violation,\(^3\) and may as a result be subject to measures of social control.

14. These measures, in turn, may involve a variety of agencies, beyond those that are the traditional focus of human rights attention (typically the police or other parts of the criminal justice system): the gamut of welfare agencies, the health service, urban planners, border control and immigration authorities, etc. As will become evident, they may increasingly involve private actors to whom the state has devolved certain services.

15. Stanley Cohen, in *Visions of Social Control* (1985), traces four key changes that occurred in the course of the nineteenth and the mid-twentieth century. The locus of social control moved from informal social institutions to the state; deviants were classified and differentiated in various categories, each meriting scientific examination and expertise; different types of custodial institutions emerged; and policy focused on changing the hearts and minds of offenders rather than the infliction of physical suffering. In the 1960s, a counter-discourse emerged, characterised by Cohen as involving calls for decentralisation, deprofessionalization, decarceration and decriminalisation. Such destructuring movements downplayed the importance of due process in favour of non-intervention and inclusionary controls, and pursuit of alternative correctional justice mechanisms. However, as Cohen and many other scholars have documented, the unintended consequence of this movement was the exclusion of the targeted groups, because the alternative measures of control did not replace but only complemented the criminal justice system and, thus, widened the entire range of controls to which people were subject. An upsurge in regard for the rights of those caught up in the criminal justice system (particularly in the penal context\(^4\)), apparent in the second half of the 20th century, was subsumed by the 1990s and beginning of the 21st century by a preoccupation with the risks to potential victims of crime, leading to a pendulum shift in social control practices. Governments focused increasingly on finding the most effective forms of control and crime prevention, and paid less attention to the causes of crime and deviance. (These developments are explored further below.)

16. In parallel, the human rights discourse also evolved. Its original anti-state position was loosely aligned to destructuring movements; but, over time, under the influence of campaigns that raised the profile of certain violations (in particular war crimes,\(^3\) As discussed later in this report, human rights violations and abuses are themselves socially constructed. The international human rights law framework defines human rights violations and abuses but this definition is constantly changing and developing, reflecting socio-political, moral and other factors.

\(^4\) Wacquant notes that prison was considered to be an institution that would soon become extinct in the period 1945–72 in the UK and USA. Contrast this with Sparks and McNeill who note that ‘with significant cultural and contextual variations, it is perhaps not too much to say that confinement is the most global of modes of state punishment today’. 

13
genocide and torture, but also more recently crimes of discrimination and violence perpetrated by non-state entities), it increasingly pressed for the criminalisation of such harms. The law came to be seen as the protector of the weak and vulnerable, and the state as ultimately responsible for ensuring protection through law-making processes.

17. Blomberg and Hay⁵ note that social control today is characterised by the following features:

- A continued expansion of exclusionary practices especially detention (often referred to as ‘hard’ measures) including imprisonment in a criminal context but also public health quarantines, civil commitment for mental illness, detention of irregular migrants;
- A continued expansion of inclusionary practices such as electronic tagging, home confinement etc. (‘soft’ measures);
- The emergence of pre-emptive inclusionary controls, most notably through surveillance; and
- The justification for such policies based on increasing public fears of crime, immigration and insecurity more generally, especially following 9/11 and the growth of ‘terrorism’.

18. These features, explored extensively in social control literature, are discussed further in this report, drawing on examples referred to in the Research Papers in order to highlight in what ways they challenge the human rights framework.

1.3 Why should human rights organisations be concerned about social control theory and developments in social control?

19. A social control perspective examines a range of state and related non-state institutions and bureaucracies, including criminal justice, social welfare, health, urban planning, immigration and border control institutions, which operate in ways that regulate and control various aspects of behaviour, ways of thinking, and status. In relation to crime, deviancy and social problems, a social control approach offers tools that permit a causal analysis of factors that encourage the state to adopt measures of control (including coercive ones) and thereby clarify how and why some human rights violations and abuses are created and perpetuated.

20. Social control systems and strategies respond to people or actions that are defined – rightly or wrongly – as in some way dangerous, threatening, deviant, problematic or undesirable; human rights law and practice focuses on the protection of groups defined in such ways. The human rights framework has long been concerned with regulating the exercise of power by state actors and increasingly non-state actors as well. In many

ways, rule creation, rule enforcement, and sanctioning of rule violations, are at the heart of the idea of both social control and human rights. While human rights focus on the consequences of such controls and their bureaucracies, social control offers critical insights into how these arise and function.

21. The human rights framework, while offering its own vision of the ordering of society and acceptable norms, often concentrates on responding to violations reactively rather than analysing the normative and institutional nature of mechanisms or policies that may lead to such violations, with the result that some even escape scrutiny. A broader awareness of patterns of categorisation that lead to infringement of rights over a broad spectrum of social policy departs from an individualistic response to human rights violations and permits the human rights impact of particular policies, including human rights interventions themselves, to be examined more holistically.

22. For the most part, human rights organisations have been concerned with control systems and ideologies that are more readily conceived as "political" rather than "social". This is understandable, but it misses the point that state and increasingly private control often appear to be non-political. To the extent that human rights practice seeks to have an impact on governance and social policy, it needs to understand what drives changes in governance and social policy. Yet, human rights organisations rarely study the logic of bureaucracies of social control (managerialism, medicalisation, privatization, etc.), which dictate whether forms of behavior, new codes of ‘deviance’, will be accepted or disowned. Looking at problems from a social control perspective could help human rights practitioners in more effective analysis of policies and mechanisms they seek to change and thereby enhance the effectiveness and relevance of their interventions.

23. An understanding of social control theory is also valuable because the human rights framework itself contributes to processes of construction and categorization. For instance:

- It promotes the de-criminalisation (for example, of HIV status or homosexuality) and criminalisation (for example, of discrimination) of particular behaviours or status;
- It categorises as a ‘human rights violation’ behaviour that had previously been normalised (such as domestic violence or torture);
- It advances values that justify criminalisation or de-criminalisation of certain behaviour or status;
- It regulates and limits the state’s authority to construct law or enforce norms (for example, by restraining surveillance on grounds of the ‘right to privacy’).

24. This report argues that it is opportune and necessary to ask whether human rights law and practice are sufficiently responsive to policies of social control and their human
rights consequences, and also to the conditions that invite control. Though the two discourses have common concerns, social control and human rights professionals rarely engage with one another. According to Sparks and McNeill, for example, criminologists and social scientists largely fail to make reference in their work to human rights norms on prison conditions, while human rights advocates rarely refer to literature on contemporary prisons published by social scientists and fail to register the significance of notions such as risk management that have deeply influenced the development of prison regimes. The arguments for mutual learning are clear in all the policy contexts this project has researched.

1.4 The construction of social problems, crime and deviance and their interface with human rights

25. A social control perspective questions how a social practice or phenomenon comes to be constructed as deviancy, a social problem, crime or a human rights violation. Oberoi wonders, for example, how migration – a condition that could be viewed as beneficial in social and economic terms, or neutral in terms of the “threat” it poses to the receiving society – has instead been constructed as a problem, a condition requiring a “solution.”

26. At the same time, where practices are defined as social problems, deviancy or crime, those who ‘fit the box’ come to be categorised. This categorisation, which is subject to change over time, and varies by social and cultural context, determines who is labelled as deviant or criminal for example, and is then liable to be articulated in criminal law and governance practices. It is important to note here that “deviance” is a sociological rather than a societal classification. Alongside the construction of categories (‘rule creation’), a vast apparatus of procedures, personnel, expertise and organisations is devoted to the selection and application of legal and non-legal controls to specific people and behaviours (‘rule enforcement’).

27. Social problems, crime and deviancy are not independent universes and frequently intersect. Some social problems (for instance the sexual exploitation of women in prostitution) may be defined as a crime, while others (for instance, substance abuse) may be considered as deviancy. In some cases a social problem may attract criminalization, as in the case of vagrancy and begging or panhandling, while in other cases a social problem is viewed as criminal deviance such as anti-social behaviour or exploitation of children. On the other hand not all deviance is deemed criminal (mental illness, for example, may cause individuals to deviate from social norms but is generally addressed therapeutically). On the other hand, crime itself, such as organised crime

---

6 The research papers refer to this process in different contexts: Oberoi with reference to the role that human rights law plays in categorising migrants, refugees and others; Leman–Langlois and Shearing with reference to the expansion of categories of people for surveillance, for example.
involving trafficking in people or drugs, and even terrorism, can precipitate stresses in the social fabric that can give rise to or fuel social problems and deviance.

<table>
<thead>
<tr>
<th>Anti–social behaviour: therapeutic and penal/criminal categorisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>As discussed further in Part II, ‘anti–social behaviour’ and more generally behaviour that incites fear in others, has increasingly been criminalised. What is interesting to note is the congruence between anti–social behaviour as defined in law and as defined in therapeutic models.</td>
</tr>
<tr>
<td>The UK Crime and Disorder Act (1998) defines anti–social behaviour as acting “… in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons...”. Compare this with the Diagnostic and Statistical Manual for Mental Disorders – IV (DSM–IV), the latest version of the globally–used criteria for assessment and diagnosis of mental disorders, including personality disorders, published by the American Psychiatric Association. In code 301.8, the DSM–IV (which applies to those 18 or above) defines Antisocial Personality Disorder as follows:</td>
</tr>
<tr>
<td>There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:</td>
</tr>
<tr>
<td>Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;</td>
</tr>
<tr>
<td>Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure, impulsivity or failure to plan ahead;</td>
</tr>
<tr>
<td>Irritability and aggressiveness, as indicated by repeated physical fights or assaults, reckless disregard for safety of self or others;</td>
</tr>
<tr>
<td>Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations;</td>
</tr>
<tr>
<td>Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.</td>
</tr>
<tr>
<td>Both the law (Crime and Disorder Act (1998)) and the science (DSM–IV) speak of 'disorder.' Both the law and the science are constructed with reference to infringements or disregard for the rights of others. Though both are instruments of control, one follows the therapeutic model and the other that of criminalisation or at least penalisation (there is of course a history – familiar to the human rights movement – of the state categorising ‘undesirable’ or ‘deviant’ individuals as anti–social and following the therapeutic model at a time when this model itself was characterised by incarceration of the mentally ill, a practice still prevalent in many parts of the world.1) One is a diagnosis drawn up by a professional while the other is largely based on perception and the reaction of those subjected to certain kinds of behaviour. Arguably, the criminal law discourse on anti–social behaviour marks a ‘devolution’ of the power to diagnose and label someone as anti–social.</td>
</tr>
</tbody>
</table>

28. Crime, as defined in law, identifies actions or behaviour deemed to be unacceptable and worthy of sanction. As with deviancy, behaviour deemed criminal may vary according to moral and ethical norms present in society and these can shift, making actions that might have been criminal at one time subject to welfare intervention at another (decriminalisation of drugs or homosexuality), or vice versa. The weight given to particular crimes (reflected in policing resources or sentencing policies, for example)
may also vary. Critical criminology questions the very notion of crime, especially its fixity, focusing on the social, political and economic context of its production.

29. As noted above, human rights law and practice play a role in criminalizing forms of behaviour, for example when state agents violate international human rights law (as in the case of torture or genocide) but also when individuals and other non–state actors commit acts (domestic violence, for example) that may previously have been accepted or tolerated or ignored in law. Developments in human rights law and practice in recent decades (particularly in relation to the protection of identity–based groups from discrimination and violence) have led states to focus increasingly on their positive obligation to protect human rights (the notion of ‘due diligence’); and the human rights community has been quick to seize on this obligation. To give one example from the field of women’s rights, the UN Deputy Secretary–General recently urged, for example, that “we must harness the power of the State to punish and prevent all forms of violence against women”.8 While such an approach provides tools for ensuring that states are accountable for their actions, in practice it can encourage the production of, or itself produce, forms of social control that can be malign or benign (as explored later in this report).

30. Human rights law also makes clear that certain actions, behaviours or status should not be criminalised or otherwise sanctioned. It affirms the right to freely express political views, for example, and to belong to a trade union or ethnic group, and forbids discrimination on grounds of HIV status, for example, though it accepts that limits can be placed on many human rights (see below). However, while human rights advocates have consistently challenged the criminalisation of political activity, they have given far less attention to the methods states employ to sanction ‘non–political crimes’, particularly methods that fall outside the criminal law. We will return to this issue in Part II and III of this report.

31. Human rights law acknowledges the need to sanction those who break the law, as long as the criminal law conforms to international human rights standards (i.e. does not allow for detention of those exercising their rights, is not discriminatory in its purpose or implementation, is not arbitrary, and ensures equality before the law) and as long as due process guarantees are followed in detaining, prosecuting and punishing those individuals. International human rights law also requires that the lawfulness of detention can be challenged (as referred to by Parmet in relation to the detention of individuals suspected of carrying infectious diseases). The principle of non–discrimination (which is non–derogable under Article 4 of the ICCPR) is central to international human rights law and provides a framework for concerns about the

---

7 International human rights law recognizes state accountability for abuses by private actors, requiring states to show ‘due diligence’ in preventing and responding to human rights violations.
targeting of individuals on the basis of their identity or status. As such, the body of human rights law places important limits on the power of state authorities to deal with crime (as also deviancy and social problems).

32. Many human rights obligations have been elaborated further, through the work of Treaty Bodies (such as the Human Rights Committee) established to oversee the working of the various human rights treaties, and through adoption of UN guidelines and standards (which unlike treaties are not legally binding). A number of standards relating to criminal justice have been adopted over the years, including standards on conditions of imprisonment, alternative justice mechanisms, and law enforcement. The scope of this human rights ‘project’ in relation to criminal justice is captured in the UN’s extensive Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice.

33. Social problems encompass numerous social issues that are perceived to be problematic or undesirable. These can include poor educational attainment, ill-health and disease, non-criminal violence, poverty and unemployment, and lack of housing and homelessness. Research indicates that in recent decades economic inequality has increased, and that a shift has occurred, away from welfare-oriented policies that sought to address social problems and towards policies that are more exclusionary (see below). In the same way that shifts in categorisation of crime and deviancy reflect shifts in moral and ethical norms, some see this shift as a reflection of the ascendancy of neo-liberal politics and the importance of the market (see discussion on neo-liberalism below).

34. International human rights law and human rights organisations again play a role in relation to social problems. They address homelessness and maternal mortality, for example, particularly through the development of work on social and economic rights. Many recommendations, guidelines and enforcement mechanisms relating to economic and social rights have strengthened obligations contained in the International Covenant on Economic, Social and Cultural Rights, which in turn are reflected in constitutional guarantees in a number of countries (notably South Africa, India and a number of Latin

---

9 Rights should be granted without “distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

10 Available at [www.uncjin.org/Standards/Compendium/compendium.html](http://www.uncjin.org/Standards/Compendium/compendium.html). This includes standards such as the UN Code of Conduct for Law Enforcement Officials (adopted in 1979), the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted in 1990), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted in 1988) and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted in 1985).

11 The Committee on Economic, Social and Cultural Rights (established in 1985) monitors implementation of the Covenant. In 2008 the UN General Assembly adopted an Optional Protocol to the Covenant allowing the Committee to examine individual complaints (this has yet to come into force). The 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, while not legally binding, have provided a useful framework for a violations-based approach to social, economic and cultural rights.
American countries) as well as in the European Social Charter. Human rights law requires states to act to address social problems (including through the principle of due diligence referred to above) and sets out procedural principles that states must respect, such as non-discrimination and equality before the law. These bear directly on many areas of social policy, including housing, public health, social protection, child welfare, and employment.

35. The concept of deviancy is important in social control theory because “deviants” are a principal target of social control, since they do not comply with a widely accepted norm or belong to a group perceived as non-compliant. The norms that they infringe are not always embodied in law or formal regulations and tend to mutate continuously, as their moral, ethical and cultural context evolves. Policy responses to sex offences, substance (especially drug) abuse, and youth offences have inspired particularly significant and controversial debates. These are key sites of deviance (sometimes also criminality), whose management tends to evoke a strong public response, given the links with public safety on one hand and the emergence of gangs and youth sub-cultures (particularly in cities) on the other, which are perceived to be serious threats to the social fabric of law and order.

36. International human rights law and the human rights movement play a role in ‘normalising’ deviancy. For example human rights advocates defend the right to non-discrimination of homosexual and transgender people who are viewed as ‘deviant’ in some societies or communities; and have called for an end to the arbitrary detention of sex workers. At the same time, the human rights framework acknowledges the need for some control over those who ‘deviate’ from norms, while saying little about when or how much control should be exercised. For example, there is no specific human rights position on how drug use should be regulated, or whether criminalisation or other forms of sanction are appropriate. Especially significant in this regard are oft recurring grounds for restrictions on the enjoyment of many human rights such as those pertaining to ‘public health’, ‘public morals’, ‘public order’ etc., which are often used as justifications for control measures.

1.5 Social control and legitimate restrictions on rights in international human rights law

37. While international human rights law provides that everyone has the right to life, liberty and security of person and a range other rights, it does permit some restrictions. It recognizes that states may limit or restrict rights (including the right to liberty) in a number of circumstances, subject to conditions. The terminology and emphasis vary in different human rights treaties, but broadly amongst the common grounds across the treaties that allow rights to be limited include ‘national security,’ ‘public morals’, ‘public
order’, ‘public health’ (and in the case of Europe ‘for the prevention of disorder or crime’). They also recognise that states may limit rights to ensure protection of the rights and freedom of others, thereby recognizing the need to ‘manage’ the distribution of rights to ensure equality. International human rights law further allows states to make reservations when ratifying international human rights treaties; and to declare states of emergency “in time of public emergency which threatens the life of the nation” (Article 4 ICCPR) and thereby suspend civil and political rights (though certain rights, including the right to non-discrimination and the right not to be subjected to torture, are non-derogable and cannot be suspended). In relation to social, economic and cultural rights, Article 4 of the ICESCR permits states to subject these rights “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. Article 2(3) of the ICESCR also provides that developing countries, with due regard to human rights and their national economy, may determine to what extent they guarantee to extend the economic rights recognised in the Covenant to non-nationals.

These limitations clearly acknowledge that states need to control and manage the exercise of the rights of their populations and are therefore central to any discussions about whether social controls violate human rights law or not. The limitations are not well defined in international law, however, and are therefore subject to interpretation.

---

12 Article 29(2) of the UDHR states that “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” In the ICCPR: Article 12 providing for the right to liberty of movement and freedom to choose residence; Article 18 providing the right to manifest religion or beliefs is subject to similar exceptions; Article 19 providing for the right to freedom of expression; Article 21 providing for the right to peaceful assembly; and Article 22 providing for the right to freedom of association – are subject to exceptions where necessary to protect national security, public order, public health or morals or the rights and freedoms of others. Exceptions contained in the European Convention on Human Rights are more explicit and wide-ranging. In addition to exceptions referred to with regard to Article 5, Articles 8 (right to privacy), 9 (right of thought, conscience and religion),10 (right to freedom of expression) and 11(right to freedom of peaceful assembly) refer to restrictions necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. The American Convention on Human Rights provides for exceptions under Articles 12 (freedom of conscience and religion),13 (freedom of thought and expression), Article 15 (right of assembly), Article 16 (freedom of association). The African Charter on Human and Peoples’ Rights indicates that a number of rights should be exercised ‘within the law,’ but also refers to exceptions of ‘national security’ and ‘the safety, health, ethics and rights and freedoms of others’ in relation to Article 11 (the right to assembly) and ‘national security, law and order, public health or morality’ in relation to Article 12 (right to freedom of movement). The UNHCR also permits states to detain asylum seekers in the interest of safeguarding public order (UNHCR Guidelines on detention of asylum seekers).

13 The reservations that states make on ratification of International Covenants often speak to the ways in which states feel that they need to maintain control of their populations and to limit their rights and freedoms. For example, a large number of states have entered reservations when ratifying the UN Convention on the Elimination of All Forms of Discrimination Against Women, particularly Article 16 (relating to discrimination against women in matters relating to marriage and family relations). See www.un.org/womenwatch/daw/cedaw/reservations.htm.
The 1984 Siracusa Principles\textsuperscript{14} sought to clarify the limitations included in the ICCPR, by stating that limitations should: be in accordance with the law; be based on a legitimate objective; be strictly necessary in a democratic society; employ the least restrictive and intrusive means available; and not be arbitrary, unreasonable, or discriminatory.

\textbf{Public morals}

39. Nevertheless, the Principles do not provide perfectly clear guidance as to what limitations on rights are and are not acceptable. They acknowledge that “public morality varies over time and from one culture to another” but suggest at the same time that the term “public morals” means “maintenance of respect for fundamental values of the community”. This implies a recognition that morals evolve. Similar limitations are present in the European Convention on Human Rights: under its ‘national margin of appreciation doctrine’, the European Court of Human Rights (ECHR) has ruled that nation states are in a better position than the Court to decide on this issue (see Handyside v. United Kingdom: 7 December 1976, Series A N.24).\textsuperscript{15} At the same time, human rights law has evolved to accommodate, or promote and enforce, new moral norms reflecting the process of social construction referred to earlier in this report. Thus a policy that might have been seen to protect public morals in the 1960s could fall foul of human rights law in the 1980s because of developments in the interpretation of human rights law. In 1981, for example, the European Court of Human Rights found that the continued criminalisation of acts of homosexuality in Northern Ireland breached Article 8(1) of the Convention.\textsuperscript{16} However, four dissenting judges in that case argued that the UK had a right to continue to criminalise because a majority of the population of that country felt it was morally right to do so.

\textbf{Public order}

40. The Siracusa Principles define public order as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded”, but such language does not make clear where such ‘fundamental principles’ or ‘fundamental values’ are to be found, or who determines what they are or whether they have changed, although it is required that any restrictions should be necessary and proportionate. In the UK, for example, the government has explicitly stated that legislation to deal with ‘anti-social behaviour’ is not governed by Articles 8 (privacy), 10

\begin{footnotesize}
\begin{enumerate}
\item Dudgeon v. the United Kingdom, Application no. 7525/76, Strasbourg 22 October 1981 available at
\end{enumerate}
\end{footnotesize}
(freedom of expression), or 11 (freedom of assembly and association) of the ECHR, because these rights are qualified, and therefore permit a public authority to interfere with them when it is necessary for the prevention of disorder or crime.\(^\text{17}\) Indeed, with a nod to considerations of public morals and public order, Article 5 of the ECHR itself explicitly permits the detention of “vagrants” and “alcoholics” (Article 5(1)(e)).

**Public health**

41. Article 5(1)(e) of the ECHR also permits the lawful detention of “persons of unsound mind”, “drug addicts”, and “for the prevention of the spreading of infectious disease”. Separately from the Siracusa Principles, Parmet points out that public health ethicists have articulated numerous ethical principles to guide public health policy, many of which are reflected in both domestic law and relevant international guidelines. Among the most important of these principles are transparency, community consultation, and equity. Like other “exceptions”, Parmet argues that these guidelines appear inadequate in the face of complex policy decisions about risk factors, especially when consideration focuses on the risk posed by an identified individual or group rather than on the most effective means of promoting the overall health of a community or population.

**Conclusion**

42. It can therefore be concluded that international human rights law may be helpful in placing limits on measures of social control; but may also provide justification for controls or may itself construct them. The research papers each identify ways in which the human rights framework engages with social controls in their specific contexts, demonstrating the complexity of the relationship.

43. This report seeks to assist human rights organisations to respond to developments in social control, based on the analysis provided by the research papers. The human rights ‘framework’ of law, jurisprudence, commentary, interpretation and practice, will be important to this process; but it is vital to point out that human rights law is not just a regulatory framework but also an exposition of fundamental values, epitomised by the Universal Declaration of Human Rights with its principles of equality, dignity, indivisibility and universality. Interpretation of existing human rights law, the creation of new human rights law, and all human rights practice proceed from that position. As a result, it should be unrestricted in its ability to condemn state or non-state institutions, policies or practices that threaten those principles. We return in Part III to consider how, with this understanding firmly in mind, human rights organizations and the human rights framework can respond to the developments highlighted in this report.

PART II: THE WIDER POLITICAL CONTEXT AND MODALITIES OF CONTROL
2. THE GOVERNANCE OF INSECURITY: NEO–LIBERALISM, PRIVATISATION AND TRANSNATIONALIZATION OF CONTROL

44. This chapter focuses on four noteworthy trends, identified in social control literature, that shape contemporary social control practices:
   - The influence of neo–liberal economic governance;
   -Privatisation and ‘webs of governance’;
   -Transnational regimes and policy transfer; and,
   -The imprint of risk on public policy and public discourse.

45. A discussion about formal social control is very much about the nature of the state and governance in general. One of the most significant changes on this front since the Second World War, further accentuated after the disintegration of the Soviet Union, has been the sustained pressure on ideas of universal social welfare and protection, powered by the rise of neo–liberal economic ideology. Two related developments have also shaped social control practices: firstly, privatization and the growing role of private actors in altering the nature of the state and governance more generally, and secondly, the influence of risk and security discourses over state policy as well as public imagination. While these ideas and developments have been especially influential in Western Europe and North America, they have travelled across the world and have had significant influence as a result of globalisation and the expansion of transnational policy regimes.

2.1 The influence of neo–liberal economic governance: social welfare as social control?

46. The effect of neo–liberal economic policies on economic and social equality has been widely documented. The widening gap between rich and poor itself raises many human rights concerns. Social control literature suggests that social policies based on notions of universal welfare have been increasingly abandoned in favour of individual responsibility, and that a range of conditionalities and deterrents have been placed on the exercise of basic human rights, thereby challenging the notion that they are inalienable. These conditionalities, it is argued, justify significant levels of ‘policing’ to ensure that they are being met, and the introduction of new penalties for failing to meet these conditionalities. Research on which this literature is based further suggests that

---

18 For the purposes of this analysis, the term neo–liberal is used to describe processes of global economic liberalisation characterised by: the dominance of the market; the roll–back of welfare services; deregulation of the economy; privatisation; the dominance of the idea of individual responsibility.


20 UN human rights bodies have repeatedly referred to the impact of privatisation (a key feature of neo–liberal economic policy) in deepening inequalities and restricting social and economic rights for example.
reduced welfare expenditures are not associated with reduced government intervention in social life, but rather with a shift towards a more exclusionary and punitive approach to the regulation of social marginality and increases in security spending. For instance, a study of Mayor Rudolph Giuliani and Police Chief William Bratton’s now famous zero-tolerance policing policy found that in the five years to 1999 the 40% increase in the police budget in New York City was accompanied by a 30% fall in expenditure on social services. The same rise in the number of police officers was reportedly accompanied by a marked decrease in the number of social workers. Parmet points to a similar correlation between cutbacks in public health spending in New York City in the same period and a policy of detaining sufferers of Multi Drug Resistant Tuberculosis, indicating a much broader pattern of policy shift that much of the literature – dominated by analysis of crime control – may have missed. The Crime and Society Foundation has found that “welfare generosity and imprisonment rates appear to be negatively correlated.” Nicola Lacey’s research suggests that as countries lean towards free-market policies they are more likely to inflict harsh criminal penalties (and notably to sustain larger prison populations), in roughly inverse proportion to their investment in socially inclusive practices such as universal welfare benefits or the degree of wealth and income inequality.

47. Sparks and McNeill note that countries which are highly tolerant of inequality appear to be more open to what has been termed the ‘penal temptation’, meaning that they locate solutions to governance and public order ‘problems’ in the criminal justice system. Wacquant, highlighting the paradox that neoliberal penalty deploys more state machinery to remedy insecurity than it saves by reducing services, terms this the ‘penalization of social insecurity’. Evidence of the punitive and exclusionary character of social policies can be found in numerous contexts, and many examples are referred to in the Research Papers and in this report. (See also the discussions of segregation and vagrancy below.)

23 David Downes and Kirstine Hansen (2006) ‘Welfare and punishment: The relationship between welfare spending and imprisonment’ Crime and Society Foundation, Briefing 2, November 2006. This finding was based on research exploring the relationship between welfare expenditure and levels of punishment across 18 countries.
27 There is a huge body of literature on this subject and it is important to highlight the difficulty of making generalisations, particularly on the basis of comparative research. See for example Michael Cavadino and James Dignan (2006) Comparative Penal Systems, London, Sage and David Nelken’s comments at a Conference: Assessing
Critical scholars argue that problems previously considered as social are increasingly classified as problems of law and order, justified as necessary to hold together the social fabric in the face of fears of social decline and ‘moral panics’. On this analysis, crime, social problems or deviancy – the ‘moral disintegration’ of a dysfunctional underclass – are no longer attributed to the marginalizing impact of socio-economic conditions but require a response based on social, economic and legal sanctions.

Thus, ‘zero-tolerance’ or ‘tough on crime’ approaches are seen to be the only effective strategy. This is possible in large measure, such scholars argue, because it is presumed that individuals exercise choice when they become deviant, infected with disease, migrate illegally or take to crime, and their circumstances are largely irrelevant. In this context, Cahn refers to the labelling of Roma as ‘socially unadaptable citizens’ and it is not difficult to see how this label might be applied to a range of groups categorised as deviant – indigenous people as well as those deemed ‘anti-social’ – not least because, by their unwillingness to conform, they represent a barrier to social and economic progress.

Nor are critical theorists the only ones to express concern. Referring to penal policies in the UK, Baronness Vivien Stern commented in 2007 that “crime control in the UK is impacting more and more on people with problems that society has failed to deal with in other ways... We are choosing to punish many people whom life has already punished severely in other ways”.

Criminologists and sociologists differ somewhat in their analysis of the factors that have generated the preoccupation with crime and other forms of control. Based on research in the UK and United States, some argue that the state has changed, from being a provider of welfare to a manager of risk. Others suggest that the insecurity associated with neo-liberal economic and social policies (the ‘fears’ associated with globalisation, job insecurity, breakdown of informal controls etc) is key, because it increases individuals’ sense of insecurity, causing them to call for more state intervention; in response, states have adopted coercive social controls in an “attempt to create social order through penal means [which] [i]nstead of reversing the processes of economic marginalization and social exclusion that are endemic in today’s globalized economy... has overlaid and reinforced these very processes.”

---

29 Hope and Karstedt (2003).
51. At the same time, governments have limited practical capacity. As Leman-Langlois and Shearing point out, crime control measures, such as policing and surveillance, have little direct impact on levels of crime. But many nevertheless make impressive claims for their initiatives in order to reduce public fear of crime and insecurity: reducing the fear of crime has become almost as important as the reduction of crime itself. In this way, states come to be preoccupied by crime control, immigration control, or public health emergency preparedness. Wacquant goes so far as to suggest that the neoliberal state’s emphasis on penal solutions can become central to its legitimacy.

52. Nicola Lacey finds that Britain’s ‘first past the post’ political system encourages grand political rhetoric regarding crime and punishment, particularly when political legitimacy is at stake. She argues that this makes it impossible for British governments to adequately address the causes of crime (even when intentions are good) because the electorally–popular demand to be tough on crime has consistently skewed penal policy towards illiberalism. More broadly, she makes the point that criminal justice reforms to increase human rights compliance will fail if they do not take account of the broader political, economic, social and cultural environment, including public attitudes. As Sparks and McNeill state: “Whether we view offenders as wayward members of an amoral community, or as damaged but correctible individuals, or as permanent carriers of unacceptable risks, or as despised outcasts, are dimensions of political culture that radically affect not just the regimes, conditions and handling that people undergo once incarcerated but also how many people we deem it acceptable to imprison and for what purposes in the first place.”

2.2 Privatisation and webs of governance

53. Metaphorically, it has been said that neoliberal governance requires states to change from rowing to steering (from being the driver of policy to being a facilitator). When states devolve powers and responsibilities to private companies and associations of civil society, it blurs the boundaries between the public, private and voluntary sectors; and this in turn complicates the ability to hold different actors accountable under human

---

33 A range of research in the UK has concluded that while CCTV cameras have some effect on vehicle theft they have little impact on other crimes, including violent crime (see for example Bradon C. Welsh and David P. Farrington (2008) ‘Effects of Closed Circuit Television Surveillance on Crime,’ Campbell Systematic Reviews, The Campbell Collaboration, at http://db.c2admin.org/doc-pdf/Welsh_CCTV_review.pdf).


37 This nautical metaphor was provided by Savos (1982) Privatising the Public Sector: How to Shrink the Government, Chatham (NJ) Chatham House, as referred to by Leman Langlois and Shearing.

rights obligations. Leman-Langlois and Shearing point out that, in addition to privatisation of state services, private governance (a "quiet revolution in governance") has enlarged, well illustrated by the growth of the private security industry, for example, which operates in the interests of private corporations.

Governing is also increasingly affected by globalisation. Developments in and ideas of social control travel between countries and domestic policies are increasingly influenced and shaped by a range of agents, institutions and political and economic processes – including what we have referred to below as transnational ‘regimes’ – far beyond the borders of the nation state. The emergence of what have been called ‘webs of governance’ challenges the idea of the all-powerful state: it critically affects how contemporary social control policies are produced and organized, and also how human rights organizations can respond to them. Part III discusses this question in more detail.

**Managerialism**

A state that facilitates (steering rather than rowing) in essence manages rather than governs, or governance itself is increasingly viewed as management. Many social control policies seek to manage social problems, crime or deviancy, and to do so employ increasingly technical systems of performance, and risk indicators, and professionals with management expertise in poverty, delinquency, public health, mental illness etc. This trend contrasts with approaches to welfare that were prevalent in the post-war period in the post-industrial North, which emphasized the transformative potential of the criminal justice and welfare systems. The social exclusion policies of Britain’s New Labour government in the late 1990s, for example, focused particularly on management by state as well as private service–providers because, although the government acknowledged the link between social exclusion, economic inequality and crime, it considered these problems resulted from deficiencies of management rather than structural inequalities in society.

The Council’s research for this project indicates that ‘managerialism’ has also influenced the governance of urban spaces and migration. In the criminal justice context, the term ‘actuarial justice’ is increasingly common, reflecting the professionalisation of risk–management in decision–making processes. Speaking of the role of social workers in the context of the UK’s Crime and Disorder Act (1998), for

---

example, Pitts comments that “managerial annexation of youth justice social work ... effectively transformed [social workers] into agents of the legal system, preoccupied with questions of ‘risk’, ‘evidence’ and ‘proof’, rather than ‘motivation’, ‘need’ and suffering”. As Leman Langlois and Shearing point out, managerialism is no less influential in new policing and penal regimes, where ‘intensive policing’ is an increasingly popular policing method. William Bratton argued for example that “what we learned above all from the New York experience is that police can control and manage virtually every type of crime in virtually every neighborhood. No place is unpoliceable”.

**Privatisation and private government**

57. Privatisation is a vast and complex area of public policy. The existence of ‘private governments’ – non–state entities such as businesses or corporations operating as mechanisms of governance in particular spaces or spheres of activity – is not the same as privatisation and, as Leman–Langlois and Shearing argue, provides evidence that the process of neoliberal devolution “has not been the only driver of the changing landscape of security governance provision”. Private governments exist with little or no government involvement, and therefore no apparent state accountability. This is especially true of ‘mass private spaces’ (shopping malls, gated townships or housing estates, stadiums and entertainment complexes, large commercial buildings, etc.), where the exercise of authority is often based on ownership of property and the basic legal framework is not necessarily the criminal law, but contract or property law. Privatisation and private government have had a very large impact on the governance of security, with effects on all the contexts this project considers, though most obviously on policing.

58. The privatization of security spans both privatisation and private government. The private security industry thrives on public perceptions of insecurity and has become extremely powerful, creating a large new market. It is evident in the United States, Britain, Canada, South Africa, Nigeria, Kenya, Brazil and many countries of South Asia. In 2006, the Law Commission of Canada reported that “private security personnel now outnumber police officers employed by the state in Canada by at least a two–to–one ratio”; the ratio in South Africa is reported to be around four–to–one. An increasing number of people spend a large amount of their time in spaces controlled by private police. These spaces may be public (streets and parks, railway stations and airports) but also may be corporately owned (like shopping malls and offices).

---


59. Canada’s Law Commission has also pointed out that “[u]nlike public policing organizations, private sector policing organizations tend not to define their missions and objectives so exclusively in terms of crime prevention and control, and law enforcement. Nor are they institutionally connected with the criminal justice system. Rather, as their job titles and descriptions often reflect, they tend to define policing more in terms of loss prevention, property protection, personal security and risk management”. They are agents of control nonetheless. Though in most countries their powers are less extensive, ‘private police’ in the United States are involved in arrest, search and seizure, criminal investigation, public order, and patrolling.

60. The essential question is: where and how is the public interest determined when private security or other private entities exercise controls? Cahn concludes that private rental markets and lack of state social housing provision have exclusionary consequences for Roma in a number of European countries. Other private companies, for example in the health insurance industry, condition the provision of ‘social’ services and exclude many people from access on the basis of income or health status, or criteria based on “risk” or “efficiency”.47

61. Thus the growth of privatisation and private governance not only puts accountability at risk. Richer individuals are increasingly able to purchase their economic and social security (private health and education, insurance against a broad spectrum of ‘risks’) and assure their personal security (Leman Langlois and Shearing point out that insurance has been crucial to the development of the private security industry) and as a result they tend to perceive welfare services as a financial burden that is irrelevant to their interests. The detachment of the better-off from public welfare further weakens the access to services of those who lack the resources to buy their own security.

2.3 Transnational regimes and policy transfer regimes

62. Obvious examples of transnational regimes include international human rights treaties and covenants and treaties on drug control, trade and transnational crimes. Other transnational regimes address specific aspects of governance – for example, public health, international migration and policing – which are not embedded in a specific framework of international law but nevertheless engage the interests of states and have influence (see box). It is beyond the scope of this present section to provide a comprehensive overview of transnational regimes, but many are discussed in the research papers, notably the regime of international human rights law. Parmet considers the International Health Regulations, and the diffusion of biosecurity and surveillance values to the control of infectious diseases. Both Cahn and Oberoi examine the role of the International Organisation for Migration (IOM) in the ad-hoc regime that

---

deals with migration.\textsuperscript{48} \textit{Leman–Langlois and Shearing} analyse the transnational nature of the security governance sector and highlight the complexity of the relationships between "security producers" and the transnationalisation of policing. Part III of this report includes a discussion of the UN Office on Drugs and Crime and its relationship with the global human rights regime. In addition, many of the concepts highlighted in social control literature and referred to earlier (managerialism, private governance, risk management etc.) have travelled across the globe via professional networks, ‘knowledge elites’ and ‘policy entrepreneurs.’

\begin{center}
\textbf{Migration management by the International Organization for Migration (IOM)}
\end{center}
Cahn argues that some governments have used the IOM to ‘displace’ their responsibility for questionable or illegal activities (such as attempting to persuade persons applying for asylum to abandon claims through “voluntary return” programs). He reports that, according to descriptions offered by IOM employees, in some "voluntary return" programmes, IOM employees have attempting to persuade some Romani claimants for asylum in countries such as Belgium and encourage them to abandon their requests on the grounds that they have very little chance of success. The Roma in question were told that, if rejected for asylum, they would receive a black stamp in their passports, making it difficult if not impossible to return to the country of exile (or to go to other countries) for years afterwards. In return for joining a "voluntary return" program, they were promised that they would receive assistance with "reintegration" in their home countries.

\begin{center}
\textbf{Policing and Security}
\end{center}
Several transnational institutions coordinate policing internationally or regionally, including Interpol (187 member countries), the International Association of Chiefs of Police, and the International Union of Police Officers. Interpol operates regional programmes in all regions of the world, and promotes standards and best practice in a number of areas (including DNA profiling, fingerprinting, and terrorism), as well as organising a wide variety of training programmes.\textsuperscript{49} It maintains a DNA database which by 2008 contained thousands of DNA profiles from 48 member countries. Though many of these transnational structures principally share knowledge, they increasingly pool information and coordinate activities between national police services, particularly at regional level, as in the case of Europol and the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO). \textit{Leman–Langlois and Shearing} foresee that Europol Interpol is likely to evolve into an "a-national" body, via professionalisation and isolation from state policies, with consequences for oversight and accountability. In addition, numerous non-governmental transnational and regional initiatives focus on criminal

\textsuperscript{48} The University of Oxford’s ‘Global Migration Governance Project’ notes that “There is no integrated migration regime, nor a United Nations Migration Organization. Instead, global migration governance is characterised by a range of multiple institutions and contested sites of governance. Governance structures exist on both a regional and global level, and fragmented governance structures exist that relate to refugee protection, the protection of internally displaced people, human trafficking and smuggling, environmental migration, development–induced displacement, remittances, irregular migration, and labour migration, for example.” See http://www.globaleconomicgovernance.org/project-migration.

\textsuperscript{49} See http://www.interpol.int/default.asp.
justice reform, including police reform, with varying degrees of acknowledgement of the role of human rights. It is difficult to assess the influence of these initiatives. Leman–Langlois and Shearing comment that research on the relationships between the producers of security has “barely scratched the surface”. They also point out that agreements between organisations vary hugely in their scope, formalisation and objectives.

Writing in 2002, Ian Loader referred to the ‘securitisation’ of Europe, as new and opaque organisational structures emerged around the justice and home affairs pillar of the EU, without adequate democratic supervision. At the time, he commented that, although security was not paramount in EU policy, it was increasingly becoming so, as Europe acquired the ability to police ‘others’ without accountability at regional level.50 A recent report by Statewatch and the Transnational Institute appears to demonstrate how this process has escalated. It documents the development of the European Union’s Security Research Programme, which aims to deliver new security-enhancing technologies to the Union’s member states in order to protect EU citizens from threat. The report warns that “the EU’s security and R&D policy is coalescing around a high-tech blueprint for a new kind of security. It envisages a future world of red zones and green zones; external borders controlled by military force and internally by a sprawling network of physical and virtual security checkpoints; public spaces, micro-states and ‘mega-events’ policed by high-tech surveillance systems and rapid reaction forces; ‘peacekeeping’ and ‘crisis management’ missions that make no operational distinction between the suburbs of Basra or the Banlieue; and the increasing integration of defence and national security functions at home and abroad... It is not just a case of “sleepwalking into” or “waking up to” a “surveillance society,” as the UK’s Information Commissioner famously warned, it feels more like turning a blind eye to the start of a new kind of arms race, one in which all the weapons are pointing inwards.”51

63. More development aid is being granted to the ‘security sector’ (under Security Sector Reform (SSR) programmes), particularly in post–conflict countries. For the OECD, for example, “[t]he recognition that development and security are inextricably linked is enabling security in partner countries to be viewed as a public policy and governance issue, inviting greater public scrutiny.”52 SSR includes the police, but also the justice, military and other sectors. The Global Facilitation Network for Security Sector Reform, while accepting that no definition of the “security sector” is universally accepted, includes traditional security actors such as the armed forces and police, oversight bodies such as the executive and legislature; civil society organisations; justice and law enforcement institutions such as the judiciary and prisons; and non–state security

providers. The SSR ‘industry’ is driven by an understanding that economic development can be undermined by disorder, crime and instability, as well as corruption. Many programmes seek to promote ‘community policing’ which has become the “sine qua non” of democratic policing. Yet such democratisation processes are almost invariably accompanied by an influx of private security, taking advantage of the fact that the neo–liberal model of political economy (which drives much development thinking) places faith in the capacity of markets to distribute collective goods, including security.

64. It is perhaps not surprising that the organisational focus of many transnational regimes reflects fears about ‘global threats’ of terrorism, organised crime, immigration, global pandemics and security more generally. McCulloch and Pickering make the point that transnational regimes are, in reality, conglomerations of state representatives who pursue foreign policy goals by extending domestic criminal justice (or other initiatives) internationally. The structure of many of these institutions allows little room for integrating human rights (in their broadest sense) into responses to security concerns. Some scholars argue that the transnational politics of security have been characterised by exclusion, threat and xenophobic stereotypes of the criminal other. States seek to dramatise selected threats and take action to address them, operating beyond democratic debate and without accountability. The approach is in marked contrast to the rhetoric of conformity to human rights to be found in much SSR literature, for example, authored in the developed world but designed to influence the global South. These two apparently opposing positions demonstrate the complexity of transnational influences.

Policy transfer

65. As Leman–Langlois and Shearing point out with respect to policing, many ‘best practice models’ emphasise Western, modern, technologically-advanced solutions to crime. The focus is less on what works but whether those involved provide a compelling account of how certain measures can be can be sold as a ‘shared solution.’ ‘Expertise’ is everything. “Governments and politicians appear only too willing to defer to expertise, particularly when this is deemed to drive from “trusted” security sources and which may

---

mean that alternative perspectives or analyses are rarely considered." William Bratton, former Commissioner of the New York Police Department and famous for implementing the ‘broken windows theory’ and introducing compstat, now markets a textbook (travelling the world as a policing consultant) on “how to police any big city”, implying that its lessons are not just limited to the United States. Reference is made elsewhere in this report and by Sparks and McNeill to the way in which the privatisation of prisons has been ‘exported’ and the same goes for criminal justice policy more generally. India introduced plea bargaining in 2005 as a means of addressing crippling delays in trials, borrowed the idea from the United States where conditions are profoundly different. There is discussion about formalising the use of plea bargaining in the UK and France and parts of Eastern Europe. Human Rights Watch has already pointed to the abuse of plea bargaining in Georgia where it has reportedly been used to cover up cases of torture. In the public health context, similarly, medicalised approaches to health problems, as well as social controls (such as surveillance) for disease control have transferred from North America and Western Europe to other parts of the world.

66. In 1982, Cohen, reflecting on the application of criminology to development processes in the 1970s, remarked: “[w]hat is especially pernicious is the advocated transfer of technical policies taken out of their original ideological context”. The trend continues for instance, Brazil, Argentina, Colombia and Venezuela have been among the leading importers of US-style penal policies, including the penal responses to poverty. Wacquant argues that such policies are imported because they dramatise the fight against crime and “fit the negative stereotypes of the poor fed by overlapping prejudices of class and ethnicity”.

67. The transfer of counter-terrorism policing, which often occurs when rights have been suspended under ‘states of exception’, is particularly dangerous. The “war on terror” has focused police reform initiatives on what Brodeur, for example, calls “high policing”, that often incorporates abuses of human rights (not to mention the engagement of armies in crime control functions in national contexts such as Iraq and Afghanistan).

68. Newburn and Jones’s work on crime control and penal policy transfer⁶⁴ found that policy transfer occurred most markedly in the form of rhetoric and symbolism (of ‘zero tolerance’ policing and ‘three strikes’ for example). Such language was particularly attractive to politicians in the UK, but did not necessarily lead to new policies, which national and local political institutions continued to condition and influence. Their conclusions are reflected in the work of others such as Nicola Lacey, who emphasises that political, economic, cultural and institutional differences between countries affect how policies are transferred. Wacquant noted for his part that, although politicians in Austria were quick to seize on the rhetoric of zero tolerance policing, the Austrian police (which retains an important degree of operational independence) has not really implemented this policy in practice.

69. While a number of studies (from criminology as well as sociology) have tracked the export of policing and security policies between countries (including Newburn and Jones’s work referred to above), they have largely focused on the export of knowledge. Because much of this transfer isn’t formal as such – Loader and Walker talk of “opaque networks of police and intelligence chiefs in Europe”⁶⁵ – it is particularly difficult to both monitor and hold these processes to account. Its global scale combined with the involvement of the private security industry make it doubly inscrutable. Private security companies have a huge global reach: Securitas and G4S (both founded in Sweden) operate in 37 and 110 countries respectively. Their economic weight in developed and developing countries, where their contribution to the economy, employment and security infrastructure is enormous, gives them huge influence.

2.4 The imprint of risk on public policy and public discourse

70. Notions of risk and danger⁶⁶ permeate contemporary policy and public discourse, as all the Research Papers illustrate. “Dangerisation” – described by Douglas and Lianos as “The tendency to perceive and analyse the world through categories of menace [leading to]... continuous detection of threats and assessment of adverse probabilities” – has therefore been important to social control analysis.⁶⁷

71. Its most obvious influence has been on policies that address the threat of terrorism, including policies of preventive detention and surveillance. At the same time, social

⁶⁶ Risk and danger are intimately connected but yet distinct. While danger may be described as the inherent potential for harm, adversity or injury in some person, event or thing, risk is a measure of that potential’s likelihood and impact.
control perspectives suggest that many recent counter-terrorism strategies in fact reflect older practices and policies that tended to marginalise the influence of socio-economic factors and causes that underly behaviour deemed dangerous, risky or undesirable. For instance, as Cahn points out, just being Roma is enough in many cases for an individual to be seen as posing various kinds of risks and threats. Measuring and assessing the risk that individuals pose, especially by virtue of their membership of or association with ‘risk groups’ through visual and data-based profiles related only statistically to the possibility of danger, is becoming increasingly important in determining access to entitlements and rights. For instance, welfare services are increasingly pressurised to use risk assessment tools rather than moral judgment when they provide or refuse services. Policing, for example, is increasingly concerned with the prediction and prevention of criminal acts, which necessarily entails the identification of dangerous subjects through risk profiling.

72. The adoption of risk models, and the categorization of people in terms of dangerousness, has had a range of consequences. In particular, they have tended to re-segregate societies, using private as well as public means, and both judicial and non-judicial mechanisms. In this context, parallels have been drawn between the domestic penal policies of the United States and the penal approach it adopted to promote the "war on terror": both "share...the premise that confining a significant portion of those presumed dangerous can by itself make our society safer." As Parmet points out, the history of Guantanamo Bay as a detention centre begins with the detention there by the United States of HIV-positive Haitian refugees and asylum seekers in 1991/92, because it was considered that they posed a risk to the health of the US population. Further concerns about segregation and exclusion are explored in the Chapter that follows, along with associated issues of criminalisation and surveillance. The discussion in this section concludes with an assessment of the risk discourse on policies in the arenas of penalty, public health and the urban poor.

73. The adoption of risk models has affected reformatory models and approaches to punishment in various ways. For example, concern has been expressed that the Federal Bureau of Prison regulations require psychologists working with offenders in US prisons, particularly sex offenders, to perform a dual role of therapist and evaluator in relation to their risk of recidivism. The list of factors on the English Probation System’s computerised system for risk assessment includes indicators of poverty, homelessness and disadvantage. "So if you score highly on measures of poverty, you are by definition

---

‘risky’. If you are risky you will be subject to more controls and thrust more deeply into the suspect part of the population from which it is hard to get out.\footnote{Speech by Baroness Vivien Stern to the Risk Management Authority Conference, Scotland, 1 June 2007 at \url{www.rmascotland.gov.uk/ViewFile.aspx?id=262}.} Crucially, policies and regulations that incorporate assessment of risk both inside and outside the prison are not subject to due process and judicial regulation, even though the conditions placed on freedoms are designed essentially to punish particular behaviours. Jonathan Simon and others have written extensively about the role of parole in returning prisoners back to prison; one author recorded that 66 per cent of offenders admitted to California’s prisons in 1999 were parole violators.\footnote{Joan Petersilia (2003) \textit{When Prisoners Come Home: Parole and Prisoner Reentry}, Oxford University Press. The author notes that this percentage is far higher than in other states and wonders if this is due to the fact that privatisation of prisons (what she calls the ‘prison-industrial complex’) is highly developed in California.} This, in common with the way in which internal prison regimes extend periods of imprisonment, is a classic “feedback loop”. For example, the practice of testing newly-released US prisoners for drugs puts many prisoners straight back in prison (turning parole officers who undertake the testing into agents of crime-control rather than social workers). “It is not the original crime which brings them back to prison, but something in their lifestyle that is undesirable.”\footnote{Nils Christie (1993) \textit{Crime Control as Industry}, Routledge.} This is what some have called the “new punitiveness” where the offender is deprived of rights and in the long term is subject to more or less permanent surveillance and control.\footnote{See John Pratt, David Brown, Simon Hallsworth, Mark Brown, Wayne Morrison (eds) (2005) \textit{The New Punitiveness}, Willan.}

\footnote{Sparks and McNeill refer to the development of community sanctions and measures (CSM) as an alternative to imprisonment.\footnote{Sparks and McNeill explore community sanctions and measures in their Research Paper.} They note that, although CSMs have become sentencing options, they are often seen as concessions to offenders rather than a legitimate penal alternative. Cynicism towards CSM contributes, they argue, to harsher sentencing and the portrayal of recipients as beneficiaries of mercy rather than individuals entitled to rights within the criminal justice system. \textit{Sparks and McNeill} also detect a shift in the public justification for CSMs, away from rehabilitation of offenders and in favour of the protection of actual and potential victims. (They acknowledge that rehabilitation does remain a consideration in most CSM measures.)}
Risk: The urban poor and public health

The fear of crime and deviancy, and the impact of risk management on those identified as dangerous, are particularly evident in cities. Urban areas inhabited by the poor are often very intensively policed. In these spaces, people are often obliged to live their lives in the open, creating increased risks in numerous dimensions. Drugs, for example, are bought and sold on the street (whereas drug abuse in most rich and middle class households goes on behind closed doors). In the United States, as a result, because crack offenders came to be associated with “the underclass”, both were perceived as more dangerous, and the “war on drugs” targeted urban African-Americans who already faced “concentrated socio-economic disadvantage”.  

Similarly Kothari documents the way in which the homeless are arrested simply for stopping to take a rest on a bench, or trying to sell goods on the street in order to make a living.

Parmet points out that infectious diseases are considered to be ‘social threats’ because they infect and harm communities; and that their ability to do so is largely determined by a range of social factors, including sanitation, trade and travel, deforestation, poverty, urbanization and behaviour patterns. She recounts that in the late 1980s and early 1990s New York City faced an epidemic of Multi Drug Resistant Tuberculosis (MDR-TB), was attributed variously to the HIV epidemic, cuts in public health programmes, lack of universal health care, and increases in homelessness and incarceration. The public debate however blamed ‘undeserving’ individuals who failed to take their medication, thereby putting innocent people at risk. The authorities responded with measures that forced people to take their medication (using methodologies like ‘directly-observed therapy’ (DOT)), and threatened with detention those who did not comply. 90% of those so detained were from minority populations and 60% were homeless. Many had substance abuse problems or had spent time in prison. Thus, the population most at risk of disease was transformed into the population that was perceived to create most risk.

Risk and public discourse

A public discourse that stokes fears of risk and insecurity and demands solutions in efficient management of risk, pointing the finger at ‘risk groups’, presents a huge challenge for human rights advocates and organisations that promote social justice. States have an interest in being seen to lower public anxiety about crime, since they are subject to criticism about a growing range of risks, over which they have little control but about which there is a growing and vocal intolerance, fuelled by the mass media. This gives risk-defined interests considerable power to shape public discourse and political behaviour (at all levels) and encourages states to emphasise surveillance of both people and places. In addition, the process is inherently speculative: it focuses on what people might do, not on what they have done, and therefore highlights individual or group characteristics that are associated with risk, which creates conditions that favour discrimination.


While it is clear that insecurity and fear of crime are real issues that should be addressed by the state, social control research demonstrates that perceptions of danger and risk are often highly politicised, and rooted in emotional judgment. Studies have shown that public perceptions of risk and danger take little account of whether a particular threat is likely to materialize. There is a popular tendency to overestimate risk of low frequency but high magnitude events and underestimate risk of high frequency but low magnitude events (for this reason, flying has always been popularly considered more dangerous than travel by road, though an individual is far less likely to be killed in a plane crash than a car accident). As a result, as Leman–Langlois and Shearing explore, the political management of risk and public insecurity is complex and subject to manipulation since all representations of risk are grounded in some value judgment of certain undesirable consequences. In this context therefore often “[R]ational [policy] choices are not necessarily always the most politically feasible ones”. Malloch and Stanley show how public discussion of asylum in Britain has often been irrational, noting how asylum seekers from Iraq and Afghanistan become “implicitly associated with the dangerousness” of the conditions they flee allowing their legal rights to be over-ridden by the assumed qualities by the dangerousness attributed to them as a group. Therefore “[A]lthough asylum seekers are protected on paper in terms of rights (with signatory states to international refugee legislation bearing a responsibility to protect global citizens from the risks they face and escape from), the organizing dynamic in which their collective identity is constructed, repeatedly in terms of danger, has culminated in a situation in which legal rights are over-ridden by populist policies based on security and control”. This is also reflected in opposition from several local communities in the UK to the construction of accommodation and removal centres for asylum seekers in their proximity. Oberoi amply demonstrates that the scramble to be tough on migration is driven largely by public fear of “the criminal other”, which exacerbates the fear of officials and politicians that they might appear “soft”.

In their discussion of community sanctions, Sparks and McNeill emphasise that it is inherently dangerous to base policy on the notion that the state can protect its subjects from risk. “Whenever and wherever CSM agencies commit themselves to or worse define themselves through the assessment and management of risks, they expose themselves not to the likelihood of failure, but to its inevitability. Not all risks are predictable and not all harms are preventable. Even being excellent at assessing and managing risks most of the time (assuming that this could be achieved) would not protect probation from occasional, spectacular failures and the political costs that they carry.”

---

77. Malloch and Stanley (2005) p. 66
80. Malloch and Stanley (2005) p. 66
As we have seen above, where notions of risk are prioritized, those identified as 'risky' are likely to be targeted by the state and public opinion. In many cases, the rights of such groups may be overlooked or deliberately and punitively infringed. Public discourse has increasingly accepted that some are less deserving of rights as they more 'risky' or dangerous. This is reflected in the discourse in discussions of the 'balance' between rights and responsibilities, and the focus – at least in Europe and North America – on victims' rights.

Policy changes that undermine the rights of suspects and offenders are publicly justified by the 'war' metaphor, now widespread. Wars have been declared on terrorism, drugs, crime, immigration, even disease and poverty. As a result, distinctions that have important implications for policy have become blurred: between ordinary crime and terrorism; between warfare and ordinary police work; between public health policies and emergencies etc. As Parmet describes, a pandemic or “outbreak” narrative permits governments to take “exceptional” measures that may enlarge the number of circumstances in which governments may derogate or simply ignore from human rights obligations. Much has been written about penal populism, much less about the dangers posed by a political and public rhetoric that encourages the majority to fear those who appear to represent a social risk. These dangers are clearly highlighted in all the research papers prepared for this report. We return to the importance of public discourse in the concluding chapter.

---

3. MODALITIES OF CONTROL – CRIMINALISATION, EXCLUSION AND SEGREGATION, SURVEILLANCE, AND THEIR HUMAN RIGHTS IMPLICATIONS

80. This Chapter addresses several forms of social control which the Research Papers and the Council’s research highlight and shows how they relate to each other and to the broader themes to which earlier Chapters refer. It goes on to highlight the human rights implications of these trends, though that question is explored in greater detail in Part III. The focus is of this chapter is criminalisation (and decriminalisation), exclusion and segregation, and surveillance. They are obviously associated in numerous ways: criminalisation facilitates exclusion; surveillance facilitates criminalisation, and vice versa. The Chapter covers the following issues:

- Criminalisation
  - Pre-emptive Controls
  - Criminalisation by means other than criminal law
  - Lack of due process safeguards: summary justice?
- Segregation and Exclusion
  - Incarceration
  - Public health and infectious diseases control
  - Urban spaces
  - Migrants and non-citizens
- Surveillance
  - The human rights implications of surveillance

3.1 Criminalisation

81. Concerns about criminalisation – the process by which particular actions and behaviours are deemed criminal in law and penalties imposed – are not new. As Part I has discussed, there have been repeated calls to decriminalize certain actions acts such as pornography and drug–use, where these are “victimless” or behaviours and attributes such as those pertaining to sexual orientation, for example. More broadly, contemporary concerns about criminalisation also include an important focus on the increased use of criminal law and non–legal crime control mechanisms (see section on ‘de–criminalisation’ below) to address deviancy and social problems. The ensuing discussion is especially relevant in the context of the influence of the ‘crime control’ model over social policy in general and an increasingly reductionist view of the criminal justice system, as one whose primary goal is security (discussed further in the next part of the report). It suggests that present policies are increasingly tending towards pushing impoverished and vulnerable groups on to a slippery slope of management, control and criminalization.
Pre-emptive controls

82. We have argued that a pervasive fear of crime has led policymakers to focus on preventing those who belong to ‘risky’ groups from inciting fear in others: law is to be used to address not just crime, but insecurity more generally, in [what some have referred to as] an increasingly "pre-crime" society. Within the European crime prevention network established by the EU Council of Ministers, for example, crime prevention has been defined as covering "all measures that are intended to reduce or otherwise contribute to reducing crime and citizens' feelings of insecurity". The EU has declared that crime, in addition to "crime in the strict sense", also includes "anti-social conduct which, without necessarily being a criminal offence, can by its cumulative effect generate a climate of tension and insecurity". Recent proposals to amend the Police and Criminal Evidence Act in the UK have included a clause that would allow an arrest to be made when "a constable reasonably believes that a person present is likely to fear for the safety of themselves and/or their property and that the suspect’s arrest is necessary to allay that fear." The human rights’ organisation Justice responded to this proposal by arguing that “a person’s fear – which may be entirely unreasonable and unfounded – should not result in the limitation of another person’s rights”.85

83. This is not preventive detention, in which the mens rea of the accused needs to be proved, but what has been called "pre-emptive" control. Though human rights advocates have given attention to pre-emptive controls that target alleged terrorists, they have not considered so closely risk-based legal controls, whose influence is much broader, as Parmet (infectious disease controls) and Tsoukala (football control orders and controls in relation to immigration within the EU) point out. Through profiling and other techniques which directly or indirectly lead to criminalization, pre-emptive controls cover an increasing range of actions. Britain’s Parliamentary Constitution Committee recently expressed concern about a raft of different control orders – anti-social behaviour orders, sex offender orders, football banning orders, serious crime prevention orders, foreign travel orders – that only require a civil standard of proof (balance of probability), allow hearsay evidence (often from witnesses who are state employees), and make assessments based on the risk of future criminality or wrongdoing. The Committee commented: “The fashion for preventative orders brings with it a

change in the relationship between citizen and state. A citizen who is subject to legal process by the police or local authorities to prevent what he or she might do in the future stands in a different relation to the state to a citizen who is subject to punishment for what he or she has done in the past."

88. The section on exclusion below examines the huge increase in incarceration that has occurred in the United States and some European countries. But there are indications that the number of people ‘diverted’ out of the formal criminal justice system but subject to other forms of control, in a process of decriminalisation accompanied by net-widening described by Stanley Cohen in the 1980s, has continued to increase as well.

89. **Criminalisation through civil and administrative law**

85. Civil or administrative law has increasingly been applied to people who are categorised as social problems, notably the homeless and ‘anti-social’ youth. While laws explicitly criminalizing vagrancy may be on the decline, a range of newer administrative measures and policies (such as zero-tolerance policing) often produce the same effect (see box). Youth control policies address a range of behaviours that are deemed risky but which are associated with (risk) factors linked to economic and other forms of deprivation.

86. Many anti-vagrancy laws were open to constitutional challenge because they criminalized socio-economic status rather than specific behaviour. However, their repeal has arguably been followed by a more subtle form of criminalisation, through so-called ‘civility laws’ (such as ASBOs) that prohibit specific behaviour, and zoning laws that exclude those who behave in particular ways in particular spaces. It has been pointed out that: “Without secure accommodation, behaviour that would otherwise be routine and lawful if performed in a home can suddenly become unlawful. By definition, a person who is homeless is deprived of an opportunity to comply with laws prohibiting certain conduct in public spaces, such as begging, sleeping, drinking or storing personal belongings. The result is borne out in a disproportionate representation of people experiencing homelessness in the infringements and criminal justice systems, often resulting in the accumulation of unpaid fines and the issuing of arrest warrants”. The new controls combine administrative, civil and criminal authority and enhance police discretionary powers; and, being defined as civil in nature, avoid the obligation to respect due process.

Measures addressing vagrancy

In the city of Winnipeg, Canada, a 1995 by-law provided for the imposition of a $1000 fine or six months in jail for offences of public begging. In 1999 Ottawa then passed a Safe Streets Act which forbade acts of "aggressive panhandling", soliciting money near vehicles or ATMs, or washing car windows in the roadway. (Three years after the Act's introduction, an impact assessment found no solid evidence that the streets had been made safer but concluded that income-generating opportunities for homeless youth were well down, that their shelter was demonstrably worse, and that 'squeegee boys' had merely been displaced to less desirable areas of the city.) British Columbia subsequently passed its own Safe Streets Act, which included the following offences: walking on the roadway when a sidewalk is available; walking on the right hand side of the roadway when no sidewalk is available; and approaching a vehicle with the aim of offering a service or commodity.

In Australia, vagrancy has been identified as “a significant pathway” into the prison system. Under Darwin’s bylaw 103, it became an offence to sleep in public at any time between sunrise and sunset. New South Wales (NSW) repealed its ‘means of support’ act in 1979, which had criminalized vagrancy, but its Summary Offences Act 1988 gave police powers to ‘give a direction’ to a person in a public space if that person’s presence “is likely to cause fear to another person”. During the run-up to the 2000 Sydney Olympics, the police acquired additional powers to move on anyone who caused an ‘annoyance or inconvenience’ to other persons.

In the United States, reports by the National Coalition for the Homeless (NCH) and the Conference of City Mayors have concluded the trend towards criminalizing homelessness appears to be growing. They documented a number of regulations that prohibit “camping” in public spaces and other activities including lying on benches.

In Switzerland, the Courts have ruled that “begging is not a right” and that cantonal laws against it are allowable in the interests of public safety and “tranquillity”. As of April 2008, police have the authority to enforce spot fines drawn directly from a beggar’s takings. Swiss law also provides for the deportation of foreigners who lack the means to support themselves.

Ireland recently passed a law to make aggressive begging an offence, but changed plans to outlaw all begging after the High Court ruled it would violate the right to free expression.

In Brazil, police arrest individuals who do not have identity cards on them for “vagrancy” and may hold such individuals in custody almost indefinitely.

96 http://genevalunch.com/2008/05/22/begging-is-not-a-human-right-says-swiss-judge/.
Infractions of civil law and regulations commonly invite criminal sanction. Behaviour that is not criminal per se, such as being homeless, a drug addict, ‘anti-social’, or an immigrant, is thereby effectively criminalized (see box on penal policy above).

Oberoi argues that social control over non-nationals is primarily achieved by criminalization and exclusion. She documents the ways in which irregular migrants are criminalized for administrative infractions, such as crossing a border without authorization, remaining in a country without authorization, or breaching the conditions of a visa. Her concerns are echoed in Wacquant’s work which documents the over-representation of foreigners in European Union prisons: he argues, for example, that “the growing share of foreigners in the prison population of France is due exclusively to the tripling in 20 years of incarcerations for violations of immigration statutes”.101 Far from being used as a last resort, as befits a measure that has drastic implications for its subject, administrative detention is routine and in some cases mandatory. In addition, those detained are protected by fewer procedural safeguards than individuals held under criminal law. No mechanism exists, for example, to determine whether the arrest or continued detention of migrants are arbitrary. Oberoi points out that this practice has been criticized by the UN Special Rapporteur on the Rights of Migrants as disproportionate and counter-productive,102 that the UN Working Group on Arbitrary Detention has asserted that “criminalizing irregular entry into a country exceeds the legitimate interest of a State to control and regulate irregular entry and can lead to unnecessary detention”,103 and that the Office of the UN High Commissioner for Human Rights has declared that “[T]he mere fact of being at odds with immigration procedures does not mean that the irregular migrant is a criminal.”104

Lack of due process safeguards: summary justice?

Leman-Langlois and Shearing refer to Herbert Packer’s warning in the 1960s about the conflict between the ‘due process model’ and the ‘crime control model’ of criminal justice in the US at that time. He argued that the crime control model promoted administrative sanctions and summary justice, ‘presumed guilt’, and sought to process

102 The Special Rapporteur on the Human Rights of Migrants drew attention in a recent report to the “increasing criminalization of irregular migration and the abuse of migrants during all phases of the migration process”. The report went on to observe that: “The Special Rapporteur has received reports of the criminal justice practices used by States to combat irregular migration, including greater criminalization of migration offences (as opposed to treating them as administrative offences) and cross-national collaboration by police and other authorities, which have in certain cases resulted in increased violations against migrants”. UN Doc A/HRC/7/12, 25 February 2008, p. 6.
large numbers of criminals through the criminal justice system with minimal occasions for challenge, whereas the due process model placed innocence at its heart and insisted on equality of treatment. Packer concluded even then that the crime control model was a threat to constitutional guarantees, as now it is a threat to human rights. The perception, widely held by the public and sometimes affirmed by government and politicians, that the criminal justice system fails to provide security because it requires too much due process and is inefficient, lies at the core of many of the measures of control about which there are human rights concerns (anti-terrorist legislation, use of torture, and pre-trial detention, as much as ASBOs etc.). In the UK at least, many of the non-criminal measures that have been introduced to address anti-social behaviour are justified as a way of addressing an ‘unresponsive and outmoded’ criminal justice system – what the Labour government (in power since 1997) has called the ‘justice gap’. This has led some to argue that out-of-court summary justice has increased.105

90. States have argued that the need to combat terrorism justifies ‘exceptional measures’, while ‘security’ justifications have been applied in an increasing range of circumstances. In India, Brazil and Mexico, where the criminal justice systems have been discredited by their inability to address crime, there is increasing public support for swift ‘justice’ including vigilantism in extreme cases. This may also include support for the police to use “violence, including deadly force, against the merest petty criminals and those who are poorest, in an effort to intimidate and deter crime and thus to create a semblance of order in an increasingly miserable population. Such a version of the war on crime is a temptation for governments as well as for their citizens. On the one hand, it rallies support for the government through the common fear of crime; on the other, it creates an image of decisive action, simple to grasp, through vengeful violence. It deflects attention from complex social problems that are among the causes of crime and turns it to quieting peoples’ fears, thus creating a sense of ‘order.’ It is a way of controlling all strata of society by concentrating on one set of problems that creates fear across the social spectrum.”106

3.2 Segregation and exclusion

91. Reference has previously been made to policies that segregate and exclude those considered deviant or criminal. Exclusion has often been used to control deviant or criminal behaviour. The prison exemplifies the exclusionary nature of punishment; and human rights law recognises that it is legitimate to curtail the freedom of those found guilty of crimes. However, the research undertaken for this project shows that exclusion


and segregation are now being employed as a mode of control in many new ways. In a number of cases, these procedures are not monitored by human rights advocates, even though they may be discriminatory and may harm the human rights of a large number of individuals. The legitimacy of these new modes of exclusion have not always been properly tested in human rights terms.

92. This section draws together references to exclusionary practices from the Research Papers, and considers how such practices impact on human rights. It notes how UN human rights bodies have responded to exclusionary practices to date.

Incarceration

93. Sociological and criminological literature (see Sparks and McNeill) and indeed human rights documentation refers extensively to increases in the prison populations in the majority of European countries and above all in the United States. To begin with there are the sheer numbers: about one per cent of the entire adult population of the United States is currently incarcerated. The Russian Federation also imprisons an extremely high proportion of its population (620 out of every 100,000 of its national population compared to 760 in the USA and 330 in South Africa). But it is also about who is being imprisoned. One in every nine young black American men is behind bars and African Americans now comprise more than half of all prisoners. Sparks and McNeill note that, where relevant research exists, it appears overwhelmingly to show that the prison population in any country is predominantly composed of individuals who are poorer, less educated, less qualified, less employable, more likely to have experienced mental illness, and more likely to belong to ethnic or religious minorities, than the average.

94. UN human rights mechanisms have expressed concern about both these issues. The UN Working Group on Arbitrary Detention has noted with concern the gross over-representation of “certain ethnic or social groups” among the prison population in some countries, commenting that: “[T]hese are often groups that are particularly vulnerable, either as a result of past or current discrimination (racial minorities, indigenous people) or because they are otherwise marginalized, such as those affected by mental disability or substance abuse, or – all too often – on both accounts. The over-representation of these groups has complex roots and cannot be redressed overnight. However, actual discrimination and de facto inequality, such as “racial profiling” in law enforcement, as well as insufficient steps to protect and enforce social and economic rights of the

---


108 Figures from the International Centre for Prison Studies, Kings College London, at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/
members of these vulnerable groups, significantly contribute to their over-representation in the penal system.” 109

95. General Comment 31 of the Committee on the Elimination of Racial Discrimination on the prevention of racial discrimination in the administration and functioning of the criminal justice system similarly reflects concern at the disproportionate punishment of racial groups. It recommends that one of the factual indicators that should be used to establish the existence of racial discrimination in the criminal justice system is “the proportionately higher crime rates attributed to persons belonging to [groups 110], particularly as regards petty street crime and offences related to drugs and prostitution, as indicators of the exclusion or the non-integration of such persons into society.”

96. In its 2006 report, the UN Working Group on Arbitrary Detention included a section on ‘over-incarceration’. 111 In doing so, it acknowledged that “States enjoy a wide margin of discretion in the choice of their penal policies, e.g. in deciding whether the public interest is best served by a ‘tough on crime’ approach or rather by legislation favouring measures that are alternatives to detention, conditional sentences and early release on parole.” However, it went on to comment that: “It is doubtful … that a sentencing policy resulting in an incarceration rate of 500 out of every 100,000 residents can find an objective and acceptable explanation, when the sentencing policy of another State produces a 100 out of every 100,000 rate” (para 63). Several US-based human rights organizations have campaigned against sentencing of crack cocaine offences, which they allege are disproportionately harsh and racially discriminatory. Human Rights Watch has argued, for example, that: “[T]he principle that punishments should not exceed that which is proportionate to the crime reflects three basic human rights precepts: the inherent dignity of the individual, the right to be free of cruel, inhuman or degrading punishment, and the right to liberty”. 112

97. Wacquant concludes that prison has become, not a tool of repression or punishment, but a means to produce and manage marginality. It segregates the increasing number of people who have a criminal record (in the majority individuals who are poor and marginalised, including irregular migrants) from the rest of society. Imprisonment becomes a way of minimising the capacity of ‘dangerous’ people to harm others,

110 Defined by the Committee as “persons belonging to racial or ethnic groups, in particular non-citizens – including immigrants, refugees, asylum-seekers and stateless persons – Roma/Gypsies, indigenous peoples, displaced populations, persons discriminated against because of their descent, as well as other vulnerable groups which are particularly exposed to exclusion, marginalization and non-integration in society, paying particular attention to the situation of women and children belonging to the aforementioned groups, who are susceptible to multiple discrimination because of their race and because of their sex or their age.”
potentially or putatively. The notion of incapacitation underpins the US penal system’s approach: “Incapacitation promises to reduce the effects of crime in society not by altering either offender or social context, but by rearranging the distribution of offenders in society. If the prison can do nothing else, incapacitation theory holds, it can detain offenders for a time and thus delay their resumption of criminal activity in society.”

98. The evidence that prison is not rehabilitative (as envisaged in international human rights law) but exclusionary; and that prison, and its consequence (see box), means that prison is being used to punish the most disadvantaged in a discriminatory manner, has profound implications for human rights advocacy in regard to incarceration.

The exclusionary consequences of criminalisation
In the United States, the 1996 Personal Responsibility and Work Opportunity Reconciliation Act bans the provision of welfare to anyone convicted of drug offences. Section 115 of the Act stipulates that persons convicted of a state or federal felony offence involving the use or sale of drugs will be banned for life from receiving cash assistance and food stamps; the provision applies to those convicted of drug offences. The provision was introduced as part of the US government’s ‘war on drugs’. The Sentencing Project found that 92,000 women (and 135,000 dependent children) were ineligible for welfare benefits as a result of the ban in the 23 states in which they conducted research and that the measure had a disproportionate impact on African American and Latina women. Since 2002, when the Sentencing Project’s report was published, a number of US states have overturned the ban, but it is applied in some states to this day. A Supervisor at the Philadelphia Department of Human Services is quoted as saying: “If a mother is not able to support her child, we would take the child; and at the end of twelve months of placement, we have to terminate parental rights unless there are compelling circumstances. If you’ve made a mistake in your life, it’s very punitive. I imagine it would come into play as more and more women lose their benefits ... Women will lose their kids, will lose everything in their lives – cash assistance, kids, jobs. Employers won’t hire them with a felony drug conviction.” This is indeed a ‘trajectory of failure’ for those who are identified as out of control. Caldeira talks of the “deligitimisation of civil citizenship” for those caught up in the criminal justice system, even when they retain citizenship rights. Of course, for many prisoners, including prisoners in the United States, political citizenship is denied. The Committee on the Elimination of Racial Discrimination has referred to the political impact of disenfranchisement of prisoners.

Infectious disease control

99. Public health programmes often target poor or excluded communities, on the basis that they are a specific source of risk (as a foyer of infection, for example). In many cases, such populations have been evicted from unsanitary housing on public health grounds and displaced to areas on the fringes of cities or in pockets of inner cities, isolated from public services and as vulnerable as they were before. It was recently decided to clear what was an encampment of irregular migrants, widely referred to in the media as ‘the jungle’, near Calais (France) on health grounds, for example. The encampment was cleared but no attempt appears to have been made to provide healthcare, adequate housing or means of survival to those whose shelters were destroyed. In such cases, risks to public health or public order are tackled, but the more immediate risks faced by the communities in question are not.

100. Parmet describes the numerous restrictions on movement, including isolation and quarantine, that are placed on immigrants and travellers suspected of carrying disease. She notes that policies in the United States and South Africa, respectively designed to isolate individuals with MDR–TB (multi drug–resistant TB) and XDR–TB (extensively drug–resistant TB) respectively, led to the barring or expulsion of other people who were ill but who did not pose the same public risk. Many countries exclude ill or disabled migrants on economic grounds, arguing that they make excessive demands on the health care system. As Oberoi notes, South Korea routinely expels migrants who are found to be HIV–positive; and the Gulf Cooperation Council (GCC) countries regularly declare ‘unfit’ and deport migrant workers who fail a mandatory medical test for communicable diseases such as HIV. In such cases too, a public health threat is apparently addressed but the real risks faced by the individuals in question are not.

Segregation and exclusion in urban spaces

101. The characterization of those who are homeless or beggars as polluting (dirty), unsafe and dangerous leads easily to a “punitive criminal response, particularly where it is enforced in conjunction with a zero tolerance approach to policing”. This reflects on the depleting obligation of the state where poverty and inequality persists, and “the onus cast on persons in poverty to procure gainful employment or, at least, to make

\[\text{\footnotesize 120 See for example Concluding Observations of the Committee on the United States of America, UN Doc. CERD/C/USA/CO/6, para 27.}\]
\[\text{\footnotesize 121 As highlighted by the former UN Special Rapporteur on the Right to Adequate Housing in a number of reports.}\]
\[\text{\footnotesize 122 Phil Lynch in Teachers with Criminal Records; Begging, The Law Report, Broadcast on 22 February 2005, Radio National, Australia, Transcript on File}\]
poverty invisible”.\textsuperscript{123} What has been called “petty apartheid”\textsuperscript{124} is starkly in evidence when it comes to ‘cleaning up’ public spaces and making them ‘safer’. As noted, a number of North American and Australian cities have passed ordinances that have the effect of banning homeless people from the streets; one American ordinance even penalises individuals from providing food to the homeless in public parks.\textsuperscript{125}

102. Kothari points out that such controls deprive the homeless not only of places to sleep but also access to water, other public conveniences and crucial economic opportunities. Relocated to shelters at the peripheries of cities, or isolated by urban planning codes from economically vibrant areas, the homeless and very poor are effectively segregated from the larger society.

103. He points out that cities are increasingly marked by the geographical exclusion of populations, in particular through the emergence of gated communities that can only be entered after clearance by police or private security agents. Their rationale is to provide security for people and property, but their effect is to segregate those who reside in them from contact with the poor, creating an ‘us and them’ mentality that inhibits social trust and the construction of inclusive social networks.\textsuperscript{126} In areas that are not ‘secured’, by contrast, public policing is often underfinanced and fails to address problems of crime and deviancy, further deepening public fear and anxiety; slum areas may even be abandoned to the control of criminal gangs.\textsuperscript{127} Kothari also highlights the excluding role of urban planning, citing the example of Managua (Nicaragua), where planning decisions have created upper class areas with no links to poorer areas. Even traffic lights were removed to prevent car-jackings, depriving pedestrians (the poor) of a safe place to cross the road.

104. Protection of the environment has also been used to justify social segregation. In Rio De Janeiro (Brazil), “eco-barriers” (10 feet high in places) have been built round many of the city’s favelas, ostensibly to preserve the Atlantic forest that surrounds them. The effect is to fence in the city’s slums, and the drug trade. Critics point out that much of the Atlantic forest has already been lost to agriculture, and that most of the walling will go up in the city’s wealthy southern district. They also note that Rio will host the 2014 football World Cup and the 2016 Olympics.\textsuperscript{128} Walling off slums prior to large sporting events is a clever way to ensure that the poor are invisible during the games.

\textsuperscript{123} Usha Ramanathan ‘Ostensible Poverty, Beggary and the Law,’ Economic and Political Weekly, November 1, 2008.
\textsuperscript{124} This term referred to legislation in apartheid South Africa that targeted the morality and behaviour of non-whites, relative to ‘Grand Apartheid.’ In the United States, ‘petit apartheid’ has been used to describe racially discriminatory practices in the criminal justice system.
\textsuperscript{125} New York Times, 28 July 2006, ‘Las Vegas makes it illegal to feed homeless in parks.’
\textsuperscript{127} Mike Davis (2006) Planet of Slums, Verso Books.
events is not without precedent. This occurred in Beijing prior to the 2008 Olympics, for example, with the then Deputy Director of the construction department in Xuanwu district reportedly arguing that such a move was prompted by concern over “the protection of the city’s environment, safety of the field work, convenience, and safety of passing pedestrians and other factors.”

129 Alvaro Tirado Mejia, a member of the United Nations Committee on Economic, Social and Cultural Rights, has reportedly described the walling of Brazilian slums as “geographic discrimination”.

Exclusion and control of migrants and non-citizens

105. Oberoi shows that migrants are particularly subject to exclusion, via harsh border controls and policies designed to prevent migration from occurring i.e. in the country of origin, creating conditions in which a range of human rights violations occur, including deaths and injury to migrants en route, denial of access to asylum, and human trafficking. Oberoi documents the increasing resort to detention of irregular migrants and the disproportionate use of deportation of migrants who commit minor criminal offences.

130. Exclusion and control of migrants and non-citizens

106. After their arrival, migrants are often subject to controls, including numerous restrictions on their ability to access public housing and social welfare, that, as Oberoi documents, make them “administratively invisible”. She reports recent legislative changes in Italy that will remove homeless people and those living in run-down housing or mobile homes from local residents’ registries, which are a precondition for obtaining access to health care, social assistance, education and public housing. This is clearly targeted at irregular migrants and excluded minorities such as Roma; in the European Union, migrants comprise around 20 per cent of the homeless population. Cahn describes the way in which many Roma are granted “duldung” or “gedulet” in Germany, “tolerated” status that must be regularly renewed, and the impact this has on their freedom of movement, access to employment and various forms of social and health protection. While “duldung” status is not restricted to Roma, he argues that there are “widespread and plausible allegations” that Roma are more likely to be granted this status than non–Romani third country nationals.

Segregation and exclusion of Roma in Europe

Cahn argues that segregation, the organizing principle of the Ottoman Empire in its treatment of Roma, has continued to this day (challenged only sporadically) in the Ottoman successor states of southeastern Europe. He documents the separation of Romani housing from mainstream housing in Central and Southeastern Europe and several Western European countries – often by means of exclusion and discrimination in the private rental market – and their consequent exclusion from key public infrastructure. He cites the case of the Slovak city of Kosice where the authorities moved Roma from the city centre to a large communist-era housing estate called Lunik IX, while simultaneously facilitating the exit of non-Roma from Lunik IX. By 2003, the area had become a ghetto, with poor waste removal services, frequent power cuts and high incidence of disease. He reports that some settlements in Italy are surrounded by high walls and that egress and ingress are monitored by police or private guards; access by non-residents is restricted and discretionary. A number of camps are subject to 24-hour video surveillance.

Cahn also observes that housing is used to restrict the movement of Roma (and others) into the European Union. “Austria requires that a person seeking to settle in Austria from outside the European Union have and demonstrate ‘housing in conformity with the standards of the community’ (ortsublichen unterkunft). Italy has a similar requirement, and although ... it provides segregated “camp for nomad” housing, Italian authorities generally do not regard such camps as meeting legal requirements for adequate housing.”

3.3 Surveillance

107. Although surveillance has always been a function of policing,132 Leman–Langlois and Shearing consider that the modern apparatus of surveillance has expanded to the point where almost every aspect of public and private life is now openly scrutinised and subject to analysis. A large and expanding literature examines its scope and impact.133

108. Human rights advocates are naturally familiar with the abusive uses of surveillance, notably in authoritarian states which monitor political opponents, human rights defenders and others. Human rights challenges to surveillance in recent decades have focused almost exclusively on the right to privacy (reflected in Article 17 of the ICCPR, Article 8 of the ECHR and Article 11 of the American Convention on Human Rights), and on the rights to freedom of speech and expression. Human rights advocacy has targeted the abuse of surveillance in the context of counter-terrorism policing, but also abusive investigation of the work of human rights defenders, journalists and others.134 However, contemporary sociological studies highlight a broader concern with surveillance as a means of control or management (see below) and not just a neutral watching activity. “It is not merely that some kinds of surveillance may seem invasive or

132 Note that Leman–Langlois and Shearing devote a significant section to surveillance technology and the policing of ‘cybercrime’ in their paper.
133 See David Lyon (20 08) Surveillance Studies: An Overview, Polity Press.
134 For example the targeting of journalists in Russia and land activists in countries of South America.
intrusive, but rather that social relations and social power are organised in part through surveillance strategies.”

109. Social control analysts focus on the relationship between information and power that surveillance reveals, highlighting the way in which forms of governance come increasingly to rely on gathering and analyzing information, including information about the behavior and attitudes of citizens, which then shapes policies and their implementation. The information gathered through CCTV cameras, video surveillance of political or environmental protests, data retained on credit card and online purchases, and many other means, enable states and other institutions to construct detailed profiles of social relationships, consumption preferences and political allegiances. David Lyons concludes that surveillance is overwhelmingly about ‘social sorting’. He argues that, though it cannot be assumed that surveillance is always used for evil purposes, it cannot be assumed either that its uses are neutral. It is therefore necessary to explore the ways in which technologies of all kinds shape attitudes, behavior and economic, social and political interventions.

110. The justifications advanced for surveillance, and its human rights impacts, mirror many of the points made elsewhere in this report and the research papers. It is argued, for example, that security concerns (particularly with regard to crime and terrorism) require increased surveillance of the general population, to monitor risks and facilitate pre-emptive action. Oberoi notes that both Britain and the United States are currently establishing comprehensive databases that will contain biometric information on non-nationals and criminals, leading to concerns over the conflation of convicted criminals with migrants who have committed no offence. Leman-Langlois and Shearing argue that “an increasing proportion of security-related activities are focused on non-crime related matters, especially in surveillance of persons and spaces”, based on the assumption that the more data the better. It can be argued, in addition, that surveillance privileges the private realm at the expense of the public, focuses on individuals and their actions rather than on common interests. This is reflected in forms of policing that restrain individuals’ risky or anti-social behaviour rather than targeting formal infringements of law (which are adjudged impersonally). As noted earlier, there is a danger that criminal justice systems will become increasingly ‘actuarial’, in their application of information and communication technologies (ICTs) to assess risk.

111. Surveillance also shifts attention from the past to the future. Actions that the state takes on the basis of surveillance often pre-empt the law. CCTV camera images, ‘gait

---

analysis’, information obtained from data-mining, encourage the construction of hypothetical profiles, with potential implications for suspects and the presumption of innocence. At the same time, surveillance encourages technicians to attribute and presume patterns of behavior in those who are observed, and to do so into the future. The ‘hypothetical subject’ of surveillance is in some senses divested of free choice and autonomy by a process that assumes his or her future behaviour. In March 2008 Scotland Yard’s director of forensic services was reported to have said that the DNA of children who exhibited behaviour that indicated likely criminality in adult life should be entered in the UK’s DNA database. (The Association of Chief Police Officers (ACPO) immediately distanced itself, saying that it did not support the DNA profiling of children.) In this context, Leman-Langlois and Shearing discuss the growing importance of intelligence-led policing, which uses a variety of strategies to prevent crime from occurring – targeting individuals identified as security threats, processes of surveillance, crime and offender mapping, and intensive policing. New surveillance technologies are reshaping the content of police work and it is likely that they will be applied increasingly extensively in the future.

112. Managerialism too justifies information-gathering as a tool for assessing the effectiveness and impact of policies. Indeed, Lyon goes so far as to argue that the managerial values of efficiency, convenience and speed have driven the growth of surveillance.

113. Wherever conditions are attached to citizenship or the granting of rights, surveillance or data-gathering may be considered desirable to assess if conditions are met. Examples of this temptation include the collection of biometric data proving citizenship or non-criminal behavior, and drug testing after arrest or imprisonment.

114. Privatisation and private governance also encourage the spread of surveillance technology. As Leman-Langlois and Shearing point out, private entities are far more likely than are police organisations to adopt new technologies. They also blur the distinction between government and commercial surveillance. Some have identified the emergence of a “Surveillance-Industrial Complex”, most prominently in the US and EU.

---

138 ‘Police Spokesman sparks DNA row’, BBC, 16 March 2008. In August 2009 it was reported that one in four black children aged between 10 and 17 had been added to the UK’s police DNA database since 2004 (compared with 10% of white children). Children & Young People Daily Bulletin, 10 August 2009 at www.cypnow.co.uk/bulletins.

139 For example in India it has been reported that in an effort to rid New Delhi of beggars in advance of the 2010 Commonwealth Games, the city was planning on building a database of beggars through a biometric identification scheme which would help them identify repeat offenders detained under the Bombay Prevention of Beggars Act 1959 (also applicable in Delhi). ‘Removing beggars not enough’ Times of India, 12 April 2009.

The transnationalisation of security policy also encourages states (and other institutions) to expand and share surveillance data (such as the Schengen Agreement in Europe which facilitates police data-sharing) and adopt initiatives to standardise and harmonise surveillance technology (on matters such as biometric passports, national ID systems, and airport screening).\textsuperscript{141} \textit{Parmet} notes that the International Health Regulations, amended in 2005 after the SARS outbreak, require states to enhance surveillance and report on the outbreak of infectious diseases to the World Health Organisation.

The social sorting role of surveillance facilitates the exclusion of groups identified as risky or dangerous. The means by which risks are assessed and threats prioritised by software techniques are either opaque or deliberately secret in the case of national security, making it difficult to assess the impact on human rights of their reliance on potentially discriminatory categories. An individual’s categorisation can mean that she or he is banned from travelling for example or refused insurance, employment, access to credit, healthcare or housing, threatening violations of the right to freedom of movement, as well as a range of social and economic rights. \textit{Parmet} highlights the exclusionary effects of mandatory reporting of medical information, such as those diagnosed with HIV infection, as a means of surveillance. However, it is clear that it is not only irregular migrants and alleged terrorists who are targeted by this technology. It targets us all and \textit{processes} each of us for risk assessment.

\textit{Cahn} notes that the requirement to provide documentary proof of citizenship is having a particular impact on Roma, because a number of countries adopted new citizenship laws after 1989, following dissolution of the USSR. This included Croatia, the Czech Republic, Macedonia and Slovenia, while major changes in Russia’s legal regime occurred, and conflict in the former Yugoslavia, all of which came to be contexts used to prevent renewal of citizenship. \textit{Cahn} notes that “a lack of a valid passport has rendered it difficult to impossible [for Roma] to secure valid residence permits in countries of migration, such as Italy, particularly in cases where they reside in informal settlements without a valid address. Thus, even in cases where there may be a formal entitlement to citizenship, for example as a result of birth on the territory, administrative obstacles in many cases preclude access to citizenship. Many of the persons concerned now have children and grandchildren, who may be formally stateless.\textsuperscript{142} Their exclusion has thus been handed down to other generations.”

Extreme poverty combined with exclusionary practices may conspire to deprive Roma of access

http://www.statewatch.org/analyses/neoconopticon-report.pdf, also referred to under ‘Transnationalisation Regimes’ above.


\textsuperscript{142} Council of Europe, European Commission against Racism and Intolerance (ECRI), Third Report on Italy, adopted on 16 December 2005, para. 96. See also Council of Europe Commissioner for Human Rights, Viewpoint, “No-one should have to be stateless in today’s Europe”, 09/06/2008, www.coe.int/commissioner.
to essential documents, such as birth certificates. This problem affects many thousands of persons, particularly in Romania and the countries of former Yugoslavia. Without a birth certificate, a person is not able to obtain personal identity cards, health insurance documents, internal passports and other documents; and will be effectively excluded from enrolment in school, access to health care, and social assistance benefits to which they would otherwise be entitled, including social housing. Such persons effectively have no administrative existence.

Cahn acknowledges that in recent years several UNHCR and EU-supported projects have been created to address this problem, but he argues that “absent major state-level commitments to ameliorating conditions for currently excluded persons to have access to documents, for example via “amnesties” for persons with no birth certificates or similar measures, there is little indication that these pilot or otherwise piecemeal projects are having major impact.” He notes that the European Court of Human Rights has ruled on cases concerning the denial of documents. In a case relating to the Russian “internal passport”, it argued that denial of this key personal document could give rise to a denial of private and family life under Convention Article 8.

The human rights implications of surveillance

117. Leman–Langlois and Shearing recognise that human rights jurisprudence restricts the use of surveillance under the right to privacy (applying principles of proportionality and legality). Nevertheless, faced by mass surveillance and new technologies that track movement and retain electronic records indefinitely, they wonder if rights “to be left alone” and “to be forgotten” should be given more attention. In this context, there are particular concerns about the holding of DNA profiles (see box).

143 Concerning Romania, “Eligibility for non-contributory health insurance is conditional on access to social support, the eligibility criteria for which can be affected by various administrative practices, potential exclusion errors, possible discriminatory denials, and insufficient information. (...) Romania's social security system also creates 'hidden impediments' to supplying social services. Access to social support is conditioned on the apparently neutral requirements of permanent residence and possession of appropriate identity documents. Large parts of the Roma population however do not have identity documents and consequently cannot be registered as permanent residents. Some government employees refuse to consider the temporary structures in which Roma often live as habitable dwellings and deny Roma permanent resident status on these grounds.” United Nations Development Programme (UNDP) (2003) The Roma in Central and Eastern Europe: Avoiding the Dependency Trap. Bratislava: UNDP.


145 Smirnova v. Russia, 24 October 2003. The Court assessed the issues as follows: “The Court has a number of times ruled that private life is a broad term not susceptible to exhaustive definition ... It has nevertheless been outlined that it protects the moral and physical integrity of the individual, ...including the right to live privately, away from unwanted attention. It also secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his personality, ... The internal passport is...required for more crucial needs, for example, finding employment or receiving medical care. The deprivation of the passport therefore represented a continuing interference with the applicant's private life.” (Paras. 95–97.)

146 These include technologies that can track individuals using mobile phones (see http://news.bbc.co.uk/1/hi/technology/7872026.stm) or GPS tracker devices advertised for use by those wishing to monitor employees or vehicles, law enforcement or homeland security agencies as well as parents and joggers (see http://www.gearstore.com/products/gps/trackstick/trackstick2/details.html).
In December 2008 the European Court of Human Rights adjudged that the British government was in violation of the European Convention because it had retained the DNA samples of individuals who had not been convicted of crimes. The Court ruled that “Given the nature and the amount of personal information contained in cellular samples, their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned.” In response, the government indicated that it would not destroy the samples which the court had ruled should not be kept – thought to be around 800,000 in number. Clause 152 of the Coroners and Justice Bill 2008 would allow ministers to override the Data Protection Act to “secure a relevant policy objective”. Whereas national and European court cases have challenged the authority of states to hold records of individuals not accused of any crime, private security firms keep surveillance footage and other private agencies maintain records with little consistency or regulation.

118. Some of the above concerns underline that surveillance technologies can violate the human rights principle of non-discrimination, although challenges under this right may well require greater transparency about such technologies than currently exists, particularly where national security is invoked. The UN Special Rapporteur on the promotion and protection of human rights while countering terrorism has noted that safeguards underpinning the right to privacy in the United States must be granted to all individuals under US jurisdiction, not merely “US citizens”, but much more needs to be done.

119. As noted at the start of this section, human rights advocates have made use of the rights to freedom of speech and expression to challenge surveillance. Leman–Langlois and Shearing identify a “fundamental transformation” of the notion of free speech following the democratisation of mass communication and mass information. This has created a new requirement to monitor the security of cyberspace, with consequent threats to the right to freedom of expression.

120. To date, human rights advocacy with regard to surveillance has sought to provide redress for those who have been the subject of abusive surveillance (in the European Court of Human Rights for example); and prevent blanket state surveillance in the context of national security. The points made above indicate that a deeper analysis of the human rights impact of surveillance may be needed. Lyon, acknowledging the fast changing nature of surveillance, recently argued that a multi-disciplinary approach is required, given the growing symbiosis between the surveillance society and what he calls the ‘safety state’. It should involve the human rights community (including UN human rights mechanisms), and consider how to address human rights impacts beyond the right to privacy and enhance regulation and accountability.

147 S and Marper vs. UK (2008) (Application nos. 30562/04 and 30566/04). The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also expressed concern about the unfettered collection of data and mass surveillance in the UK and elsewhere (UN Doc A/HRC/10/3 dated 4 February 2009).
149 UN Doc. A/HRC/6/17/Add.3.
Finally, it is important to say that surveillance can be used not only to control, but also to facilitate entitlement and protection. In the field of public health, Parmet notes that international human rights law requires states to use epidemiological surveillance: General Comment 14 explains that, under Article 12.2 of ICESCR, states must undertake individual and joint efforts, “using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease controls.” It further clarifies that states can violate their obligations in this regard by inaction as well as action. UN human rights bodies have affirmed that states have a similar responsibility to gather information on trafficking and gender-based discrimination. As in other areas of policy, there is some tension here between the use of data-gathering to secure rights and concerns about its malign use. Parmet indicates that involuntary methods of surveillance (including case reporting, mandatory testing, screening and syndromic surveillance or data-mining) are widespread in the field of infectious disease control. These interventions may help to secure the health of vulnerable populations but may also be used to undermine their liberties.

INTRODUCTION TO PART III

122. The Council’s research suggests that developments in social control challenge many of the assumptions on which human rights advocacy agendas have been based. To meet these challenges human rights organisations will need in some cases to develop a broader and stronger response, one that engages the underlying logics of control, restraint and detention rather than just their outcomes. In addition, human rights advocates will also have to advocate familiar ‘procedural protections’, with a better understanding of how these can be used both ‘imaginatively or coercively’ for purposes quite contrary to those intended.

123. This Part examines a range of consequences for human rights advocacy flowing from contemporary developments in social control. In particular, it concentrates on cross-cutting issues, which in some cases demand further research or analysis while others demand a reorientation or repositioning of the human rights discourse. It incorporates some of the key conclusions of the research papers and is divided into the following chapters and sub–chapters:

Chapter 4: Social Control and the Human Rights Discourse
- Security and rights or securitisation of rights;
- Citizenship, migration and social control;
- Economic and social rights discourses;
- Public health and infectious diseases control.

Chapter 5: Human Rights and Criminal Justice
- The lure of procedural justice;
- The ‘criminal justice temptation’;
- Human rights and prisons;
- Social control and the complexity of protection.

Chapter 6: Reconsidering Governance
- Privatisation and the role of the state;
- Transnational regimes and the role of the state;
- Legality and legitimacy.

4. SOCIAL CONTROL AND THE HUMAN RIGHTS DISCOURSE

124. This Chapter reviews the implications of the preceding analysis for human rights in three major areas: with respect to ‘security'; citizenship; and economic and social rights.

125. When policies and public attitudes claim that human rights threaten to undermine security, or that assessments of “risk” are sufficient grounds to curtail the rights of people, it is evident that they need to be challenged. At the same time, criminality, delinquency and security are highly emotive matters, and it cannot be ignored that human rights actors are often criticized for (appearing to) protect criminals rather than victims, and for defending the interests of the few rather than the security of the majority. For human rights advocates, it was relatively easy to argue the rights of political prisoners who were victims of state power. It has been much harder to address successfully the subject of crime in general. It has proved a challenge to affirm that human rights protect everyone, while acknowledging the needs and claims of victims, and the fears and risks generated by terrorism, for instance. This challenge arises in part from the ‘unfixity’ of rights: the fact that they are subject to qualification and interpretation. It can mean that their definition, delivery and administration is subject to political manipulation.153

126. Techniques of counter-narrative need to be developed that challenge inappropriate rhetoric – such as the use of “war” metaphors to describe programmes on drugs, crime, illegal immigration, and disease154 – and the perverse effects of public policies that rescue ‘victims’ of trafficking, for example, only to return them to danger or poverty, or promote public health by moving populations to insanitary areas without services, or punish anti-social behaviour while pursuing policies that create social alienation. Whenever public interest is invoked, it is vital to ask how that interest is defined: whose security is being protected or diluted, who is at risk as the result of a public health crisis? This critique should occur at every level, including both at local and national level and not least in United Nations fora, which develop and approve international human rights law and standards but which largely exclude human rights considerations from discussions of crime and security. As discussed below, policies of social control need to be interrogated and questioned in the same spirit.

127. A process of this kind will also require increasing engagement with different policy discourses and professional communities (such as health professionals, prison officers, immigration officials, urban planners, sociologists, criminologists, psychologists, etc.),

153 For example, in the UK, the Press Complaints Commission has issued guidelines that identify the dangers of using the “sometimes pejorative” term ‘bogus’ or ‘illegal’ in relation to asylum seekers and has upheld complaints against use of the term in the UK media (although the practice continues).

and the development of a careful dialogue between disciplines that can explore where and when human rights can improve the fairness and outcomes of policies.

4.1 Security and rights or securitisation of rights? Towards a more coherent human rights response

“No one has a right to security purchased through injustice.”

Human rights protections have been under increasing attack from those who argue that rights should be balanced against a notion of “security” that challenges certain human rights, liberty in particular. Partly the problem occurs because human rights are portrayed as if they compromise security. This assumption has gained ground since the attacks in the United States in September 2001, and the emergence of a model of ‘national security’ that has intensified controls in every context where a potential threat of terrorism exists. Parmet refers to the adoption of the Model State Emergency Health Powers Act (MSEHPA), sponsored by the U.S. Centers for Disease Control and Prevention and drafted by Georgetown and Johns Hopkins Universities in the fall of 2001. "Premised on the assumption that government officials would need to invoke strong social controls if there was either a bioterrorist event or an emerging epidemic, the MSEHPA offered a model law that would allow officials to restrict civil liberties in the event of a ‘public health emergency.’ Although it was widely criticized by civil libertarians, the MSEHPA was adopted in whole or in part by many U.S. states. Perhaps more important than the MSEHPA’s actual content was the rhetoric used to justify it, which emphasized that officials would need to restrict individual rights in the event of a public health emergency.” Similar thinking has been earlier reflected in the context of “wars” on crime and drugs, where some argued that human rights interventions have prevented state agents from effectively ‘tackling’ a particular problem or that they have ignored the rights of victims. In response, human rights advocates adopted slogans such as “no security without human rights,” echoing Leman–Langlois and Shearing who argue at the start of their paper that, rather than counterbalancing or contradicting security, human rights are an essential constituent of human security. However, linking human rights to security in this way has its own dangers as discussed further below.

---

155 This section draws extensively on the research paper written for this project by Stephane Leman–Langlois and Clifford Shearing.

The notion of ‘security’ in human rights law

While security arguments are used to justify restrictions or abuse of human rights, the notion of security has always been central to the human rights framework, the interpretation of which continues to evolve. Article 3 of the UDHR provides that everyone has the right to security of person. The ‘traditional’ human rights understanding of the right to security of person relates to defence of their civil and political rights as elaborated in the ICCPR and subsequent treaties, such as the right not to be arbitrarily detained or ‘disappeared’ for example.

The UDHR also provides for social and economic ‘security.’ Article 22 provides that “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” The right to social security is also reflected in Article 9 of the ICESCR. The UN Committee on Economic Social and Cultural Rights has stated in its General Comment 7 on the right to adequate housing under Article 11.1 of the ICESCR that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.” Article 25(1) of the UDHR provides that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.

In recent years the right to security has also been used by the human rights community as a response to human rights and humanitarian crises, paving the way for international intervention based on the right to ‘human security’. Parmet points out that in 2000 the UN Security Council discussed HIV/AIDS as a security threat and in 2004 the UN Secretary General’s High-Level Panel on Threats, Challenges and Change emphasized the relationship between public health and international security. In that sense, human rights advocates have themselves ‘securitised’ certain problems, by articulating issues as threats to social and economic development. Some have criticised this approach on the grounds that it creates false priorities and expectations (see below).

129. Privileging ‘security’, or emphasizing the security dimension of rights, can involve dangers for the human rights movement that become all too obvious when governments affirm that security is their overarching priority, or set the claims of “security” against the rights of a minority of ‘individuals’ or who groups who create social “risks”. As Ian Loader has pointed out, when human rights advocates group other rights under the right to security, it allows others to do the same: “[W]hile concepts such as human dignity are also vague, security’s close relationship with inscrutable perceptions of future risk particularly undermines jurisprudential constraints on the potential range of associated rights claims.”

157 The concept of human security was framed in the UN Development Programme’s 1994 Human Development Report which talked of freedom from fear and freedom from want.
The notion of ‘human security’ could merely lead to the "securitisation" of human rights if not clearly tied to specific rights and protections. For example, in the context of policing, Leman-Langlois and Shearing point out that "while policing styles such as intensive policing might offer much in terms of greater security in an increasingly insecure world, the danger is that this promise of security brings with it a conceptualization of security and rights that is likely to see the governance values underlying human rights increasingly being trumped by security values." Advocates need to use the term ‘security' with care in this highly charged context and consider how messages about rights’ protection and security are perceived and understood by the wider public and in broader political contexts. Explicitly acknowledging that the notion of security is contested could be a starting point – raising such questions as: security for who and to what end?

Despite the common language of ‘security’, there is today something like a confrontation between the notion of security adopted by human rights advocates and the term as it is used in crime-control or law and order contexts, wherein the cause of insecurity (as a result of violence, disease, crime) focuses on misdeeds or failures of personal behaviour. In the latter conception, it is legitimate to increase security by curtailing the freedom of those deemed to carry risks and who are considered to be in need of professional intervention or management.

Rather than existing to protect individuals and dispense justice, it becomes the primary objective of the criminal justice system, penal, social or health policy, to protect society from threats of risk; to provide ‘security', thereby legitimising restrictions of human rights. In this manner Parmet argues that the ‘emerging disease perspective’ perpetuates the securitization of public health, which in turn makes states more apt to rely on derogation rather than affirmation of human rights in the face of public health threats. Hornqvist goes so far as to argue that the law does not have a role to play when

161 For example Parmet warns of the danger of using the security discourse to encourage international action against the spread of disease in developing countries.
162 Some hold that this reflects a contested attitude to risk. While some hold that risk is a morally neutral concept, others say that it can encourage moral action and outrage and lead to positive regulation, accountability and justice (Richard V Ericson and Aaron Doyle (ed.) (2003) Risk and Morality, University of Toronto Press)
163 It is interesting to note the response of the Miguel Agustin Pro Juarez Human Rights Centre in Mexico to the militarisation of policing operations against organized crime in Mexico. “In a country in which recent standardized test results show that over 79% of primary and secondary school students lack competence in subjects such as literacy and mathematics, the need to prioritize socioeconomic deficiencies would appear urgent from the perspectives of human rights, development, and security alike. As a non–governmental organization dedicated to the defense of human rights, we have therefore voiced deep concern over governmental discourse that reduces security concerns to the fight against organized crime.” (Miguel Agustín Pro Juárez Human Rights Center, Mexico City, Human Rights under Siege: Public Security and Criminal Justice in Mexico, September 2008 available at http://centroprodh.org.mx/2008/publicaciones%202008/Centro%20Prodh%20Human%20Rights%20Under%20Siege.pdf
a state raises the spectre of security: "It is quite obvious that the law is ruptured by the use of this conception of security. The core assumption is that the threat to security cannot be dealt with within the framework of the law and of general legal principles."¹⁶⁴ Some have even argued that in this context the role of human rights becomes ‘purposeless’.¹⁶⁵ In this report, we hope more optimistically to identify a more effective role for human rights and human rights law.

133. Leman–Langlois and Shearing consider the possibility of allowing for restrictions on rights only if these restrictions are dedicated to the preservation of freedom rather than any other value such as security, as proposed by Fernando Teson.¹⁶⁶ Human rights responses to ‘security legislation’, for example, could move beyond a procedural analysis of whether security measures violate international human rights law, and consider what political ends they serve or repress. Similarly, human rights responses should interrogate risk claims that justify the imposition of social controls. Too often, security legislation – but also more benign social control measures – reflect a failure by the State to provide for “the legitimate economic, social and cultural security of the large mass of people” and a lack of “integrity, commitment and vision to understand or engage with the resistance it is faced with.”¹⁶⁷ In this way, states often deal with social and economic unrest as matters of law and order, criminalizing and detaining those who campaign for the realization of their social and economic rights, frequently applying national security legislation.

134. Instead of seeking to balance security and rights, human rights advocates could pay “more sustained attention to the ways in which the restructuring of political life in response to many different forces is being shaped and distorted by agencies capable of converting serious threats that require democratically considered responses into extreme states of emergency that require military responses, new modalities of social control, intensified forms of surveillance and exclusion and unwarranted assaults on the most basic values of liberalism, democracy and the rule of law.”¹⁶⁸

135. The social control discourse can help the human rights community reassess the security discourse. In addition to the oversight and monitoring role that the human rights movement is engaged in, it should consider how to encourage those involved in security governance to “view and to practice the protection of human rights as an integral part

of their security functions.”\textsuperscript{169} Leman–Langlois and Shearing float the possibility that “a rights discourse may not of itself be sufficient in responding to the task of protecting rights values within the governance of security” and that the human rights movement may need to “learn” much more from other discourses than has been the case to date. Human rights scholars and activists should consider joining with other disciplines in critically examining crime beyond a notion of crime that focuses on state crimes as human rights violations and should consider making crime an integral concern of human rights groups.

136. Importantly, human rights actors need to consider the shifts in the governance of security. The plural and hybrid nature of governance challenges the human rights movement to re-examine the legalism and stateism of the current human rights framework and accompanying discourse if it is to address the impact on how human rights abuses are perpetrated or human rights protections circumvented (further reference to the governance of security is made in Chapter 6).

4.2 Citizenship, migration and social control\textsuperscript{170}

137. The primacy accorded to sovereign nation states in international human rights law inevitably connects human rights to citizenship.\textsuperscript{171} “Viewed from the inside, citizenship rights may represent the fullest attempt to deliver on the promise of universally recognised human rights, but viewed from the outside they can function as a tool of exclusion and closure.”\textsuperscript{172} Rather than representing a framework of rights, citizenship is itself increasingly used as a justification for expanding controls, with conditionalities on citizenship backed up by ever increasing methods of surveillance employed to exclude the most vulnerable.

138. In a world of ‘documentary citizenship’, the legitimacy of an individual to make rights claims is critically dependent on her ability to establish her credentials in specific ways. The non–possession of documents such as a birth–certificate or other acceptable form of identification is often a pre-condition to access many basic entitlements. Being undocumented, the plight of millions of impoverished ‘citizens’ as well as migrants can leave one at risk of both illegitimacy and illegality—either one an invitation to being subject to regime of control. Documentation, often justified on grounds of security or identifying those ‘deserving’, as in targeted welfare programmes, provides states with the justificatory logic to subject whole categories of individuals to surveillance and

\textsuperscript{169} Leman–Langlois and Shearing.

\textsuperscript{170} This section draws extensively on the research paper written for this project by Pia Oberoi.

\textsuperscript{171} Some argue that the effect of international human rights law is to establish the boundless power of the nation state and its laws, so creating a contradiction with regard to the rights of non–citizens. Costas Douzinas (2007) Human Rights and Empire, Routledge.

control. The human rights movement needs to conduct a far deeper analysis of such processes of documentation, their underlying logics and impacts and mount a resolute challenge to the biometrics of exclusion.

139. Oberoi highlights numerous ways in which migrants and non–citizens may be excluded, many of which are reflected elsewhere in this report. Cahn has concluded that measures of social control targeted at Roma migrants and non–citizens include: efforts to limit immigration on racially discriminatory grounds as well as the use of ethnic and racial profiling measures; large–scale and in some cases collective expulsion; a range of measures aimed at forcing migrants to leave the country, including regular destruction of shanty housing; and measures infringing their social and economic rights, including the denial of mainstream housing and exclusion from all but emergency health care.

140. The idea of a lawful alien in Article 13 of the ICCPR mirrors the deeply problematic label ‘illegal immigrant’ or ‘bogus asylum–seeker’, both of which drive much of the public discourse and policy response across the world with respect to migration, voluntary or involuntary. The 1951 Refugee Convention grants refugee status to a small fraction of international migrants, acting as a filter and creating and legitimizing a "hierarchy of need" that has been interpreted by states as a “hierarchy of rights.” Human rights organizations have also tended to legitimate this hierarchy in which ‘genuine’ refugees who warrant particular protection are distinguished from migrants who do not or who warrant less, thereby creating a vast underclass of the ‘undeserving’. Oberoi argues that categories and labels established in international law are “increasingly irrelevant to the lives of many of those on the move.” She finds the argument for a radical re–thinking of the protection regime, in favour of opening borders as a means of ending the human rights violations that accompany the control of migration, “compelling.” This because not only is the situation of migrants “increasingly intolerable from a human rights perspective” but because the current protection regime is "fraying at the seams."

141. The control of illegal migration and defence of the territorial border has become a preoccupation of the modern nation state, reflected in intergovernmental processes of ‘migration management.’ The construction of migrants as a burden and harmful to the societies that they enter, thus presenting a huge challenge to the human rights movement. Social control theory, especially “moral panic” perspectives, are particularly useful to the study of migration and control of migrants because they highlight the marginalising processes at work in the creation of immigration as an imminent threat and as a justification for exclusionary policies: the dominant methodologies of social control in relation to non–nationals being the twin policies of criminalization and exclusion.

142. An understanding of the way in which citizenship can invite controls may help the human rights movement to focus on a range of abuses to which migrants and other
non-citizens are subjected both through the law and other measures of control that result in disempowerment and exclusion, discrimination and inequality. The human rights framework contains important obligations and principles to challenge exclusionary and criminalizing policies of social control in this context. These include specific accountabilities of state and non-state actors for protecting, promoting and respecting the rights of migrants, with the ability of rights-holders to seek remedies for violations and abuses committed against them. In addition, the principles of non-discrimination and equality as well participation and access to information are also extremely relevant.

143. Even the fact that the legal standards applicable to irregular migrants are “still relatively indeterminate,” may provide an opportunity, Oberoi argues, but one that needs a robust and more holistic response from the human rights movement, ranging from pressing human rights bodies and courts for more specific enabling legal guidance including, for example, on specific dimensions such as the scope of the right to health and housing but also pressing for a debate on a putative “right to mobility”.

4.3 Social and economic rights discourses

144. Social and economic rights continue to present important challenges to a human rights movement used to relatively clear definitions of violations within the civil and political rights sphere and which has steered clear of political decision-making about social policy. Issues of social control frequently arise at the intersection of several rights and as this report shows are increasingly embedded in diverse areas of social policy. The treatment of a homeless person affects his or her civil and political as well as social and economic rights, in ways that are interwoven and not easily distinguishable. Preventing an individual from access to public housing using anti-social behaviour orders, or withdrawing welfare from a family accused of child abuse or neglect, has consequences for the ability of those involved to realize the full range of their human rights. Measures of social control have both cause and effect (as highlighted in the section on ‘exclusion’ in Part II) and these too relate as much to social, economic and cultural as to civil and political rights.

145. This project has highlighted the emergence of exclusionary practices of social control that reflect political, social and economic changes in society. A social control analysis points to the growth of policies that ‘manage’ the poor and their behaviour largely through various forms of exclusion or conditional inclusion. Wacquant contrasts a ‘social’ treatment of poverty, “guided by values of justice and solidarity”, with the ‘penal’ treatment of poverty referred to in the earlier part of the report.¹⁷³ He argues

that "the penalization of urban poverty only aggravates the very ills it is supposed to treat, while traditional welfarist approaches leave largely untouched the causal mechanisms feeding the new urban poverty. So much to say that, to make a real difference, public policies aimed at combating advanced marginality will have to reach beyond the narrow perimeter of wage employment and move towards the institutionalisation of a right to subsistence outside of the tutelage of the market via some variant of ‘basic income’".174 He argues that welfare itself is not enough (welfare itself can be used as a form of control) and that empowerment is critical. According to the Office of the High Commissioner for Human Rights empowerment and participation are also central tenets of a human rights approach to poverty reduction.175 However, exclusion rather than empowerment continues to be dominant within the policy and judicial sphere. In Clingham, the UK House of Lords ruled that use of hearsay evidence in applications for ASBOs176 was legal after weighing the balance between the general interests of the community and the protection of the defendants’ rights, finding in favour of the former. Ashworth notes that this implied that the defendants were somehow ‘outside’ the community”.177

146. Many of the controls highlighted in this report target those who are socially and economically excluded. The relationship between discrimination and poverty, socio-economic exclusion and socio-economic status, has been explored by a number of UN human rights treaty bodies.178 Unfortunately this has had little apparent political impact on a dominant neoliberal doctrine that believes that individuals are responsible for putting themselves in poverty or becoming ill for example, that regards welfare as creating a ‘culture of poverty’: what some have called a ‘culture of inequality’ in which populations have a “high taste for inequality” and where “the view prevails that government is not responsible for ameliorating the causes and products of social and economic inequality”.179

147. These attitudes are reflected in two examples of state responses to human rights challenges concerning economic inequality. In May 2009, in its statement to the Committee on Economic, Social and Cultural Rights when examining its fourth and fifth periodic reports on implementation of the ICESCR, the UK delegation asserted that the

175 http://www.unhchr.ch/development/povertyfinal.html.
rights contained in the Covenant are mere principles and values and not justiciable;¹⁸⁰
In 2001, the Ontario Court of Justice in Canada, hearing an appeal against the Safe
Streets Act 1999 which makes aggressive soliciting a criminal offence, ruled that
poverty is not a ground of discrimination, arguing that the Act did not discriminate
against persons sharing personal characteristics of ‘extreme poverty’, that poverty was
not an ‘analogous ground’ for discrimination under s.15 of the Charter and that the
Canadian Charter of Rights and Freedoms refers to civil and political rights and not
social and economic rights.¹⁸¹

¹⁴⁸. This approach by these developed states should come as no surprise, given the trends
identified in this report including a retreat from the social treatment of poverty. Their
approach was also out of step with international human rights law.¹⁸² The Committee
on Social, Economic and Cultural rights has recently clarified in its General Comment 20
issued in June 2009 that “economic and social situation” is a prohibited ground for
discrimination falling under the category of ‘other status’ in Article 2(2) of the
Covenant. In relation to this the Committee has commented: “Individuals and groups of
individuals must not be arbitrarily treated on account of belonging to a certain
economic or social group or strata within society. A person’s social and economic
situation when living in poverty or being homeless may result in pervasive
discrimination, stigmatisation and negative stereotyping which can lead to the refusal of
or unequal access to the same quality of education and health care as others, as well as
the denial of or unequal access to public places.”¹⁸³

¹⁴⁹. Human rights advocates have often been criticized on the grounds that their focus on
individual rights and responsibilities ignores social conditions that produce
criminality.¹⁸⁴ As Parmet points out, states are permitted to detain individuals to contain
an epidemic, even while they may continue to deny their populations access to clean
water or to rudimentary health services that would halt it.¹⁸⁵ In addition to a wider

¹⁸² As the UN Committee was quick to point out to the UK government, on ratification of an international
instrument a state party is under a legal obligation to comply with such an instrument and to give it full effect in its
further force to these rights, culminating in the adoption in mid–2008 of an Optional Protocol to the ICESCR (which
comes into force in 2010). In relation to discrimination, paragraph 11 of the Maastricht Guidelines states that “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.”¹⁸³
¹⁸³ UN Doc. E/C.12/GC/20, 10 June 2009.
(2007) Human Rights and Empire, Routledge, both referred to in the conclusion of this report.
¹⁸⁵ In this regard, Parmet recommends that policies that limit rights should be assessed on the necessity principle
based on the state’s fulfilment of a broader obligation to provide the conditions necessary for health. Further
conclusions drawn in Wendy Parmet’s paper are referred to below.
political engagement with issues of inequality, human rights advocacy must challenge a
apenal treatment of poverty as well as welfare that tend towards control, conditionality
and paternalism rather than empowerment and participation.

150. Control of ‘the excluded’ may not be exerted through obviously discriminatory
legislation such as under apartheid in South Africa, but – as described in the previous
chapter – through categorisation of groups of people as ‘dangerous’ and the
normalisation of policies of inequality. Human rights organizations must bring to light
the connection between the social, economic and political position of marginalized
populations, in particular the poor, and the way in which they are subjected to forms of
control that far outweigh controls placed on other citizens. This is also important
with a view to employing human rights law to make a legally enforceable argument
about lack of equality before the law or discrimination (as opposed to ‘legitimate
distinctions’ in law for example). Targeting social controls on the basis that there are
groups of people who are less deserving presents barriers to human rights progress in
a whole range of spheres.

4.4 Public health, infectious diseases control and human rights

151. Public health panics are often at the root of many of the human rights abuses that occur
in the name of public health in the context of infectious diseases control. What Parmet
identifies as the “emerging disease perspective” strengthens public health panics and
“emphasizes the conflict between, rather than the compatibility of health and human
rights” leading to policies that fail to adequately address both health and human rights.
As the fear of the risk of the spread of infectious diseases rises, so do the controls
planned or implemented to address that fear. She cites for example the revision of the
International Health Regulations in 2005 following the SARS outbreak in mainland
China. These aim “to prevent, protect against, control and provide a public health
response to the international spread of disease in ways that are commensurate with and
restricted to public health risks, and which avoid unnecessary interference with
international traffic and trade” (Article 2). They authorise a range of controls which
include surveillance, preventive detention via isolation or quarantine, travel bans,
immigration bans, criminalization, and mandatory vaccination and treatment. In the
midst of a public health panic, necessity appears to justify (both legally and ethically)
broad limitations on human rights.

186 Lianos and Douglas go so far as to wonder whether race and gender have been replaced by dangerousness as
Environment’ British Journal of Criminology, 40, 261-278).
187 In a similar way perhaps to the way in which the UN Special Rapporteur on the promotion and protection of
human rights and fundamental freedoms while countering terrorism, has highlighted the impact of counter-
terrorism measures on social, economic and cultural rights (see UN Doc A/HRC/6/17).
188 This section draws extensively on the research paper written for this project by Wendy Parmet.
152. Social perceptions and understandings of disease (including 'moral panics'), perceptions of the risk or riskiness of particular individuals and populations (including discriminatory attitudes), and the values that a society places on various rights and liberties often outweigh the science in determining whether a potential risk to public health justifies the infringement of the rights of an individual or community. “States frequently impose highly coercive interventions that initially appear to be justified to prevent a public threat. In hindsight, however, it often becomes evident that the perception of the threat, and the identification of the threat with particular individuals or groups, was fuelled by a public health panic, antipathy to marginalized populations, and the deep desire to contain and control the risk.”\textsuperscript{189}

153. Very often in the midst of a public health panic, interventions that target groups “who are perceived as being associated with a disease, or having a higher risk of the disease, such as travellers, immigrants, and sex workers will appear to be necessary and justifiable, and hence non-discriminatory and the least restrictive.”\textsuperscript{190} In this climate, the limitations on the exercise of rights contained in international human rights law (for reasons of “public health”) may well be deemed justifiable even if challenged at judicial review (which would be unlikely in the midst of an outbreak of disease). As a result, the legal and ethical principles which seek to secure the protection of human rights in the face of public health interventions, effectively legitimate the restriction of human rights during a public health panic.

154. Frequently, the limitations imposed on the rights of individuals offer little or no public health benefits and are sometimes clearly counter-productive in that they divert resources away from other public health needs of the wider population. A focus on outbreak preparedness that concentrates on controls neglects the social and economic conditions that foster epidemics and weaken the health of their populations.

155. By engaging with social control theory, and developing a greater sensitivity towards the social construction of public health risks as well as the importance of human rights to the protection of public health, human rights activists and public health advocates can reduce the risks that arise when panics drive public health policy. The human rights community needs to call for greater efforts to ensure that international human rights law places specific obligations on states to undertake the measures necessary to address the social, economic and environmental factors that play a far greater role in determining human health than do the specific pathogens or infected individuals that form the target of public health panics. While progress is being made in that direction – with the adoption of the Optional Protocol to the ICESCR for example – greater efforts should be made to compel states to undertake meaningful measures before an

\textsuperscript{189} Parmet.
\textsuperscript{190} Parmet.
epidemic strikes that might alter their population’s vulnerability to potential epidemics. The relationship between health and human rights should be emphasised even more strongly during public health emergencies: “By protecting human rights, especially social and economic rights, a state is able to ensure that its population has the health and access to health care that becomes vital to withstanding any public health emergency. Moreover, by respecting the rights of all people, including the most vulnerable, health officials can earn the trust of the populations they will need to work with during an emergency. In contrast, if health officials abridge human rights and turn against marginalized populations, they risk losing the trust and support of that population during an emergency.”

A state’s fulfillment of its broader obligation under international law to provide the conditions necessary for health should be taken into account when assessing whether an abrogation of human rights is necessary. Parmet also underlines the importance of referring to ethical and legal principles of transparency, community consultation and equity. If both public health and human rights are to be protected, human rights activists should call into question the emerging infectious disease and biosecurity perspectives which are “priming the world for public health panics and laying the foundations for the unnecessary restriction of human rights.” Public health and human rights activists need to resist the temptation of “focusing on discrete and fearful events,” and work to highlight the “chronic and endemic conditions and the many social determinants that undermine health throughout the globe.”

191 Parmet.
192 Parmet.
5. HUMAN RIGHTS AND CRIMINAL JUSTICE

157. This Chapter will consider the implications of the preceding analysis for human rights advocates and their engagement with the criminal justice system.

5.1 The lure of procedural justice

158. The international human rights movement's major focus following the birth of the ICCPR and the ICESCR, in the initial few decades at least, was on civil and political rights. As Leman-Langlois and Shearing put it, "[t]he government institutions that have been regarded as perhaps most crucial to first generation rights have been the institutions of security, in particular the institutions of ‘criminal justice’". However, this approach did not really allow for inclusion of broader social, economic and cultural rights context, or take into account why individuals came into contact with the criminal justice system in the first place or the broader human rights consequences of that contact.193 As Sparks and McNeill note, a preoccupation with procedural justice or individual redress can obscure larger questions about rights violations as clues to social organization, economic distribution and political culture.

159. Barbara Hudson has identified a strand of criminology that she calls “technicist penology”, which accepts rather than questions the aims of punishment espoused by the state. “The problems they seek to resolve are second–order questions such as what type of prison regime will serve the needs of reform, or public protection or retribution; how prisons can be managed so as to minimise disorder and maximise security; what kind of non–custodial penalties will satisfy the penal aims of protection, retribution and rehabilitation. They also address themselves to the values which law is supposed to encompass, such as fairness and consistency, but the focus is on whether the correct legal processes are followed, and they pay little attention to the outcomes of criminal justice and penal processes.... such penology may appear to criticise, but it is not critical in the sense of wanting to bring about any profound change in the state's penal strategies.”194

160. In recent years, a “technicist” approach to criminal justice appears to have dominated much human rights practice. Human rights organizations argue whether due process guarantees have been met in specific laws (such as the ASBO, for example), but accept as given the authority of the state to raise the threshold of harm to include fear and on

193 Commentary on a comprehensive study of police contact with young people in Edinburgh, Scotland (Edinburgh Study of Youth Transitions and Crime) argues that police may be unfairly targeting certain categories of young people and that the policing of children may itself serve to sustain and reproduce the problems which it attempts to contain or eradicate. See Lesley Mcara and Susan Mcvie (2005) 'The usual suspects? Street –life, young people and the police' Criminal Justice, Vol.5, No.1: 5–36.
the basis of a right to freedom from fear. Similarly, when the UN CERD Committee, the UN Committee Against Torture and the UN Human Rights Committee have expressed concerns about life sentences without parole in the United States, they have focused on the harm to juveniles because the rights of juveniles are more clearly set out in international human rights law: they have not challenged life without parole itself. Could advocates not apply the principle that penal systems should be rehabilitative, which is reflected in international human rights law, to challenge penal regimes that exclude, segregate and incapacitate rather than rehabilitate?

195 The principle that penal systems should be rehabilitative, when they balance the protection of society from crime against the protection of offenders’ rights, is reflected in Article 10(3) of the ICCPR which states that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”, and is further elaborated in Standard 58 of the UN Standard Minimum Rules for the Treatment of Prisoners, which states that: “[t]he purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life”.

76
Criminal Justice in the UN: A Vanishing Present

The history of how human rights has been positioned within international discourses of crime and criminal justice is enlightening and should prompt deep reflection within the human rights community about its role in allowing transnational criminal justice policy initiatives to ‘escape’ human rights.

The ‘UN Congresses on Prevention of Crime and Treatment of Offenders’ that took place in the 1970s recognized the importance of preventing crime; but their language reflects a specific concern with the relationship between development, social justice, equity and crime, and the consequent well-being of society as a whole. The Caracas Declaration adopted by the 6th Congress in 1980 and the Milan Plan of Action adopted by the 7th Congress in 1985 both talk of crime prevention in the context of the New International Economic Order.196 The Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order – which were perhaps tellingly never formally adopted by the 7th Congress contained the following paragraph: In view of the staggering dimensions of social, political, cultural and economic marginality of many segments of the population in certain countries, criminal policies should avoid transforming such deprivation into likely conditions for the application of criminal sanctions. Effective social policies should, on the contrary, be adopted to alleviate the plight of the disadvantaged, and equality, fairness and equity in the processes of law enforcement, prosecution, sentencing and treatment should be ensured so as to avoid discriminatory practices based on socio-economic, cultural, ethnic, national or political backgrounds, on sex or on material means. It is necessary to proceed from the principle that the establishment of genuine social justice in the distribution of material and spiritual goods among all members of society, the elimination of all forms of exploitation and of social and economic inequality and oppression, and the real assurance of all basic human rights and freedoms represent a principal hope for the successful combating of crime and its eradication from the life of society in general.197

These documents abound with references to social justice and human rights in the context of crime prevention. However, by the 8th Congress in 1990, the focus had switched to computer crime. A new body, the Commission on Crime Prevention and Criminal Justice, focused much of its attention on organized crime, drug control and transfer of technical expertise. This institution was in turn subsumed into the UN Office on Drugs and Crime (UNODC). The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, adopted by the UN General Assembly in 2001, contains just one reference to human rights (in procedural terms), and a passing reference to poverty. Unlike earlier documents, it includes no strong analysis of the causes of crime. The ECOSOC Resolution (2008/24) on Strengthening prevention of urban crime: an integrated approach actually calls on states to “integrate crime prevention considerations into all relevant social and economic policies and programmes”, a near-complete turnaround from earlier formulations that emphasised social rather than criminal justice. That the UNODC’s 2008–2011 strategy198 makes no explicit mention of human

196 The term New International Economic Order described a system of trade and financial relationships between industrialized countries and developing countries. It was promoted by developing and non-aligned countries at the UN in response to the economic crisis of the 1970s and in opposition to the Bretton Woods system and was never fully supported by developed countries. By the late 1990s it had been set aside in favour of policies promoting free markets and UN institutions no longer refer to it.


rights (despite the fact that under ‘rule of law’ – one of three main themes to the strategy – the promotion of “effective, fair and humane criminal justice systems through the use and application of UN standards and norms in crime prevention and criminal justice” is cited as a key objective) should come as no surprise, especially considering that it has described its mission in terms of a fight against “uncivil society.”

161. These changes in the approach to crime in the UN illustrate the weaknesses of a policy discourse that emphasizes responsibility and punishment for crime, but ignores the fact that crime occurs in a social, economic and political context. If invoked at all, human rights are considered in procedural terms, as rule of law principles rather than the expression of deeper values of justice and equity. To challenge contemporary criminalizing practices, advocates might do well to develop a broader critique, that would deconstruct notions of deviancy and security, the criminal and the victim, in order to re-construct them in line with human rights principles.

162. At a practical level, human rights advocates may also lose key opportunities for intervention, if they do not monitor and critique processes of international cooperation in the area of crime control and their impact on national strategies on criminal justice and crime prevention processes. (This issue is discussed further in the section on transnational regimes.)

163. At the same time, the influence of risk thinking over rights thinking in criminal justice contexts has created new categories of risk and blurred the distinction between suspects and offenders, migrants and terrorists. It has allowed security to trump due process guarantees and other rights. That the global human rights community has posed little resistance to this rhetoric is perhaps evidence of how narrow its approach to criminal justice has been. It is especially significant to note that the displacement of human rights and ideas of equity and social justice from the UN’s crime control agenda – as reflected in the current approach of the UN Office on Drugs and Crime – has occurred while human rights mechanisms elsewhere within the UN have grown rapidly.

5.2 The criminal justice temptation

164. Human rights advocates have looked far too often to the criminal justice system for responses to human rights problems, and have been far too preoccupied with the use of criminal trial and sanctions to address impunity. Because this approach reinforces the logic of victim and perpetrator (albeit more often than not with the state as perpetrator),
it has become more difficult to position the notion of "justice" in a broad socio-economic and political context.

165. When human rights advocates call for enforcement mechanisms (including criminalisation) to promote human rights objectives (often in the absence of strong judicial institutions or an organically emerging rights movement that is sensitive to context and incorporates non-legal solutions), they portray the state and its agents as neutral arbiters between victims and offenders, allowing them to escape their share of responsibility for creating conditions in which human rights abuses occur. They focus attention on the acts of individual perpetrators rather than on the social, economic, and political context, as if criminalisation could engineer egalitarian social change. They also allow it to be supposed that criminal justice systems can provide justice, when in many instances this is clearly not so (as human rights organisations themselves frequently report).

166. More broadly, it is argued by some analysts that criminal justice systems are part of unequal power structures that do not address real "harm" in society and attach unequal weight to the crimes of the poor compared to those of the powerful. This resembles the feminist argument that gender inequality is inherent in criminal justice processes, despite their claim to promote "equality before the law". Advocates should consider such criticisms of the criminal justice system seriously because their focus on "harm" rather than "crimes" is relevant to the focus of human rights on ensuring rights for the most vulnerable.

167. Leman-Langlois and Shearing make a separate but related point that officials in criminal justice systems are alienated from the socio-economic and political causes of marginalisation and exclusion. Wacquant argues similarly that police are faced with an impossible task because politicians portray social insecurity as criminal insecurity, thereby placing on them impossible expectations. In consequence, those working inside the criminal justice system come to perceive that better, more efficient security "may excuse, or otherwise render permissible" the neglected or damaged environments in which security problems take root. If human rights advocates focus their reform efforts on officials in the criminal justice system, they may simply exacerbate the drive towards increased security.

202 Centre for Crime and Justice Studies (2005), Criminal obsessions: Why harm matters more than crime, Kings College London (www.crimeandjustice.org.uk).
5.3 Human rights and prisons: need for a renewed engagement\textsuperscript{204}

168. One of the key messages of this report is that human rights organizations need to urgently engage not just with the criminal justice system but with the idea of crime, criminality and penology. Further, the interface between the human rights movement and prisons should not be restricted to the compliance of prison conditions with international human rights standards (see previous reference to ‘technicist penology,’), important though that is. Though the fact that the state and society deem it permissible to incarcerate large numbers of people (thereby fundamentally restricting their human rights) may seem an obvious issue to examine more closely, it is often overlooked. The human rights movement should play a role in bringing the prison out of obscurity and into the spotlight, considering for instance whether prisoners are viewed as bearers of inherent human rights or stripped of citizenship in some way?; why “confinement is the most global of modes of state punishment today”\textsuperscript{205} with some 10 million people incarcerated by the world’s criminal justice systems. The prison remains the norm against which other sanctions (such as Community Sanctions and Measures (CSM) – referred to below) are defined and with which they must compete for credibility and legitimacy. This is despite the fact that prison has not been the principal mode of criminal sanction throughout history and despite the fact that the CSM outnumber sentences of imprisonment in most jurisdictions.

169. In considering the dominance of incarceration, \textit{Sparks and McNeill} identify the damaging effect of ‘moral panics:' “The translation of episodic scandals and crises into a durable condition of social alarm favours the imposition of more liberty-depriving sanctions, the erosion of procedural safeguards, the creation of suspect populations, and not infrequently the resort to ‘magical’ or gestural solutions even in the face of contrary evidence.” This is reflected in indeterminate prison sentences, the use of punishments disproportionate to the crime committed and new post-prison powers of surveillance, control and restriction.

170. As noted earlier in this report (p.++), CSMs can become more about protecting the liberties of potential victims, reflecting an increasing public and political tension over whether the subjects of CSMs ‘deserve’ rights. The pursuit of public protection as the dominant purpose of CSM is not necessarily the best way of advancing victims’ or communities’ rights – indeed, it can lead to their neglect on the basis that a preoccupation with public protection leads to a focus on the possibility of future offending based on uncertain risk assessments. As such, CSMs in which public protection is paramount raise the following concerns relevant to the human rights of offenders:

\begin{flushright}
\textsuperscript{204} This section draws extensively on the research paper written for this project by Richard Sparks and Fergus McNeill.
\textsuperscript{205} \textit{Sparks and McNeill}.
\end{flushright}
Access of offenders to CSM (whether instead of custody or as mechanisms for early release) can become conditional on assessments of the risks involved in their release, irrespective of the sometimes dubious basis of such assessments;

Offenders may not be required to consent to the CSMs to which they find themselves subject, since these measures are not aimed at their interests;

CSMs may come to be loaded with more onerous and intrusive conditions, in the public interest;

Combinations of the involuntary nature of supervision and its more onerous conditions may increase the likelihood of technical violations of CSM; and

Technical violation of CSM may lead to greater penalties than would have been imposed at first instance. In these conditions, CSM can become a driver of incarceration rates rather than a brake upon them.

171. Referring to the emergence of a human rights agenda within the CSM field, Sparks and McNeill point to ‘desistance research’ (i.e. research into what stops offenders from reoffending) which has provided “empirical evidence” to suggest desistance requires “a reinstatement of social inclusion/integration as a priority, and the use of practice methods characterised by both humanity and legitimacy. In a sense, desistance research seems to make an empirical necessity out of morally virtuous forms of supervision that not only respect human rights but that recognise and seek to support offender’s rights claims against the state.”

172. Sparks and McNeill further suggest that the human rights movement should pay close attention to the idea of legitimacy as a “connecting thread” around which to fashion a response to penal policy. They point out that while legitimacy acts as a constraint on state/public conduct it can be influenced by public opinion, the mass media etc, in relation to punishment with consequences for policy that can lead to conflict with human rights requirements. However, what is deemed legitimate in relation to prison governance is subject to temporal changes and changes to the political culture. Human rights standards could have a valuable role to play in both reflecting and requiring moral standards. If they capture the public imagination they can be effective forms of legitimacy (as Sparks and McNeill have suggested has been the case with regard to human rights standards relating to prison conditions in Europe).

173. The human rights framework should become part of the “architecture of governance” in prisons but also in other areas of penal systems, with an increased dialogue between human rights activists and criminologists and others concerned with penal systems extending beyond interior aspects of prisons to encompass wider questions of social control or contests over the scale and uses of imprisonment and its ‘alternatives.’ For example, a penal philosophy that combines ideas of distinguishing ‘constructive punishment’ from merely ‘punitive punishment’ with an acknowledgement of the
importance of social justice ("recognising that where social injustice is implicated in the genesis of offending, the infliction of punishment (even constructive punishment) by the state is rendered morally problematic, because the state is itself complicit in the offending through having failed in its prior duties to the ‘offender’") is highly relevant to the human rights movement.

5.4 Social control and the complexity of ‘protection’

174. It has been pointed out earlier in this report that requiring the state to protect individuals from abuse by private actors may have unforeseen effects. As we have seen, preventive state intervention can lead to the adoption of pernicious forms of control, which focus disproportionately on those who are already disadvantaged and lack moral, social and economic capital. When they call for protection, therefore, human rights advocates should have these risks in mind. This is particularly the case in contexts where the state itself acts in ways that are violent and/or discriminatory and where advocating state intervention might increase the range of human rights abuses (Campaigning for the criminalisation of domestic violence in a context like Brazil might be one example, where the penal system is already characterised by violence and injustice. Oberoi provides another: anti-trafficking campaigns based on the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, can have the effect of controlling migration rather than protecting vulnerable people.)

175. When states intervene in the name of individual human rights, it can lead to a clash of rights between ‘offenders’ and ‘victims’. The ‘victim movement’, which is both associated with the human rights movement (in its concern for access to justice and protection of the rights of vulnerable groups) and distinct (in its acceptance of diminished rights for the accused), has in many countries driven both a decline in due process safeguards (such as the right not to be tried twice for the same offence) and a shift away from liberal rehabilitative approaches (towards indeterminate sentences for example). In recent times, the right of children to be protected (from sexual abuse) appears to have ‘trumped’ other rights. In the UK, it has been publicly argued that child protection supersedes human rights in the context of allegations of child abuse. Hundreds of child sex offenders in the USA have been forced into homelessness on leaving prison because of stringent regulations that prohibit them from living within a

206 See for example Lauren Snider (2008) ‘Criminalising violence against women: solution or dead end’, Criminal Justice Matters, No.74. She points out that the first person to serve prison time under Canada’s mandatory charging provisions for domestic assault was a women charged with contempt because she refused to testify against her assailant in court. “It is hard to argue that subjecting marginalized populations to public censure and stigmatisation, and/or to jail... is a step towards social justice. It takes those who have suffered injuries of class and race all their lives and turns them into statistics.”

207 In Britain the principle of double jeopardy was abandoned in 2005 in response to campaigns by victims of crime.
particular distance from anywhere where children congregate, raising concerns about their right to freedom of movement and residence. In Australia, following the publication of a report alleging widespread sexual abuse of aboriginal children in the Northern Territories, legislative measures were introduced that “quarantined” welfare payments as well as land rights. These measures were censured by the UN Committee on Social, Economic and Cultural Rights in May 2009 on the grounds that they were “inconsistent with the Covenant rights, in particular with the principle of non-discrimination, and have a negative impact on the realisation of the rights of indigenous peoples”.

These situations present difficult dilemmas for human rights organizations. While a social control perspective cannot provide all the answers, it could be invaluable in helping advocates to examine how ‘crimes’, ‘victims’ and ‘offenders’ are socially constructed, and therefore offer deeper insights into the broader context in which human rights violations occur and human rights work is undertaken.

208 See for example ‘Miami’s tent city for sex offenders’ BBC News 21 June 2009.
6. RECONSIDERING GOVERNANCE

177. This Chapter considers three important aspects of governance that human rights advocates need to reconsider: privatisation and the role of the state; the role of transnational regimes; and, the question of legality and legitimacy.

6.1 Privatisation and the role of the state

178. In a previous paper for the ICHRP, Clifford Shearing argued that "human rights organisations risk being marginalised if they operate from within a conceptual framework that is out of touch with the realities of governance". The relationship between the individual and the state continues to be central to international human rights law (including where there is an abnegation of government) as Leman-Langlois and Shearing acknowledge in their paper for this project. The assumption is built into human rights that states should be and are the exclusive source of authority for public governance as well as the only appropriate providers of such governance. This reflects assumptions in society more generally: few people are aware, for example, of the size of the private security industry and the wide range of areas in which ‘private police’ are currently employed. In addition, the reality is obscured by the rhetoric of states which imply they have greater control over these actors than they actually do. The state is no longer the exclusive source of authority of public governance and therefore rights cannot entirely focus on the relationship between states and citizens. While the human rights framework has begun to acknowledge this there is not sufficient acknowledgement of the extent of the impact of both privatisation and private government. Leman-Langlois and Shearing argue that what they call the “fracturing or pluralisation of the auspices of government” has been underplayed (with the focus all on devolution of state governance through privatisation), and that this has “undermined our ability to understand the nature of shifts in governance and... our ability to fully recognize the implications in shifts in governance for human rights.”

179. Monitoring of the impact of privatization on human rights has been fairly recent and has tended to focus on social and economic rights, such as the right to water and health services. Concerns have also been raised about unequal provision and distribution of services between those who can and cannot pay. Human rights organisations have not scrutinised the impact of the privatization of security, or social controls, to anything like the same degree. Under the framework of international human rights law, UN human rights bodies have held states accountable for the actions of private security

personnel, and highlighted concerns about the hiring of former police and security forces with records of human rights violations as private security guards, particularly in countries that have undergone political transition (such as Argentina for example).

However, they have not addressed squarely the broader impact of privatized security, either in developing countries (where private security companies tend to be dominated by senior ex-military officers who operate alongside public police in the interests of private individuals), or in developed economies where, as the Law Commission of Canada has pointed out, “[O]verall, policing–related governance and accountability mechanisms still reflect the public–private dichotomy.” In this respect, the human rights framework appears under-equipped to address the broader impacts of private security on society and its institutions. Leman–Langlois and Shearing identify private security as responding autonomously to the “appetite for security” and order outside the purview of traditional human rights monitoring mechanisms, with implications in particular for how the human rights framework is able to respond to policing (in its widest sense).

Privatisation of prisons
The privatisation of prisons has increased rapidly and the practice has been exported globally (notably from the USA) despite evidence that private prisons provide “decreased security, poor employment standards and inadequate protection of prisoners’ human rights.” In 1993 the UK government announced that all new prisons would be built and run by private companies. The UK’s HM Chief Inspectorate of Prisons recently found that private prisons are less safe for inmates. Nevertheless, as a proportion of the population, the UK holds more people than the United States in privately–run prisons.

Arguments against the privatization of prisons focus on questions that are highly relevant to the human rights community, as Sparks and McNeill point out. The first is whether privatization automatically leads to expansion of the prison population. After all, if prisons are ‘profit centres’, it can be argued that the more people are in them the better. That this can lead to abuse is evident from the indictment of two County Judges in the United States who reportedly took some $2.6 million in bribes from a corporation running private detention facilities for juvenile offenders. Some of these were handed down longer sentences to “keep centers filled”. Another concerns whether privatized prisons become warehouses. The sentencing

213 Leman–Langlois and Shearing note that little research data is available on the non–state policing sector, even in security governance literature. They suggest that human rights advocates should give this sector more attention.
217 Two judges in Pennsylvania, USA, were reported in March 2009 to have jailed children in exchange for bribes from private prison companies. Prison corporations had reportedly been guaranteed a certain number of inmates. (The Guardian, George Monbiot, ‘This revolting trade in human lives is an incentive to lock people up’, 3 March 2009.)
principle that American corporate prisons refer to most frequently is incapacitation. A third focuses on how the public interest is served by an unregulated relationship between government and the private sector, where the private sector runs institutions that punish in the name of the State. Finally, there is the fundamental question of whether the state can and should delegate its coercive powers in the first place.

UN Human Rights bodies have attempted to address these questions. The UN Sub-Commission on the Promotion and Protection of Human Rights tried unsuccessfully to encourage the Commission on Human Rights to carry out a comprehensive study of privatization; political considerations appear to have effectively blocked a process that might have questioned whether privatization of the administration of justice was compatible with international human rights law. In 2002 the Human Rights Committee, while welcoming information that all prisons would be publicly managed in New Zealand from July 2005 (a policy that has since been overturned), also said that the Committee remained concerned “whether the practice of privatization, in an area where the State is responsible for protecting the rights of persons whom it has deprived of their liberty, effectively meets the obligations of the State Party under the Covenant and its own accountability for any violations.”

Privatization is mentioned only sporadically in human rights discussions of prisons or academic journals on penal policy, despite a number of local and national advocacy campaigns against privatization. Where it is mentioned, the key questions that it throws up appear to be ignored. The (non-binding) European Prison Rules state that “Prisons shall be the responsibility of public authorities” (71) but also that “[W]here privately managed prisons exist, all the European Prison Rules shall apply” (88).

180. The concept of due diligence in international human rights law makes it possible to extend the responsibility of state parties to cover actions by private actors. Kothari, for example, quotes the Committee on the Elimination of Racial Discrimination which notified the state of Brazil of its responsibilities when racial segregation occurs without any direct involvement by the public authorities. However, research for this project indicates that human rights advocates, and indeed human rights law, have not altogether adapted to current realities of governance. In particular, as Leman-Langlois

---

219 A year after his resignation from government, former UK Home Secretary John Reid became a consultant to private prison operator G4S (The Guardian, George Monbiot, ‘This revolting trade in human lives is an incentive to lock people up’, 3 March 2009).
220 An outline of a study was prepared at the request of the Sub-Commission in 1993 (UN Doc. E/CN.4/Sub.2/1993/21). It provides an interesting analysis of the arguments against privatisation of prisons in international human rights law. It recommended the development of a set of minimum rules to govern State practices in contracting out prison services but this was never followed up and the Commission failed to authorize a full study.
223 Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies).
224 UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Brazil, 28 April 2004: UN Doc. CERD/C/64/CO/2.
and Shearing point out, the development of hybrid forms of policing mean that “public, private and hybrid organizations and their members have variable duties, responsibilities, objectives, and are subject to variable levels of review and remedy”. In a similar way, privatised forms of governance may be used as means of control, and can contribute to processes of segregation and exclusion.

181. The character as well as the emerging diversity of governance matters. The earlier discussion of managerialism suggested that, in many spheres, governance, particularly privatised governance, has been reduced to the efficient management of inequality. This is fundamentally at odds with the spirit of human rights, which is justice-oriented, and applies the central notion of universality to achieve equality.

182. While some argue that “[t]he study of organizational power lies at the core of modern-day human rights theory and practice” and that human rights are a “means of constraining and channelling organised power,” it is doubtful that human rights organisations have considered the diversity of governance sufficiently. An understanding of ‘who is steering and who is rowing’ is crucial to any application of legal accountability and to the delivery of justice. It also determines the effectiveness of human rights advocacy and strategies to achieve change.

6.2 Transnational regimes and the role of the state

183. In a similar manner, human rights organizations may be failing to take fully into account the role of transnational regimes. The human rights framework focuses on policies implemented by the nation state, allowing policies implemented by nation states through transnational regimes to escape scrutiny. In recent years, more attention has been given to the role of private companies and transnational corporations. Nevertheless, as this project has highlighted, the influential, often opaque roles that states, private entities and elite individuals play in transnational regimes is not well understood and requires further study.

184. Any strategy to address the impact of human rights on the primacy of the ‘security’ discourse in particular, must take into account the role of transnational institutions. While localised efforts to challenge security policies are numerous and impressive, the regional and global nature of security regimes requires a regional and global response. At present this is being done in an ad hoc manner, in part because of the nature of international human rights law and its focus on the nation state. Human rights

---

227 Statewatch, a non-governmental organisation that monitors developments in the EU, is an important example. See www.statewatch.org.
bodies do not refer often enough to the role played by regional or international intergovernmental institutions, or their influence and more detailed study of these institutions is essential. Similarly, more human rights research should focus on the transfer of policies and their impact on the ground, providing an empirical foundation for future advocacy.

185. It is important for human rights actors, civil society organizations as well as human rights bodies
- to understand better the contexts in which policies of social control are socially and politically constructed not least through influences outside a state's borders including the role of knowledge elites; and,
- monitor processes and outcomes of policy and knowledge transfers through formal transnational regimes as well as less-formal networks of elite institutional and individual knowledge providers.

6.3 Legality and legitimacy of restrictions in human rights law

186. A consideration of social control policies in relation to human rights focuses attention on the role of law (including civil, criminal and human rights law), and its legitimacy. As explored earlier, ideas of danger and risk assessment often exacerbate structural inequalities, because those most discriminated are most likely to be dangerized. ‘Dangerization’ is often encoded in law and as a result specific actions but also identities, socio-economic or legal status, association, appearance, thought, states of health etc. may be criminalized or made subject to coercive legal powers. Using law to legitimise the control and management of risk, and populations deemed to create risk, strengthens the coercive powers of states but also those of a variety of non-state actors, such as private security agencies, and creates extensive networks and bureaucracies of control. As this report has described, directly and indirectly, these coercive powers can deepen deprivation and lead to the infringement of rights, especially through the development and use of new technologies and procedures of detention, custodialization and institutionalisation, segregation and policing (both public and private) of movement and the regulation of public spaces.

187. Increasingly, states have been able to argue that such actions are legal, notably to defend ‘security’ and ‘public order’ or even ‘public morals’; they also claim "public support" for new forms of control. In this context, apparently neutral legislation (that imposes conditionalities on rights, for example) can directly affect the situation of groups of people who are already vulnerable. ‘Hard controls’, such as security legislation, invite a rights challenge; but ‘soft controls’, such as administrative regulations, are less likely to be monitored and challenged, and yet can use the granting of rights as a means of control.

188. The limitations on liberty that human rights law permits (and the procedural protections of such limitations) are a two-edged sword. They may restrict the state’s coercive
powers and provide checks on the abuse of state controls; but at the same time they may legitimate and rationalize the restraints on or deprivation of liberty. The legalization of social control measures allows such restraint to be socially justified. In this context, efforts to define the circumstances in which states can legitimately limit rights (for example, to protect ‘security’) should be set in a broader context and should consider how the law, and practices of social control beyond the law, may exclude and persecute.

189. It is clear that, when they inserted limitations into human rights law (see Part I), the drafters intended to provide conditional restrictions that were neither absolute or unquestioned. The challenge for human rights advocates now is to test the legitimacy of the use of these limitations at every turn, even when positive law may support a claim of legality. Interpretation of human rights law has furnished the principles on which such tests can be based:

- reasonableness;\textsuperscript{228}
- necessity;
- non-discrimination: limitations should not be based on or result in discrimination;
- proportion: actions should be proportionate to the ends that are sought;\textsuperscript{229} and
- limited in time: limitations should be lifted as soon as possible.

190. These principles help; but they will only protect the rights of vulnerable people when they are applied robustly and when claims of risk are questioned.\textsuperscript{230}

191. Recognising that law can be repressive as well as emancipatory, human rights actors need not only to interrogate legislation against these principles,\textsuperscript{231} but to do so from a broader perspective that encompasses civil, political, social, economic and cultural rights. To what ends is the law used? Is the use of law necessary and proportionate – or discriminatory? On what understanding of security or public order is the law based? Can the law be interpreted in terms of a human rights understanding of security, that promotes equality? (As Parmet argues, decisions to abrogate human rights on public health grounds should take into account a state’s fulfillment of its broader obligation to provide the conditions necessary for health.)

\textsuperscript{228} Oberoi points out that international human rights law provides that permissible distinctions made between citizens and migrants should be subject to tests of reasonableness, noting that it has been considered a useful methodology to set a threshold for acceptable state conduct in respect of economic, social and cultural rights and has been developed as such by the South African courts (see footnote 98).

\textsuperscript{229} In relation to measures taken during a declared state of emergency, the Human Rights Committee has argued that the principle of proportionality means that measures must not be excessive in comparison with the threat, and must correspond with a genuine threat, or existing practice which leads to criminal acts, rather than a perceived threat, or generalized fear.

\textsuperscript{230} Therese Murphy and Noel Whitty ((2007) ‘Risk and Human Rights in UK Prison Governance’, \textit{British Journal of Criminology}, Vo.47, No.5: 798–816) make the point that the law fails to effectively question ‘expert opinion’ of which risk assessments are now treated as such. This, they argue, is wrong since expert practices and knowledge are socially constructed and should be tested. They point out that Belmarsh (see following footnote) is one example of how such expert opinion has been tested. Parmet similarly points out that risk assessments concerning the spread of disease are based on conjecture as much as science.

\textsuperscript{231} As was successfully achieved in the UK House of Lords decision on the 'Belmarsh detainees' [2004] UKHL 56.
In sum, limitations on rights must be lawful but also 'legitimate.' *Sparks and McNeill* argue that "questions of state legitimacy remain pivotal both to the scale of the penal enterprise and to its character, with major implications for the role of and prospects for Human Rights institutions and practices in relation to prisons, other penalties and social control mechanisms".\(^{232}\) This asks human rights actors to focus on legitimacy in the broadest sense.

\(^{232}\) *Sparks and McNeill* explore the concept of legitimacy in relation to human rights and prison regimes in their paper.
CONCLUSION

193. This report has examined how social control is exercised, and its causes and effects, in a number of different contexts. It suggests that human rights practice must confront some quite fundamental challenges, which have already been articulated on many occasions. Both Conor Gearty and Costas Douzinas have wondered whether human rights, because they focus on individual rights and legal remedies, highlight individual struggles but fail to consider larger causes and processes bring small improvements rather than fundamental change. The concentration on individual rights and state-individual relationships draws attention away from economic and social conditions that underlie human rights abuses, and from the notion of justice as a societal norm rather than an individual right. There are perhaps good reasons to be wary of the liberal individualism “prominent in rights talk”, which may obscure social relations and be at odds with the concept of ‘the social’.

194. Individual rights and procedural justice should therefore not be human rights’ exclusive focus. The UDHR clearly considers justice and equality to be societal norms. Yet, the evidence that this report has assembled points to the way in which political and economic norms are increasingly justifying a widening web of control that threatens both justice and equality. Conor Gearty is right when he argues that the human rights movement needs to be more political in its drive for social justice. Human rights actors should engage more deeply with the political and economic norms that drive policies of control if they are to effectively address, and protect people from, many of the violations of rights that are the focus of their advocacy.

195. Criticisms of human rights illuminate the power of human rights as a moral idea and as an influence on international and national policy. Human rights values and principles are much less understood than human rights professionals think, and are often misunderstood (often enough not deliberately). Human rights organizations – particularly at the UN and in regional fora where political argument is crucial – have a responsibility to respond to the criticisms of human rights discussed in this report, to explain their own values, and challenge policies that are antagonistic to those values – as they have done on many issues in the past.

196. In the context that this report describes, in which the exercise of rights tends increasingly to be shackled by conditions, impediments and deterrents, social control

policies should be monitored and assessed, not just by courts and UN treaty bodies, using legal tools, but also in public debate. States should be asked to justify their authority to define public morals, public order and security. When they consider strategies for reform, human rights advocates and those involved in designing and implementing policies of social control need to look beyond law to other mechanisms that will address human rights concerns. (Such a strategy may appeal more to social scientists, critical criminologists and others who understand the law as extending the state’s powers and promoting further regulation of individual liberty.) They should speak not just about international human rights law and its interpretation, but about values that are at the heart of human rights, such as social justice and equality. They need to reposition human rights at the heart of policy in a variety of ways, complementing the legal framework.

197. In many of the contexts reviewed in this report, human rights may be abused with perfect legality; that should not mean that human rights actors have nothing to say. They should follow the example of many local and national advocacy organisations which have fought social controls. They should draw on this experience to document the effects of controls on marginalized communities and use principles at the heart of human rights law to support them. Human rights advocates have adapted to challenges many times in the past and human rights law has often been reframed to address new problems. It can be again. Human rights retain their distinctive capacity to articulate the moral obligation of society towards its ‘others’.

198. Human rights may never escape the tension between its focus on individual rights (particularly with regard to justiciability), and its concern with the social, because of the nature of law. “The power of law as well as its attraction and danger lie in its ability to create and impose social reality, meanings and values, and eventually to make them appear natural and self-evident and thus uncontested. In other words, the dual aspect of law enables the rulers to govern not only by rule of law (e.g., by means of the administration and the judiciary) but equally rule by law by creating social reality and meanings which are considered self-evident.” As this report seeks to show, however, human rights are not just about legality but about fundamental values of justice and equality.

199. The purpose of this project has been to learn from a conversation between those who apply a social control perspective and those who work from within the human rights framework. How can we better address practices of social control that have human rights implications? While the larger argument of the report is about the broader links

237 Wacquant refers to the work of advocacy organisations (including the Ligue des droits de l’homme) which have joined French social workers’ unions in their campaign against official plans to computerize welfare records and produce typologies of individuals and households claiming welfare according to problematic subjective criteria. Loïc Wacquant (2009) Prisons of Poverty, University of Minnesota Press.
between social and economic policies and human rights violations, it contains more specific messages for human rights actors, for example about the risks of linking rights to citizenship in a globalised world, or ignoring the fragmentation of governance, or embracing the temptation to adopt an exclusively criminal justice response to human rights violations.