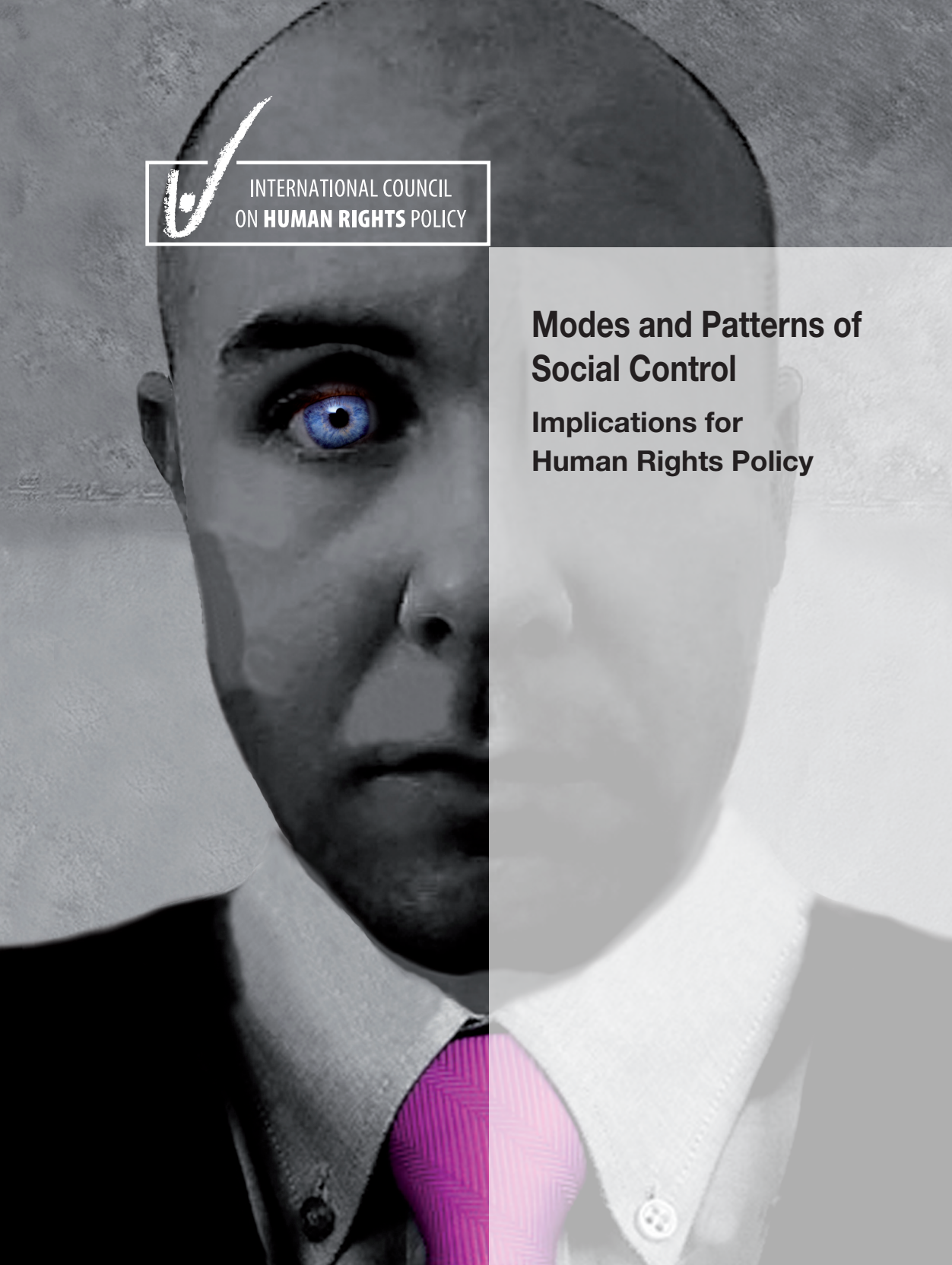

INTERNATIONAL COUNCIL
ON **HUMAN RIGHTS** POLICY

Modes and Patterns of Social Control

Implications for Human Rights Policy

International Council on Human Rights Policy

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Modes and Patterns of Social Control: Implications for Human Rights Policy

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Modes and Patterns of Social Control: Implications for Human Rights Policy

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CONTENTS

TEXTBOXES

ACRONYMS

CSMs	Community Sanctions and Measures
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
IHR	International Health Regulations
IHRA	The International Harm Reduction Association
IOM	International Organisation for Migration
MSEHPA	Model State Emergency Health Powers Act
OHCHR	Office of the High Commissioner for Human Rights
OSI	Open Society Institute
UIDAI	Unique Identification Authority of India
UK	United Kingdom
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
US	United States (of America)

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EXECUTIVE SUMMARY

1. Introduction: The Research

This report is the outcome of an enquiry into the human rights implications of contemporary patterns of social control – how laws, policies and administrative regulations define, construct and respond to people, behaviour or status defined as "undesirable", "dangerous", criminal or socially problematic. Five policy areas reflecting a wide range of contemporary policy concerns were chosen for specific examination:

(1) Policing and surveillance;
(2) Punishment and incarceration;
(3) Urban spaces and the poor;
(4) Migrants and non-citizens;
(5) Public health and infectious disease control.

A case study of the Roma in Europe was also commissioned.

1.1. Approach and Focus

The report approaches the idea of social control in terms of its role in securing conformity with established norms by preventing, adjudicating, remedying and sanctioning non-compliance. It focuses on formal mechanisms of social control that deal with crime, dangerousness, delinquency and other social problems, including the criminal justice system, the health system, the welfare system and urban planning authorities. These are broadly state-centred or privatised functions and operate at national, regional and transnational levels.[1]

A "social control perspective" is valuable to human rights practice insofar as it throws light on the logic underlying the policy and practice of relevant institutions that impose controls and their cumulative impact on human rights. Using such a perspective, this report invites a human rights engagement with questions, such as the following:

- How do changing ideas of crime, criminality and risk shape social policy?

- What purposes do prisons serve in modern society, and why does incarceration continue to be a preferred sanction?

1 For a detailed description of how the concept of "social control" is used in the report, see p. 5, below.

- How are public health and urban planning becoming regimes of discipline and punitiveness?

- How do surveillance and data-gathering technologies order and organise social relations?

Given their significant human rights implications, such questions demand serious attention from human rights advocates.

A social control perspective reviews how a behaviour or activity comes to be constructed as a "social problem" or a "crime". It involves consideration of how these categories are produced and how individuals or their behaviour come to be attributed to them and, ultimately, how methods of intervention are selected. It throws light on the dynamics of the forces that shape attitudes and policy and their relationship with larger socio-political processes and institutions.

Within the context of the policy areas chosen for this project, this perspective focuses attention on policies and patterns that are broadly social rather than narrowly political, including both "new" (such as new technologies of surveillance) and old (such as probation regimes or imprisonment) and the forces that drive changes in governance and social policy (e.g., managerialism, privatisation, transnational transfer, medicalisation).

The report also considers how human rights standards and principles such as equality, dignity, indivisibility and universality might be applied to test and evaluate contemporary social control policies. As a contribution to a continuing debate that involves many communities of practice, the report is written for all who are concerned with human rights, whether they view themselves as human rights advocates or as professionals with an interest in specific areas like public health, urban poverty, policing, penal sanctions, migration, etc.

2. Key findings of the Report: Modes and Patterns of Social Control

2.1. Criminalisation and Sanctions

The influence of the "crime control" model on social policy and the diffusion of an increasingly reductionist view of the criminal justice system (which considers security to be its primary goal) deserve closer human rights scrutiny, especially because they push impoverished and

vulnerable groups onto a slippery slope of management, control and criminalisation. In particular, constructing policy around fear of crime permits a dangerously wide range of state interventions and sanctions based on uncertain criteria and increasing the risk of enforcement being disproportionate, discriminatory and arbitrary.

Increasingly, control measures embedded within civil or administrative law target persons, status or behaviour categorised as social problems (e.g., homelessness, drug use, irregular migration, infectious diseases). While the consequences of controls on individuals vary, the spectrum of behaviour and status subject to controls is widening. It is vital to determine how such controls are enforced and against whom, again, underlining that such policies have differential and significant influences on vulnerable groups. For instance, while the number of laws that explicitly criminalise vagrancy may be in decline, a set of new administrative measures or policies often produce the same effect of criminalising poverty.

There is an urgent need for a human rights–based narrative of crime and criminality and responses to crime. On the one hand, it is critical to monitor the impact of both criminal and non-criminal control measures and to assess them against relevant human rights principles, including tests of proportionality, non-discrimination, reasonableness, least restrictive or intrusive means and non-arbitrariness. At the same time, as those who are poor and disadvantaged are more likely to be criminalised, human rights analyses of crime and criminality must take full account of the way in which crimes, social problems, victims and offenders are socially constructed and their relationship with marginality and structural exclusion.

When it comes to the imposition of sanctions, while the traditional civil liberties approach of focusing on prison conditions remains important to defend, the principle enshrined in human rights law that prison systems should be rehabilitative needs more vigorous advocacy in the face of concerns about the exclusionary nature of contemporary prison and post-prison regimes. There are good human rights grounds to look beyond even rehabilitative treatment models and at a penal philosophy that distinguishes constructive from punitive measures and recognises the importance of social justice.

Non-custodial forms of punishment themselves merit close human rights monitoring, especially because imprisonment remains the norm against which other sanctions, such as Community Sanctions and

Measures (CSMs), are assessed. Such practices must be monitored to ensure that access to them is not subject to questionable assessment of the risks involved and that they do not contain conditionalities that are so intrusive or onerous that there is a high likelihood of violating them for technical reasons leading to more penalties.

2.2. Segregation

Segregating those considered undesirable or dangerous includes the act of imprisonment, but modes of segregation are also embedded in urban planning, treatment of infectious diseases or responses to irregular migration. Societies are being re-segregated using private as well as public means and both judicial and administrative mechanisms. The adoption of risk models and the categorisation of people in terms of dangerousness has had a range of adverse human rights consequences in a number of contexts.

The report stresses that the premise that segregating or confining a significant portion of those presumed dangerous can, by itself, make our society safer is increasingly influencing social policy and criminal justice. Prisons are increasingly becoming warehouses to segregate "undesirable" populations rather than to enable rehabilitation and reintegration, thus rendering imprisonment not just a tool of repression or punishment but also a means to produce and manage marginality.

In a rapidly urbanising world, urban planning practices are promoting the institutionalisation of segregation, crippling social trust and inhibiting the construction of inclusive social network structures, not to mention undermining human rights of poorer populations.

2.3. Surveillance

Focusing on risk has created an insatiable appetite for information on which to base policy and to intensify surveillance. 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.

Contemporary sociological studies of surveillance are valuable from a human rights perspective because they demonstrate a broad concern with surveillance as a means to order, control and manage social relations; as a means of social sorting. Gathering of personal data facilitates convergence and tracking while syndromic surveillance that

compiles health information anonymously contributes to the construction of notions and ideals of normality, furthering control. The involvement of private entities also blurs the distinction between governmental and commercial surveillance.

Human rights monitoring of surveillance can be more effective when it highlights the broader range of concerns and analyses surveillance as a tool of control and social management. Privacy rights are critical, but the range of issues has broadened, and human rights advocacy should take account of this and consider issues such as the interests that public and private institutions, especially corporations, have in using such technologies, their accountability and the use of surveillance technologies in socio-economic contexts that are often very unequal.

3. Key Findings of the Report: Underlying Forces and Contexts

3.1. Political Economy

It is vital to situate social controls within the context of wider political, social and economic forces, state as well as non-state. The mechanisms that legitimate social control are tied to the "political cultures" that shape responses to social marginality. When economic and social policies tend towards exclusion over universal welfare and inclusion, they impose more controls on those at the margins. Polities with greater socio-economic inequalities tend to be more likely to look to the criminal justice system to solve social problems and failures of governance. In many contexts, the increasing privatisation of state functions (particularly the growth of the private security sector) closely tied to an emphasis on managerialism is also critical in determining the nature and consequences of control regimes. Given the overwhelming power and influence of private capital and industry, depending only on state regulation of private actors may be insufficient. The legitimacy of privatising certain criminal justice functions, for example, must be challenged on human rights grounds.

3.2. Transnational and International Regimes

International and transnational regimes (formal and informal) facilitate the transfer of policies and technologies of control. International regimes involve formal co-operation amongst States, often accompanied by an international normative framework; transnational regimes include non-state actors like large global private corporations or even epistemic communities of experts, ferrying knowledge across different spaces.

The complexity and opacity of policy transfer raises serious concerns related to monitoring and accountability.

There are also problems of coherence. The human rights protection regimes in relation to migration or health, for example, have different foundations from those of the International Organisation for Migration (IOM) or the International Health Regulations (IHR), which typically take an approach that constructs their subjects as problems in need of management rather than protection. Despite its significant expansion, the human rights framework receives insufficient attention in global and regional policing and criminal justice regimes, including the United Nations Office on Drugs and Crime (UNODC).

If human rights advocates were to monitor and map regional and global regimes of policy transfer, they could make a significant contribution. This also includes monitoring and mapping of the technologies and know-how that are transferred and the State and non-state actors involved, including private corporations. Beyond seeking to ensure that such policies comply with international human rights standards in a procedural sense, advocates could play a vital role in highlighting the extent to which such regimes are premised on respect for human rights, calling on principles such as equality, universality and indivisibility.

3.3 Risk and Security

Ideas of risk and danger are a major influence on contemporary public discourse and policy at the national, regional and international level. Policing, for example, is increasingly concerned with the prediction and prevention of future criminal acts, which necessarily entails the identification of dangerous individuals via risk profiling. The adoption of risk models has also undermined rehabilitative approaches to punishment in the prison context. “Moral panics” favour the imposition of more liberty-depriving sanctions. They also encourage the erosion of procedural safeguards and the creation of suspect populations in a number of different contexts, from public health to migration policy. An understanding of such panics is important in understanding how ideas of security, protection and victim rights can themselves generate and perpetuate control mechanisms that undermine rights.

There is a need for a stronger human rights narrative to counter the argument that increasing controls are justified on grounds of security. Human rights advocacy needs to interrogate risk claims that are advanced to justify the imposition of restrictions and controls to ensure they do not

mask a failure by the State to fulfil its wider human rights responsibilities. It is also important to recognise the danger that "securitising" rights (i.e., grouping a range of human rights under the rubric of security, as embodied in ideas like human security) presents.

4. Additional Conclusions

The report suggests that there are key areas in which the human rights movement could deepen its analysis of the underlying forces that shape controls. The way in which human rights abuses result in the imposition of controls and the way in which those controls themselves violate human rights warrant equal attention.

In seeking to limit the negative impact of controls and to strengthen the benefits they may bring, human rights advocacy can draw on principles governing limitations on the exercise of rights that exist in international human rights law (i.e., proportionality, non-discrimination, reasonableness, least restrictive or intrusive means, and non-arbitrariness) and apply these to the exercise of controls. With regard to the State's positive duty to protect and its negative duty to refrain from abuse, the principle of non-discrimination, in particular, can be applied to highlight the differential impact of policies of control on access to social and economic as well as civil and political rights. The principle of non-discrimination can also help signal policies disproportionately targeted at the socially and economically vulnerable. In the context of drug use and drug dependence, the harm reduction approach serves as an example of how the principle of the least restrictive or least intrusive means might be used in other contexts to prevent policies of control that restrict rights.

At the same time, the political and social forces that influence modes of control and how they are imposed could themselves be challenged with principles of universality, equality and indivisibility. The aim of this project is to encourage co-operation in this endeavour between human rights advocates, social scientists, social policy analysts, practitioners, political activists and others.

INTRODUCTION

This report is the outcome of an enquiry into the human rights implications of contemporary patterns of social control – how laws, policies and administrative regulations define, construct and respond to people, behaviour or status defined as "undesirable", "dangerous", criminal or socially problematic. Some of these patterns are not new and are the subject of much research and theory. However, a considerable gap exists between those engaged in research and theory and those engaged in human rights advocacy and policy. This report seeks to bridge that gap.

The five policy areas chosen for examination reflect a wide range of contemporary policy concerns. The ICHRP commissioned research papers on each area as well as a case study of the social controls experienced by the Roma in Europe. Authors were chosen for their interdisciplinary background in human rights, criminology, sociology, social work, public health, migration, urban planning and law. Their research and papers provide the foundation of the analysis in this report.

Policy Areas and Authors of Research Papers

- *Policing and Surveillance*, Stephane Leman-Langlois[2] and Clifford Shearing[3];
- *Punishment and Incarceration*, Fergus McNeill[4] and Richard Sparks[5];
- *Controls on Migrants and Non-Citizens*, Pia Oberoi[6];
- *Public Health and Infectious Disease Control*, Wendy Parmet[7];

2 Professor of Criminology, École de service social de l'Université Laval, Canada and Researcher, International Centre for Comparative Criminology (ICCC).

3 Director of the Institute of Criminology, Law Faculty, University of Cape Town.

4 Professor of Criminology and Social Work in the Glasgow School of Social Work.

5 Professor of Criminology, Edinburgh Law Schools and Co-Director of the Scottish Centre for Crime and Justice Research.

6 Currently with the Office of the High Commissioner for Human Rights, she has worked on migration and refugee issues with Amnesty International and Forum Asia.

7 Professor of Law at Northeastern University, Boston, USA.

- *Urban Spaces and the Poor*, Miloon Kothari[8];
- *Roma Case Study*, Claude Cahn[9].

The individual research papers are not reproduced in print as part of this report but are found electronically at the ICHRP website[10] or on the CD-ROM accompanying the printed report.[11] Individual papers are referred to throughout this report by the authors' name(s): e.g., *Cahn*.

A Note on Approach and Focus

The report is written for all who are concerned with human rights, whether human rights advocates or professionals with an interest in specific areas like public health, urban poverty, policing, penal sanctions, migration, etc. It invites all to consider the value of a social control perspective in engaging with the logic underlying the policy and practice of relevant institutions in these areas, and their cumulative impact on human rights.

The project locates key concerns about a range of contemporary policies revealed by a social control analysis and attempts to understand their implications from a human rights point of view. The report invites those engaged in human rights protection to consider the value of using a social control perspective to engage with the logic underlying the policy and practice of relevant institutions and their cumulative impact on human rights. It looks at how changing ideas of crime, criminality and risk shape social policy, extending the traditional concerns of human

8 Co-ordinator, South Asian Regional Programme of the Habitat International Coalition's (HIC) Housing and Land Rights Network and former UN Special Rapporteur on the right to adequate housing.

9 Currently Human Rights Advisor to the UN in Moldova, formerly Global Advocacy Director of Committee on Housing Rights and Evictions (COHRE) and Programme Director of the European Roma Rights Center (ERRC).

10 www.ichrp.org.

11 Because the paper on Urban Spaces and the Poor was incomplete at the time of printing, it is not included on the CD-ROM accompanying the printed report. Issues raised in a draft of the paper, and ICHRP research on this subject, are referenced.

rights advocates[12] to ask, for example, what purposes prisons serve in modern society and why incarceration continues to be a preferred sanction or how public health and urban planning are becoming regimes of discipline and punitiveness. Having discussed these questions and others, it goes on to suggest that because these concerns have significant human rights implications, those involved in human rights advocacy and policy need to engage with them more seriously.

Even though this report considers examples from the global South, it focuses largely on the global North. This is partly because much of the social control theory and literature focuses on countries of the global North, largely owing to the disciplinary history – the practice of critical sociology (discussed below) being more "inward" looking (unlike anthropology, for example). This focus is also deliberate for two reasons:

(1) Because even while many countries in the global North are home to relatively well-developed mechanisms for human rights protection, they are also progenitors of new forms of social control that, as this report argues, undermine these very protections;

(2) Because state and non-state institutions in the global North export ideas, policies and technologies of control and significantly influence the direction of policy in other regions.

Finally, yet importantly, this report gives the criminal justice system most attention because sanctions that have the most drastic consequences for individual life and liberty are often applied through the criminal justice system and also because criminal justice systems are expanding and influencing social policy in many ways with significant human rights implications. The report explores the interaction of criminal justice systems with activities and behaviours that lie at the edge of criminal law.

Structure of the Report

Part I introduces the idea of social control and shows how the human rights regime intersects with it in both theory and practice. It clarifies

12 We cannot speak of "human rights" as a homogenous discourse or of the "human rights movement" as an undifferentiated community of practice, nor are agreements and disagreements always binary in form (North–South, or national–international, for example). Moreover, because human rights advocates come from different political and disciplinary contexts, the approach taken in this report will naturally be more familiar to some than to others.

conceptually the themes that follow and outlines key continuities and changes in social control practices in recent decades. It concludes by highlighting some tensions and complementarities between human rights and social control and by considering how the two perspectives might enrich each other.

Parts II and III analyse cross-cutting themes that emerged from the research papers, the ICHRP's own research and discussions held during the course of the project. These are divided into dominant *modes and patterns of social control* and the *underlying forces and contexts* that shape them.

Modes and patterns of social control (Part II) are grouped under three broad categories:

- Criminalisation and pre-emptive controls;
- Segregation;
- Surveillance, policing and data-gathering technologies.

Underlying forces and contexts (Part III) are subdivided into the following:

- Issues of political economy and governance;
- The impact of discourses of risk and danger;
- Transnational and international regimes and policy transfer.

Part IV examines the implications of contemporary modes and patterns of social control for human rights policy and advocacy. It highlights some of the broader challenges facing human rights advocacy and policy and suggests how human rights principles and norms might be employed in response. It points to the importance of developing a human rights narrative to think anew about crime and responses to it. It also addresses important questions with respect to dominant regimes of sanctions and punishment, the challenges posed by increasing segregation in a range of contexts and dilemmas associated with protection and victims' rights discourses.

I. SOCIAL CONTROL AND HUMAN RIGHTS

1. What Is Social Control?

In sociological dictionaries, "social control" is defined to include all social processes, institutions and methods that produce (or attempt to produce) conformity or regulate the individual and collective conduct of its members.[13]

This report considers social control in terms of its role in securing conformity with established norms by preventing, adjudicating, remedying and sanctioning non-compliance. It focuses on intentional, planned and programmed responses by state authorities and corporations to activities, behaviours or status that are perceived to be criminal, problematic, undesirable, dangerous or troublesome. The anchors of this form of social control are institutions that deal with crime, dangerousness, delinquency and other social problems, including the criminal justice system, the health system, immigration and border control, the welfare system and urban planning authorities.

For purposes of human rights policy, this enquiry is concerned with:

- Forms of social control that are state-centred: criminal justice (criminal law, policing, courts, prisons) and other systems of legal and administrative regulation (e.g., immigration controls, welfare, urban planning);

- Privatised systems of formal social control and security, such as private prisons or policing;

- National, regional and global regimes of control and regulation (e.g., IHR, the IOM, Europol);

- Less explicit but significant social control dimensions of other state or non-state institutions, such as the media or institutions engaged in education, planning, and health and welfare.

The report gives little attention to forms of informal social control that are "outside" the State's purview (such as socialisation, shame, gossip,

13 Such definitions are both too broad for the purposes of this report – they cover anything from infant socialisation to public execution – and too abstract. The report therefore does not use "social control" in this universal or anthropological sense.

public ritual, peer pressure). The importance of such measures and of related non-state actors is undeniable, but it was beyond the scope of this research to look at them in any detail.

The report and the research on which it relies draw on an approach to social control that can be traced back to "critical" or "radical" sociology at the end of the 1960s.[14] It will be referred to as "social control theory" or as the "social control perspective".

The approach adopts a social constructionist analysis of social problems. It assumes that social problems consist of an "objective" condition (e.g., the existence of homeless people, undocumented migrants, sexual offenders) and also a "subjective" condition (i.e., the *perception* that certain behaviours are undesirable or threaten dominant values or interests). A social problem goes through stages of "claims-making" which run from the initial creation of a problem to its categorisation (e.g., as a crime, an illness, a human rights violation) to a method of intervention (punishment, treatment, or political action).

For example, consider the category of "anti-social behaviour" in the United Kingdom (UK). The Crime and Disorder Act (1998) declares that behaviour causing (or likely to cause) "...harassment, alarm or distress to one or more persons…" can be characterised legally as anti-social. The *anti-social* character of an act does not lie in the act itself but in the reaction of others to it. *Parmet* signals how important it is to understand the social construction of risk, and address it in policy, arguing that "public health theory and international law overlook the role that social factors play in determining the nature and extent of health risks, as well as how risks are perceived and what interventions are chosen".

A social control perspective questions how a behaviour or activity comes to be constructed as a social problem or crime and seeks to throw light on the forces that shape attitudes and policy formation, shifts in those forces, and their relationship with larger socio-political processes and institutions.

"Naming" a category can be controversial. This is clear from discussions of prostitution, where the descriptors "women in sex work", "women in the sex trade", "sex workers", or "commercial sex workers" each imply

14 For guides to this approach, see Cohen (1985) and Blumberg and Cohen (eds.) (2004). For a current introduction, see Innes (2003).

different, often nuanced understandings that reflect distinct worldviews and political or moral positions. Use of the term "irregular migrant" rather than "illegal migrant", or "person who uses drugs" versus "drug abuser" can be significant in exactly the same way.

Once categories have been created, people and behaviours must then be attributed to them. An important aspect of subjective attribution is that at different times and in different places the same behaviour may be perceived and responded to in quite different ways. A psychologist working with sex offenders in the US, commenting on changes of attitude (that now a 17-year-old teenager who has sex with his 15-year-old girlfriend or a drunk who exposes himself in public may be categorised as "sexual predators", whereas a man exposing himself on a popular TV show was once considered funny) wonders how we come to "fear and hate what we once found pathetic or even humorous".[15]

Categorisation determines who is labelled as criminal or dangerous, and this judgment is then liable to be articulated in criminal law and governance practices.[16] A vast apparatus of procedures, personnel, expertise and organisations is now devoted to the selection and application of judicial and non-judicial controls to identify people and behaviours that fit categories ("rule enforcement"). Some agencies that do this work have long been the focus of human rights attention, including the police, immigration and border control authorities, and parts of the criminal justice system. Others (e.g., welfare agencies, the health service, urban planners) have been scrutinised far less. These institutions increasingly employ private agencies to whom States have devolved the delivery of certain services.

Individuals or groups may be regulated by or subject to social controls because their existence is perceived to be threatening or to lie outside the dominant norms of society: they are considered deviant or dangerous, not necessarily for what they have done, but because of who they are or the traits they possess. Non-compliant behaviour or status, or its consequences, may be considered criminal, deviant, or a

15 A Letter to the Editor of the *Reno Gazette-Journal* in Nevada, USA, from Steven Ing, a psychologist. Available on file.

16 The research papers refer to this process in different contexts. *Oberoi* refers to the role that human rights law plays in categorising migrants, refugees and others, for example, while *Leman-Langlois and Shearing* refer to the enlargement of categories of people subject to surveillance.

social problem, or even a human rights violation[17] and may be subject to measures of social control as a result.

In *Visions of Social Control* (1985), Stanley Cohen traces four key changes in modes of social control that occurred in the course of the nineteenth and the mid-twentieth centuries:

- 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;
- Policy focused on changing the hearts and minds of offenders rather than on infliction of physical suffering.

In the 1960s, a counter-discourse emerged, which, according to Cohen, called for decentralisation, deprofessionalisation, decarceration and decriminalisation. Such "destructuring" movements downplayed due process in favour of non-intervention, inclusionary controls and pursuit of alternative correctional justice mechanisms. Cohen and other scholars have documented that this movement had the unintended consequence of excluding targeted groups because the alternative measures of control they espoused did not replace but only complemented the criminal justice system. As a result, the range of controls to which people could be subject broadened. An upsurge of interest in the rights of people who became enmeshed in the criminal justice system (particularly in the penal context), apparent in the second half of the 20th century, was overtaken during the 1990s and early 21st century by a preoccupation with risk. Concern about the risks that crime poses to potential victims caused a significant shift in social control practices. Governments focused increasingly on finding effective forms of control and crime prevention and paid less attention to the causes of crime and deviance. Social control today is characterised by the following features:[18]

17 As discussed later in this report, human rights violations and abuses are also socially constructed. The international human rights law framework defines human rights violations and abuses, but interpretations of these definitions constantly change and develop, reflecting socio-political, moral and other factors.

18 Blumberg and Hay (2007).

- Continued expansion of exclusionary practices, especially detention (often referred to as "hard" measures), including imprisonment in a criminal context but also civil commitment for mental illness or drug dependence, detention for irregular migration, etc.;

- Continued expansion of inclusionary practices ("soft" measures), such as CSMs, electronic tagging, home confinement, etc.;

- Emergence of pre-emptive inclusionary controls, notably the use of surveillance;

- Justification of the above policies in terms of protecting the public from crime, immigration and insecurity more generally (especially after the terrorist attacks in the US in September 2001).

Groups may be subject to social controls because they are perceived as a threat or abnormal, considered deviant or dangerous, not necessarily for what they have done, but because of who they are or the traits they possess.

2. Human Rights and Social Control: Tensions and Complementarities

The over-riding aim of the project (as reflected in the research papers) is to view contemporary modes and patterns of social control from a human rights perspective. The human rights edifice, however, can itself be viewed as a form of social control. It seeks to regulate the exercise of power, mainly by the State, but in so doing it creates new forms of deviance and crimes (e.g., human rights violations and abuses, crimes of the State, crimes against humanity) and new deviants and criminals (e.g., perpetrators, abusers, war criminals). Similar social processes are at work (rule creation, rule enforcement and state-approved punishment of rule breakers) in the regimes of both social control and human rights. In both cases, rule creation is a form of social construction.

The most concrete and best-known form of rule creation is criminalisation. There are a number of ways in which human rights relate to criminalisation:

- It categorises behaviour that had previously been normalised or tolerated (e.g., domestic violence, torture) as a "human rights violation";

- It advances values that can be used by others to support either criminalisation or decriminalisation;

- It promotes both decriminalisation (e.g., of HIV status or homosexuality) and criminalisation of particular actions (e.g., abuse or discrimination);

- It regulates and limits state authority to construct laws or enforce norms (e.g., it restrains surveillance by asserting the "right to privacy").

Positions have also changed over recent history. For instance, human rights advocates were originally wary of state intervention in general. This was loosely in line with the destructuring movements of the 1960s (as described above). Whole areas of life were variously declared as "private", "not the business of the State" or "crimes without victims" (e.g., homosexuality, drug-taking, alcohol abuse, abortion, pornography, gambling). The extension of criminal law into these areas was seen as ineffective, corrupting, expensive, criminogenic and abusive of civil liberties.

By the 1980s, however, the emphasis radically changed. The progressive impulse was towards the stronger enforcement of some existing laws or the creation of new laws. The early libertarian streak was denounced for its unwitting support for conservative roll-back of the State; applying the concept of "victimless crime" to such areas as pornography was criticised, and there were calls for widening the criminalisation of sexual abuse and domestic violence; and "new" victims were found (of state violence, corporate greed and environmental damage). More generic terms like "abuses of power" or "crimes of the State" became common. Methods of social control became increasingly judged in terms of preventing harm and damage, achieving social justice and conformity to universal human rights standards. Human rights campaigns have raised the visibility of "gross violations" such as war crimes, genocide and torture and also (more recently) offences of discrimination and violence perpetrated by non-state entities, such as multi-national corporations. 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. Social movements have increasingly come to use successful criminalisation (i.e., rule creation) as a more general index of success.

The role of criminalisation is further discussed below[19] in the overall repertoire of social control; however, generic categories of "gross violations of human rights" or "crimes of the State" are not further discussed. The research focuses more on "ordinary crime" (i.e., offences primarily committed by individual citizens against each other,

19 See p. 13, below.

such as theft, violence, or sexual abuse, or against the government in an abstract sense, such as breach of immigration rules or regulations concerning movement) rather than "political crimes".

In its formative years, the international human rights movement concentrated primarily on abuses defined in the political context of the Cold War; it was primarily concerned with violations of civil and political rights and claimed neutrality about the contested political conflict itself. Human rights values were seen as somehow "transcending" political ideology and choices, and advocates identified specific abuses and campaigned to remedy them.

Human rights organisations today have widened their remit beyond civil and political rights to include social, economic and cultural rights. They have also engaged more with the root causes of human rights violations and the status of human rights as a social problem. Many observers within and outside the human rights community welcome this widening of theory and practice.[20]

This report invites human rights advocates to deepen analysis of and engagement with policies and patterns that are broadly social rather than narrowly political. This includes both "new" ones (e.g., new technologies of surveillance) and old ones (e.g., probation regimes, imprisonment). It also includes the forces that drive changes in governance and social policy (e.g., managerialism, privatisation, transnational transfer, medicalisation).[21]

Conversely, theorists and practitioners of social control are invited to consider how human rights standards and principles such as equality, dignity, indivisibility and universality might be applied to test and evaluate contemporary social control policies.

20 Gearty (2008) and Douzinas (2007).

21 The research papers (available at either www.ichrp.org or on the CD-ROM accompanying the printed report) discuss in detail many specific problems that merit closer human rights scrutiny.

II. MODES AND PATTERNS OF SOCIAL CONTROL: CRIMINALISATION, SEGREGATION AND SURVEILLANCE

Introduction

Part II explores the dominant *modes and patterns of social control*, and the *underlying forces and contexts* that shape them are discussed in Part III. It is worth stressing that the connections between "modes and patterns" and "underlying forces" are complex and, in many instances, even circular.[22]

Modes and patterns of social control have been grouped into three broad categories, which will be discussed below:

- Criminalisation and pre-emptive controls;
- Segregation;
- Surveillance, policing and data-gathering technologies.

1. Criminalisation and Pre-emptive Controls

The increasing use of criminal law and allied administrative mechanisms to address social problems and the stress on security, widely noted, is central to this discussion. The influence of the "crime control" model on social policy, and the diffusion of an increasingly reductionist view of the criminal justice system that considers security to be its primary goal deserve closer human rights scrutiny, especially because current policies tend to push impoverished and vulnerable groups onto a slippery slope of management, control and criminalisation.[23]

22 For further elaboration in specific policy contexts, please refer to the research papers at www.ichrp.org or on the CD-ROM accompanying the printed report.

23 Peay (2007).

Box 1. The Criminalisation of Poverty

In the city of Winnipeg, **Canada**, a 1995 by-law provided for the imposition of a $1,000 fine or six months in jail for offences of public begging. In 1999, Ottawa 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 firm evidence that the streets had been made safer but concluded that income-generating opportunities for homeless youth had declined, that their shelter was demonstrably worse and that "squeegee boys" had merely been displaced to less desirable areas of the city.[1] 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.[2] Under Darwin's bylaw 103, it became an offence to sleep in public at any time between sunrise and sunset. New South Wales repealed its "means of support" Act in 1979, which had criminalised 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[3] and the Conference of City Mayors[4] have concluded that the trend towards criminalising homelessness appears to be growing. They have documented a number of regulations that prohibit "camping" in public spaces and other activities, including lying on benches.

Swiss courts have ruled that "begging is not a right" and that cantonal laws against it are permissable in the interests of public safety and "tranquillity".[5] As of April 2008, police have authority to enforce spot fines drawn directly from a beggar's takings.[6] Swiss law also provides for deportation of foreigners who lack the means to support themselves.[7]

In **Brazil**, police may arrest individuals who do not have identity cards on them for "vagrancy" and may hold such individuals in custody almost indefinitely.[8]

In **India**, "ostensible poverty" continues to be grounds for arrest, especially of beggars but also of homeless working populations.[9] In Mumbai, India's commercial capital,

1 Skinnider (2005).

2 Walsh (2003).

3 National Coalition for the Homeless (2004).

4 The United States Conference of Mayors (2008).

5 genevalunch.com/2008/05/22/begging-is-not-a-human-right-says-swiss-judge.

6 genevalunch.com/2008/04/08/geneva-police-begin-fining-beggars-on-the-spot.

7 genevalunch.com/2009/01/15/geneva-rounds-up-romanian-beggars-bern-hits-out-at-racists.

8 Wacquant (2008b).

9 For more on this, see Ramanathan (2008).

almost 80% of persons arrested under the Bombay Prevention of Beggary Act 1959 come from homeless working populations. Their only crime is to have been found sleeping on the pavements or in other public places.[10]

10 Based on primary research conducted by Koshish, a field action project of the Tata Institute of Social Sciences. Personal communication.

1.1. The Widening Scope of Crime and Crime Control

Criminal and civil law increasingly focus not just on crime but on insecurity more generally in what has been described as a "pre-crime" society.[24] Within the European Crime Prevention Network established by the EU Council of Ministers, 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".[25] United Nations (UN) Guidelines for the Prevention of Crime state that "'crime prevention' comprises strategies and measures that seek to reduce the risk of crimes occurring, and their potential harmful effects on individuals and society, including fear of crime, by intervening to influence their multiple causes".[26] While this may not appear problematic in itself, the discussion that follows will highlight the dangers of over-emphasising crime prevention, especially to address general feelings of insecurity, risk of crime, fear of crime (all of which combine to justify the surveillance, control and criminalisation of an ever widening array of actions, behaviour and statuses).

The UNODC considers itself at the forefront of the battle against "uncivil society".[27] 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".[28] Anti-social conduct is perceived to be not just a *precursor of crime* but to transcend it, linking other problems (e.g., housing, education, employment and citizenship) with crime and security.[29] Effective action to control anti-social conduct is

24 Zedner (2007).

25 Council of the European Union (2001), as referred to in Hornqvist (2004).

26 www.e-doca.eu/content/docs/UNguidelines.pdf.

27 UNODC (2008).

28 Hornqvist (2004).

29 Crawford (2007).

believed to require a policy response that extends well beyond criminal justice and formal policing. The mix of civil and criminal procedures has significant consequences for human rights protection, not least for the principles of due process and proportionality.

1.2. Impact on Due Process Safeguards and Other Human Rights Principles

Constructing policy around fear of crime permits a dangerously wide range of state interventions and sanctions, based on uncertain criteria. This increases the risk of enforcement being disproportionate, discriminatory and arbitrary. This is referred to as "pre-emptive" control,[30] which should not be confused with preventive detention in which the *mens rea* of the accused needs to be ascertained. Human rights advocates have given attention to pre-emptive controls, especially those that target alleged terror suspects, but *Parmet* (with respect to infectious disease controls) and Tsoukala[31] (with respect to football control orders and controls on immigration within the EU), *inter alia* argue that the effects of more general risk-based legal controls should be examined more deeply. Through profiling and other techniques, which directly or indirectly lead to criminalisation, pre-emptive controls cover an increasing range of behaviours. For example, a proposal was recently made to amend the Police and Criminal Evidence Act in England and Wales to allow an arrest 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." In response, the human rights organisation Justice argued, "a person's fear – which may be entirely unreasonable and unfounded – should not result in the limitation of another person's rights".[32]

Constructing policy around fear of crime permits a dangerously wide range of state interventions and sanctions based on uncertain criteria. This increases the risk of enforcement being disproportionate, discriminatory and arbitrary.

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

30 Zedner (2007).

31 Tsoukala (2008).

32 Justice (2008).

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 wrong-doing. 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.*[33]

While the spectrum of offences covered is wide (from misdemeanours in a stadium to major "crimes") and the consequences of the restrictions for the human rights of individuals also vary, the constant creep of controls is of concern. It is vital to monitor how such controls, even seemingly innocuous ones, are enforced and against whom.

The constant creep of controls and the spectrum of offences covered are both of concern. While the consequences of the restrictions on rights vary widely, it is vital to monitor how such controls, even the more innocuous ones, are enforced and against whom.

The new controls combine administrative, civil and criminal authority and expand police discretionary powers. They are often defined as civil in nature and thereby avoid the obligation to respect due process. Infractions of civil law and regulations often invite criminal sanction, especially when they are associated with behaviours or status not in themselves criminal but characterised as polluting (dirty), unsafe or dangerous, often leading to a "punitive criminal response, particularly where it is enforced in conjunction with a zero-tolerance approach to policing."[34] This is generally the case with, for example, homelessness, drug use, "anti-social" conduct or undocumented migration. *Oberoi* points out that non-nationals, especially poor migrant workers, are particularly vulnerable to control through criminalisation and exclusion. She documents the ways in which irregular migrants are criminalised for administrative infractions, such as crossing a border without authorisation, remaining in a country without authorisation or breaching the conditions of a visa. This practice has been criticised by the UN Special Rapporteur on the Human Rights of Migrants, who calls it

33 www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/128/12803.htm.

34 Phil Lynch in "Teachers with Criminal Records: Begging", The Law Report, Broadcast on 22 February 2005, Radio National, Australia, transcript on file.

disproportionate and counter-productive;[35] by the UN Working Group on Arbitrary Detention, which states 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",[36] and by the Office of the UN High Commissioner for Human Rights, which has declared that "[T]he mere fact of being at odds with immigration procedures does not mean that the irregular migrant is a criminal".[37]

1.3. Impacts on the Vulnerable

Embedding control measures within civil or administrative laws that target persons, status or behaviour that are categorised as social problems (e.g., homelessness, drug use, irregular migration) is increasingly common. For example, while the number of laws that explicitly criminalise vagrancy may be in decline, a range of newer administrative measures and policies (such as zero-tolerance policing) often produce the same effect of criminalising poverty (see Box 1). Current youth control policies in England and Wales, for example, address a range of behaviours that are associated with risk factors linked to economic and other forms of deprivation.[38] Many older anti-vagrancy laws were open to constitutional challenge because they criminalised socio-economic status rather than specific behaviour. More subtle forms of criminalisation have succeeded their repeal: so-called "civility laws" (such as anti-social behaviour orders) that prohibit specific behaviours and zoning laws that exclude from particular spaces persons who behave in prescribed ways or who match a certain status, such as being homeless.[39]

35 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 continued: "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.

36 Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, 18 December 1998.

37 OHCHR (2008). See also, ICHRP (2010).

38 Muncie et al. (eds.) (2009), p. 12. The authors provide a list of risk factors identified by the UK Home Office in 2008 purporting to explain predispositions to anti-social behaviour. They include economic marginalisation and location in places where unemployment is high, public facilities are poor and a high proportion of people live in poverty.

39 Beckett and Herbert (2008).

The urban poor who are homeless or lack secure accommodation are especially vulnerable because "behaviour that would otherwise be routine and lawful if performed in a home can suddenly become unlawful."[40] In the words of a homeless man in New York:

> *Homelessness means that you are forced to carry out life-sustaining activities, such as sleeping, or using the toilet, in public spaces. Simple acts, which persons who are not homeless do with impunity, like drinking beer in public is criminalized, and becomes a topic of 'selective enforcement' … The worst-case scenario is when I am unjustly victimized by police, who arbitrarily confiscate my cans, my work, and ticket or arrest me so I am excluded from public housing, employment and voting.*[41]

It is no surprise, then, that homeless people are disproportionately represented in the criminal justice system.

Parmet observes that infectious diseases are considered to be "social threats" because they infect and harm communities, but their ability to do so is largely determined by a range of social and economic factors (e.g., trade and travel, deforestation, poverty, levels of urbanisation, conditions of sanitation and behaviour patterns). *Parmet* recounts that in the late 1980s and early 1990s, New York City faced an epidemic of multi-drug-resistant tuberculosis, which was attributed variously to the HIV epidemic, cuts in public health programmes, lack of universal healthcare, and increases in homelessness and incarceration. However, the public debate focused largely on "undeserving" individuals who failed to take their medication and put innocent people at risk. The authorities responded with measures that forced people to take their medication (using methodologies like "directly-observed therapy") and threatened with detention those who did not comply. Ninety percent of those so detained were from minority populations and 60% were homeless. Many had substance abuse problems or had spent time in prison. Thus, those most at risk became those perceived as most dangerous.

In other contexts, "exceptional measures", introduced to address crime or anti-social behaviour that the criminal justice system appears

40 Tinkler (2007).

41 Testimony from Jean Rice, a homeless man from Harlem, New York, included in the report of the UN Special Rapporteur on Extreme Poverty's visit to the US in 2005, UN Doc. E/CN.4/2006/43/Add.1, para. 37.

unable to deal with swiftly, begin to resemble "social cleansing".[42] An example is the rounding-up of beggars or homeless persons before important sporting or political events. *Cahn* points out that in many cases individuals may be considered socially undesirable simply for being Roma and, as a result, may be exposed to various risks and threats and subject to controls, especially on their movement and residence. In India, a number of provisions continue to exist, a legacy of British rule, in ordinary criminal law to effect preventive detention. The Criminal Code of Procedure (section 41(d)) and the Bombay Police Act (section 122) permit a police officer to arrest a person if, in the officer's opinion, he or she is found under "suspicious circumstances" or is likely to commit an offence. These powers have been found to be grossly misused by police to clear public places of "unwanted elements".[43] There were numerous reports from India at the time of the 2009 Parliamentary elections of the preventive detention of hundreds of people on security grounds, large numbers of whom were said to be young migrant workers who have no permanent residences seeking employment in cities.[44]

2. Segregation

The segregation of offenders in prisons is an exemplary form of institutionalised exclusion, whose legitimacy is recognised in principle even in human rights law. Practices of incarceration are referred to in *Sparks and McNeill*, but all the research papers refer to segregation, *de facto* and *de jure*, its exclusionary consequences and its use to deal with marginality in different contexts.

The first point concerns over-incarceration and the abuse of legitimate means of segregation. Some 10 million people are incarcerated by the world's criminal justice systems. The US imprisons 760 out of every 100,000 of its national population. About 1% of its adult population is currently in prison; one in every nine young black American men is behind bars; African-Americans comprise more than half of all prisoners.[45] By comparison, 592 out of every 100,000 people are imprisoned in the

42 In Latin American countries such as Guatemala the term referred to the extrajudicial, summary or arbitrary executions by state security forces of gang members, criminal suspects and other social "undesirables". See Human Rights Watch (2008).

43 Personal communication by Dr. Vijay Raghavan, Tata Institute of Social Sciences, Mumbai, India.

44 Asian Human Rights Commission (2009). The Election Commission itself reported that 373,861 people had been "booked under various preventive sections" during the election process. Election Commission of India (2009).

45 Simon (2009).

Russian Federation, 324 in South Africa, 253 in Brazil, 155 in England and Wales, and 78 in Sweden.[46] As *Sparks and McNeill* ask: why is imprisonment or confinement "the most global of modes of state punishment today?" What functions and interests does it serve?

Sparks and McNeill note that where relevant research exists, it overwhelmingly shows 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. This highlights the way in which institutions of control (from social services to the prison system, as well as post-incarceration regimes) are both a cause and symptom of human rights violations.

Criminal justice policy is increasingly driven by fear of crime, management of risk and incapacitation rather than rehabilitation and reintegration.

The UN Working Group on Arbitrary Detention has noted with concern the gross over-representation of "certain ethnic or social groups" in the prison population of 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 members of these vulnerable groups, significantly contribute to their over-representation in the penal system.*[47]

In its General Comment 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the UN Committee on the Elimination of Racial Discrimination expresses similar concern at the disproportionate punishment of racial groups. It recommends that one of the factual indicators that should be used to establish the

46 Figures as of October 2010 from the International Centre for Prison Studies, Kings College. Available at: www.kcl.ac.uk/depsta/law/research/icps/worldbrief/.

47 Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7.

existence of racial discrimination in the criminal justice system is:

> *... the proportionately higher crime rates attributed to persons belonging to [such groups],*[48] *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.*

In its 2006 report, the UN Working Group on Arbitrary Detention includes a section on "over-incarceration".[49] It acknowledges 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 goes on to comment (para. 63) 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.*

It has been argued that the idea of incapacitation underpins US penal policy with imprisonment used not just as a tool of repression or punishment but as a means to produce and manage marginality by segregating an 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.[50] Indeed, as Box 2 indicates, punishment through various forms of exclusion continues even after imprisonment.

Sparks and McNeill's findings, which are borne out in other research, show that criminal justice policy (and prison policy in particular) is increasingly driven by fear of crime, management of risk and incapacitation rather than rehabilitation and reintegration (as envisaged in international human rights law). The result is segregation and

48 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".

49 Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7.

50 Wacquant (2008a). See also Shearing (2001).

exclusion or forced inclusion into a "prison-industrial complex".

Parallels have been drawn between the domestic penal policies of the US and the approach it adopted in the context of the "war on terror". Both "share … the premise that confining a significant portion of those presumed dangerous can by itself make our society safer".[51]

Box 2. The Exclusionary Consequences of Imprisonment

In the US, 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 was introduced as part of the US government's "war on drugs". The Sentencing Project, a national research and advocacy NGO in the US, 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."[1] This is indeed a "trajectory of failure",[2] a "delegitimisation of civil citizenship" for those caught up in the criminal justice system, even when they remain citizens, at least in name.[3] Many prisoners, such as those in the US and the UK, who lose their right to vote while imprisoned (and in the case of two remaining US States even after release following felony convictions), face exclusion from political society. Human rights judgments have so far fallen short of calling for an end to the political disenfranchisement of prisoners, even though it contradicts the rehabilitative ideal.[4]

1 Allard (2002).

2 Peay (2007).

3 Caldeira (2000).

4 The Committee on the Elimination of Racial Discrimination has described the disenfranchisement of prisoners in the US as a punitive policy in the context of disproportionate imprisonment of racial and ethnic minorities. See, for example, Concluding Observations of the Committee on the United States of America, UN Doc. CERD/C/USA/CO/6, para. 27. The European Court of Human Rights has criticised the UK's sweeping ban on the right of prisoners to vote but failed to treat it as a right that cannot be restricted. See www.guardian.co.uk/world/2010/mar/09/prisoners-vote-general-election-europe.

51 Simon (2009).

The adoption of risk models and the categorisation of people in terms of dangerousness has had a range of consequences in a number of contexts. These policy approaches have re-segregated societies, using private as well as public means and both judicial and administrative mechanisms.

Sex offender registries provide a popular form of segregation in the US and UK. Sex offenders continue to be listed after completion of a sentence, and listing triggers exclusion from employment, residence, access to healthcare and other services and separation from family.[52] In Miami, a local law prohibits those found guilty of sexually abusing minors from living within 2,500 ft (760 m) of anywhere where children congregate, such as schools, libraries and parks. Having found that "there was virtually nowhere else for these people to live", Florida's correctional authorities subsequently "began dropping them off" under a causeway bridge where they were forced to live in squalid conditions without any programme of reintegration.[53] Tracing the history of how practices such as removing sex offenders from society came to be legitimated, La Fond points to the "death of the rehabilitative ideal" in criminal justice in favour of a punitive model that paves the way for a "deliberate misuse of the therapeutic state for social control".[54] In Washington, this led to a sexual psychopath law in 1990 that has enabled virtually lifelong preventive detention for potentially violent sexual predators, using a medical model of involuntary commitment.[55] Responding to sexual offences, especially serial offences, poses complex policy challenges in terms of rights of victims and survivors as well as offenders. However, responses that are punitive and segregationist, even if popular, are not necessarily effective or helpful and have serious human rights implications.[56]

52 For an analysis of these registration requirements and other concerns, see Human Rights Watch (2007b).

53 See news.bbc.co.uk/2/hi/americas/8110356.stm, June 2009. Sex offender registries often include teenagers convicted of sex with willing younger classmates. For an example from the US State of Georgia, see www.ajc.com/opinion/content/opinion/stories/2008/02/28/offender_0228.html.

54 La Fond (1991–1992).

55 Ibid.

56 In 2010, a campaign was initiated in Switzerland to force a referendum to bring back the death penalty (abolished for civilian criminal cases in 1942) for murder involving sexual abuse, particularly of children. *Swiss campaign for referendum on death penalty begins*, BBC, August 24 2010. Available at: www.bbc.co.uk/news/world-europe-11075346.

Parmet describes the numerous restrictions on movement, including isolation and quarantine, imposed on immigrants and travellers suspected of carrying disease. In the US and South Africa, policies respectively designed to isolate individuals with multi-drug-resistant tuberculosis and extensively drug-resistant tuberculosis caused ill people who did not pose the same public risk to be barred or expelled. Many countries exclude ill or disabled migrants on economic grounds, arguing that they make excessive demands on the healthcare system. *Oberoi* notes that South Korea routinely expels migrants who are found to be HIV-positive, while Gulf Cooperation Council countries regularly declare "unfit" and deport migrant workers who fail a mandatory medical test for communicable diseases such as HIV.

Oberoi shows that irregular migrants are increasingly being detained and deported for minor criminal offences.[57] As this report was being finalised, a popular referendum on deporting migrants guilty of crimes was imminent in Switzerland. This included a proposal by the Swiss People's Party calling for "automatic expulsion of all criminals without the right of appeal, including those convicted of 'lighter' infractions not covered under the government proposal, such as drug dealing, burglary and abuse of social and welfare benefits".[58] At almost the same time, France began large-scale deportations of Roma, a leaked official memo apparently indicating that Roma were specifically targeted as part of a measure to deport irregular migrants suspected of being involved in illegal activities.[59]

In addition, *Oberoi* points out that the controls to which many migrants are subject include numerous restrictions on their ability to access public housing and social welfare and tend to make them "administratively invisible". *Cahn* describes an example of *de jure* segregation in Germany, where Roma are more likely than others to be granted "*duldung*" or "*gedulet*", a "tolerated" status that must be regularly renewed and which restricts their freedom of movement as well as access to employment and various forms of social and health protection.

2.1. Segregation and Urban Planning

Many cities have become increasingly segregated, divided by "internal frontiers" reflected in and consolidated by urban planning decisions. Here

57 See Human Rights Watch (2009a).

58 "Swiss Consider Deporting Foreign Criminals", Time, August 14 2010. Available at: www.time.com / time / world / article/ 0,8599,2010450,00.html #ixzz10A XtlGgE.

59 See www.bbc.co.uk/news/world-europe-11027288.

too, exclusion manifests itself not only in physical forms (e.g., separate housing, no-go areas, gated communities and controlled access) but also through law and administrative regulations that institutionalise exclusion by setting conditions on access to services and other entitlements.

The use of urban planning as a tool of segregation has a long history. It was a central element of colonial administrations in many parts of the world, was prominent in US policies towards its African-American population and was institutionalised in apartheid South Africa. It is starkly evident in Israel's policies towards its Arab population, both inside Israel and in the Occupied Palestinian Territories.[60]

Many cities have become increasingly segregated, divided by "internal frontiers" reflected in and consolidated by urban planning decisions. Here too, exclusion manifests itself not only in physical forms (e.g., separate housing, no-go areas, gated communities and controlled access) but also through law and administrative regulations that institutionalise exclusion by setting conditions on access to services and other entitlements.

In a rapidly urbanising world, cities are attracting massive numbers of poor people, an underclass considered to be a threat. They are increasingly marked by the geographical exclusion of populations, for example, through the emergence of gated communities, to which access is controlled 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.[61] In areas that are not "secured", by contrast, public services (e.g., public policing, schools, health services) are often underfinanced and fail to address social and economic problems including crime and deviancy, further deepening public fear and anxiety. Slum areas may even be abandoned to the control of criminal gangs.[62]

It is also typical to find, as in the case of Managua, that elites actually "disembed" themselves from the city through fortified networks across

60 See, for example, B'tselem (2010), as well as the work of Bimkom – Planners for Planning Rights at eng.bimkom.org and reports by Amnesty International, Human Rights Watch, and others.

61 Landman and Schonteich (2002).

62 Davis (2006).

the metropolis.[63] This includes, for example, creating upper-class areas without links to poorer areas or removing traffic lights in some places to prevent car-jacking, in turn depriving pedestrians (the poor) of safe means to cross roads. Elsewhere, environmental protection has been used to justify social segregation. In Rio de Janeiro, "eco-barriers" (up to 10 ft [3 m] in height) enclose 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.[64] Alvaro Tirado Mejia, a member of the UN Committee on Economic, Social and Cultural Rights, has described the walling of Brazilian slums as "geographic discrimination".[65] Walling of poor areas also occurred in Beijing prior to the 2008 Olympics. The then Deputy Director of the construction department in Xuanwu district argued that it was prompted by concern over "protection of the city's environment, safety of the field work, convenience, and safety of passing pedestrians and other factors".[66] Arguably, the most dramatic contemporary instance of wall-building is in Israel and the Occupied Palestinian Territories. Justified in terms of security, this wall serves essentially to segregate populations but also to transfer and appropriate resources and territory.[67]

Cahn 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 the consequent exclusion of Roma from key social infrastructures. 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 the same estate. By 2003, the area had become a ghetto, suffering from poor waste removal services, frequent power cuts and a high incidence of disease. He reports that some Roma settlements in Italy are surrounded by high walls and that entry and exit are monitored by police or private guards. Access by non-residents is restricted and discretionary; a number of camps are also

63 Rodgers (2004) in Candan and Kolluoğlu (2008).

64 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. See Council on Hemispheric Affairs (2009).

65 Frayssinet (2009).

66 Referred to in Council on Hemispheric Affairs (2009).

67 See, for example, the section "Annexation in the Guise of Security: The Separation Barrier in B'tselem (2010).

subject to 24-hour video surveillance. *Oberoi* 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 healthcare, social assistance, education and public housing. This is clearly targeted at irregular migrants and excluded minorities such as Roma.

What has been called "petit apartheid" is starkly in evidence when it comes to "cleaning up" public spaces and making them "safer".

Punitive exclusionary policies are encouraged by cities competing for conferences and business and major sporting events: visible symptoms of underdevelopment and social distress are perceived to reduce their competitiveness.[68] The eviction of populations from unsanitary housing, deemed a source of risk, and their displacement to the periphery or to inner-city pockets isolated from public services leaves them as vulnerable (if not more) as they were before.[69] Such policies relocate risk rather than mitigate the hazards that vulnerable communities face and often reflect the State's refusal or failure to address persistent poverty and inequality, especially when "the onus is cast on persons in poverty to procure gainful employment or, at the least, to make poverty invisible".[70]

What has been called "petit apartheid"[71] is starkly in evidence when it comes to "cleaning up" public spaces and making them "safer". For instance, most of the arrests of beggars or homeless working people in Mumbai are made by the Beggars' Squad of Mumbai Police, attached to the Azad Maidan Police Station in the affluent area of South Mumbai, which is frequented by foreign tourists and houses both government offices and upmarket residential apartments. This suggests that the objective is to "secure" and "'clean' upmarket areas in the city of poor

68 See Beckett and Herbert (2009).

69 As highlighted in several reports of the UN Special Rapporteur on the right to adequate housing.

70 Ramanathan (2008).

71 This term referred to legislation in apartheid South Africa that targeted the morality and behaviour of non-whites, relative to "Grand Apartheid". In the US, "petit apartheid" has been used to describe racially discriminatory practices in the criminal justice system.

people".[72] In the run up the 2010 Commonwealth Games in Delhi, squads of plainclothes policemen hauled beggars before Magistrates in roadside mobile courts to be summarily sentenced.[73] In some cases, this was reported to include serving up to a year in a Beggar's Home, a detention-cum-rehabilitation centre.[74] It was also reported that there were proposals to convert some parks into holding centres, covered with banners and hoardings of the games, to prevent beggars from being out on the streets.[75]

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 even penalises individuals from providing food to the homeless in public parks.[76] Such controls deprive the homeless not only of places to sleep but also access to water, other public conveniences and crucial economic opportunities. Criminalised and imprisoned or forcibly relocated to shelters at the peripheries of cities or isolated by urban planning codes from economically vibrant areas, the homeless and the extremely poor (including migrants) are effectively segregated from society. They are locked into a regime that moves them between different carceral and control regimes, a process referred to as "transcarceration".[77]

Measures that concentrate social control on the poorest sections of society in the city are integral to the "'deteriorating city' narrative."[78] As Lindsey suggests, this is not so much about "making the 'safe space' ideal the 'norm'" but about normalising the "reality of control", making it an end in itself.[79] This enables the institutionalisation of double gaze: a "protective gaze" for the average victim-citizen and a suspicious gaze

72 Personal communication from Dr Vijay Raghavan, drawing on research conducted by Koshish, a field action project of the Tata Institute of Social Sciences.

73 While this was personally communicated to the ICHRP by human rights activists, it was also reported in the media. See, for example, *Delhi bans beggars in games run-up*, Al-Jazeera, available at: english.aljazeera.net/news/asia/2010/03/201036114136685131.html and *Delhi cracks down on street beggars ahead of Commonwealth Games*, BBC, available at: www.bbc.co.uk/news/world-south-asia-11379042.

74 Ibid.

75 Ibid.

76 New York Times, 28 July 2006, "Las Vegas makes it illegal to feed homeless in parks".

77 Lawman et al. (eds.) (1987).

78 Delario (2004).

79 Ibid.

for the undesirable deviants, so that controlling the latter is seen as no longer exceptional, but rather as normal practice. This is perhaps exemplified in Sri Lanka, with the country's Urban Development Authority being brought under the aegis of the Ministry of Defence.[80] Shortly thereafter followed news of forced evictions and summary demolitions involving the military as well as allegations that beggars (apparently described as eyesores or even as agents of terrorism by senior ministers), were being extra-judicially executed.[81]

3. Surveillance, Policing and Data Gathering Technologies[82]

From a human rights perspective, contemporary sociological studies of surveillance are of interest because they exhibit a broad concern with surveillance as a means to order, control and manage social relations.

Leman-Langlois and Shearing observe that focusing on risk creates an insatiable appetite for information on which to base policy and intensify surveillance. They argue that though policing has always involved surveillance innumerable aspects of public and private life are now subject to it, sometimes overtly but more often covertly.[83] "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 more data is better.

Contemporary studies of surveillance highlight not only its potentially intrusive nature but suggest that, in addition to some kinds of surveillance being invasive or intrusive, "social relations and social power are organised in part through surveillance strategies."[84]

80 See www.uda.lk.

81 See *Sri Lanka: Killing beggars under the pretext of eliminating terrorists: A Statement by the Asian Human Rights Commission?* July 2, 2010, available at: www.ahrchk.net/statements/mainfile.php/2010statements/2666/. See also *Sri Lanka: Residents protest against demolition of homes*, available at: www.wsws.org/articles/2010/may2010/sril-m15.shtml, and *Sri Lankan defence ministry begins evicting poor in Colombo*, available at: www.wsws.org/articles/2010/may2010/sril-m10.shtml.

82 A forthcoming ICHRP research project on privacy and data-gathering technologies analyses these issues and their human rights implications in greater detail.

83 *Leman-Lenglois and Shearing* devote a section of their paper to surveillance technology and the policing of "cybercrime".

84 Lyon (2007a).

The information that is gathered by CCTV cameras, by video surveillance of political or environmental protests, via data retained on credit card and online purchases and by many other means enables States and private institutions to construct detailed profiles of individuals, their social relationships, consumption preferences and political allegiances. Forms of governance come increasingly to rely on gathering and analysing this information, including information about the behaviour and attitudes of citizens, which then shapes policies and their implementation.

This has led to the view that surveillance works at two levels:

(1) **At micro level**: Avenues "through which people are sorted, classified, and differentially treated";

(2) **At macro level**: Observing how "social structures are formed, institutionalised, and occasionally challenged and changed".[85]

Claiming that surveillance is overwhelmingly about "social sorting", Lyon argues that, though it is not always undertaken or used for harmful purposes, the use of surveillance cannot be presumed to be neutral.[86] For this reason, the ways in which data-gathering technologies shape attitudes, behaviour and social policy need to be explored.

For example, in many countries people who are drug dependent are entered onto official government "registries". This is a form of social control that brands people as drug users for years, sometimes indefinitely, regardless of whether they have ceased using drugs. In China, for example, methadone treatment patients are added to government registries linked to their identification documents and accessible to the police. In Thailand, once registered, drug users remain under surveillance by police and anti-drug agencies, and information about patient drug use is shared. In Russia, people who enrol in public drug treatment programs are added to registries. Being listed on the registry can lead to loss of employment, housing and even child custody.[87]

Technologies of surveillance may bring apparent human rights benefits, for example, anonymous epidemiological surveillance has improved public health responses to disease and is indeed required under

85 Jenness et al. (2007), p. vii.

86 Lyon (ed.) (2002).

87 See OSI (2009). See also Human Rights Watch (2007a), p. 20, and Human Rights Watch (2007c).

international law.[88] Using again the example of drug use and dependence, anonymous epidemiological research has been critical to understanding the global HIV epidemic driven by unsafe injecting practices and guiding responses such as needle and syringe exchange.[89]

On the other hand, such justifications advanced for surveillance are double-edged and evoke many of the concerns identified in this report and the research papers. Security considerations, particularly with regard to crime and terrorism, but also infectious disease control (as *Parmet* highlights) are frequently advanced to justify increased surveillance of the general population in order to monitor risks and facilitate pre-emptive action. *Parmet* reports that involuntary methods of surveillance (case reporting, mandatory testing, screening, syndromic surveillance[90] and data-mining) are widespread in the field of infectious disease control. New Zealand subjects approximately 50 diseases to mandatory reporting; in the US, the Federal Centre for Disease Control requires States to notify it about approximately 60 infectious diseases, and many jurisdictions also require reporting about non-infectious diseases and health risks, including injuries, acts of violence and even cases of cancer. Albeit intended to help secure the health of vulnerable populations, these interventions risk undermining their rights and negatively affect their health and well-being in the long term. As *Parmet* notes, "even the most benign forms of surveillance (from a human rights perspective), such as syndromic surveillance, which looks at individual medical information but does not compile individual names, can help construct notions of normality and expectations as to how people should live their lives".

Improvements in technological capacity have led to the "professionalisation and specialisation of social control" and the development of models of prevention that aim to make it impossible to commit particular crimes

88 General Comment 14 maintains that, under Article 12.2 of the International Covenant on Economic, Social and Cultural Rights (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" (UN Doc. E/C.12/2000/4).

89 See Mathers et al. (2010).

90 The Center for Disease Control notes that "'syndromic surveillance' applies to surveillance using health-related data that precede diagnosis and signal a sufficient probability of a case or an outbreak to warrant further public health response. Though historically syndromic surveillance has been utilized to target investigation of potential cases, its utility for detecting outbreaks associated with bioterrorism is increasingly being explored by public health officials." See www.cdc.gov/ncphi/disss/nndss/syndromic.htm.

(the holy grail of a "maximum security society").[91] Such approaches involve both "thin" and "thick" forms of surveillance.[92] The former concentrate on movement, transactions or exchanges, while the latter involves more intensive surveillance and restricts mobility. In general, "thin" surveillance tends to monitor people who are not poor, while "thick" surveillance targets the poor (such as the urban poor and homeless) because they are more likely to be institutionalised or confined. Undocumented workers and migrants, or social groups like the Roma, are also likely to face "thick" surveillance. *Oberoi* notes that both Britain and the US are currently establishing comprehensive databases that will contain biometric information on non-nationals and criminals, leading to concerns that convicted criminals will be conflated with migrants who have not committed any criminal offence.

Even the most benign forms of surveillance can help construct notions of normality and expectations as to how people should live their lives.

Actions that the State takes on the basis of surveillance are often *pre-emptive* in nature. CCTV camera images, gait analysis and information obtained from data-mining encourage the construction of hypothetical profiles with potentially adverse implications for the rights of suspects (not least their presumed innocence). This, in turn, encourages analysts to attribute motives to those who are observed or to predict their future actions based on presumed patterns of behaviour. The "hypothetical subject" of surveillance is in some senses divested of free choice and autonomy by a process that derives future behaviour from statistical analysis. 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 immediately distanced itself, saying that it did not support the DNA profiling of children.[93]

91 Marx (1995).

92 Torpey (2007).

93 "Police Spokesman sparks DNA row", BBC, 16 March 2008. In August 2009, it was reported that 25% of 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. Available at: www.cypnow.co.uk/bulletins.

Box 3. National Identity Programmes

The "war on terror" gave impetus to the issuance of national identity numbers and/or cards in many countries. National identity programmes typically involve collection and collation of biometrics and other personal data (residential, educational, professional, health, financial), and proponents often argue that this promotes both security and social welfare objectves on the grounds that ID registration will help individuals to access and governments to design public services. For the same reasons, critics are concerned that ID programmes will enable governments and private institutions to profile citizens, invade privacy and put at risk various freedoms and rights. On these grounds, ID proposals have been rejected in Australia, Canada, the Philippines, the US and Britain, among others.

The American Civil Liberties Union concluded that an ID card system will "lead to a slippery slope of surveillance and monitoring of citizens ... [O]nce put in place, it is exceedingly unlikely that such a system would be restricted to its original purpose. Social Security numbers, for example, were originally intended to be used only to administer the retirement program. But that limit has been routinely ignored and steadily abandoned over the past 50 years. A national ID system would threaten the privacy that Americans have always enjoyed and gradually increase the control that government and business wields over everyday citizens."[1]

India's Programme

India is developing perhaps the most ambitious current national identity project. In January 2009, the government established the Unique Identification Authority of India (UIDAI) to "develop and implement the necessary institutional, technical and legal infrastructure to issue unique identity numbers to Indian residents". It will collect, collate and organise key personal details, including biometrics, of some 1.5 billion Indians in order to make that information available to various users. In a related exercise, since 2003, a National Population Registry is being set up through household surveys, including biometrics, which will feed information to the UIDAI project.[2] The national population registry is not governed by the Census Act 1948, which carries an explicit confidentiality provision.[3] It operates under the Citizenship Act of 1955 and the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003; as a result, it is not constrained by privacy protections.

The UIDAI is intended to act as a bridge between "silos" of information held separately by various public and private agencies. Such convergence would enable construction of detailed profiles of individuals and their tracking. A leading multinational operating in India's health and hospital sector has reportedly already proposed to "link the UID number with health profiles of those provided the ID number, and offered to manage

1 See www.aclu.org/technology-and-liberty/5-problems-national-id-cards.

2 The UIDAI itself admits a decision was taken "to collate the two schemes – the National Population Register under the Citizenship Act, 1955 and the Unique Identification Number project of the Department of Information Technology". See uidai.gov.in/Historical Background.

3 Ramanathan (2010a). The Census Act (Section 15) is categorical that information collected by the census agency is "not open to inspection nor admissible in evidence".

the health records".[4] The apparent rationale for a national ID number is that it will enable citizens, especially the poor, more effective access to public services. However, even the UIDAI acknowledges the "UID number will only guarantee identity, not rights, benefits or entitlements".

The "technological determinism"[5] underlying the project is evident; an information technology entrepreneur heads the UIDAI with the rank of Union Cabinet Minister (superior to the Registrar of Census of India). Moreover, billions of rupees have been allocated to the initiative without an effective cost–benefit analysis, based on the assumption that technology can be used to "fix the ills of social inefficiencies", overcome flaws in public policies and structural barriers such as entrenched poverty and discrimination that prevent people from accessing their entitlements.[6] Just how such technologies may be used *for* the poor is evident from reports that, in an effort to rid New Delhi of beggars in advance of the 2010 Commonwealth Games, the city considered constructing a biometric database of beggars which would help them identify repeat offenders detained under the Bombay Prevention of Beggars Act 1959 (also applicable in Delhi).[7]

4 Ramanathan (2010b).

5 Ramakumar (2010).

6 Ibid.

7 "Removing beggars not enough", *Times of India*, 12 April 2009.

The spread of surveillance technology is also encouraged by processes of privatisation. *Leman-Langlois and Shearing* point out that private entities are far more likely than police organisations to adopt new technologies. The involvement of private entities blurs the distinction between governmental and commercial surveillance. Some have identified the emergence of a "Surveillance-Industrial Complex", most prominently in the US and the EU.[94] The transnationalisation of security policy also encourages States (and other institutions) to expand and share surveillance data (for example through the European Schengen Agreement, which facilitates police data-sharing) and to adopt initiatives to standardise and harmonise surveillance technology (on matters such as biometric passports, national ID systems and airport screening).[95]

The employment of surveillance and data-gathering technologies appears to enjoy significant public support. Of particular interest here are technologies that "empower" individuals to conduct their own surveillance. These include user-friendly technologies that can track individuals using

94 See American Civil Liberties Union (2004). For Europe, see Hayes (2009), also referred to below.

95 Lyon (2007b).

mobile phones,[96] GPS tracker devices that log movement[97] and real-time tracking devices that employers, supervisors, parents, paramours or private and public law enforcement and security agencies can use.[98]

96 See news.bbc.co.uk/1/hi/technology/7872026.stm.

97 See, for instance, www.gpstrackstick.com.

98 See, for instance, www.liveviewgps.com.

III. UNDERLYING FORCES AND CONTEXTS: POLITICAL ECONOMY, DISCOURSES OF RISK AND POLICY TRANSFER REGIMES

> *"Whether we view offenders as wayward members of an amoral community, or as damaged but corrigible 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."*
>
> —Sparks and McNeill

Introduction

Part III discusses the *underlying forces and contexts* that shape the dominant *modes and patterns of social control* discussed in Part II.

Underlying forces and contexts have been subdivided into the following:

- Issues of political economy and governance;
- The impact of discourses of risk and danger;
- Transnational and international regimes and policy transfer.

1. Political Economy and Governance

One of the most significant contributions of a social control perspective is to draw attention to the importance of situating social controls within the context of wider political, social and economic forces, state as well as non-state. Research describing the "political cultures" that shape responses to social marginality is particularly relevant.

One of the most significant contributions of a social control perspective is to draw attention to the importance of situating social controls within the context of wider political, social and economic forces.

Evidence suggests that when social policies favour individual responsibility and exclusion over universal welfare and inclusion, they tend to impose more controls on those at the margin. *Sparks and McNeill* note that countries

that are highly tolerant of inequality appear more susceptible to the "penal temptation": looking to the criminal justice system to provide solutions to failures of governance or social problems. Studies of industrialised northern democracies suggest that countries that inflict harsher criminal penalties and sustain larger prison populations spend less on universal welfare benefits and other socially inclusive practices.[99] Research also suggests that levels of punishment, especially imprisonment, correlate with levels of welfare spending and equality/inequality.[100] Neo-liberal economic policies are also important to consider in this context.[101] A comparison of penal systems in a dozen capitalist countries (categorised broadly as neo-liberal, conservative corporatist, social democratic and oriental corporatist) found a direct correlation between the type of political economy, the punitiveness of the State (including rates of imprisonment) and attitudes to those perceived as deviant.[102] Economic systems characterised as neo-liberal were the most punitive.

Evidence suggests that when social policies favour individual responsibility and exclusion over universal welfare and inclusion, they tend to impose more controls on those at the margin.

The argument is that the neo-liberal model of individual responsibility discounts the influence of socio-economic conditions and supports policies that focus on legal sanctions directed at errant individuals.[103] Reduced welfare expenditures are not associated with reduced government intervention in social life but with a shift towards a more exclusionary and punitive approach to the regulation of social marginality and increased investment in security.[104] Some social control

99 Lacey (2008).

100 Downes and Hansen (2006). The research explored the relationship between welfare expenditure and levels of punishment in 18 countries. See also Wilkinson and Pickett (2009).

101 For the purposes of this analysis, "neo-liberalism" refers to a form of economic governance that promotes free markets, deregulation, privatisation and individual responsibility and reduces welfare services and the role of government .

102 Cavadino and Dignan (2006). David Nelken argues that "*neo-liberal societies have the highest prison rates because they follow social and economic policies which lead to exclusionary cultural attitudes towards our deviant and marginalised fellow citizens*". Nelken (2007), p. 18.

103 Hope and Karstedt (2003).

104 Beckett and Western (2001).

literature talks of an "exclusive society"[105] in which the labour market, civil society and the criminal justice system act together to exclude a large proportion of the population, and in which social controls and policy are designed to contain the poor rather than address inequality or the causes of their poverty.[106] A range of conditionalities and deterrents placed on the exercise of basic human rights not only challenges the notion that rights are inalienable but also justifies higher levels of "policing" (including surveillance) to ensure that individuals are meeting these conditions and to introduce new penalties for failing to meet them.

Policies that "penalize social insecurity" in this way often deploy more resources to remedy the insecurity they create than those they save by reducing social services.[107] A study of Mayor Rudolph Guiliani and Police Chief William Bratton's now famous zero-tolerance policing policy in New York City found that in the five years to 1999 a 40% increase in the police budget was accompanied by a 30% fall in expenditure on social services.[108]

Oberoi identifies a similar "common sense" at play in migration policy. On the one hand, irregular migration has become "structurally embedded in economies and societies", driven by underdevelopment and poverty in countries of origin, globalisation and the demand for cheap, flexible labour in countries of destination. On the other hand, migrants are politically stigmatised, subject to draconian border controls and many forms of discrimination and exploitation.[109] *Cahn* describes the treatment of Roma in Europe, where police, health professionals, border guards and urban planners tend to consider them as "socially unadaptable" rather than members of a marginalised and vulnerable minority. Stern highlights that an analysis of the factors listed on the English Probation System's computerised system for risk assessment reveals that they include classic indicators of poverty, homelessness and disadvantage and, as a result:

105 Young (1999).

106 Bauman's notion of "liquid modernity" graphically portrays the opportunities for freedom and mobility that are available to those who are successful while poor people, in contrast, are subject to harsh forms of punishment and are largely immobilised in a condition from which it is difficult to escape. Bauman (2002), pp. 52–73.

107 Wacquant (2004). Elsewhere, Wacquant (2008a) speaks of the "advanced marginality" of urban areas of the US, France and the UK, and the "punitive containment of the black (sub-)proletariat" in the US.

108 Wacquant (1999).

109 For more, see ICHRP (2010).

> *[I]f 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.*[110]

"Crime control 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." —Vivien Stern

In the field of drug control, it has been widely recognised that the current international legal and policy framework (largely prohibitionist and punitive in nature[111]) has had a number of serious "unintended negative consequences". Among these are "policy displacement" from public health to law enforcement and the social marginalisation of people who are drug dependent.[112] According to the UNODC:

> *A system appears to have been created in which those who fall into the web of addiction find themselves excluded and marginalized from the social mainstream, tainted with a moral stigma, and often unable to find treatment even when they may be motivated to want it.*[113]

Such forms of stigmatisation are not limited to Europe and North America. They have travelled across the world via transnational communities and policy regimes.

Privatisation is another feature of the contemporary economic and political landscape that has shaped social control practices.[114] The changed role of the State has been described in a nautical metaphor, as from rowing to steering, from driving policy to being its facilitator.[115] *Leman-Langlois and*

110 Speech by Baroness Vivien Stern to the Risk Management Authority Conference, Scotland, 1 June 2007. Available at: www.rmascotland.gov.uk/ViewFile.aspx?id=262.

111 For an overview see Barrett et al. (2008).

112 UNODC, "Making drug control fit for purpose: Building on the UNGASS decade" UN Doc No E/CN.7/2008/CRP.17, 7 March 2008.

113 Ibid., p. 1.1. See also Barrett (2010).

114 The implications of privatisation for human rights are further discussed on pp. 65–68, below.

115 The nautical metaphor was provided by Savos (1982), referred to by *Leman Langlois and Shearing*.

Shearing make the point that, in parallel to the privatisation of state services, private governance has also enlarged, creating a "quiet revolution in governance".[116] This is well-illustrated by the growth of private security, now a multi-billion dollar global industry driven by large corporations.[117] Private forms of government exist with little or no formal government involvement and, therefore, no apparent state accountability. This is especially true with respect to "mass private spaces" (e.g., shopping malls, gated townships or housing estates, stadiums and entertainment complexes, large commercial buildings) where the exercise of authority is often based on ownership of property, and the governing legal framework is not necessarily the criminal law but contract or property law. This gives rise to a range of concerns, including unreasonable restrictions or conditionalities placed on access to such places, the power of private security agents and the restrictions on the exercise of the right to peaceful assembly or protest.[118]

The rise of "managerialism" is an important related feature. Social policy including criminal justice is increasingly marked by technical systems of performance and risk measurement, controlled by professional managers with expertise in fields such as poverty, delinquency, public health, urban planning. This contrasts with approaches to welfare that emphasised the transformative potential of welfare systems, including criminal justice.[119] Speaking of the role of social workers in the context of the UK's Crime and Disorder Act (1998), 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'".[120] *Leman Langlois and Shearing* point out that managerialism is no less influential in new policing and penal regimes, such as the increasingly popular "intensive policing" method.[121] Private companies in the health insurance industry,

116 Shearing and Stenning (1983).

117 Private security companies have a wide reach: Securitas and G4S (both founded in Sweden) operate in 37 and 110 countries, respectively. Their economic weight gives them considerable influence in both developed and developing countries.

118 For a story on how the growth of mass private spaces is restricting spaces available for public protest see "Off our streets: Are private developers squeezing out demos?" in *The Economist*, 21 October 2010.

119 Feeley and Simon (1992).

120 Pitts (2001), p. 140. Quoted in Scraton (2003).

121 Former New York Police Chief 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". Bratton and Andrews (1999).

for example, condition the provision of "social" services by reference to income or health status or criteria based on "risk" or "efficiency".[122]

The media are another important factor shaping political culture. For most of the public, the mass media are the primary source of information and imagination about both social control and human rights. The media are particularly prone to an exaggerated depiction of groups considered to be risky, dangerous or undesirable (e.g., youth gangs, "bogus" asylum seekers, sex offenders) and those who are most insecure and at risk (e.g., children, minors). This can lead to a hardening of public opinion and put pressure on politicians to institute tougher policies to address popular perceptions of risk and danger.[123]

2. The Impact of Discourses of Risk

Ideas of risk and danger are a major influence on contemporary public discourse and policy.

All the research papers show that ideas of risk and danger are a major influence on contemporary public discourse and policy.[124] This is most obviously true of policies that address the threat of terrorism, including policies of preventive detention and surveillance. Social control research suggests that many recent counter-terrorism strategies in fact reflect older practices and policies that have tended to mark people or behaviour as "dangerous", "risky" or "undesirable" while ignoring underlying socio-economic factors and context. As *Parmet* points out, the history of Guantanamo Bay as a detention centre began in 1991–1992 when the US detained Haitian refugees and asylum seekers there, especially those who tested positive for HIV, who were "required to demonstrate a new, higher standard" in support of their claims in interviews at which the applicants' attorneys were not allowed to be present.

122 Enteman (1993).

123 Lacey (2008) has found that grand political rhetoric on crime and punishment is most likely to occur under a "first past the post" electoral system, particularly if political legitimacy is at stake. She argues that this makes it impossible for British governments for example to adequately address the causes of crime (even when intentions are good) because the electoral popularity of "tough on crime" positions consistently skews penal policy towards illiberalism.

124 Risk and danger are intimately connected but distinct. Danger refers to the potential for harm, adversity or injury to some person, event or thing, while risk measures its likelihood and degree.

Policing is increasingly concerned with the prediction and prevention of future criminal acts, which necessarily entails the identification of dangerous individuals via risk profiling.

Measuring and assessing the risk that individuals pose has become increasingly important in determining access to entitlements and rights; and techniques of measurement have relied increasingly on membership of, or association with, "risk groups" and visual and data-based profiling that relate only statistically to the incidence of danger.[125] *Leman-Langlois and Shearing* point out that policing is increasingly concerned with the prediction and prevention of future criminal acts, which necessarily entails the identification of dangerous individuals via risk profiling. "Dangerisation" (described by Douglas and Lianos as "[t]he tendency to perceive and analyse the world through categories of menace [leading to] … continuous detection of threats and assessment of adverse probabilities") has become a central notion of social control analysis.[126]

In considering the predominance of incarceration as a form of punishment, *Sparks and McNe*ill (in common with other authors referring to different contexts) 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, as referred to above. In similar terms, *Oberoi* demonstrates that the scramble to be tough on migration is driven largely by public fear of "the criminal other", which in turn brings pressure on officials and politicians not to appear "soft". She argues that social control theory and the notion of "moral panic" are particularly useful in the context of migration because they illuminate why immigration is considered a threat, justifying exclusionary policies.

125 Hudson (2003a).

126 Douglas and Lianos (2000).

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 ... the resort to "magical'"or gestural solutions ...

Parmet describes how the panic accompanying pandemic or "outbreak" narratives permits governments to take "exceptional" measures and enlarge the number of circumstances in which governments may derogate from or simply ignore human rights obligations. She specifically refers to the adoption in 2001 of the Model State Emergency Health Powers Act (MSEHPA), sponsored by the US Centers for Disease Control and Prevention and drafted by Georgetown and Johns Hopkins Universities. *Parmet* observes that:

> *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'.*[127]

Social perceptions and understandings of disease (including "moral panics"), perceptions of riskiness of particular individuals and populations (often embodying discriminatory attitudes) and the values that a society places on various rights and liberties frequently outweigh science in determining whether a potential risk to public health justifies infringement of the rights of an individual or community. As *Parmet* argues:

> *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.*

127 Though widely criticised by civil libertarians, the MSEHPA was adopted in whole or in part by many US States. *Parmet* further comments that: "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".

The adoption of risk models has adversely affected rehabilitative models and approaches to punishment.

In their paper on incarceration, *Sparks and McNeill* note that alternatives to imprisonment, such as CSMs, are often seen as concessions to offenders rather than a legitimate penal alternative. They argue that cynicism towards CSMs, and the assumption that public protection is the primary purpose of a CSM, encourage authorities to sentence offenders more harshly and portray them as beneficiaries of mercy rather than individuals entitled to rights. They conclude that this does not necessarily advance victims' or communities' rights because a preoccupation with public protection leads authorities to focus disproportionately on future offending and uncertain forms of risk assessment rather than actual past harms.

In their discussion of CSMs, *Sparks and McNeill* emphasise that it is inherently dangerous to base policy on the premise that officials can protect individuals 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.*

The adoption of risk models has affected rehabilitation models and approaches to punishment in other ways too. 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.[128] Policies and regulations that incorporate assessments of risk, inside or outside prison, are not subject to due process and judicial regulation even though conditions placed on freedoms are designed to punish particular behaviours. Jonathan Simon and others have written extensively about the role of parole

128 Palermo (2009).

in returning prisoners back to prison. One author recorded that 66% of the offenders admitted to California's prisons in 1999 were parole violators.[129] Like the practice of using internal prison regimes to extend periods of imprisonment for various rule infractions, this is a classic "feedback loop". Drug testing newly-released US prisoners is open to the same criticism: it puts many prisoners straight back in prison and transforms parole officers (who undertake the testing) from social workers into agents of crime-control. "It is not the original crime which brings them back to prison, but something in their lifestyle that is undesirable."[130] This is what some have called the "new punitiveness", by which offenders are deprived of rights and subjected to more or less permanent surveillance and control.[131]

While insecurity and fear of crime are real issues that States should address, the social control perspective draws attention to the politicisation of perceptions of danger and risk, which are rooted in emotional judgments. Studies have shown that public perceptions of risk and danger take little account of whether a particular threat is likely to materialise.[132] Since representations of risk are grounded in value judgments, often personal and relative, the political management of risk and public insecurity is vulnerable to manipulation, which means that "[R]ational [policy] choices are not necessarily always the most politically feasible ones".[133]

3. Transnational and International Regimes and Policy Transfer

Transnational regimes are a major pathway of social control policy transfers, via experts ("epistemic communities"), capital and investment, and technologies and knowledge.

The research papers discuss international and transnational regimes

129 Simon (1993). Also, Petersilia (2003). Noting that this percentage is far higher than in other States, the author wonders if this is because California has privatised a high proportion of its prisons.

130 Christie (1993).

131 Pratt et al. (eds.) (2005).

132 For instance, there is a popular tendency to overestimate the occurrence of low-frequency events that have great impact and to underestimate the occurrence of frequent but less dramatic risks. This is why flying has always been 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.

133 Garland (2003), p. 25.

and their role in the diffusion of control systems. By international regimes, we refer to those that involve extensive international co-operation amongst States, often accompanied by an international legal framework. In the context of this project, it is important to acknowledge that international human rights law is itself an international regime. The term "transnational" refers to international regimes that are not centred on States but extend to non-state actors, such as private corporations.

Not all international regimes are embedded in a specific framework of international law. Many have significant influence, sometimes in opaque and unaccountable ways. *Cahn* and *Oberoi* examine the role of the IOM in the emerging global migration regime.[134] *Cahn* argues that some governments have used the IOM to "displace" their responsibility for questionable or even illegal activities (such as attempting to persuade persons applying for asylum to abandon claims through "voluntary return" programs). Both refer to the developing practice of States to reduce migration at source by establishing checks and screening procedures in countries from which migrants are most likely to originate.

The context in which international regimes evolve is also significant. *Parmet* points out that the adoption and ratification of the IHR were given momentum by the SARS outbreak, the UN Secretary General's High-Level Panel on Threats, Challenges and Change (which emphasised the relationship between public health and international security)[135] and calls for an expanded role for the Security Council in the event of "an overwhelming outbreak of infectious disease that threatens international security".[136] She argues that the IHR and associated measures have facilitated the transfer and diffusion of the predominance of bio-security and surveillance (much of it involuntary) perspectives in responding to infectious diseases.

The concern over the extent to which security perspectives that dominate international regimes may do so at the cost of human rights considerations

134 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." Available at: www.globaleconomicgovernance.org/project-migration.

135 Fidler and Gostin (2008) in *Parmet*.

136 Murphy and Whitty (2009) in *Parmet*.

is most clearly apparent in the case of mechanisms designed to combat drug-related offences. Despite assertions by UN human rights bodies that drug-related offences do not constitute "most serious offences", many countries continue to retain the death penalty for many drug-related offences. However, as the International Harm Reduction Association (IHRA) points out, many such countries are beneficiaries of technical assistance programmes of the UNODC, the European Commission and many European States.[137] The UNODC itself has recently admitted that it has not done enough to prevent treatment for drug addiction and respect for human rights from being subsumed by an overemphasis on criminalisation and punishment in the "war on drugs".[138]

Transnational regimes may involve more *ad-hoc* and limited co-operation amongst specific kinds of actors. Organisations like Interpol are an example. *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. They point out that agreements between security organisations vary greatly in their scope, formality and objectives and foresee that Europol, for example, is likely to evolve into an "a-national" body, via professionalisation, isolated from state policies, with serious consequences for oversight and accountability.

Many transnational regimes are industry-focused and dominated primarily by private corporations. The security services industry is constantly developing processes and forums to ensure global synergies and transfers of technology.

The organisational focus of many international and transnational regimes reflects fears about the "global threats" of terrorism, organised crime, immigration, global pandemics and security more generally. Policing and criminal justice systems are transnationalising, driven largely by the need to develop structures and processes of governance to deal with emerging issues, such as global economic restructuring, climate change, population growth and migration.[139]

Many transnational regimes are industry-focused and dominated primarily by private corporations. The security services industry is

137 IHRA (2010a).

138 Drug control, crime prevention and criminal justice: A Human Rights Perspective. Note by the Executive Director, Commission on Narcotic Drugs, Fifty-third session, Vienna, 8–12 March 2010, UN Doc. E/CN.7/2010/CRP.6-E/CN.15/2010/CRP.1.

139 Bowling (2010).

constantly developing processes and forums to ensure global synergies and transfers of technology. The ID WORLD International Congress, for example, held annually, claims to be "the most comprehensive showcase on the evolving world of RFID, biometrics and smart card technologies, and is the only international forum that looks at the advanced auto ID industry as a whole, rather than focusing on a specific technology or vertical sector".[140] The 2009 Congress brought together a "distinguished line up of ministers and high ranking government representatives as well as 72 leading CEOs from the ID Revolution Community, joined to share their vision and thought leadership".[141] Backed by state institutions and multinational corporations, but also attracting individual innovators, investors and entrepreneurs, such forums act as highways for the transfer of technology as well as ideas and perspectives that shape the contemporary landscape of social control.

Transnational regimes are a major pathway of social control policy transfers, via experts ("epistemic communities"), capital and investment, and technologies and knowledge. While a number of studies have tracked the export of policing and security policies between countries,[142] they have largely focused on the export of knowledge, finding that:

> *Governments and politicians appear only too willing to defer to expertise, particularly when this is deemed to derive from 'trusted' security sources and which may mean that alternative perspectives or analyses are rarely considered.*[143]

In this context, *Sparks and McNeill* refer to the way in which the privatisation of prisons has been "exported"; the same can be said of criminal justice policy more generally.[144]

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140 www.idworldonline.com/index.php?id=138.

141 www.idworldonline.com/index.php?id=records09.

142 See Newburn and Jones (2001).The authors point out that, although policy transfer visibly influences rhetoric and symbolism (zero-tolerance policing and three strikes are obvious examples), national and local political institutions continue to condition and influence policy in less obvious ways.

143 Ellison and O'Reilly (2008).

144 India introduced plea bargaining in 2005 to address crippling delays in trials, borrowing the idea from the US 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 (2005) has already pointed to the abuse of plea bargaining in Georgia where it has reportedly been used to cover up cases of torture.

Because much of this transfer is not formal (Loader and Walker talk of "opaque networks of police and intelligence chiefs in Europe"[145]), it is particularly difficult to monitor and hold these processes to account. A feature of the "securitisation" of Europe is the growth of new and opaque organisational structures that have emerged around the justice and home affairs pillar of the EU, which lack adequate democratic supervision and accountability at regional level.[146] The American Civil Liberties Union's "Policy Laundering Project" confirms the importance of addressing transnational regimes,[147] though their scale (and the involvement of players such as the private security industry) makes it difficult to scrutinise them effectively.

In the public health context, *Parmet* points out that the export of public health legislation in many ways parallels the export of criminal justice policy. She cites a report that suggests the criminalisation of HIV infection has reached a "new pitch" with the drafting of a model law by West African parliamentarians that would criminalise the transmission of HIV through "any means by a person with full knowledge of his/her HIV/AIDS status".[148] This model law has reportedly been enacted by at least nine countries in Africa.[149] It would be a mistake to assume this is an African phenomena: according to *Parmet*, 23 States in the US prohibit HIV-positive individuals from having sexual relations without disclosing

145 Loader and Walker (2007).

146 Loader, I. (2002). A recent report by Statewatch and the Transnational Institute (see Hayes (2009)) shows how this process has escalated. It documents the development of the EU'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."

147 See www.policylaundering.org/PolicyLaunderingIntro.html. The project describes policy laundering as the use by the US government of foreign and international forums as "an indirect means of pushing policies that could never win direct approval through the regular domestic political process".

148 Burris and Cameron (2008) in *Parmet*.

149 Ibid.

their status to their partner.[150] Some of these laws allow for extremely long sentences (in Arkansas, a possible 30 years in prison).[151]

As far back as 1982, when he was reflecting on the application of criminology to development processes in the 1970s, Cohen remarked: "[w]hat is especially pernicious is the advocated transfer of technical policies taken out of their original ideological context".[152] This trend continues: for instance, Brazil, Argentina, Colombia and Venezuela have been among the leading importers of US-style penal policies, including their 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".[153] With respect to policing, *Leman-Langlois and Shearing* point out that 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 sold as a "shared solution".

150 Galletly and Pinkerton (2006), pp. 451–461 in *Parmet*.

151 Ibid. As *Parmet* notes: "None of these laws require that HIV actually be transmitted. Moreover, in many States, individuals may be prosecuted even if they use a condom. Hence, these criminal statutes contradict public health messages that encourage people to use condoms and engage in safe sexual practices. Other statutes may confuse public health efforts by criminalizing the transfer of urine or saliva, even though these fluids do not transmit HIV" (footnotes excised).

152 Cohen (1982).

153 Wacquant (2008b).

IV. HUMAN RIGHTS ADVOCACY AND POLICY: CHALLENGES AND POSSIBILITIES

The purpose of Part IV is to highlight some of the broader challenges facing human rights advocacy and policy in relation to social control and to suggest how human rights principles might help deal with those challenges. In doing so, wherever relevant, this section draws on the conclusions of the research papers.

1. Understanding Crime

A key message of this project is that there is an urgent need for a human rights–based narrative of crime and criminality and responses to crime. It is illuminating to compare the language and approach of early UN Crime Congresses on Prevention of Crime and Treatment of Offenders with that of its successor, the UNODC. The Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, adopted by the 7th Congress in 1985, contains the following:

> *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.*[154]

154 UN Doc. A/CONF.121/19, para. 35. Available at: www.uncjin.org/Standards/compendium.pdf.

This approach is strikingly different from a range of contemporary policies that are predominantly driven by considerations of risk and danger, in the context of a political economy that generates inequality. Those who are poor and disadvantaged are more likely to be criminalised, segregated, placed under surveillance and subjected to a range of controls. Policies of control, especially crime control, are increasingly disconnected from any "real assurance of all basic human rights and freedoms." The more extreme poverty and deprivation are, the more likely it is that it will attract social control, including both criminal and non-criminal sanctions.

There is an urgent need for a human rights–based narrative of crime, criminality and responses to it that is based on an analysis of marginality and structural exclusion.

This shift is reflected in contemporary UN discourses on crime, despite the phenomenal expansion of the human rights system. The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, for example, adopted by the UN General Assembly in 2001, contains just one reference to human rights (and then, in a strictly procedural sense) and one passing reference to poverty. Unlike earlier documents, it contains no serious analysis of the causes of crime. The ECOSOC Resolution (2008/24) on "Strengthening prevention of urban crime: an integrated approach", calls on States to "integrate crime prevention considerations into all relevant social and economic policies and programmes". In other words, it recommends that crime control considerations should permeate social policy, a near-complete reversal of the early formulations that emphasised social justice. Human rights organisations have strong reasons to want to develop an analysis of crime and criminality that takes full account of marginality and structural exclusion.

"Technicist" critiques of criminal justice question contemporary penal and control policies but are "not critical in the sense of wanting to bring about any profound change in the State's penal strategies".[155] Procedural

155 The term "technicist penology" is taken from Hudson (2003b), p. 11, who characterises it as an approach that resolves "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... [S]uch 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."

protections, fairness, consistency, decent prison conditions, etc., are vital to protection of human rights, but a deeper critique is required. Human rights advocates must go beyond technicist critiques of criminal justice and, drawing on deeper analysis of socio-economic contexts, focus on different ways in which social and economic policies expose people to criminal justice, control or correctional regimes (including the use of civil law and administrative mechanisms to impose controls) and restrict access to civic freedoms and socio-economic entitlements.

Human rights advocates must go beyond technicist critiques of criminal justice and focus on different ways social and economic policies expose people to criminal justice, control or correctional regimes.

Work that Human Rights Watch has done on US drug enforcement policies provides a good example of such an approach. This research, which also examined arrest and sentencing practices, addressed policies that have placed a disproportionate number of African-Americans in prison.[156] Its analysis gives attention to the principle of non-discrimination but also highlights the links between patterns of urbanisation and urban poverty and the way in which these facilitate contact with the criminal justice system. Urban areas inhabited by the poor are often intensely policed, and many people are obliged to live their lives in the open, exposing them to risks. By contrast, drug use in upper- and middle-class households goes on behind closed doors. Human Rights Watch has additionally highlighted the way in which the strategy that involved increasing controls (in the form of prison sentences) disproportionately for crack cocaine offenders, associated with "the underclass" and perceived as more dangerous, ended up targeting urban African-Americans who already faced "concentrated socio-economic disadvantage".[157]

Human rights organisations should focus not just on injustices arising from implementation of certain controls or sanctions but also on their underlying logics and how people become subject to them.

An analysis like that above incorporates an awareness of how criminality and responses to it are constructed and identifies where the concerns

156 See Human Rights Watch (2009b).

157 Fellner (2009). See also Human Rights Watch (2010).

about fulfilment and protection of human rights arise in such contexts. In other words, human rights organisations need to focus not just on the injustices arising from the implementation of certain controls or sanctions but also on their underlying logics and how certain people come to be subject to them.

2. Sanctions and Punishment

The European Court has noted the fine line between restraint (restrictions on freedom) and detention (complete deprivation of freedom).[158] The examples provided in previous sections of this report and in the research papers indicate that numerous forms of sanctions and "soft" controls operate alongside the "hard" control of detention and merit careful scrutiny.

Prison and post-prison regimes have moved away from the "rehabilitative ideal" and are being used to punish and segregate the most disadvantaged.

Versions of the conflict between punishment and treatment have long been intrinsic to debates about social control in popular discussions and in professional, political and academic discourses. Broadly speaking, on the one hand is punishment, viewed as "hard" (formal, legalistic, coercive) and politically conservative; on the other hand is treatment and its many variations (e.g., therapy, rehabilitation), seen as "soft" (and less formal, less-legalistic and voluntary). This polar opposition does no justice at all to the complexities of social control.

The traditional civil liberties concern has been with the rights of individual prisoners (e.g., the right to medical treatment, but also protections against coercive treatment) leading to the establishment of a set of minimum standards of imprisonment.[159] While the traditional civil liberties approach remains important to defend, the more ambitious idea of therapeutic regimes within prisons or the assertion, as a human rights principle, of the idea that prison systems should be rehabilitative, seems to be less vigorously defended, despite the fact that it is reflected in human rights

158 Peay (2007).

159 UN Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955.

law.[160] As discussed in Part II, above, it is clear that prison and post-prison regimes have moved away from the "rehabilitative ideal" and are being used to punish and segregate the most disadvantaged, often in a discriminatory manner.

It is vital to concretise the somewhat abstract nature of rehabilitation. A good example is an articulation of rehabilitation based on the right not to be subjected to cruel and inhuman treatment.[161] Rotman argues that prisoners' rights upheld in US and European Courts themselves represent this "right to rehabilitation" and require States to provide at least sufficient rehabilitative input to prevent the deterioration of prisoners through bad conditions, lack of contact with relatives and lack of education or work to preserve skills and employability. He defines the right to rehabilitation as:

> *[T]he right to an opportunity to return to society with a better chance of being a useful citizen and of staying out of prison. This right requires not only education and therapy but also a non-destructive prison environment and, when possible, less restrictive alternatives to incarceration… The right to rehabilitation is consistent with the drive toward the full restoration of prisoners' civil and political rights of citizenship after release.*[162]

Rotman also notes the danger that rehabilitation can become a pretext for abuse of discretion on the part of sentencing and correctional authorities, arguing that "to subject the inmate to the harmful effects of imprisonment without allowing any possibility to counteract them is additional and unlawful punishment".[163]

160 Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) 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: "The 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."

161 Rotman (1990), pp. 183–184.

162 Ibid.

163 Ibid.

In the quest for alternatives to punishment, there are good human rights grounds for looking beyond models of rehabilitative treatment to models of social justice, reconciliation, restitution and reparation.

At the same time, there are inherent dangers in the therapeutic approach, especially when advocated as a macro-level alternative to the more traditional criminal law model. The abuse of psychiatry to control dissidents in the Soviet Union, for example, became a paradigm for the wider human rights dangers of seeing political dissidence and conflict as symptoms of psychotherapy. While earlier dystopian fears about the coming "therapeutic state" have proved to be overstated, there are great hidden dangers in the everyday "medicalisation of deviance."[164] This refers to the extension of social control by widening the categories of behaviour that "need" psychological treatment; these include eating, sexual, learning or drug "disorders" and interventions to prevent "anti-social behaviour." In the quest for alternatives to punishment, there are good human rights grounds for looking beyond models of rehabilitative treatment to models of social justice, reconciliation, restitution and reparation (illustrated in the "justice in transition" debate).

As *Sparks and McNeill* suggest, a penal philosophy that distinguishes "constructive" from "punitive" punishment and acknowledges the importance of social justice could make an essential contribution to human rights protection. They also note:

> *[W]here 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'.*

Sparks and McNeill argue compellingly that the moral challenges and ambiguities of prison as an institution need to be discussed openly with the objective of understanding how human rights are granted, conditioned or withheld from people who are detained in them. Viewing prisoners as bearers of human rights and entitled to a sanctions regime that rehabilitates rather than segregates or incapacitates involves making a strong human rights case against measures such as depriving prisoners of the right to vote or life sentences without parole, as well as aspects of probation and other post-incarceration regimes that restrict rights.

Non-custodial forms of punishment merit close human rights monitoring, especially because imprisonment remains the norm against which

164 Conrad and Schneider (1992).

other sanctions (such as CSMs) are measured and with which they must compete for credibility and legitimacy. In discussing CSMs (in the UK context), *Sparks and McNeill* argue that it will be important to monitor them from a human rights perspective, especially where they are overly influenced by the contemporary preoccupation with public protection and where human rights are likely to be at risk:

- When an offender's access to a CSM (in place of custody or facilitate early release) is subject to questionable assessment of the risks involved in his or her release;

- When offenders do not (or are not required to) consent to a CSM that affects their rights (since such measures may not be in their interest);

- When CSMs contain onerous and intrusive conditions (including on public interest grounds), such as surveillance, daily reporting or other disproportionate restrictions;

- When obligatory supervision arrangements and other conditions are such that offenders are likely to violate their CSMs for technical reasons;

- Where technical violations of CSMs may cause offenders to face more serious penalties than would otherwise have been imposed upon them (since such CSMs can increase rather than reduce rates of incarceration).

3. Non-Criminal Sanctions and "Soft" Controls

Human rights monitoring of "soft" controls is of special significance. "Soft" controls (such as administrative regulations) are less likely to be monitored and questioned, though in many instances they set conditions on the granting of rights as a means of control. Apparently neutral legislation that imposes such conditions can worsen the situation of groups of people who are already vulnerable.

Where new modes of policing are developed to deal with "emergency" events, their effects need to be monitored and their legitimacy tested in human rights terms.

For example, the impact of urban planning regulations and their particular impact on the poor should be closely monitored. Administrative measures that create no-go areas, wall off city areas, regulate access

to public spaces (such as parks), impose vagrancy legislation, or are otherwise designed to control or restrict the movements, or access to facilities, of poor and especially homeless populations are likely to violate or undermine human rights.

Such controls are often tightened when emergencies, such as a public health crisis, occur. Where new modes of policing are developed to deal with such events, their effects need to be monitored and their legitimacy tested in human rights terms.

Controls, whether or not explicit, in administrative and civil law can have a significant impact on social and economic rights as much as civil and political rights. When individuals are denied access to public housing because they are subject to an anti-social behaviour order or denied welfare because they have been accused of child abuse or are drug offenders, it undermines the exercise of many civil, political, economic and social rights. In May 2009, the UN Committee on Economic, Social and Cultural Rights censured Australia for introducing legislative measures that "quarantined" welfare payments as well as land rights following the publication of a report alleging widespread sexual abuse of aboriginal children in the Northern Territories.[165] The Committee noted that such measures 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".[166]

While "soft" controls have been the subject of a number of challenges at the national and local level, there is potential for international human rights advocacy to "join up" these challenges by documenting the impact of such controls and assessing them against relevant human rights principles, including tests of proportionality, non-discrimination, reasonableness, least restrictive or intrusive means, and non-arbitrariness.

4. Segregation and Exclusion

A recurring concern underlined by this project is the return of segregation across all the areas of public policy examined. As highlighted in this report and the research papers, segregation arising from administrative regulations, laws and policies with respect to urban

165 "Little Children are Sacred". Available at: www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf.

166 Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia, UN Doc.E/C.12/AUS/CO/4, 22 May 2009, para. 15.

planning, health, social welfare, criminal justice or migration, reproduce a social architecture reflected in growing inequalities and differentiated access to rights and entitlements.

Cities (small, big and mega) perhaps present the most significant space in which segregation is played out. Indeed, the fact that for the first time in human history a greater proportion of people will be living in urban areas itself has a number of implications for social policy and, by extension, for human rights policy and advocacy. The burgeoning of mass private spaces or public spaces that are privately policed raises very significant human rights questions in terms of inclusion, rights of access and the extent of powers of private security actors. However, a human rights critique of urban segregation and social controls, including linking policing – public and private – and exercise of basic freedoms to property rights has to account for the complex nature of the social, political, economic and cultural geography of contemporary urban realities.[167] It must also account for the impact of security thinking (rather than rights thinking), which has led to every aspect of urban life coming under increasing surveillance and control, leading some to point to the emergence of a *New Urban Militarism*,[168] reshaping urban governance to contain risk and insecurity rather than to promote inclusion and freedom. As Candan and Kolluoğlu point out, the "spatial segregation feeds into and reproduces the social distances between groups", a social distance that is "mediated by deepening anxieties and urban fears."[169]

What can human rights offer to those at the margins in this context? As a starting point, human rights advocacy could urgently turn its attention to the criminalisation of the poor and, in particular, challenge and call for the abrogation of vagrancy laws and administrative measures that criminalise the urban poor. As referred to in the section on "soft controls" above, it is critical to expose the different ways in which laws and regulations render illegal or obstruct a whole range of legitimate social and economic activities, ranging from freedom of movement and access of impoverished populations to public spaces: naming,

167 See, for example, Davis (2006) or Rodgers (2004).

168 See Graham (2010). As Major Ralph Peters, US Army, put it, "The future of warfare lies in the streets, sewers, high-rise buildings, industrial parks, and the sprawl of houses, shacks, and shelters that form the broken cities of our world. We will fight elsewhere, but not so often, rarely as reluctantly, and never so brutally." Available at: housingstruggles.wordpress.com/2009/01/09/mike-davis-the-new-ecology-of-war.

169 Candan and Kolluoğlu (2008), p. 41.

shaming and resisting the myriad forms of "petit apartheid" arising from social control measures across policy areas emerges as a critical agenda for human rights policy and advocacy. While challenging forced evictions, arbitrary slum clearance, lack of basic entitlements etc. are vital, subjecting the entirety of urban planning and governance itself to human rights scrutiny is of urgent importance.[170]

More broadly, advocacy must highlight a double standard in citizenship: to some granting the right to freedom from insecurity and fear, while to others denying a range of rights because they are perceived as being "outside" the community due to their status or behaviour. There must also be a clear recognition of the particular precariousness of poor immigrants in this situation who are not even protected by the notional label of citizenship and are therefore particularly vulnerable to exclusionary controls.

5. Protection and Victims' Rights

Human rights advocates have championed the rights of victims of human rights violations and underlined the obligation of States to protect them. They have increasingly called on States to use their power to protect those at risk, in public but also in "private" spaces, in the family or in homes. Human rights bodies have required States (and increasingly private actors) to exercise due diligence when they assess risk.[171]

The social control perspective reminds us that protection objectives may be used to generate and perpetuate control. A public discourse that stokes fears of risk and insecurity, that stigmatises "risk groups" and demands solutions based on efficient management of the risk they represent, brings pressure on States to act on matters over which they often have little real control and could endanger core principles of judicial protection and human rights. Purveyors of and investors in risk acquire considerable power to shape public discourse and political behaviour at all levels,[172] while States are encouraged to increase surveillance and other forms of monitoring of people as well as places. This process is inherently

170 Work on the subject has been done by the present and former UN Special Rapporteur on the right to adequate housing and NGOs such as the Housing and Land Rights Network or the Committee on Housing Rights and Evictions.

171 See European Court of Human Rights judgments, e.g., *Ozman v. United Kingdom* (1998) and *Opuz v. Turkey* (2009).

172 Garland (2003), p. 62.

speculative: it focuses on what people *might* do, not on what they have done. It highlights individual or group characteristics that are associated with risk and thereby creates conditions that favour discrimination.[173]

The research papers highlight some of these dangers. *Oberoi* notes that measures to protect victims of trafficking have been applied to control irregular migration and that, though trafficking has "rightly" been criminalised in international law,[174] in practice many people "at risk" of being trafficked have been deprived of liberty and freedom of movement as a result, since "all movement [is viewed] as forced and undesirable". This effectively criminalises emigration for some.

The social control perspective reminds us that protection objectives may be used to generate and perpetuate control.

The element of protection is also often gendered. For example, when women victims of trafficking are rescued in India, they are often sent into protective custody until their cases are heard or until they are sent back home. Frequently they languish for years in these homes, in very poor conditions, forgotten by everyone. Clearly such a practice seriously infringes the human rights of the women concerned. As the UN Special Rapporteur on Violence against Women has observed: "[t]he notion of protection is perhaps most problematic when it comes to the practice of 'protective custody'".[175] Other forms of preventive state intervention can also lead to the adoption of forms of control, which focus disproportionately on those who are already disadvantaged.[176]

173 Tsoukala (2008).

174 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted in 2000.

175 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy. Addendum: Mission to Bangladesh, Nepal and India on the issue of trafficking of women and girls (28 October–15 November 2000) E/CN.4/2001/73/Add. 2, page 12.

176 See, for example, Snider (2008). She points out that the first person to serve prison time under Canada's mandatory charging provisions for domestic assault was a woman charged with contempt because she refused to testify against her assailant in court. "It is hard to argue that subjecting marginalised 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."

While a social control perspective cannot provide all the answers, a better understanding of just how "crimes", "victims" and "offenders" and "controls" are socially constructed is vital to better inform and target human rights advocacy.

Human rights advocates need to consider this risk when they call for protection, particularly in contexts where the State is predisposed to act in ways that are violent or discriminatory and where advocating state intervention (such as criminalisation in a context of overcrowded and violent prison conditions) might increase the incidence or gravity of human rights abuses.

There is a further danger that calls for strong state action to enforce protection can present the State and its agents as neutral arbiters between victims and offenders, allowing them to escape their share of responsibility for the conditions in which abuse is likely to occur. Such advocacy can also focus attention on the acts of individual perpetrators to the neglect of the social, economic and political context, falsely suggesting that the efficient punishment of wrongdoers might engineer egalitarian social change.[177] Developments in the sphere of reparations within international human rights law are relevant here: for example, the UN Special Rapporteur on Violence against Women has noted that States have a responsibility to address structural, cultural or other inequalities that enable violence against women as part of their obligations in the context of reparations.[178]

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 from it (to the extent that it has, on occasion, accepted diminished rights for the accused), has contributed to weakening the commitment of many countries to due process safeguards (such as the right not to be tried twice for the same offence[179]) and liberal principles of rehabilitation (with regard to sentencing policies,

177 Aharonson (2010).

178 See, for example, the Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc, A/HRC/14/22, 23 April 2010, with a separate section on reparations.

179 Britain abandoned the principle of double jeopardy in 2005 (under the Criminal Justice Act, 2003) in response to campaigns by victims of crime. The Court of Appeal can now quash an acquittal and order a retrial when "new and compelling" evidence is produced.

such as life without parole or indefinite detention[180]). Such situations present difficult dilemmas for human rights organisations.

While a social control perspective cannot provide all the answers, a better understanding of just how "crimes", "victims" and "offenders" and "controls" are socially constructed is vital to better inform and target human rights advocacy. In the context of infectious disease control, *Parmet* argues that, were human rights and public health advocates to engage with social control theory, they would become more conscious of the social construction of public health risks, and this would reduce the risks that arise when panics drive public health policy.[181]

6. Surveillance and Security

Social control analysis identifies ways in which the "appetite for security" has widened the scope of policing in both the state and private sectors, and shifted its focus from responding to prevention of crime, anti-social behaviour, disease, etc.

Leman-Langlois and Shearing argue that a transition is occurring, towards "risk societies" whose governance is designed to manage the future and future risk, and that this evolution challenges the existing human rights framework designed to protect individuals by applying a "backward-looking governance regime". They list three implications that human rights advocates need to consider:

- Security will be unequally distributed (because risk priorities will be politically influenced);

- The thirst for information (which drives policy formation) will increase surveillance across all areas of life, on the assumption that "it is now persons who constitute risk that have become the new offenders";

180 Washington State's 1990 Community Protection Act, enacted in response to public fears about the reoffending of "sexual predators", provides for the indeterminate commitment for treatment and control at the end of their sentence of sex offenders believed to suffer from a "mental disorder" and thought to be dangerous. Several other US States have since adopted similar statutes. See La Fond (1991–1992). He notes that the victims' rights movement played a significant role in this decision.

181 Murphy and Whitty (2007). The authors argue that the law fails to effectively question "expert opinion", which is responsible for providing risk assessments and suggest the "Belmarsh" decision in the UK House of Lords shows how expert opinion can be tested.

- Individuals will increasingly be categorised, creating conditions for new and old forms of discrimination.

Human rights advocates are familiar with the abusive uses of surveillance, notably in States that impose restrictions on political opponents, human rights defenders and others. Profile-based controls, many of which incorporate biometrics and other recognition technologies, as well as simpler forms of identification, raise a number of additional human rights concerns. Convergence (i.e., measures that enable the bringing together of information held in different places and the construction of detailed profiles) and possibilities of tracking expand the possible uses to which public and private agencies might put information they collect or share, greatly reducing the degree to which individuals have control over information about them being held by different public and private agencies.

In order to be more effective, human rights monitoring of surveillance could:

- Highlight the broader range of concerns and analyse surveillance as a tool of control and social sorting. Privacy rights are critical but the range of issues has broadened, and human rights advocacy should take account of this;

- Unearth the interests that public and private institutions have in using such technologies and the presumptions of common interest and "public good" in their deployment;

- Examine the use of such technologies in socio-economic contexts, which are often very unequal;

- Examine the role played by private corporations and the State (in particular security agencies) in the development and deployment of these technologies and the challenges for accountability.

Proposals to issue national or local identity cards or to introduce biometric identification schemes and databanks are best assessed with the above issues in mind.

Given the rapid evolution of surveillance and the growing symbiosis between the "surveillance society" and the "safety state", human rights advocates will need to adopt a multi-disciplinary approach and deepen their co-operation with experts in security and other relevant disciplines.[182]

182 Lyon (2007b). See also the forthcoming ICHRP report on privacy and data-gathering technologies.

7. Privatisation of Prisons and Policing

A fundamental question that faces human rights organisations is whether it is appropriate for States to devolve to private entities their power to use force or restrict freedoms: to privatise the application of controls that threaten life and liberty. As Canada's Law Commission has pointed out:

> *Unlike 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. And their powers, though still relatively restricted in most countries, are expanding. "Private police" in the US are involved in arrest, search and seizure, criminal investigation, public order and patrolling. In South Africa private security agents may stop and search people, move people on, control behaviour their clients complain about and make arrests.[183] The Federation of Indian Chambers of Commerce and Industry has recently recommended to the Government that, to enhance their security capabilities, some private security agencies should be licensed to carry automatic weapons.[184]

Sparks and McNeill discuss the privatisation of prisons. They point out that opponents of prison privatisation raise arguments that are highly relevant to human rights. They say first that privatisation is likely to cause prison populations to expand. After all, if prisons are "profit centres", the more people are in them, the better.[185] They claim that privatised prisons become warehouses (the sentencing principle that American

183 Misha Glenny, How crime took on the world – Part Three, first broadcast on May 12, 2008, on the BBC World Service.

184 FICCI Task Force Report on National Security and Terrorism (2009). Available at: www.ficci.com/SPdocument/20032/terrorism-report.pdf. The carrying of such weapons is currently restricted under the Private Security Agencies Act 2005.

185 That this can lead to abuse is evident from the indictment of two County Judges in the US who reportedly took some $2.6 million in bribes from a corporation running private detention facilities for juvenile offenders. Some juveniles were given longer sentences to "keep centers filled". Available at: www.nytimes.com/2009/02/13/us/13judge.html?_r=3&emc=eta1.

corporate prisons refer to most frequently is "incapacitation"). Thirdly, they question whether the public interest is served when the private sector runs institutions that punish in the name of the State.

But should the State delegate its coercive powers in the first place (or is it even entitled to do so)? In November 2009, a nine-judge panel of the Israeli High Court of Justice found that actions involved in running a prison, such as ordering inspection of a prisoner's naked body, authorising solitary confinement or approving the use of reasonable force to search a prisoner, are unacceptably invasive when in the hands of a private agent. The finding was in response to a petition filed by a human rights organisation that argued that transferring powers to private providers would violate prisoners' fundamental human rights to liberty and dignity and that a private organisation's essential purpose was to maximise profits and cut costs, and this would lead to the undermining of rights. The court argued that, when transferred to a private corporation whose main aim is to make money, the act of depriving someone of their liberty loses much of its legitimacy.[186]

Should the State be allowed to delegate coercive powers to private actors? Arguments against prison privatisation raise many relevant human rights questions.

UN human rights bodies have also attempted to address the privatisation of prisons. In the 1990s, the UN Sub-Commission on the Promotion and Protection of Human Rights tried unsuccessfully to encourage the Commission on Human Rights to conduct a comprehensive study of prison privatisation.[187] Political considerations appear to have effectively blocked an initiative that might have clarified whether such privatisation is compatible with international human rights law. In March 2010, the UN Human Rights Committee reiterated concerns expressed in 2002 about privatisation of prisons in New Zealand. It questioned, "whether such privatization in an area where the State party is responsible for the protection of human rights of persons deprived of their liberty effectively meets the

186 See www.haaretz.com/print-edition/news/international-legal-precedent-no-private-prisons-in-israel-1.3774. The text of the decision in Hebrew can be found at: elyon1.court.gove.il/files/05/ 050/026/n39/05026050.n39.htm.

187 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 authorise a full study.

obligations of the State party under the Covenant and its accountability for any violations, irrespective of the safeguards in place".[188]

For *Leman-Langlois and Shearing* some assumptions about the organisation of public governance, which underpins the human rights framework, no longer hold. Other fundamental issues also need to be addressed (not least, whether certain state functions can be privatised even if international and national regulations and standards are respected and even if privatisation might result in short-term improvements in the human rights of those concerned).[189] This question is one that must be asked about the delegation of lethal and non-lethal force (powers vested in private security agencies) and the deprivation of liberty (private prisons).

Even if degrees of devolution are acceptable, are governments in a position to regulate the private security industry given the nature and technical sophistication of the many services that such companies offer and the difficulty of making security operations accountable and transparent? Their integration within the operations of institutions of state (from police forces to the military) is such that it is questionable if even the world's most powerful security apparatus, such as that of the US, might be able to operate efficiently if they dispensed with the innumerable private contractors that they commission to provide essential military, policing, surveillance, maintenance and civilian services.

188 Concluding Observations of the Human Rights Committee in relation to the fifth periodic report of New Zealand, UN Doc. CCPR/C/NZ/CO5, 7 April 2010, para. 11.

189 It is of interest that the "Draft Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World", issued at the Twelfth UN Congress on Crime Prevention and Criminal Justice (Brazil, 2010), included the following paragraph: "We recognize the importance of strengthening public–private partnerships in preventing and countering crime in all its forms and manifestations. We are convinced that through the mutual and effective sharing of information, knowledge and experience and through joint and coordinated actions, *Governments and businesses can develop, improve and implement measures to prevent, prosecute and punish crime*, including emerging and changing challenges." Emphasis added. UN Doc. A/CONF.213/L.6/Rev. 2, para. 34.

8. Transnational and International Policy Transfer Regimes and Processes

Human rights monitoring of regional and global regimes of policy transfer are vital. Beyond seeking to ensure compliance with international human rights standards in a procedural sense, it is important to unravel the pretexts on which such regimes are based.

The emergence of multiple transnational and international regimes poses a further challenge for human rights policy. To start with, there is a question of coherence, and coherence to what end and on what basis? The human rights protection regimes in relation to migration or health, for example, have different intellectual and ethical foundations from those of the IOM or the IHR, which typically take an approach that constructs their subjects as problems in need of management rather than protection. Similarly, even though the global response to the drug problem involves serious human rights concerns, "the United Nations drug control and human rights regimes have developed in what have been described as 'parallel universes'."[190] While the UN drug control programme "has not incorporated human rights into its activities, conducting no human rights impact assessments, for example, despite the risk of complicity in human rights abuses", UN human rights bodies have paid scant attention to human rights issues in "countering the world drug problem".[191]

Accountability presents a challenge in this context, particularly in regard to monitoring the traffic in expertise and knowledge involving "independent" consultants, experts and think tanks, who often travel back and forth between the government, inter-governmental, corporate, and NGO worlds.[192] In general, while many national initiatives to monitor and advocate in relation to security policy are in evidence, effective advocacy is less evident at a regional and global level. Human rights advocates could make a significant contribution were they to monitor the transfer of criminal justice policies through international and transnational regimes and map regional and global regimes of policy

190 IHRA (2008).

191 Ibid.

192 For example, a year after his resignation from government, former UK Home Secretary John Reid became a consultant to private prison operator G4S. George Monbiot, "This revolting trade in human lives is an incentive to lock people up", The Guardian, 3 March 2009.

transfer as well as the technologies, know-how and policies that are transferred. Beyond seeking to ensure that such policies comply with international human rights standards in a procedural sense, they could play a vital role in holding such regimes to account, calling on principles such as equality, universality and indivisibility.

9. The Relevance of Human Rights Principles in Monitoring Social Control

States argue that measures of control are legal, notably in the interests of "security", "public safety", "public order", "public health" or even "public morals". This presents a dilemma for human rights advocates because human rights law permits States to limit liberty, subject to procedural protections.[193] The terms of human rights law may be applied to restrict the State's coercive powers and provide checks on the abuse of state controls but may also legitimise restraints on or deprivations of liberty.

The terms of human rights law may be applied to restrict the State's coercive powers and provide checks on the abuse of state controls but may also legitimise restraints on or deprivations of liberty.

Parmet suggests that, when public health panics occur, limiting the exercise of rights is likely to be deemed justifiable even after judicial review.

> *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 abridgement of human rights during a public health panic.*

She maintains that human rights, which could play an invaluable role in promoting public health, have instead been devalued here, as elsewhere, on the grounds that security (in this case from infectious disease) should override them. As a consequence, "preparedness planning" drains resources from endemic and chronic conditions that pose far greater risks to most of the world's population, xenophobia is reinforced and the securitisation of public health is perpetuated.

The way in which "exceptional" measures may be extended or

193 Broadly, human rights treaties allow rights to be limited on grounds of "national security", "public morals", "public order", and "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 recognising the need to "manage" the allocation of rights to ensure equity.

normalised in the aftermath of "moral" or "security" crises has long been of concern to human rights advocates. Some scholars have even gone so far as to argue that law has no role to play when States raise 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.*[194]

What protection does human rights law provide in such contexts? How might human rights principles be applied to restrict States from applying controls that restrict rights? Where social control policies have been introduced, how might human rights advocacy limit their negative impact and strengthen the benefits they may bring?

Several human rights principles are relevant. Governments are required to justify any restrictions to the enjoyment of rights that they impose on grounds recognised in human rights law; their authority is neither absolute nor unconditional. The use of permissible limitations must be interrogated at every turn, even when positive law may support a claim of legality. Human rights advocacy can draw on principles governing limitations on the exercise of rights that exist in international human rights law and apply these to the exercise of controls, having regard both to the State's positive duty to protect and to its negative duty to refrain from abuse.

Limitations on the exercise of human rights must be:[195]

- In accordance with the law;
- Based on a legitimate objective;
- Strictly necessary in a democratic society;
- The least restrictive and intrusive means available;
- Subject to review and to remedy against its abusive application;
- Not arbitrary, unreasonable or discriminatory.

Central to these conditions is the principle that any limit on a right should be proportionate to a legitimate aim. The UN Human Rights Committee has interpreted the principle of proportionality to mean that measures must not be excessive in comparison to the threat and must correspond with a genuine threat or existing practice, which leads to criminal acts rather than

194 Hornqvist (2004).

195 United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, Annex (1985). These principles have been further interpreted by human rights treaty bodies elsewhere.

a perceived threat or generalised fear.[196] While this interpretation refers to situations of declared emergency under international human rights law, it could be equally applicable to a range of "every-day" policies, often a response to "moral panics", as highlighted in this report and in the research papers. It underlines the importance of balanced and informed determinations about what are reasonable and proportionate limits, taking into account how moral panics are constructed and applying existing human rights principles accordingly.

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In April 2010, the UK Supreme Court ruled that permanent inclusion on the sex offenders' register without possibility of review was a disproportionate interference in the family lives of the appellants.[197] The 2007 Human Rights Watch analysis of sex offender legislation in the US demonstrated how the same principles provide excellent tests against which to measure a range of controls.[198] As the report and other sources note, extreme controls, such as residency restrictions on sex offenders, not only do not work but may actually lead to offenders losing access to essential treatment, employment and, as a state Corrections Secretary noted, "they actually make things more dangerous rather than make them safer."[199] It would be a mistake to assume that there is an "inherent contradiction between protecting the rights of children and protecting the rights of former offenders."[200] While there are "no easy answers", an approach that respects human rights of all (victims and offenders alike) and focuses on time-bound individual assessments of offenders (rather than permanent assignment of risky status), notification on a need-to-know basis (rather than open registries), case-by-case supervision with effective review mechanisms, among other measures, are far more likely to enhance protection and inclusion.[201]

196 Human Rights Committee, General Comment 29, States of Emergency (article 4), UN Doc.CCPR/C/21/Rev.1/Add. 11 (2001).

197 BBC News, "Sex offenders win legal challenge over register", 21 April 2010. Available at: news.bbc.co.uk/1/hi/uk/8634239.stm.

198 Human Rights Watch (2007b).

199 www.ktka.com/news/2008/may/19/do_residency_restrictions_sex_offenders_work.

200 Human Rights Watch (2007b).

201 Ibid.

The principle of non-discrimination can be applied to highlight the differential impact of policies of control on access to social and economic rights as well as civil and political rights and the way in which policies are disproportionately targeted at the socially and economically vulnerable.

A note prepared recently for the UN Commission on Narcotic Drugs pointed out that the principle that the severity of penalties should not be disproportionate to the criminal offence is reflected in a number of human rights–related standards and includes the notions that imprisonment should be used as a penalty of last resort and that the choice between penalties should take into consideration the likelihood of the offender being rehabilitated.[202] Within the EU, the principle of proportionality has been applied to restrict the detention of non-nationals to a period no longer than is necessary to determine immigration status.[203] As *Oberoi* argues, "international human rights law places narrow limits on permissible distinctions that can be made between citizens and migrants and affirms that any potential distinctions should be subject to necessity, proportionality and tests of reasonableness".[204] She notes that this has been considered a useful methodology for setting a threshold of acceptable state conduct with regard to economic, social and cultural rights (and has been adopted and developed by the South African courts, for example).

The principle of non-discrimination is also key. It can be applied to highlight the differential impact of policies of control on access to social and economic rights as well as civil and political rights and the way in which policies are disproportionately targeted at the socially and economically vulnerable. In this context, it is also important to challenge

202 Drug control, crime prevention and criminal justice: A Human Rights Perspective. Note by the Executive Director, Commission on Narcotic Drugs, Fifty-third session, Vienna, 8–12 March 2010, UN Doc. E/CN.7/2010/CRP.6-E/CN.15/2010/CRP.1. The note referred specifically to Report of the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August–7 September 1990, Chapter 19: "Management of criminal justice and development of sentencing policies", at p. 164 UN Doc. A/CONF.144/28/Rev.1. Also, Charter of Fundamental Rights of the European Union, Art. 49, "Principles of legality and proportionality of criminal offences and penalties."

203 See UK Joint Parliamentary Committee on Human Rights (2007). This report demonstrates the ways in which aspects of the asylum process in the UK are disproportionate, unreasonable and discriminatory.

204 In 2007, the UK Court of Appeal upheld an earlier High Court ruling that government regulations seeking to prevent "sham" marriages of illegal immigrants were discriminatory. "Government loses sham marriages appeal", The Guardian, 23 May 2007.

the continuing contention of many States that social and economic rights are mere principles and are not justiciable,[205] and that poverty is not a ground for discrimination.[206]

In the context of drug use and drug dependence, the harm reduction approach serves as an example of how the principle of the least restrictive or intrusive means might be used to avoid policies of control restricting rights. According to the IHRA, "'Harm Reduction' refers to policies, programmes and practices that aim primarily to reduce the adverse health, social and economic consequences of the use of legal and illegal psychoactive drugs without necessarily reducing drug consumption".[207] Developed primarily as a response to injection-driven HIV, this definition places harm reduction at odds with policies based on an ideology that views drug use as morally wrong and addiction as an "evil" or threat to be "combated".[208] Instead of security, harm reduction is therefore based on a commitment to public health and human rights; this requires asking very different questions of policies and considering alternative indicators of success. Harm reduction is "facilitative rather than coercive, and […] grounded in the needs of individuals"[209] including rights to education and health care, for example. Rather than adopt penal strategies, stigmatise individuals (such as drug-users) as "dangerous" and impose punitive restrictions, harm reduction seeks to focus on expanding the capacities of those most at risk to empower themselves while addressing wider social and economic factors that exacerbate such risks. As the former UN Special Rapporteur on the Right to Health noted:

205 As the UK delegation did in May 2009 in its statement, when the Committee on Economic, Social and Cultural Rights examined its fourth and fifth periodic reports on implementation of the ICESCR. See Concluding Observations, UN Doc. E/C.12/GBR/CO/5, para. 13).

206 In 2001, the Ontario Court of Justice in Canada considered a challenge to the Safe Streets Act (Ontario) 1999 which made aggressive soliciting a criminal offence. The challenge included the charge that the Act discriminated against those who shared the characteristic of "extreme poverty." In rejecting this aspect of the challenge, the Court commented that "the weight of authority is against recognising poverty itself as an analogous ground of discrimination" under the Canadian Charter of Rights and Freedoms. Available at: www.flora.org/legal/tickets/RvBanksOnCtJus2001.pdf.

207 "Harm Reduction" refers to policies, programmes and practices that aim primarily to reduce the adverse health, social and economic consequences of the use of legal and illegal psychoactive drugs without necessarily reducing drug consumption. It is based on a commitment to public health and human rights. See the IHRA at www.ihra.net. One of the more commonly known harm reduction interventions is, for example, needle and syringe exchange.

208 Preamble, 1961 Single Convention on Narcotic Drugs.

209 See www.ihra.net/what-is-harm-reduction.

> *In seeking to reduce drug-related harm, without judgement, and with respect for the inherent dignity of every individual, regardless of lifestyle, harm reduction stands as a clear example of human rights in practice.*[210]

In the context of drug use and drug dependence, the harm reduction approach serves as an example of how the principle of the least restrictive or intrusive means might be used to avoid policies of control restricting rights.

Human rights advocacy should interrogate risk claims that are advanced to justify the imposition of restrictions and control measures (even if these are apparently benign) to ensure that they do not mask a failure by the State to fulfil its wider human rights responsibilities. To illustrate from the case of infectious disease control, *Parmet* argues that, when assessments are made about whether restrictions of rights are required to deal with a public health "emergency", they should take into account the State's obligation under international law to provide the conditions necessary to promote health. A similar assessment of a State's obligations could be made with regard to other rights when considering the permissibility of limiting rights through social controls.

Human rights advocacy should interrogate risk claims that are advanced to justify the imposition of restrictions and control measures (even if these are apparently benign).

10. Security and Human Rights

It has been a recurring theme of this report that there is a need for a stronger human rights narrative that can counter the argument that increasing controls are justified on grounds of security. Such a

210 IHRA (2008), p. 5. Within the UN system, however, there is a clear division between the health, HIV and development bodies where harm reduction is fully endorsed, and the criminal justice and drug control bodies (in particular the Commission on Narcotic Drugs and the International Narcotics Control Board), where the approach remains highly controversial. The UNODC occupies an uncomfortable position within this as both the lead agency on HIV and injecting drug use, as well as on drug trafficking and organised crime. This conflict is reflected also at national level in many countries where disagreements arise between, for example, health and justice ministries. Harm reduction as a response to HIV, however, has now been adopted in policy or practice in 93 countries and territories worldwide, indicating that it is by no means a marginal policy option. See IHRA (2010b).

narrative would challenge inappropriate rhetoric (such as the use of "war" metaphors to describe programmes on drugs, crime, poverty, irregular migration and disease) and publicise the perverse effects of policies that rescue "victims" of trafficking, only to return them to danger or poverty, or punish anti-social behaviour by applying remedies that deepen social alienation.

In recent years the notion of "human security" has been used by human rights actors in responding to human rights and humanitarian crises. *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 emphasised the relationship between public health and international security.

Privileging "security" or emphasising the security dimension of rights can involve dangers for human rights that become all too obvious when governments affirm that security is their overarching priority or set the claims of "security" against the rights of individuals or groups who create social "risks".

When human rights advocates group other rights under the rubric of security, others may 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."[211] Talk of risk or dangerousness deflects attention from concerns about the social or economic inequality of particular groups; social and economic exclusion is effectively disguised by an individual's criminal status.[212]

The language of "human security" risks leading to the "securitisation" of human rights if it is not clearly tied to specific rights and protections.[213] In the context of policing, *Leman-Langlois and Shearing* point out:

> *[W]hile 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*

211 Loader (2007).

212 Hornqvist (2004).

213 Lazarus (2005).

is likely to see the governance values underlying human rights increasingly being trumped by security values.

There are good reasons to use the term "security" with care in this highly charged context and to consider how messages about rights protection and security will be perceived and understood by the wider public and in the broader political context. Explicitly acknowledging that the notion of security is contested could be a starting point. Security for whom? And to what end?[214]

Human rights monitoring could pay:

> *[M]ore 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.*[215]

To do this effectively will require far deeper co-operation between human rights advocates, social scientists and social policy analysts, and practitioners and political activists. The terrain of social control may be a good place to start, and the purpose of this report is to contribute to that endeavour.

214 It is interesting to note the response of the Miguel Agustin Pro Juárez Human Rights Centre in Mexico to the militarisation of policing operations against organised 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 (2008).

215 Bigo and Guild (2007), pp. 99–121.

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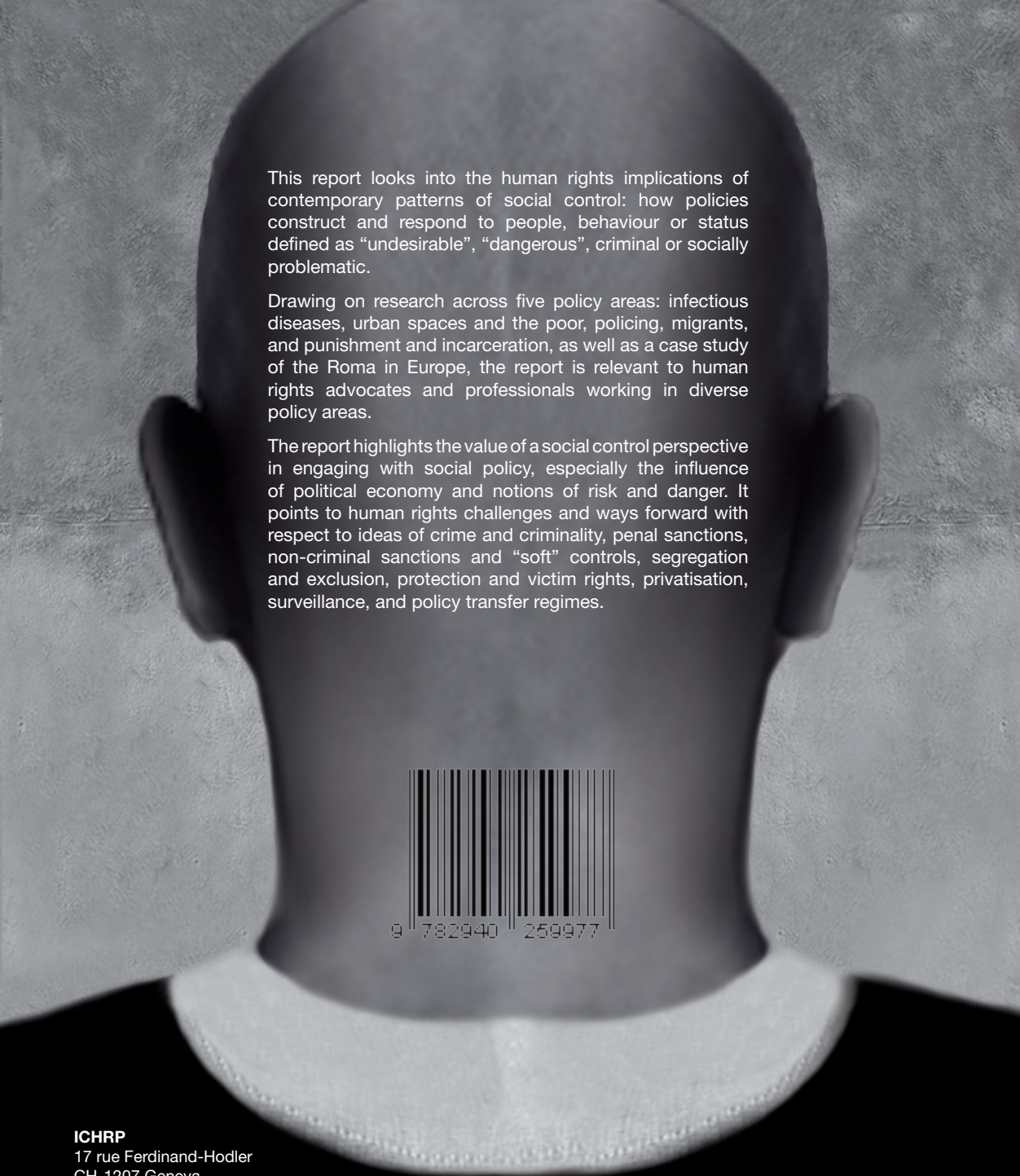

This report looks into the human rights implications of contemporary patterns of social control: how policies construct and respond to people, behaviour or status defined as “undesirable”, “dangerous”, criminal or socially problematic.

Drawing on research across five policy areas: infectious diseases, urban spaces and the poor, policing, migrants, and punishment and incarceration, as well as a case study of the Roma in Europe, the report is relevant to human rights advocates and professionals working in diverse policy areas.

The report highlights the value of a social control perspective in engaging with social policy, especially the influence of political economy and notions of risk and danger. It points to human rights challenges and ways forward with respect to ideas of crime and criminality, penal sanctions, non-criminal sanctions and “soft” controls, segregation and exclusion, protection and victim rights, privatisation, surveillance, and policy transfer regimes.

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