

# Human rights and limits on security policies

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## Introduction

This course in public safety and crime prevention policies has introduced you to the fundamentals of security and crime prevention policies, and has exposed you to research and debates on policing, private security, fear of crime, and crime prevention. Many of these policies are about preventing, deterring or designing out crime or the fear of crime. But can these policies go too far in restricting individuals' rights? Furthermore, are these policies always administered humanely? And are they administered fairly, without privileging any particular group of people? These are the concerns of human rights defenders and they are also the concerns of democratic governments who are ultimately responsible for what happens to their constituents. Because security policies are usually implemented by public agencies, these agencies must be held accountable for the possible excesses or abuses associated with these policies. However, even non-State agents (for example, private prisons, private security firms, non-governmental organisations and neighbourhood associations) put in place security policies. They too need to consider the human rights limits of their actions. This module will introduce you to the concept of human rights and their application to criminal justice interventions.

Criminologists who study the criminal justice system or who work in applied criminology as criminal justice practitioners must be aware of the intersection between human rights and criminal justice, because criminal justice interventions are subject to a range of international and nationally guaranteed human rights that limit their scope and range. A variety of institutions, both national and international, monitor their fair application, and civil society watchdog organisations also play a role in denouncing abuses in the media and bringing them to the attention of authorities who are competent to intervene. There is also substantial evidence that citizens grant more legitimacy to institutions that administer justice fairly. Thus, this topic relates to the ethics of our profession, as well as to the broader area of legitimacy and trust in criminal justice institutions and compliance with their policies and decisions.

In some cases, human rights put limits on what security policies can and cannot do. In other cases, they mandate what they *must* do. For example, the police cannot torture accused offenders. But prisons must provide for the basic needs of prisoners. A responsible criminologist, then, working in the area of law enforcement or security policies must know the limits of these policies as well as what these policies must encompass to be in line with human rights standards. Similarly, a criminologist who works to help offenders or victims should know their human rights vis-à-vis security policies. This knowledge has implications for the proper training and management of criminal justice personnel.

The international community has created a plethora of International standards and norms in criminal justice ([http://www.unodc.org/pdf/criminal\\_justice/Compendium\\_UN\\_Standards\\_and\\_Norms\\_CP\\_and\\_CJ\\_English.pdf](http://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf))

These norms cover the treatment of prisoners, the work of the judiciary, prosecutors, lawyers, legal aid, juvenile justice, alternatives to imprisonment and restorative justice, protection from torture, the death penalty, extradition, mutual legal assistance, foreign prisoners and prisoner transfer, crime prevention, principles of justice for victims of crime and abuse of power, the treatment of witnesses, including children, violence against women, law enforcement officers, etc. These norms are soft law and there is no formal compliance mechanism. However, the vast majority of global and regional human rights conventions, some of which have enforcement mechanisms, have implications for criminal justice, such as the Convention on the Rights of the Child; The Convention Against Torture; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention on the Prevention and Punishment of the Crime of Genocide; and the International Convention for the Protection of All Persons from Enforced Disappearance. International norms are a good starting point for the student of criminology who is interested in human rights violations; since they were drafted with universal application in mind, they are parsimonious tools that exemplify the essentials of human rights. The Appendix to this module, adapted from Annex I of the U.N. Office on Drugs and Crime's 2012 publication, *UNODC and the promotion and protection of human rights*, offers an excellent breakdown of the human rights implications and guarantees as they relate to criminal justice.

Criminologists are also interested in human rights violations of criminal justice interventions as a matter of scholarly criminological inquiry, through research on documenting, explaining and preventing these abuses. This area of research is often classified as State criminality. The post 9/11 world and the War on Terror have been the backdrop to many current debates about security policies and human rights, including the rights of terrorist detainees, the justification of torture and surveillance in Muslim communities (Arden, 2005). In Spain, these debates are not new. A wide body of legal scholarship exists that documents the distortion of criminal justice and the rule of law thanks to State counterterrorism policies against Basque extremists, as well as more positive measures whereby States seek to both isolate extremists and hold them accountable for their own violations of citizens' human rights and then encourage their reinsertion (Alonso and Reinares, 2005). But security policy excesses also exist for common crimes. Most criminal justice systems around the world focus their energies on subgroups of the population, arresting and incarcerating disproportionate numbers of ethnic or racial subgroups; most criminal justice systems overuse pre-trial detention; and few prison systems are fully

in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners. The reality of criminal justice is that human rights limits are frequently disregarded. Stan Cohen's seminar work, *States of Denial*, documents how states and citizens not only overlook human rights violations, but learn how to deny their existence. The challenge to criminologists is threefold: to monitor and denounce the excesses of security policies, to design new criminal justice reforms in line with human rights standards and to research why these excesses occur and how they can be prevented.

## Objectives

In line with the introduction, there are four learning objectives for this module:

1. To understand human rights as they relate to criminal justice and security policies
2. To understand why security policies lead to violations of human rights
3. To understand select instances of human rights limits on crime prevention, policing, sentencing and incarceration
4. To understand the ways to intervene to set human rights limits on security policies

These objectives are inter-related. In this module, we will be using security policies and criminal justice systems in different parts of the world as well as globally applicable norms and standards promulgated by international organisations as examples.



# 1. Security policies and human rights: Background, origins and explanations

## 1.1. Background and origins

From the very early writings of social contract thinkers in the eighteenth century, the criminal justice system has been tied to human rights. It was perceived as a system that should operate through minimal intervention, restrictions on the use of force and punishment, human treatment and rational decision making by criminal justice agents. Cesare Beccaria, whose work *On Crimes and Punishments* is a typical starting point for students of criminological and criminal justice theory and formed the basis for modern criminal justice systems, is exemplary of the classical school of thought on criminal justice but also provides utilitarian arguments for human rights guarantees to offenders. Beccaria was an advocate of minimal intervention of criminal law and proportionality of punishment; he saw excessive severity of punishment as leading to more crime, as opposed to preventing it; he believed torture and secret accusations should be abolished, as should the death penalty; and he believed that punishment should be applied equally to the rich and poor.

Beccaria's work is reflected in modern day thinking about the rule of law. Since his time, criminal justice scholars around the globe have generated a vast body of literature on the objectives of the criminal justice system, whether in theory or in practice and whether strictly bound by legal norms or emanating and, even sometimes, conflicting with legal norms. A central theme in the literature is that the main purpose of the criminal justice system is to deliver justice — to resolve conflict through the application of fair and systematic procedures to all human beings without discrimination. What the criminal justice system delivers is thus a public good and the criminal justice system is part of the institutions that help to bring about the rule of law. The rule of law is defined as

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency... [J]ustice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims, and for the well-being of society at large”

Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, 2004.

Within this definition of the rule of law, human rights play a fundamental role—so fundamental and so intrinsically bound to the delivery of justice that criminal justice scholars do not see them as indistinguishable. Often, they become distinguishable when they are clearly violated: when criminal justice agents perpetuate torture; persecute racial or ethnic minorities; carry out inhumane punishment; or apply excessive force. The advancement of the rule of law is necessary for the full realisation of all human rights and fundamental freedoms.

It is obvious to most criminal justice scholars and practitioners that the criminal justice system is not a coherent system with consistent objectives. Comparative criminal justice research provides the backdrop for this observation. Despite the general existence of police, courts and prisons (the three-legged stool of criminal justice) in most countries around the globe, there is great variability of criminal justice systems worldwide and there are enormous waves of change in the criminal justice system over time. Criminal justice and criminology as sciences are truly pre-paradigmatic. Whereas health institutions prevent or cure disease, the criminal justice system does not cure society from evil and a well-functioning criminal justice system does not guarantee a crime-free society. Even the simplest of criminal justice functions can be in conflict with each other and often priorities will fluctuate over time very widely.

Herbert Packer (1968) argued that criminal justice systems fluctuate on a spectrum between **crime control** and **due process**. The tension between the two ends of what is really an ideal type (a theoretical model of opposites) accounts for the conflict and disharmony that is often observable in the criminal justice system. The crime control model asserts that the repression of crime should be the most important task for criminal justice because order is necessary for a free society. Criminal justice should concentrate on asserting victims' rights over the protection of defendants' rights. Police powers should be expanded to facilitate investigation, arrest, search, seizure and conviction. Legal technicalities that inhibit police powers should be eliminated. The criminal justice process should operate in assembly-line fashion, processing cases quickly to their final outcome. The main objective of the criminal justice process should be to discover the truth or to establish the factual guilt of the accused.

Packer's due process model is the opposite of his crime control model. According to the due process model, the most important function of criminal justice should be to provide due process or fundamental fairness under the law. Criminal justice should concentrate on defendants' rights, not victims' rights. Police powers should be limited to prevent the sanctioned repression or oppression of the individual. The rights of the accused are not technical obstacles, but they are very important for the rule of law. Criminal justice agents and institutions should be held accountable to rules, procedures and guidelines to ensure fairness and consistency in the justice process. The criminal justice process should not be an assembly line, but rather an obstacle course,

whereby procedural rules protect the innocent as well as the guilty. An accused person should be convicted only if the government follows legal procedures in its fact-finding.

Packer argued that politics —value judgments— determine which end of the spectrum is in vogue at any given period in any jurisdiction. The crime control model reflects conservative values, while the due process model reflects liberal values. Political climate determines which model shapes criminal justice policy in time and place. During the politically liberal 1960s (in the United States in particular), the principles and policies of due process predominated in criminal justice. From the mid 1970s onwards, conservatism has been the dominant political philosophy and resulted in criminal justice policies that reflect the crime control model.

Many countries battle with Packer's spectrum urgently: the wake of armed conflict, crime waves, natural disasters, social unrest and insurgencies often push states to focus on crime control over due process. In these circumstances, the priority objective is often to ensure that the police, courts and prisons deter crime or detect it and punish it effectively, restoring order. These are times of risk for fundamental freedoms, in which human rights can be sacrificed for order maintenance. Even in stable times, criminal justice priorities can fluctuate via legislative reform or executive mandate.

For example, over the last two decades, there has been increasing attention paid to child sex offenders, zero tolerance policing, rigid sentencing policies and the surveillance of potential terrorists. All of these changes in priorities have implications for human rights, even though these developments are not necessarily emergencies.

Sometimes, citizens themselves call for change in criminal justice systems, demanding increased police presence, victim restitution schemes, accountability for white-collar crimes or less corruption. And most importantly, crime has become politicised. State building has become synonymous with the development of a functional and legitimate criminal justice system and the response to crime can serve important national and foreign political objectives. The implications of this are that, nowadays, domestic and international agents have many more choices to make in strategizing about criminal justice systems. These choices revolve around improving effectiveness and efficiency; building in multiple objectives for criminal justice functions; reaching new or underserved populations; and preventing or controlling emerging crime problems. Oftentimes, human rights become secondary to criminal justice objectives.

There are many human rights and the literature on human rights is extensive. In the long run, all are related to security policies. However, those most related to security policies are those that prohibit discrimination, abuse of power and guarantee access to justice and human dignity. The Universal Declaration of Human Rights is the starting point for our discussion, but many other inter-

nationally and regionally agreed conventions, guidelines, rules and policies are relevant to criminal justice, as are national and local laws and regulations that have been enacted in accordance with international obligations.

Equality and non-discrimination are key human rights principles and they are very relevant to security policies, which should always be applied fairly across social groups. The Universal Declaration of Human Rights guarantees equal applicability of human rights: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2). In addition, Article 6 states that “Everyone has the right to recognition everywhere as a person before the law” and Article 7 says that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Human rights also safeguard one’s personal integrity and, thus, prohibit the excesses or arbitrariness of interference with one’s personal integrity, whether one has violated a law or not, and guarantees access to justice. Article 3 guarantees that “everyone has the right to life, liberty and security of person.” Article 5 guarantees that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 8 guarantees access to justice: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Article 9 forbids arbitrary arrest, detention or exile. Articles 10 and 11 guarantee rights for the accused of a crime: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” (Article 10); “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed” (Article 11). Article 12 prohibits violations of privacy and attacks to one’s reputation: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

The right to mobility is guaranteed in Article 13: “(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country.” This right is important given legislation in some countries that prohibits personal movement, such as sex offender legislation in the United

States that restricts movement and publicises where sex offenders reside. In addition, sex workers have complained that human trafficking laws work to limit their right to mobility, by categorising them as victims instead of autonomous workers when they migrate to work, internally or internationally.

Article 25 guarantees the right to health. This right is particularly important as it concerns security policies affecting drug users as well as those affecting people in prison.

## **1.2. Explanations**

How do we explain the excesses of security policies? This is an area of scholarly research for criminologists and criminal justice scholars, from a variety of perspectives. Criminal justice practitioners, managers and administrators often deal with these excesses as part of a management strategy or a management problem, the result of faulty recruitment, training or supervision. Criminal justice policy analysts treat these excesses as inherent in the policies themselves, as direct by-products of policies or unintended consequences. Criminologists who study State crime and corruption see these excesses as (organisational or individual) deviance. Human rights advocates and researchers see these excesses as abuses of power.

Discretion in criminal justice is a frequent explanation for the excesses of security policies. Discretion is the power afforded to criminal justice agents to adapt the law to context. In some civil systems, discretion is formally forbidden and tantamount to corruption. However, in all legal systems, some amount of discretion is a reality. It is virtually impossible and impractical for police officers and prison guards, for example, to strictly apply the law 100% of the time. Judges are often given choices as to dispositions, sentencing guidelines or ranges of decision-making. The advent of professional policing, the incorporation of social psychology into the practice of judging and the increased training of prison guards means that many criminal justice authorities believe that discretion is part of professionalism. Many policing agencies consider discretion part of the profession of policing and incorporate it in training. The unbridled use of discretion, of course, can result in excesses of security policies that violate human rights. Thus, discretion needs to be carefully curtailed and criminal justice agents need to be clearly trained in the correct use of discretion.

The isolation of criminal justice agents and the secluded nature of the results of security policies is another explanation for excesses. Police may conduct searches and identity checks in public, but they generally interrogate and supervise detainees in private. Prisons are generally impervious to public view. According to crime prevention theory, police officers and prison officers are

the “capable guardians” —those designed to prevent crime and victimisation and maintain order. But what happens when they are not? This scenario begs for oversight mechanisms, which we will examine later.

Besides the isolation of much of criminal justice work, offenders and victims often come from vulnerable groups who do not know their rights and do not have easy access to justice. This is another explanation of excesses of security policies, whereby abuses of power take place on populations too ignorant or weak to protest and too lacking in social capital to enlist the help of others to defend them.

The monopoly on use of force by the State is a potent explanation for excesses in security policies and the violations of human rights. This is particularly true in peacetime democracies where law enforcement officers are the only ones to carry weapons and be authorised to use them. In conflict or post-conflict countries, policing is obviously more difficult, since police may not have the monopoly on the use of force. Military or paramilitary organisations, rebels or militias and vigilante groups may also take force into their own hands. (That scenario of the competitive use of force does not bode well for crime prevention, either.) But much current thinking on the police locates the abuse of power and violations of human rights to the unchecked or unmonitored use of force by security agents.

There is a range of explanations that do not excuse the excesses of security policies, but rather justify them. States of emergency, zero tolerance security policies (*mano dura*) and popular punitiveness all are seen to lead to, if not justify, excesses in security that violate human rights. Security policies that dehumanise offenders as enemy, ‘predator’ or ‘other’ are likely to justify severe treatment. Security policies that are rigid in nature, allowing no flexibility in decision-making, treat offenders in a one-size-fits-all manner. This will undeniably result in harsh treatment of the less serious offenders. Mandatory minimum sentences, three-strikes-and-you’re-out schemes and zero-tolerance policies are, by nature, likely to deliver harshness to those at the less serious end of the spectrum. Redondo (2009) questions the prevalence of such rigid norms in today’s society and suggests that social harmony could be achieved without them.

Subcultural explanations are also potent explanations of human rights violations. The most common have been those focused on “cop culture”, although studies of prison guards have also revealed subcultural tendencies. Studies of the police as a workplace subculture have emphasised, first, the gendered nature of policing and the hegemonic, aggressive masculinity expected of most police officers. Police subculture evidences an us-versus-them mentality, based on the everyday negotiation of risk and dangerousness by the police in encounters with the public; the need to bend the rules learned at the academy to the realities of maintaining order, respect and safety on the street; the loyalty the police officers feels to his or her partner and other police officers;

the authoritarianism and hierarchical nature of most police agencies; the high level of job-related stress; and the cynicism that often results from the police officer's work experience. This subculture may be more or less present in different countries and cultures, but the fact that most police officers regard their counterparts in other countries as 'brothers' leads one to think that, worldwide, the police have much in common. Abuses of power are explained by police subcultures because police tend to have more in-group loyalty than empathy towards citizens, including offenders, and can justify their actions as necessary given the circumstances.

The purposeful violation of human rights by the State is the focus of those criminologists who study state criminality. Stanley Cohen's seminal book, *States of Denial*, chronicles the various mechanisms by which States commit not only human rights violations, but atrocities and engage the collective memory in such a way that these atrocities are justified, minimised or denied and eventually forgotten. Students will remember the "techniques of neutralisation" from their module in criminological theory. These techniques are applicable to criminal justice authorities and to States. Denial of responsibility means that offenders will argue that they were victims of circumstance or were forced into situations beyond their control. In denial of injury, offenders insist that their actions did not cause any harm or damage. Offenders believe that the victims deserved what the offenders did, in denial of victims. And in condemnation of the condemners, offenders maintain that those who condemn their offense are doing so purely out of spite or are shifting blame off themselves. Appeal to higher loyalties is the final technique, whereby offenders argue that their offense was for a higher, loftier cause. All of these techniques can be applied to those who design or implement excessive security policies that violate human rights. All of them resonate with us when we read newspaper stories about human rights violations, whether it be police brutality, excessive use of force, discriminatory searches or stops, cruel and unusual punishment or Draconian sentencing policies.

## 2. Discrimination

Discrimination is a key issue for security policies. Many security policies reflect the attitudes of the larger society; and those who implement security policies are also not immune from attitudes of larger society. Racial and ethnic bias can be overt or institutionalised. By overt, we mean that policies or agents openly discriminate against protected classes of people. By institutionalised, we mean that policies and their implementation by criminal justice agents have the effect of discriminating against protected classes of people, even if that was not intended.

Many crime prevention policies can incorporate overt or institutionalised bias. One of the influences on modern policing and crime prevention is criminological research on the concentration of crime (such as hot spots) in social life and the emergence of focused policing tactics such as crackdowns, focused patrol, street interrogation (stop and frisk) and profiling. When the police focus on certain neighbourhoods or certain crimes, if members of certain social groups disproportionately reside or frequent those neighbourhoods or disproportionately commit certain crimes, the law ends up being applied unfairly. Crime prevention policies based in social or situational crime prevention can have the same effect. It is thus important that criminologists question the possible human rights limits of security policies.

For example, in the United States, crack cocaine guidelines were first set by Congress in 1986 with the Anti-Drug Abuse Act, which established the first mandatory sentence minimums with a sharp crack-to-powder ratio — 5 grams of crack cocaine was treated as harshly as 500 grams of powder cocaine. Crack cocaine trafficking is typically undertaken by African Americans, whereas powder cocaine is typically used by whites and Hispanics. The Fair Sentencing Act was enacted in 2010 as a response to what many consider racially biased sentencing guidelines for crack cocaine versus powder cocaine crimes.

Fleetwood (2011) makes a similar argument about the five-kilo rule for cocaine trafficking. Current and proposed sentence guidelines for drug-trafficking crimes in the United Kingdom are based on the premise that greater quantities of drugs will yield a greater profit, which deserves more severe punishment. Greater quantities are measured by weight to determine the maximum sentence available (five kilos for Class A drugs). Fleetwood's research on drug mules found that mules often carry greater quantities of drugs than professional traffickers and that therefore sentence guidelines based on weight will punish mules disproportionately. Research has found that drug mules come from the most marginal and vulnerable parts of the globe and are disproportionately female and from ethnic minorities.



In research on women and crime, the lower numbers of women arrested, convicted and incarcerated were for many years thought to be the result of “chivalrous” security policies whereby the police and courts treat women leniently because they see them as less dangerous and want to behave in a gentlemanly manner. More recent research has proved this questionable and in fact found quite the opposite: that women who violate gender norms (in the perpetration of their crimes, as well as their demeanour before police and judges) are treated more harshly than if they conformed to gender norms and that women, particularly girls, are subject to formal social control for their sexual misbehaviour (“promiscuity”) more than men (Belknap, 2007). Furthermore, mandatory minimum sentencing for drugs has had the effect of net widening for women who usually are involved with smaller quantities of drugs. Furthermore, Danner (2012) highlights the nefarious effects on women of conservative criminal justice policy reforms (mandatory sentences, prison building *etc*). These reforms —some of which are now being undone due to budget crises— hit women hard in a number of ways. Prison building means cuts to social services for the poor, targeting women and children, and unemployment for women, who tend to hold the jobs in social service work. Mass incarceration, largely of men, leaves the women in their lives to fend for their children as well as take care of the men. A gendered look at security policies and criminal justice reforms is always part of the criminologist’s role: given the marked differences between women and men regarding offending and victimisation, security policies are likely to have different effects on men and women.

Similarly, racial profiling in policing tactics has long been the focus of researchers and criminal justice reform activists. Racial profiling is to be differentiated from offender profiling, which is an investigative tool and a scientific means of trying to determine who committed a particular crime. Racial profiling is the use of an individual’s race or ethnicity by law enforcement personnel as a key factor in deciding whether to engage in enforcement (such as making a traffic stop or arrest). This practice is controversial and is illegal in many jurisdictions. It is also very hard to prove, because the police may say that race is not a factor in their work and that they are simply stopping more ethnic or racial minorities because of suspicion of crime commission. Some economists, for example, argue that the fact that police disproportionately search minority motorists in the United States is not racist. What matters instead is the rate of successful searches that discover drug contraband (the hit rate). When the hit rates are the same across racial or ethnic lines, the police are not racist in their searches. With racially equal hit rates, the police have achieved a racial balance, albeit with a racial imbalance at its base. On the other hand, others (legal scholars and civil libertarians), focusing on the raw disparities in searches, argue that the disparities themselves produce large numbers of innocent minority motorists subjected to negative police contact and state surveillance, which, they suggest, is unacceptable in human rights

terms. Others cite drug consumption self-report surveys, arguing that there is no evidence that minority motorists offend at higher rates than whites (Harcourt, 2004).

Racial profiling calls into question, then, the equal application of the law. Sociologists, criminologists and human rights advocates have highlighted other consequences of racial profiling, however, such as stigma experienced by racial and ethnic minorities (even if they are only stopped, but not charged or arrested with any crime) and their consequent lack of trust in the police and other authorities.

The United States is not the only country where discriminatory police practices have been exposed. The Open Society has conducted a series of studies on identity checks and police stops in Europe. In 2007 the Open Society issued a study of ethnic profiling by the police in Hungary, Bulgaria and Spain. It was a response to allegations of police discrimination against Roma and members of other visible minorities in the course of ordinary crime prevention activities and new reports of the targeting of Muslims by the police, engaged in the fight against terrorism. The results indicated that the police in all three countries practice ethnic profiling. Roma pedestrians in Bulgaria and Hungary and immigrants in Spain have valid reason to believe that they will be stopped by police more frequently than majority nationals of these countries. They are also more likely to have unpleasant experiences during automobile and pedestrian stops. Roma in all three countries and immigrants in Spain report feeling targeted on the basis of ethnicity. The report found that there was little routine data collection to allow police officers to be held accountable for ethnic profiling practices and that policies and procedures were not in place to actively prohibit it (Open Society, 2007).

A 2009 study conducted by the Centre National de la Recherche Scientifique (CNRS) and the Open Society Justice Initiative at five places in or near train stations in Paris, France, revealed that persons perceived as black were stopped by police at 6 times the rate of those perceived to be white. Those perceived to be Arab were stopped at 8 times the rate of perceived whites. In 2011, a European Union survey found that 25 per cent of French residents from minority groups reported being stopped by police in the prior two years, compared to 10 per cent of the majority population. A 2010 survey by the EU Fundamental Rights Agency found rates for targeting North Africans and Sub-Saharan Africans for street and vehicle stops in France that were amongst the highest percentages of stops targeting minorities in the EU. Discriminatory identity checks send a powerful message to both the person stopped and to all bystanders about who belongs and who does not. Entire sectors of the population are left feeling that they will always be second-class citizens simply because they “don’t look French”. This is particularly hard on second and third generation immigrants, because they were born in France, have French citizenship and their life experience is French. Besides this effect, discriminatory identity checks foster stereotypes, racism and xenophobia. When members of

the public see visible minorities stopped and searched by police over and over again, they frequently assume that these people must be criminals or otherwise dangerous. Furthermore, many families of visible minorities take it upon themselves to teach their children how to react to these searches submissively, so as to avoid trouble; many of those who are frequently stopped change their daily routines to avoid the police and report missed opportunities from the time consumed by these stops. Thus, discriminatory stops have many effects on the lives of visible minorities (Open Society, 2013).

### 3. Use of force

The excessive use of force, whether it is torture or brutality, in an encounter with an alleged offender is a key excess of security policies. In 1990, the United Nations put forth the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. These principles clarify that the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights, thus harking back to one of the key tenets of human rights that we saw earlier in this module, the principle of minimal intervention. They clarify that the least amount of force necessary should be used in all situations. The guidelines ask governments and law enforcement agencies to develop rules about the use of force and the ethics of using force; encourage the acquisition by law enforcement of a range of weapons, some non-lethal, thus proposing a graduated spectrum of response by force; foster the provision of protective gear to the police (vests, helmets, shields) such that force does not have to be the only answer to aggression from others; they ask governments to ensure that arbitrary or abusive use of force and firearms by law enforcement is punished as a criminal offence; and they clarify that exceptional circumstances such as internal political instability or another public emergency may not be invoked to justify any departure from these principles. The guidelines ask officers to be responsible for the damage caused, seeking medical attention for any injuries to others as well as notification of their nearest kin. Finally, the guidelines clarify that firearms must be fully justified given the seriousness of the offense and danger of the situation, encourage warning suspects that firearms will be used and mandate reporting systems for all incidents of use of force.

## 4. Excessive severity and cruel punishment

Excessive severity of punishment is a common excess of security policies. In this category we will include excessive court delay, the overuse of pre-trial detention, mandatory and life sentences, the death penalty, juvenile waivers to adult court, prison overcrowding, mass incarceration and inhumane prison treatment, including the prolonged use of solitary confinement, and the stigmatisation of ex-offenders via restricted voting rights, sex offender registries and employment and housing discrimination. Around the globe, these phenomena respond to both a resource issue as well as pro-punishment, nothing-works attitudes towards offenders. The lack of resources for police, court and counsel is frequently responsible for court delay as well as the overuse of pre-trial detention. Excesses in terms of sentencing and punishment, particularly prominent in the United States, Britain and other parts of Europe, have received criticism on human rights grounds from legal scholars (Ashworth, 2004; Ashworth and Van Zyl Smit, 2004; Snacken, 2006; Murphy and Whitty, 2007) and are well explained by David Garland's *Culture of Control*: a replacement of the penal-welfarist model emphasising rehabilitation, the social roots of crime, the re-integration of ex-offenders into society by a model that emphasises incapacitation and an exclusionary model of social control that keeps suspicious groups (the young, the poor, racial and ethnic minorities) out of increasingly privatised public space. This model is accompanied by an intellectual movement (a rational choice view of crime; a conservative reassertion of retribution as a basis for sentencing; and a moral outlook that simply regards some people as throwaways) combined with growing fears of a collapsing social order, such that sentencing policies and prisons can be restructured to imprison vast numbers of people with no attention to re-integration, mandate ever-harsher sentences, with the result that crime and punishment become a kind of politicised purging ritual.

While Garland provides a convincing analysis for recent excesses in sentencing and punishment, historical antecedents of mistreatment in prison and the uncertainty of indeterminate sentences predate his analysis. There is a long history of human rights abuses towards detainees and convicted prisoners, as well as the indiscriminate use of prison over other non-custodial measures to respond to offending. The excesses of security policies in this area have been well documented throughout time and place. The United Nations Standard Minimum Rules for the Treatment of Prisoners were adopted in 1955 and approved by the UN Economic and Social Council in 1957. Although these guidelines are 'soft law', they are a main reference point for the design and evaluation of prison conditions worldwide, whether for men or for women,

and they are frequently cited and used in rule of law development assistance, particularly when nations are in political transition or when newly created nations want to improve prison conditions.

Since 1955, more international guidelines concerning imprisonment have been drafted and approved. The most important of these are the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the 1990 Basic Principles for the Treatment of Prisoners, both adopted by the UN General Assembly. Along with the Standard Minimum Rules, these principles affirm that all prisoners must be treated with respect for their human dignity. They emphasise that the purpose of imprisonment is rehabilitation and they establish minimum standards for prisoner classification, prison discipline, contact with the outside world, healthcare, complaints, work and recreation, and religion and culture.

However, these rules and principles barely mention women and girl prisoners. If anything, they discuss women's biological needs, including maternity. Given global research that notes that the differences between women and men prisoners go beyond their reproductive functions, there has always been a subjacent interest in women prisoners. In 2010, the United Nations adopted special guidelines for the treatment of women prisoners, the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok rules). This was a landmark step in adapting the *1955 Standard Minimum Rules for the Treatment of Prisoners* to women. Although these rules have yet to be fully implemented, they constitute an improvement in international law for women prisoners. These rules recognize that female prisoners have significantly different needs from male prisoners. The Bangkok rules are largely evidence-based, recognizing many of the findings in this chapter and previous chapters in this book.

For example, they take into account the presence of high levels of victimization among women prisoners and their greater propensity for self-harm and suicide; the lower risk of most women prisoners yet higher classification levels; the special status of some women prisoners as mothers of children; the distance of women's prisons from home communities and the difficulties of prison visiting; the particular health and hygiene concerns of women; the stigma and discrimination facing women prisoners; the use of prisons as shelters for women's safety, as well as their use for 'immoral crimes'; the difficult pregnancies of juvenile female prisoners, some of whom may have been married very young; the need for gender-responsive programs and activities for women in prison, yet on a par with the opportunities given to men prisoners; and the particular needs of indigenous women prisoners and those from diverse religious and cultural backgrounds (Barberet, in press).

The rules call for gender-responsive and gender-sensitive policies and programs in prison in a wide variety of areas: intake, classification, mental and physical healthcare, mothering in prison, searches, women's safety, and the

development of pre- and post-release programmes that take into account the stigmatisation and discrimination that women face upon release from prison. They call for free sanitary towels, development of alternatives to strip and invasive searching, development of alternatives to incarceration for women and research, evaluation and data gathering on issues related to women in prison. They recognize that in some countries, women may be put in prison for their own safety and as a result of rape or immoral behaviour and call for alternative sanctions and provisions for women to denounce their victimisers and receive psychological counselling, putting the diagnosis of such conditions in the hands of doctors. These issues had not been dealt with in the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955. Because the United Nations is currently revising the 1955 Standard Minimum Rules for the Treatment of Prisoners, the Bangkok rules serve as an antecedent, pointing to modern challenges to the human rights of prisoners that must be the backdrop to any update of the Standard Minimum Rules for all prisoners.

## 5. Criminal justice research and human rights

The excesses of security policies are also relevant to research subjects, via the criminologist's engagement in criminal justice research with human subjects to better inform security policies. Offenders and inmates are generally considered vulnerable populations, because their submission to authority or captivity means restricted choice and implied coercion in participating in research studies. Victims can be also considered vulnerable, given that they may be in a weakened psychological state. Thus, criminologists need to consider the human rights implications of their own research.

Much criminological and criminal justice research is increasingly experimental. This kind of research is done in the field, through cooperative agreements with police agencies, courts and prisons, and often involves randomising police or court practices and assigning inmates to treatment and control groups for interventions. Experimental research in criminal justice has a nefarious past. Nazi experimentation on Jewish people in concentration camps during World War II violated their human rights. Experiments were targeted at this particular subpopulation, voluntary consent to participate was not requested, the experiments were of dubious scientific value and entailed high risk and, often, lethal practices. Other experiments with a criminal justice focus also formed the basis for a reform of human subjects' rights.

In 1961, Stanley Milgram, a Yale psychology professor, started his experiments on the obedience to authority. He wanted to know how easy it was to convince people to commit cruel acts as part of obeying authority. He designed an experiment whereby an unsuspecting person was asked to apply electric shocks by an authority figure to a third, unknown person who was actually a confederate of the authority figure. He found that the shock administrator was quite willing to do so, although with considerable psychological duress. The experiments were controversial and considered by some scientists to be unethical and physically or psychologically abusive.

The Stanford prison experiment, conducted in 1971 at Stanford University in the United States by psychology professor Philip Zimbardo, involved recruiting human subjects to play the roles of guards and prisoners. It demonstrated the excesses that the prison situation was likely to engender and, like the Milgram experiment, argued that, with the right situation and ideology, normal people could act very cruelly. Zimbardo had to end his experiment early because of the cruelties of his prison guards and the trauma suffered by his prisoner subjects; and he was criticised for the same kind of ethical violations as Milgram. Zimbardo was an expert witness for a defendant in the Abu Ghraib trial in the United States and published a book, *The Lucifer Effect: Understanding How Good People Turn Evil*, in 2007, which deals with the similarities between



his own Stanford Prison Experiment and the Abu Ghraib abuses. Along with criminologist Martha Huggins and psychologist Mika Haritos-Fatouros, he also researched police torturers in Brazil for their award-winning book *Violence Workers: Police Torturers and Murderers Reconstruct Brazilian Atrocities*.

In many countries, ethics boards based at universities watch out for violations of human rights of research subjects. Alternatively, professional organisations have ethical codes for their members to follow. Voluntary, informed consent is now seen to be key for human subject research. Human subjects must be informed of the risks and benefits of research, and must be treated as autonomous agents. They should be given extensive information about the research they are asked to participate in and the benefits of the research should outweigh the risks. Human subjects must have the right to end participation in research at any time. Researchers have the obligation to safeguard research subjects' integrity and protect them from physical, mental and emotional harm. They should also protect their privacy. Criminal justice experiments can also be said to be discriminatory: if field experiments always involve racial or ethnic minority offenders or neighbourhoods, they have a disproportionate impact.

## 6. Crime prevention

It is often argued that security policies that are not repressive or deterrent in nature are less likely to violate human rights. The 2002 United Nations Guidelines for the Prevention of Crime outline eight principles on which prevention should be based. These are: government leadership —at all levels to create and maintain an institutional framework for effective crime prevention; socioeconomic development and inclusion —integration of crime prevention into relevant social and economic policies, a focus on integration of at-risk communities, children, families and youth; cooperation and partnerships —between government organisations, civil society and the business sector; sustainability and accountability —adequate funding to establish and sustain programmes and evaluation, and clear accountability for funding; use of a knowledge base —using evidence of proven practices as the basis for policies and programmes; human rights/rule of law/culture of lawfulness —respect for human rights and promotion of a culture of lawfulness; interdependency —take account of links between local crime problems and international organised crime; and differentiation —respecting different needs of men and women and vulnerable members of society (ECOSOC, 2002). It is easy to see how these guidelines are connected to human rights, both because they explicitly mention the rule of law and human rights, but also because they are linked to governance institutions, incorporate accountability and demand a response to the needs of a diverse population. The UN Guidelines for the Prevention of Crime contemplate a number of approaches to crime prevention: social, developmental, situational and the reintegration of ex-offenders. They also contemplate the complex task of preventing organised crime.

In a discussion of the application of situational crime prevention to organised crime, Felson (2006) argues that regulating or redesigning settings, as opposed to repressing people, is less prone to violate human rights:

Of course, a total denial of freedom of assembly can reduce crime, too. Such a denial is antithetical to a free society. The Universal Declaration of Human Rights does not include these provisions:

- The right to get as drunk as possible among a group that's just as drunk.
- The right to trade stolen goods in public places.
- The right to take over a public park and kick everybody else out.
- The right for businesses to grow by facilitating crime.
- The right to sell heroin to new teenage customers in public places.

As you shall see, society can protect public places while minimizing arrests. Indeed, focusing on settings is far less dangerous to freedom than focusing on human suspects (Felson, 2006).

Felson makes an important point: instead of targeting or repressing offenders or crime-prone people, let us redesign settings so as to design out crime. However, even softer security policies —such as those advocated by situation-

al crime prevention schools of thought— can have consequences for human rights. The building of walls or enacting other measures of access control, frequently advocated by situation crime prevention experts, can have unintended devastating consequences, through the effect of displacement. The restrictions on migration by land or air to Europe, a form of access control that is related to security concerns, have resulted in an increase of migration by sea from Africa and the Middle East to Europe under very dangerous conditions, with the consequence being the loss of lives of men, women and children, estimated at 20,000 over the last two decades. The European Union Agency on Fundamental Rights has documented the many human rights implications of such practices at Europe's southern sea borders (2013). Shortly, Eurosur—a new Mediterranean surveillance and data-sharing system developed by the EU which, among other things, uses satellite imagery and drones to monitor the high seas and the north African coast—is due to be in place. It is expected to save migrant lives at sea. Critics argue that the project is still mainly focused on preventing migrants from reaching Europe at all and laws need to be reframed to prioritise humanitarian concerns in Eurosur's operations (Shenker, 2012).

Similarly, Guerette (2007) highlights the consequence of increased surveillance of the border between the United States and Mexico. The U.S. Border Patrol took action in selected border areas designed to prevent and detect illegal entries, with the aim of disrupting the routes most frequently travelled by migrants and smugglers so that they would be deterred from entry, enter via ports of entry where inspection is systematic or choose more remote routes where Border Patrol agents would have a tactical advantage. Despite the apparent success in altering migration routes, as a result of increased border security, activists called attention to an unexpected consequence of this phenomenon, an increase in deaths as migrants sought out more treacherous routes to enter the United States undetected. Since then, more than 300 migrant deaths were recorded along the border each year, surely an underestimate since many more may have died and not been found or recorded. In response to these problems, the then Immigration and Naturalization Service (INS) created the Border Safety Initiative (BSI) in 1998, which directed the United States Border Patrol (USBP) to increase safety along the border zone to prevent migrant deaths.

Crime prevention, as conceptualised by the United Nations as well as by other organisations active in promulgating good practice in crime prevention (for example, the International Centre for the Prevention of Crime in Montreal; the European Forum on Urban Safety), does not include neighbourhood vigilantism. Neighbourhood vigilantism is common in situations and parts of the world where the police have failed to protect citizens and where private security forces are poorly trained or supervised, or inaccessible to substantial segments of the population. In these situations, frustrated individuals or mercenaries come forward to take the law in their own hands. Human rights violations are common. Since these are largely non-State agents, the policies and practices they enact are not public security policies. However, vigilantism

is worth mentioning in this module as a failure of security policies, and as an example of the kind of response to crime that operates outside of human rights safeguards to the public.

## 7. Solutions and interventions

A fundamental role for criminologists is the design of policies and interventions to monitor security policies and the work of criminal justice agents such that they are in compliance with human rights standards. Given that much of this work is incipient, there is a promising role for criminologists to play. This section will examine the many ways that those internal and external to criminal justice can influence policy and procedure so as to prevent excesses and abuses.

The oversight of criminal justice is similar and different to other sectors. Similar to education and health, oversight is generic and administrative in nature, aimed to ensure that funds in criminal justice can be accounted for or spent for authorised purposes. Such excesses are more properly characterised as corruption than human rights violations. But because the State, through its security institutions, has in theory or in practice a monopoly on force, oversight is also about due process and humane treatment for the detained and incarcerated. Thus, oversight is about procedural legal guarantees and human rights. As we have mentioned, police stations (see Stone, 2005, for a good overview of police accountability issues), holding cells and prisons are also not as public as schools and hospitals and, thus, the risk of neglect or abuse of power is increased. Furthermore, whereas students and the sick have not offended society, there is often animosity towards offenders, which again increases the risk of mistreatment, and deadly force used by police officers. Those in custody must also be carefully managed. Besides the human rights of offenders, human rights of victims of crimes are also important. They can also be manipulated by zealous prosecutors through aggressive implementation of the opportunity principle and be made to testify without protection for their safety or privacy. The possibilities for abuse and neglect, then, are where oversight in criminal justice is different than in other institutions and there are a myriad of ways in which oversight is undertaken, either internally, within other government agencies or ministries, by independent official monitoring bodies locally or nationally or by supranational organisations and the civil society at large (see Dietch, 2010a and 2010b, for a review of prisons oversight mechanisms used internationally). Table 1 details these different possibilities and gives examples of the names of different kinds of oversight bodies and mechanisms. These oversight agencies have been categorised by whether they are internal or horizontal to the institution being monitored, as well as to whether they are completely independent oversight mechanisms within governmental structures or outside governmental structures in the form of civil society transparency mechanisms or inquiries (including whistleblowing so-

cial media sites) or supranational structures. There is a great deal of variability around the world in terms of police, judicial and prison oversight, and a great deal to learn from the various models available.

Table 1. Accountability and Oversight of Formal Criminal Justice Institutions: International Examples

(Institutions)	Internal	Horizontal	Independent	Civil Society	Supranational
Police, courts, prisons, legal aid, prosecution, victim services, pretrial services, crime prevention, alternatives to incarceration, probation/parole, re-entry etc.	Line Ministries, Supreme Court, Internal Affairs, Police Councils, Judiciary Councils aka Council of the Magistracy, Council of the Judicature, National Judicial Service Commission (South Sudan), Other Councils Administrative Corporation of the Judicial Branch (CAPJ, Chile), Bar Associations	Ad hoc Governmental Inquiries, Prison judges, Anti-Corruption Prosecutors, Judges/Courts, Anti-Corruption Commissions, Attorneys General	Ombudsmen, Public Defenders, Inspectorates, Human Rights Commissions, Citizen Complaint Review Boards or Independent Complaints Directorate (South Africa), Ad hoc independent inquiries, Commission of Civil Control on Corruption (Ecuador), Independent Monitoring Boards (UK)	Community Police Fora (South Africa) CSO-led Inquiries (AI; HRW) CSO Networks Accreditation Bodies (Police: CALEA; Prisons: American Correctional Association). Social media, e.g. <a href="http://www.lpaidabribe.com">www.lpaidabribe.com</a> <a href="http://www.whistleblowers.com">www.whistleblowers.com</a> Informal justice mechanisms General and specialised media	ICRC, Human Rights Rapporteurs, UN CAT, Regional HR Commissions, Truth Commissions, Ad hoc Tribunals, International Criminal Court, Donors

Nearly all the Spanish-speaking countries in Latin America have adopted *defensorías del pueblo*, modelled after those in Spain and organised into the Federación Iberoamericana del Ombudsman. Councils of the judiciary, a feature of many European and Latin American judiciaries, are categorised by a northern or southern European model. And the involvement of civil society in independent monitoring is a feature of participatory democracies—the UK being a prime example with Independent Monitoring Boards of prisons appointed by the State Secretary but composed of lay volunteers from the communities where the prisons are located.

Laws and standards form the basis for many of these oversight mechanisms, of course. Standards, toolkits and checklists are important and are at the base of any oversight mechanism. They involve the operationalization of human rights principles into measurable indicators and outcomes. Of course, plain data gathering is part of the monitoring process. Many of the accusations of discriminatory identity checks cannot be substantiated because the police fail to systematically gather data about the characteristics of those they stop (Open Society, 2012). Figure 1 is an example of a Blackberry screen put in place for the West Yorkshire (UK) police to monitor discriminatory stops and searches.

Figure 1. Blackberry de la policía de West Yorkshire

The screenshot shows a web browser window with the following form sections:

- Stop Details:** Includes fields for Stop Date (02 Jun 2009 0155), Stop Officer First Name, Stop Officer Supervisor Number, Stop Type (Search), Other Officer Badge, Reason for Stop, Unattended Vehicle (No), Injury Damage (No), Outcome, Deployment Type, Operation Name, Stop Officer Badge, Stop Officer Last Name, Stop Officer Station (Pudsey Police Station), Other Officer Badge, In Company of Others (No), Legal Power, Evidential Property (No), Item Searched For, Offences, Grounds, and Breath Test Results.
- Stop Location Details:** Includes fields for SCU Name, Ward Name, Street Name, Town Name, Postcode, Setting, NPT Name, District Name, County Name, and Nothing.
- Person Details:** Includes fields for Surname, Date of Birth, First Names, and Gender.

As cited in Open Society, 2012.

The Criminal Justice System Toolkit, in compliance with the norms and conventions covered in Table 2, covers policing, access to justice, custodial and non-custodial measures, and cross-cutting issues such as criminal justice information, juvenile justice, victims and witnesses, international cooperation, crime prevention assessment and gender in the criminal justice system assessment (<http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html>). The toolkit does not have quantitative benchmarks, but is useful for institutional diagnostics of criminal justice systems. It includes a software version that allows users to access topics or questions from the toolkit that they wish to incorporate in their assessment and enter answers from their inquiries. The software also accesses relevant UN Standards and Norms. Thus, the toolkit is good at ensuring a comprehensive description of criminal justice systems by assessors. Apart from the UNODC toolkit, DCAF also supplies useful toolkits (Aelpli, 2012; Bastick and Valasek, 2008).

The United Nations rule of law indicators 'Basket 3: Integrity and accountability' assesses whether police violate human rights or abuse their power and alleged incidents of police corruption, misconduct or lack of integrity are reported and investigated. This collection of indicators also measures judicial abuse of power, as well as whether criminal justice agencies have vetting systems in place to avoid hiring former human rights abusers. ([http://www.un.org/en/events/peacekeepersday/2011/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf))

Academic centres can also be involved in human rights monitoring. Recently, Cornell Law School's Avon Global Center for Women and Justice and International Human Rights Clinic, in Ithaca, New York, USA, at the invitation of the Defensoría General de la República de Argentina, developed a mechanism for monitoring compliance of women's prisons with the new Bangkok rules, alluded to earlier in this module. A team

of experts visited federal women's prisons in Argentina, applied the rules and issued a report: [http://www.lawschool.cornell.edu/womenandjustice/upload/Argentina\\_report\\_final\\_web.pdf](http://www.lawschool.cornell.edu/womenandjustice/upload/Argentina_report_final_web.pdf)

Finally, citizens can be involved in monitoring abuses directly. Police Station visitors' week, put in place by the Vera Institute of Justice in New York City and Altus Global Alliance, is a week whereby citizens visit their local police stations and report on the conditions and practices therein. In developing the assessment process and hosting a global, weeklong event, Vera and its Altus Global Alliance partners have created an active role for ordinary citizens in overseeing and improving police services. Moreover, for many of the visitors—especially those who are female, poor, or marginalised for other reasons—this visit experience is the first real access to local law enforcement that provides them with an opportunity to observe and voice their views on whether the police are really serving all members of the community. Figure 2 is the checklist used by citizens to monitor compliance with good practice (Altus Global Alliance, 2011).

The successful implementation of security policies that are in line with human rights is dependent on the recruitment and training of criminal justice agents such that they are representative of the population they serve, knowledgeable about the characteristics of this population and sensitive to their needs, and well trained in human rights standards. States alternatively militarise their police forces, or use their military to provide policing functions. Many policing functions, such as public order maintenance, routine patrol, counternarcotic and conflict and disaster management around the world are shared or administered with the cooperation of Defence either temporarily or permanently. Policing can be influenced by military procedures, tactics, resources and equipment. Yet civilian police training is very different from that given to the military: the police are not warriors and offenders are not the enemy. Complaints about human rights abuses are frequent against the military when conducting police functions. Experience gained in the United States with ex-combat veterans from Iraq and Afghanistan in the United States shows that potential police officers who are veterans must be given transitional services and training in order to be effective law enforcement officers.



Figure 2

EQUAL TREATMENT OF THE PUBLIC WITHOUT BIAS BASED ON AGE, GENDER, ETHNICITY, NATIONALITY, MINORITY STATUS OR SEXUAL ORIENTATION					
9_ Facilities available for interviewing crime victims and witnesses in cases which require privacy (for example, domestic violence, partner assaults)	1	2	3	4	5
10_ Facilities and conditions specifically available to women (for example, bathrooms, changing rooms, cleanliness)	1	2	3	4	5
11_ Services available to persons with physical disabilities (elderly people, temporarily or permanently injured persons) to access the police station (for example, ramps for stairs, wider doors)	1	2	3	4	5
12_ Services/referrals specifically available to minority groups (for example, victim services, female staff to help female victims, counselors, medical personnel, legal assistance, language assistance)	1	2	3	4	5

  

TRANSPARENCY AND ACCOUNTABILITY					
13_ Information available to the public on patterns of crimes in the area served by the police station (for example, charts, maps, displays, posters, newsletters, hotlines, a computer with information available to the public)	1	2	3	4	5
14_ Information available to the public regarding the police station's performance (for example, number of arrests, crimes unsolved and solved, results of citizen satisfaction surveys, cases on trial)	1	2	3	4	5
15_ Information available describing how to make a complaint against police staff for misconduct (for example, complaint boxes, posters, brochures, contact details of police ombudsman's office/internal affairs/police public complaints bureau)	1	2	3	4	5
16_ Identification of police station's personnel (for example, name or number tags, strips, uniforms)	1	2	3	4	5

  

DETENTION CONDITIONS					
17_ Detention area security conditions (for example, surveillance, safe custody and movement of detainees)	1	2	3	4	5
18_ Detainees' identification (for example, names, tags, identification numbers)	1	2	3	4	5
19_ Facilities and conditions provided for lawyers or families/others to visit detainees (for example, meeting spaces, access to telephone, ability to bring food for detainees)	1	2	3	4	5
20_ Sanitary conditions of the detention areas (for example, cleanliness, bathrooms and ventilation)	1	2	3	4	5

But apart from differentiating the military from the police, diversity is an important prevention mechanism for discrimination on the job towards many protected groups of people. Men are often over-represented in security-related agencies and many issues that directly affect women, girls and marginalised men and boys are often neglected in security policies. Gender and women's issues need to be included in security policies. Violence against women is one of the largest threats to human security. Gendered initiatives should be developed to meet these needs —such as establishing special units or desks within the police and justice services to deal with female and juvenile victims of violence. The barriers to equal participation in criminal justice agencies should be addressed. This will mean structural and policy reforms, as well as changes in

personnel practices (recruitment, retention, promotion) to embed a systematic approach to the participation of women. Other reforms can include gender-specific budgeting, policies prohibiting discrimination and relevant gender training. Empowering women to undertake positions of authority and supervision will change the institutional culture within the security and justice sectors (OECD, 2007).

Training is a key area for the prevention of human rights violations among criminal justice agents. Besides the teaching and learning of technical rules of policing, much training in criminal justice academies focuses on ethics training or training in human dignity, as the ways in which critical thinking skills can be developed. This is because institutional culture, which is often much harder to affect than training curricula, often supersedes book learning once new recruits are sent out into the field. If new employees are schooled in ways to respond to pressure to commit security excesses, ways to negotiate conflict verbally instead of physically, and taught to think critically about the effects of their actions (not just means-justify-ends behaviour) many believe that training will be more effective in producing ethical and legal law enforcement behaviour.

Module 4 will cover police and policing, and discuss the ways in which traditional repressive, order maintenance policing is being transformed to community policing, problem-oriented policing, intelligence-led policing and other policing models that see policing as a public service that is designed and structured for crime reduction rather than public repression. It is likely that these new policing models will be less prone to excesses than traditional policing, if only because they present officers with new tools besides force and coercion for combating crime, and value thinking, dialoguing and planning over repression. Thus, while monitoring and accountability of criminal justice institutions is always a necessity, modern advances in research and changes to traditional criminal justice roles are likely to reduce the excesses of security policies and practices.

## Summary

This module has provided you with the background against which the criminal justice system can engage in excesses that violate human rights and the reasons human rights violations may occur. A criminologist needs to be aware of human rights violations because they are fundamentally incompatible with the rule of law. We have learned about discrimination, the use of force, excessive punishment severity, the human rights of our criminal justice research subjects, as well as the connection between human rights and crime prevention policies (those not ground in deterrence or repression). We have covered the explanations that scholars and practitioners frequently use in understanding the excesses of security policies or the agents that implement them. Finally, we looked at ways to monitor compliance with human rights safeguards. This last topic is a key area of the professional development of criminologists, since the creation of oversight mechanisms can also be said to be part of the profession of criminology.



## Self-evaluation

1. In our vigilance for the violation of human rights through security policies, we need only focus on the activities of government agencies.

- a) True
- b) False

2. International standards for criminal justice are good starting places for students of criminology to become aware of the human rights implications of security policies because they ...

- a) are available in Spanish
- b) are universally applicable
- c) only deal with the use of force by the police

3. Discriminatory policies and practices in criminal justice...

- a) are unfair
- b) are stigmatising to visible minority populations
- c) reinforce stereotyping and bias by the public
- d) all of the above

4. Crime prevention policies that are not based in deterrence theory can never violate human rights.

- a) True
- b) False

5. Subcultural explanations of human rights violations emphasise:

- a) the learning of attitudes and justifications of extra-legal behaviour
- b) punishment as a way to discourage rotten apples within the police
- c) ethnic and racial differences in law enforcement

6. Human research subjects should understand the risks and benefits of participating in criminal justice research and give voluntary consent.

- a) True
- b) False

7. Oversight mechanisms in criminal justice ...

- a) foster transparency
- b) foster accountability
- c) frequently involve outsiders, including private citizens
- d) all of the above

8. Training that involves critical thinking is likely to make criminal justice agents more reflective of their ethical choices.

- a) True
- b) False

## **Answer key**

### **Self-evaluation**

1. b

2. b

3. d

4. b

5. a

6. a

7. d

8. a

## Glossary

**Abuse of power** Abuse of power is the act of using one's position of power or authority in an abusive way, either to manipulate or force someone to do something or to gain a benefit that would otherwise be unattainable.

**Cruel, inhuman or degrading treatment or punishment** Cruel, inhuman or degrading treatment or punishment is prohibited under Article 5 of the Universal Declaration of Human Rights. Security policies such as the death penalty, the prolonged use of solitary confinement or the use of solitary confinement for juveniles can be considered under this prohibition, as well as many other inhumane punishment or prison conditions.

**Discretion** Discretion is the practice by criminal justice agents to adapt the law to context. In English-speaking countries, discretion is considered key to good police work and the skill or art of discretion is a part of policing training. Adhering 100% to the law is seen to result in either very difficult or unfair policing. In continental countries, which strictly follow the principle of legality, discretion, while existent, is either denied or frowned upon, because it is tantamount to corruption. Discretion is relevant to this module because it can result in excesses in security policies. If police officers, for example, are not trained in the limits of discretion, they can overuse it and violate human rights.

**Discrimination (indirect and direct)** Direct discrimination arises when there is less favourable or detrimental treatment of an individual or group on the basis of a prohibited characteristic or ground, such as race, sex or disability. Indirect discrimination occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups, unless justified (UNODC, 2012).

**Ethnic or racial profiling** Ethnic or racial profiling is the practice used by the police of generalising about suspects of crime being from certain racial, ethnic or religious categories. These generalisations cause the police to stop people from these categories more than those from other social categories, instead of stopping suspects based on evidence or actual behaviour. Ethnic profiling is discriminatory and violates human rights, which guarantee equal legal treatment to all. Ethnic profiling can sometimes be the result of individual officer action or it can be institutionalised whereby certain neighbourhoods or certain crimes can be the focus of increased police action without foreseeing the consequences of such actions on ethnic, racial or religious subgroups.

**Human dignity** Human dignity is at the base of much of the literature on human rights and security policies. Human dignity is the inviolable value and worth of a human being.

**Human rights** Human rights are those rights that are considered universal and inalienable, enshrined in the Universal Declaration of Human Rights, international and regional treaties and conventions as ratified by States, and the multitude of norms, standards, guidelines and declarations enacted by intergovernmental bodies. These rights are often reflected in national and local laws and policies.

**Mass incarceration** Mass incarceration is the phenomenon of very high incarceration rates, such as those that have existed in the last few decades in the United States. It is the result of mandatory sentencing policies and the availability of prison beds. When examined within communities where inmates are likely to originate, it has been shown to be racist and classist. Researchers have examined the effects of mass incarceration and the destruction of inner-city communities. Mass incarceration is an excess of security policies.

**Net widening** When security policies have the effect of bringing more people under penal control than would previously have been the case, this is referred to as net widening. The metaphor is a fishing net, where widening or enlarging the net means that the fisherman is likely to catch more fish. Net widening is a consequence of increasingly punitive practices that sometimes appear benign and it frequently refers to behaviours that are not clearly considered criminal in public or legal opinion. An example would be antisocial behaviour orders in the UK?

**Popular punitivism** Popular punitivism is the twentieth century phenomenon of the clamouring for punishment on the part of the public and lawmakers as the solution to a collapsing social order. It has resulted in excesses of security policies in countries where it is prevalent, such as the United States and the United Kingdom.

**Rule of law** Rule of law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in

decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency” (Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, 2004).

**State crime** State crime refers to crimes committed by the State. Many excesses of security policies are the responsibility of the State, and when this is purposeful or negligent, criminologists frequently categorise it as State criminality. Thus, State-sanctioned police violence, torture, enforced disappearances and arbitrary arrest are all examples of State crime. The term State crime is useful to criminologists because it identifies the State as the perpetrator, thus allowing for broader theorising about crime perpetration.

**Torture** According to the UN Convention Against Torture, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (Article 1).

**Vulnerability** Vulnerability is a characteristic of individuals or groups, and refers to the ease of which they can be the targets of excesses of security policies. This vulnerability can be related to their legal status (for example, as undocumented migrants, or refugees) or to other personal or social characteristics, such as age, sex, social class, etc.

**Zero tolerance** Zero tolerance is a term used in criminal justice policy and practice for the absolute intolerance (usually accompanied by a repressive response such as arrest or reporting), on the part of the criminal justice system (usually the police, but also other agencies) for some types of criminal behaviour. The term originated in a campaign against domestic violence in Scotland and has been adapted to many other types of crimes, such as common street crime, sexual harassment in the workplace, bullying, etc. Zero tolerance policies often lead to excesses that violate human rights because they violate the principle of proportionality as well as minimum legal intervention.



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## Appendix

### APPENDIX

#### Human Rights and Criminal Justice

Law Enforcement	Prosecution and Courts	Sentencing and Prisons
Law enforcement officials shall respect and protect human dignity and maintain and uphold the rights of all.	Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty by law and to be tried by a competent, independent and impartial tribunal.	The severity of penalties must not be disproportionate to the criminal offence. Imprisonment should be used as a penalty of last resort and the choice between penalties should take into account likelihood of rehabilitation.
Law enforcement officials shall not instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment.	Criminal proceedings must be started and completed within a reasonable time.	All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person.
Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. Firearms shall only be used in self-defence or defence of others against the imminent threat of death or serious injury.	In the determination of any criminal charge, persons shall have the right to adequate time and facilities for the preparation of defence and to defend themselves through legal assistance of their own choosing. In any case where the accused does not have sufficient means to pay, and the interests of justice so require, legal assistance shall be assigned without payment by the accused.	The death penalty is prohibited for countries that have ratified the Optional Protocol to the International Covenant on Civil and Political Rights. For countries which have not abolished the death penalty, the sentence of death may be imposed only 'for the most serious crimes'. This is limited to an intention to kill which resulted in loss of life. Drug offences (including possession and trafficking) and offences of a purely economic nature do not meet this threshold.
Anyone who is arrested shall be informed at the time of the arrest of the reasons for his/her arrest and shall be promptly informed of any charges.	Both the accused and the prosecution in a criminal trial must be in a procedurally equal position during the course of the trial and have an equal opportunity to make their case.	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer. Pre-trial detention should be an exception and as short as possible.	The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any direct or indirect restrictions, improper influences, inducements, pressures, threats or interferences.	No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.
Powers of seizure and confiscation must be applied in a non-arbitrary, case proportionate manner and – depending upon the procedure in national law – in conformity with the right to fair trial.	Witnesses, relatives and defence counsel, as well as persons participating in the investigation, shall be protected against all ill-treatment or intimidation as a consequence of the investigation or evidence given.	Prisoners shall be provided with clothing and separate and sufficient bedding, food of nutritional value adequate for health and strength, drinking water, adequate bath and shower facilities, and medical facilities of no lesser standard than available outside of prison.
Searches and arrests must be based on real suspicion of criminal intent and not solely on the grounds of race.	Trafficked persons should not be prosecuted for violations of immigration laws or for other activities as a direct result of being trafficked, but rather should receive assistance and protection.	Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

Law Enforcement	Prosecution and Courts	Sentencing and Prisons
Any interference with the right to privacy, family, home or correspondence should be authorized by provisions of law that are publicly accessible, precise and proportionate to the security threat, and offer effective guarantees against abuse.		
Evidence, including confessions, elicited as a result of torture or other cruel, inhuman or degrading treatment must not be used in any proceedings.		
Non-Discrimination	Rights of Women	Rights of the Child
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	In all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, shall be taken to ensure the full development and advancement of women.	The rights of the child shall be respected and ensured without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
Direct discrimination arises when there is less favorable or detrimental treatment of an individual or group on the basis of a prohibited characteristics or ground, such as race, sex or disability. Indirect discrimination occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups, unless justified.	Effective crime prevention and criminal justice responses to violence against women shall be human rights-based, manage risk and promote victim safety and empowerment while ensuring the accountability of the offender.	In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
Not all differences of treatment are prohibited discrimination under international law. In order to be justified, a distinction must pursue a legitimate aim and be proportional. The means of achieving the legitimate aim must be appropriate and necessary and relevant to the differential treatment.	Account shall be taken of the distinctive needs of women prisoners. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.	Every child alleged as, accused of, or recognized as having infringed the penal law shall be treated in a manner consistent with the promotion of the child's sense of dignity and worth and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
The right to privacy and nondiscrimination protects individuals from mandatory and compulsory HIV testing except in cases of blood, organ or tissue donations. This includes in prison situations, where there is no public health or security justification for mandatory HIV testing of prisoners, nor discrimination against or segregation of prisoners living with HIV.	In cases involving violence or other crimes against women, the primary responsibility for initiating investigations lies with the police and prosecution authorities rather than with the victim. This is the case regardless of the level or form of violence.	The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of the offender and the offence.
Different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, legal reason for detention and necessities of treatment. Children should be separated from adults.	Court evidentiary rules and rules and principles of defence shall not discriminate against women. "Honor" or "provocation" may not be invoked by perpetrators of violence against women as a full defence to criminal responsibility.	The placement of a child in conflict with the law in an institution shall always be a disposition of last resort and for the shortest appropriate period.

Law Enforcement	Prosecution and Courts	Sentencing and Prisons
	All appropriate measures shall be taken to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.	All appropriate measures, including legislative, administrative, social and educational, shall be taken in order to protect children from the illicit use of narcotic drugs and psychotropic substances.
Drug prevention, treatment and care	Alternative development and sustainable livelihoods	HIV/AIDS
Drug dependence is a multi-factorial health disorder. Nothing less should be provided than for any other chronic health condition. The right to health calls for evidence-based prevention, treatment and care services. Measures should include evidence-based prevention (family skills training, workplace and schools prevention, life skills education) and treatment (brief interventions, counseling, outreach work, psychosocial and pharmacological interventions in line with established sound medical practice including, where appropriate, treatment with long acting opioid agonists and symptomatic medication to ease withdrawal), as well as social assistance and measures to reduce the negative health and social consequences of drug use and dependence.	All persons have the right to participate in a process that expands the capabilities or freedom of individuals to improve their well-being and capabilities	Criminal law should not be an impediment to reducing the risk of HIV transmission among drug users or to HIV-related care and treatment for injecting drug users. Repeal of laws criminalizing the possession, distribution, and dispensing of needles and syringes, in favor of the authorization or legalization and promotion of needle and syringe exchange programmes should be considered.
Responses to drug law offences must be proportionate. Serious offences, such as trafficking in illicit drugs must be dealt with more severely and extensively than offences such as possession of drugs for personal use. For offences involving the possession, purchase or cultivation of illicit drugs for personal use, community-based treatment, education, aftercare, rehabilitation and social integration represent a more effective and proportionate alternative to conviction and punishment, including detention.	All development processes should be realized in a rights-based manner that is transparent, accountable, participatory, and non-discriminatory, as well as equitable and just.	Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients. Children and adult sex workers who have been trafficked or coerced into sex work should not be prosecuted for such participation but provided with medical and psychosocial support services, including those related to HIV.
Criminal law should not be an impediment to access to drug dependence treatment.	Freedom of choice is an integral part of the right to development. Where crop eradication of plants containing narcotic or psychotropic substances is carried out through indiscriminate means and/or without prior consultation the right to development risks being compromised.	The right to privacy and nondiscrimination protects individuals from mandatory and compulsory HIV testing except in cases of blood, organ or tissue donations. This includes in prison situations where there is no public health or security justification for mandatory HIV testing of prisoners, nor discrimination against or segregation of prisoners living with HIV.
Drug-users when deprived of their liberty are particularly vulnerable and must receive appropriate medical care, including evidence-based drug dependence treatment.	Consultations with affected persons regarding development activities must be active, in good faith, through culturally appropriate procedures, and with the objective of reaching an agreement.	Authorities should provide access for prisoners to HIV-related information, education and means of prevention, voluntary testing and counseling, confidentiality and HIV-related health treatment, care and support and access to and voluntary participation in treatment trials.

Law Enforcement	Prosecution and Courts	Sentencing and Prisons
<p>Drug treatment should be voluntary and subject to prior full informed consent. Compulsory treatment may only be applied in exceptional situations of high risk for self or others, and for defined short periods that are no longer than strictly, clinically necessary. Such treatment must be specified by law, follow transparent procedures and be subject to medical and judicial review.</p>	<p>Development assistance should not be conditional on reductions on illicit crop cultivation.</p>	<p>Prisoners with terminal diseases, including AIDS, should be considered for early release and given proper treatment outside prison.</p>
	<p>Development initiatives should ensure that women are able to fully participate in the development process with a view to ensuring realization of women's economic and social rights, including rights to land, property, inheritance, adequate housing and an adequate standard of living.</p>	<p>Authorities should repeal HIV specific criminal laws, laws directly mandating disclosure of HIV status, and other laws which are counterproductive to HIV prevention, treatment, care and support efforts. Only general criminal law (such as assault laws) should be applied to the intentional transmission of HIV. People living with HIV should not be discriminated against on the basis of their HIV status.</p>
	<p>Everyone has the right to an adequate standard of living including the right to those things necessary for health and well-being, such as food, clothing, housing and medical care and necessary social services, the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond control.</p>	

Source: UNODC (2012) UNODC and the promotion and protection of human rights, Annex I. Vienna: UNODC. [http://www.unodc.org/documents/justice-and-prison-reform/UNODC\\_Human\\_rights\\_position\\_paper\\_2012.pdf](http://www.unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf)