Human rights elephants in an era of globalisation : commodification, crimmigration, and human rights in confinement

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3 Locked up, locked out, locked away
Crimmigration in confinement

3.1 INTRODUCTION

Comparing prisons and immigration detention facilities may appear random at first.[1] Prisons function to execute penal sentences as imposed by the criminal justice apparatus; immigration detention excludes certain immigrants from society for administrative purposes. Both are spaces of confinement as well as total institutions,[2] yet plenty additional of such closed environments exist – consider police cells, forensic psychiatric institutions, closed mental health units, and closed disability units.[3] This raises questions as to why prisons and immigration detention facilities are compared in this research instead of, say, prisons and police cells.[4]

The answer is to be found in the notion of 'crimmigration', which arguably constitutes a second globalisation development that is scrutinised in this research. First introduced in the scholarly literature in 2006 by Juliet Stumpf, the contraction 'crimmigration' was originally intended to denote the increasing merger, or intersection, of criminal law and immigration law.[5] Their confluence is, according to Stumpf, problematic, given that

> "[i]t operates in this new area to define an ever-expanding group of immigrants and ex-offenders who are denied badges of membership in society […]. This convergence of immigration and criminal law brings to bear only the harshest elements of each area of law, and the apparatus of the state is used to expel from

1 A modified version of part of this chapter has previously been published: Van Berlo, P. (2019). Crimmigration and Human Rights in Contexts of Confinement. In P. Billings (Ed.), *Crimmigration in Australia: Law, Politics, and Society* (pp. 353-379). Singapore: Springer.

2 As Turnbull explains, "[t]he defining feature of immigration detention […] is the denial of liberty, which distinguishes this practice from the "open" and "voluntary" nature of "reception" or "waiting" centers for migrants": Turnbull, 2017, p. 2.

3 Naylor et al., 2014.

4 It is not uncommon, however, to compare trends in two or more total institutions in the first place: see, for instance, the work of Raoult & Harcourt, 2017 on mental asylums and prisons in France.

5 Stumpf, 2006, p. 376. Whilst Stumpf introduced the term, the increasing merger between criminal law and immigration law had already been denoted before: see, notably, T.A. Miller, 2003. A variety of terminologies and metaphors have subsequently been used to denote this process of crimmigration: De Ridder, 2016b for example speaks about a process of "percolation".

> society those deemed criminally alien. The undesirable result is an ever-expanding population of the excluded and alienated".[6]

Ultimately, criminal law and immigration law become "doppelgangers".[7] This holds, as various authors have subsequently pointed out, not only true for the legislative level but also for policy, discourse, and enforcement of crime and migration control.[8] Criminal justice and immigration control as such merge simultaneously at a variety of levels "to the point of indistinction".[9]

In denoting crimmigration trends on these various levels and across nations, many scholars have scrutinised the criminalisation of immigrants and the use of immigration law and control for criminal justice purposes.[10] Their work is focused, in other words, on how *immigrants* are increasingly drawn into the *penal* net. This may appear rather unsurprising given that it was Stumpf herself who in her seminal work referred more than once to the "criminalization of immigration law".[11] What has somewhat escaped attention, however, is that she also denoted – albeit in a footnote and with due reference to earlier work by Teresa Miller – the "immigrationization of criminal law".[12] This latter development denotes that criminal justice is increasingly employed to achieve goals of immigration law.[13] Crimmigration is, in this sense, thus also concerned with how *criminals* are increasingly drawn into the *immigration* net. As such, crimmigration is a bi-directional trend that seeps into both immigration control and crime control.[14] It operates on multiple planes simultaneously and the 'immigrationization' of criminal law is henceforth arguably not as some have contended the "inverse of crimmigration",[15] but rather an underexplored branch thereof. Miller thus emphasises that "the 'criminalization' of immigration law fails to capture the dynamic process by which both systems converge at points to create a new system of social control that draws from both immigration and criminal justice, but it is purely neither".[16] As Sklansky

6 Stumpf, 2006, pp. 377–378.
7 Stumpf, 2006, p. 378.
8 See amongst others J. Brouwer, van der Woude, & van der Leun, 2017; J. Brouwer, Van der Woude, & Van der Leun, 2018; Di Molfetta & Brouwer, 2019; Doty & Wheatley, 2013, p. 435; Franko Aas, 2011; Van der Woude & Van Berlo, 2015, p. 63; van der Woude & van der Leun, 2017; van der Woude et al., 2014.
9 Franko Aas, 2014, p. 525.
10 Barker, 2013, pp. 237–238; Chacon, 2009, pp. 135–136, 2012, p. 613; Gerard & Pickering, 2014. For example, see in the context of Slovenia, Bajt & Frelih, 2019; Jalušič, 2019.
11 Stumpf, 2006.
12 Stumpf, 2006, p. 376, see notably also T.A. Miller, 2003, p. 618.
13 Moyers, 2009, p. 688.
14 Franko Aas, 2011, p. 339; Zedner, 2010, p. 381.
15 Moyers, 2009, p. 688.
16 T.A. Miller, 2003, pp. 617–618.

likewise points out, "if there is colonization going on, it isn't clear which field is colonizing which".[17]

This chapter will provide attention to both crimmigration developments with an explicit focus on the crimmigration elements of private and offshore prisons and immigration detention centres. It should be noted from the start, however, that the term 'crimmigration' itself is both illuminating and obscuring. Illuminating, because it directly pinpoints with what it is concerned: the merger between crime and migration. Obscuring, at the same time, because it arguably covers a plethora of developments that one way or the other feature elements of both crime, criminal law, crime control, and criminal justice on the one hand, and migration, migration law, migration control, and migration surveillance on the other. It is, in this sense, little more than a catchword that says it all whilst saying hardly anything. This, in turn, has allowed a wide variety of research endeavours to employ the term, often without explicitly positioning itself in the broader field of 'crimmigration' scholarship. At a certain point, it may even appear as if *anything* marginally involving crime control and migration control is crimmigration. This chapter will therefore recalibrate the notion by developing an argument as to the actual meaning of the somewhat opaque notion of 'crimmigration'. As will be argued, 'crimmigration' as a globalisation development is inherently linked to *membership theory*: it is to be understood, at least in the context of this research, as an umbrella term for a variety of developments by which changed and changing ideas about membership, resulting from globalisation, are implemented. Thus, the notion comprises not only the targeting of non-citizens through the expansion of criminal grounds for deportation and the regulation of migration through immigration-related criminal grounds, but also the simultaneous targeting of so-called sub-citizens whose membership entitlements are increasingly depleted through criminal justice mechanisms and who are consequently disenfranchised, alienated, and ultimately expulsed from society in a fashion that closely resembles immigration control. By positioning crimmigration in membership theory, it becomes clear that whilst a wide variety of crimmigration practices may exist, they ultimately share common goals and rationales.

Subsequently, the chapter will show how crimmigration on many occasions is ingrained in settings of confinement, both at a global macro level and in the case studies' contexts. This approach again will make clear why it is important to look at the 'glocal' level to study the implications of crimmigration as a globalisation development. Specific attention will be paid to the intimate connection, or nexus, between crimmigration and commodification in confinement. As will be argued, crimmigration may occur both explicitly and implicitly throughout commodified facilities.

17 Sklansky, 2012, p. 195.

In the final part of this chapter, the way in which crimmigration challenges international human rights law will be addressed. The focus here will again be on the key values of human rights accountability, effectiveness, and legitimacy. As will become clear, the presence of crimmigration in settings of commodified confinement may further aggravate the problems of accountability, effectiveness, and legitimacy that were identified in the previous chapter. Together, commodification and crimmigration therefore embody a significant potential to undermine the protection value of international human rights law.

3.2 Theorising crimmigration: the merger of criminal justice and migration control

Both crime control and immigration control are, at their core, systems of inclusion and exclusion. They create insiders and outsiders, whether it be in the sense of innocent versus guilty or in the sense of admitted versus excluded.[18] Before explicit crimmigration measures were proposed – for example the criminalisation of illegal stay or the introduction of criminal convictions as grounds for deportation – criminal law and immigration law thus already overlapped in function and rationale. Both systems carve out the borders of belonging to the polity.

Given that both crime control and immigration control act as gatekeepers and make determinations as to who is an eligible and worthy member of society and who is not, it is unsurprising that the underlying rationales of both systems have been located in the sphere of membership theory. Such theory is based on the idea that a social contract exists between the government and the members of a polity, which endows those with membership entitlements with particular rights and duties. Individual rights and privileges are therefore limited to the members of a social contract and, as such, of a polity.[19] Membership theory, it is argued, underpins crime control and migration control in similar ways: both processes of control centre around the enforcement of the social contract as a basis of the government's legitimacy.[20] Indeed, whilst crime control mechanisms have the ability to deprive individuals of certain elements of membership for breaching the social contract,[21] immigration

18 J. Brouwer, 2017, p. 34; Infantino, 2016, pp. 4–7; Stumpf, 2006, p. 380.
19 Stumpf, 2006, p. 397.
20 See e.g. Duff, 2010; Franko Aas, 2011, 2014; Stumpf, 2006; Vaughan, 2000; Zedner, 2013.
21 As Vaughan puts it, "[t]he relationship between punishment and citizenship is then conditional in two senses: the first is that one's claim to citizenship is granted only if one abides by an accepted standard of behaviour and punishment may be imposed if one does not live up to this standard; second, while undergoing this punishment, one is no longer a full citizen yet neither is one completely rejected. Instead, one occupies the purgatory of being a 'conditional citizen'": Vaughan, 2000, p. 26.

control mechanisms regulate entry to the polity – and, hence, to the social contract – in the first place. As such, it is argued that the "government plays the role of a bouncer in the crimmigration context. Upon discovering that an individual either is not a member or has broken the membership's rules, the government has enormous discretion to use persuasion or force to remove the individual from the premises".[22]

Crimmigration and membership theory henceforth appear closely related. At the same time, one runs into conceptual difficulties when considering their interrelationship. Membership theory is argued to shape the convergence of immigration and criminal law up to the point where we can speak about 'crimmigration' law, yet at the same time it are exactly those domains of immigration and criminal law that have traditionally functioned as core systems of inclusion and exclusion and that have shaped the accepted categories of membership also before their alleged merger. As such, it is difficult to see how one could claim simultaneously that "at bottom, both criminal and immigration law embody choices about who should be members of society"[23] and "*introducing* membership theory into criminal law, and *especially* into the uncharted territory of crimmigration law, undermines the strength of constitutional protections for those considered excludable".[24] Indeed, how can one introduce membership theory into a system that is premised on membership theory? Moreover, how can membership theory be introduced into 'the uncharted territory of crimmigration law' if it is that same membership theory which is offered as an explanation and a "unifying theory for this crimmigration crisis"?[25]

Instead, the merger of crime control and migration control does not seem to miraculously 'result' either from or in membership theory. Rather, crimmigration and membership theory should be seen as two distinct conceptual frameworks that are closely aligned and inform one another. That is to say, the carving out of membership seems to have informed the ongoing merger of crime and migration control, whereas conversely this merger has had a significant bearing on the common understanding of who belongs to the body politic and who does not. The underlying rationale of the rise of crimmigration should accordingly not be sought in the theory of membership as such, but rather in the ongoing processes of globalisation and transnational interaction that have increasingly influenced and shaped contemporary politics of identity and that have pressured states to make creative use of existing frameworks and mechanisms in order to effectively implement advanced membership strategies.

22 Stumpf, 2006, p. 402.
23 Stumpf, 2006, p. 397.
24 Stumpf, 2006, p. 398 (emphasis added).
25 Stumpf, 2006, p. 377.

In the face of globalisation, which *inter alia* has spurred an increasing interconnectedness and rapid mobility, governments are increasingly faced with new forms of transnational connectivity, risk, and movement that have raised all sorts of questions of membership and entitlements.[26] Even more so, these contemporary forms of mass mobility occur "upon a scale unimaginable even in the relatively recent past".[27] Aas remarks that the "progressive de-bounding of social risks and the blurring boundaries between internal and external notions of security" make it difficult if not largely impossible to "know your enemy".[28] Governments henceforth have to deal with a myriad of economic and security factors that they do not directly control and that are, importantly, no longer confined to territorial or political boundaries.[29] We thus live in what Beck has labelled the "world risk society", in which distinctions between the inside and the outside, the domestic and the foreign, and security abroad and security at home are increasingly challenged.[30]

In such de-bounded realities, questions of belonging have become muddled. Criminal justice and immigration control to certain extents provide tools for governments to grapple with such muddled notions and growing insecurities. They allow the state to continuously adjust or even *re*-draw the boundaries between those who belong and those who do not in an attempt to both counter de-bounded threats to the fabric of society and account for globalisation processes more generally. Such attempts guide the rejection of the unfamiliar and the potentially dangerous both in public debate and in law and policy making.[31] In this process, membership entitlements arguably do not neatly run along the lines of citizenship but are based on transformed social boundaries between an illegalised social underclass on the one hand and a 'bona fide' upper-class on the other.[32] As Aas outlines, the former group includes 'sub-citizens', or 'outsiders inside', who are formally included in terms of citizenship but whose inclusion is morally questioned and increasingly depleted,[33] and 'non-citizens', i.e. 'outsiders outside', who are formally excluded from citizenship and whose exclusion is upheld on moral grounds.[34]

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26 Franko Aas, 2012; Furman et al., 2016, pp. 2–3; Van der Woude, 2017, p. 63.

27 Zedner, 2010, p. 380. Indeed, "[g]lobalization is by no means a totally new phenomena [sic]; what is new is its pace and intensification": Sarat & Kearns, 2001, p. 13.

28 Franko Aas, 2012, p. 235.

29 Furman et al., 2016, p. 3.

30 Beck, 2006; Franko Aas, 2012, p. 236.

31 Compare Boone, 2012, p. 15.

32 Franko Aas, 2011, p. 337; M. Griffiths, 2015; Loftsdóttir, 2016. For a critical acclaim of terminology, see Castles, 2017.

33 Vaughan speaks in this sense about 'conditional citizens': Vaughan, 2000, p. 26.

34 Franko Aas, 2011, p. 340. See also the work of Balibar, who argues in the European context that "differences of nationality, distinguishing the national and the foreigner, which formerly applied in the same manner in each nation-state to aliens, are now creating a permanent discrimination: some foreigners (the 'fellow Europeans'), in terms of rights and social status, have become *less than foreigners*, they are in fact no longer exactly strangers, which is not

Conversely, the latter group includes 'citizens', that is 'insiders inside', whose membership entitlements are neither questioned nor depleted, and 'supra-citizens', i.e. 'insiders outside', who – although not enjoying formal membership – enjoy high levels of mobility and privilege, such as cosmopolitans and jetsetters belonging to business, diplomatic, and cultural elites.[35]

We are thus witnessing significant social transformations "caused by the emerging, deeply stratifying global ordering".[36] New categories of membership are created in the face of globalisation and increased mobility, distinguishing citizens and supra-citizens from sub-citizens and non-citizens. In relation to the latter group, whilst differences continue to exist between sub-citizens and non-citizens, they increasingly become alike given that sub-citizens are excluded through the criminal justice system which increasingly functions as a mechanism of alienation and expulsion, whilst non-citizens are excluded through the immigration control system – sometimes operating in conjunction with the criminal justice system – which increasingly functions as a mechanism to punish and convey condemnation. Admittedly, on many occasions the criminal justice system is not *as* alienating as immigration control, and, conversely, the immigration control system is not *as* condemning as criminal justice, yet under the gaze of globalisation the two systems at least gradually tend to operate more alike.[37] As others have denoted, the exclusion of sub-citizens thus parallels the exclusion of non-citizens: "neither group is treated like those 'deserving' citizens who can enjoy the full panoply of civil, political, and economic rights".[38] In the US, for example, it has been argued that, since the mid-1990s, an enhanced focus on 'civic virtues' has fostered the gradual inclusion of both sub-citizens and non-citizens within a unified conception of undeservingness, excluding both categories of people alike from the benefits of societal membership.[39] In contrast with the 'winners of globalisation' at both sides of the physical and symbolic borders of the nation state, the migrant is thereby unified with "another denigrated Other, [i.e.] the Criminal"[40] in

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to say that they feel no difference […]; while other foreigners, the 'extra-communitarians', and especially the immigrant workers and refugees from the South, are now, so to speak, *more than foreigners*, they are *the absolute aliens* subject to institutional and cultural racism": Balibar, 2010, p. 319, original emphasis. This distinction is however not static but is dependent on the Zeitgeist: whether one is considered a foreigner or not may change over time and does not run neatly along the lines of for instance a European common heritage per se.

35 Franko Aas, 2011, pp. 340–341. For a clear example of the difference between various novel membership categories, see Loftsdóttir, 2016.

36 Franko Aas, 2007, p. 284.

37 See, on the way in which both systems increasingly deliver a symbolic message of reprobation and disapproval, Di Molfetta & Brouwer, 2019.

38 Demleitner, 1999, pp. 158–159.

39 Demleitner, 1999, p. 159.

40 M. Griffiths, 2015, p. 72.

an overarching category of non-membership. Figure 9 schematically depicts these distinctions of belonging.

		Formal distinctions of belonging	
		Belonging	Non-belonging
Novel distinctions of belonging	Belonging	Citizens *(insiders inside)*	Supra-citizens *(insiders outside)*
	Non-belonging	Sub-citizens *(outsiders inside)*	Non-citizens *(outsiders outside)*

Figure 9: traditional and novel distinctions of membership.[41]

Of course, these categories are archetypes rather than binary options: a sliding scale exist with certain populations not being squarely excluded, nor being squarely included in novel conceptions of belonging. Consider, for example, populations of rejected asylum seekers and unauthorised migrants who are to be deported but whose deportation is prevented by, for instance, human rights concerns such as the principle of non-refoulement or practical barriers such as non-cooperating countries of origin. In such instances, individuals are not squarely outsiders-outside, as they remain, at least physically, part of the social body until expulsion has effectively taken place, yet they cannot squarely be categorised as sub-citizens either, as they lack any type of relevant citizenship whatsoever. Whilst they thus find themselves somewhat in between both categories, what nevertheless transpires is that they are, under novel distinctions of membership, squarely on the side of non-belonging. Aas reminds us that the notions of *zoepolitics* (distinguishing between citizens and non-citizens) and *biopolitics* (distinguishing life within the social body) as developed by Agamben and Foucault are crucial in this regard: both are at play in carving out the novel categories of belonging.[42] Indeed, where individuals cannot be excluded through zoepolitics, they still can be encountered through biopolitical approaches. The distinctions in Figure 9 thus serve primarily to explicate these novel distinctions of belonging, not to present clearly delineated categories altogether.

Plesničar and Kukavica are thus right in concluding that "foreignness is not a uniform question, but rather a continuum with non-foreignness on one side and complete foreignness on the other, and a plethora of possible interpretations in between".[43] Of course, one may argue, the shift from traditional to novel distinctions of membership is somewhat artificial given that there is a long history of inclusion of certain supra-citizens – consider for example

41 Compare Franko Aas, 2011.

42 Franko Aas, 2011, pp. 339–340. These notions were developed *inter alia* in Agamben, 1998; Foucault, 2004. See notably also Schinkel, 2010.

43 Plesničar & Kukavica, 2019, p. 45.

the rich historical background and connotations of cosmopolitanism – and the total exclusion of certain sub-citizens – consider the histories of penal banishment, denunciation, and ex-communication.[44] What seems different in contemporary crimmigration developments, however, is that the *fundamental* conception of who belongs to the polity and who does not has been radically redrawn under the gaze of rapid globalisation, the delocalisation of the border and the nation state, and the inflationary application of securitisation rationales – a development that has been labelled as the 'crisis of the nation-state' in times of globalisation.[45] As scholars in the field of border studies have argued, "borders and bordering in globalization may be uncoupled from the national scale and linked to identity and belonging within and beyond the state".[46] It is in this light important to be aware of the 'territorial trap' when conceptualising borders: regarding the border as a simple line rather than as a dynamic interaction of which the physical border is only one component renders the border line unduly durable and the more complex border process "hazy if not superfluous".[47] Instead, borders are, particularly under the gaze of globalisation, not only dividers of space but also expressions of social interaction and symbolic landmarks of control.[48] In this sense, they constitute constructed processes that may function to simultaneously inclusion and exclude people on both sides of the geographical line.[49]

The ongoing bordering process is effectuated by more traditional Westphalian power mechanisms such as criminal law enforcement and migration control – which in turn may go to great lengths in explaining their ongoing merger. Crimmigration may well be the result of the stretching of state powers in an attempt to accommodate – or grapple with – the novel de-bounded paradigms of membership. Rubins, likewise, conceptualises 'crimmigration' as the result of the 'control society', functioning as a regime of domestic policing and population management instead of as a system dedicated solely to the deportation of undesirable migrants.[50] This, in turn, conforms to what Sklansky has labelled 'ad hoc instrumentalism': in order to deal with novel challenges brought about by developments of globalisation, authorities resort

44 On the historical and philosophical roots of cosmopolitanism, see generally Appiah, 2015; Kleingeld, 2012. On various aspects of histories of penal banishment, denunciation, and ex-communication, see amongst others M. De Koster, 2018; M. E. Moore, 2007; Washburn, 2013.

45 Balibar, 2010, p. 319; Bosworth, 2008. This constitutes a 'cosmopolitan difficulty', since 'others' are often "no longer confronted in absolutely separate places": Balibar, 2010, p. 321.

46 Konrad, 2015, p. 3.

47 Konrad, 2015, p. 3.

48 Diener & Hagen, 2012, p. 2.

49 Balibar, 2002; de Haas et al., 2016; Infantino, 2016, pp. 4–7; Migdal, 2004; Newman, 2006; Van Houtum & Spierings, 2012.

50 Rubins, 2019.

to a number of instruments and branches of law whilst the formal distinctions between these instruments and branches fades to the background.[51]

This seems to be a two-step process: first, in drawing membership lines, non-members are identified both among citizens and non-citizens as illustrated in Figure 9. Rubins similarly concludes that crimmigration "works through the construction of dangerous classes and the categorization of populations according to the perceived threat they pose to the nation-state".[52] Given that membership theory is "inherently flexible", the subjective viewpoints of – as well as the exercises of discretion by – the decision-maker are largely decisive in this process.[53] In light of such subjectivity, novel categories of belonging have frequently been explained along the lines of, prominently, ethnicity and race.[54] Second, identified non-members are excluded by a combined use of criminalising and alienating rationales, mechanisms, and rhetoric. Both crime and immigration control hence offer tools such as confinement to control, contain, and ultimately expulse – symbolically, physically, or both – certain potentially threatening populations from society and to consequently enforce novel understandings of membership, albeit to varying extents. In these processes, criminality is grafted onto immigrants – the criminalisation-of-immigrants – whilst criminal sanctions increasingly result in the alienation, segregation, and banishment of convicts – the immigrationisation-of-criminals.[55]

Hence, as Barker puts it, "membership matters most".[56] It should be added, however, that 'membership' in this regard includes both a formal and an informal aspect. That is to say, both formal membership – i.e. based on one's formal documentation and citizenship – and informal membership – i.e. based on whether one is perceived to be a member under novel conceptions of belonging as depicted in Figure 9 – ultimately determine to what extent the criminalising and alienating features of crime control and/or immigration control are effectuated vis-à-vis the individual. Banishment of populations who have formal membership but lack informal membership under novel conceptions of belonging will, save for situations in which their citizenship is revoked altogether, indeed likely be of a different nature than banishment of populations who lack both formal and informal membership. Whereas for the former category banishment may continue to rely largely on the use of criminal justice mechanisms, for the latter category the emphasis may be on the use of immigration control mechanisms, although in both instances both censure and alienation will be conveyed. Conversely, the implications will likely be completely different as well: whilst non-citizens formally excluded in terms of membership

51 Sklansky, 2012.
52 Rubins, 2019, p. 298.
53 Stumpf, 2006, p. 379.
54 See for instance Fan, 2013; Garner, 2015; Pickett, 2016; Plesničar & Kukavica, 2019, p. 31; Vazquez, 2015.
55 Barker, 2013, p. 238; Chacon, 2009; T.A. Miller, 2003.
56 Barker, 2013.

may have other memberships, of other societies, to fall back on, sub-citizens may lack such alternatives and may consequently be relegated to the status of 'pseudo-citizens'.[57] Therefore, *who* you are in terms of your formal and informal membership determines *what* measures are applied, *how* they are applied, and *to what extent* alienation and condemnation materialise.[58]

3.3 Crimmigration in confinement on a global level

The novel conceptions of belonging as depicted in Figure 9 are informal in the sense that they are based on subjective perceptions of who belongs to the polity in a globalised world. Confinement is increasingly used to carve out these novel distinctions of membership.[59] In fact, immigration detention and prisons do not only enforce novel membership entitlements but may even be conceptualised as physically representing or functioning as novel borders between the included and excluded.[60] Both types of confinement are generally regarded as ultimate expressions of sovereignty: whereas imprisonment expresses the sovereign state's power to restrict one's liberty in the execution of legitimate punishments for wrongdoings, immigration detention is a visible expression of the sovereign state's broad discretion to determine who can enter and reside on its territory and who cannot.[61] This reverts to Stump's characterisation of the government as bouncers of the polity: when an individual is considered to either temporary or permanently not belong to the polity, whether it is because the individual is an alleged outsider or because the individual has broken the membership rules, the state can remove said individual from its premises through *inter alia* confinement.[62]

Here, the use of confinement to carve out such novel distinctions of membership will be examined on a global scale, focussing on macro-level developments. This endeavour is significantly constrained, however, by the fact that scholarship on crimmigration in confinement remains relatively scarce, especially when compared to scholarship on commodification trends as discussed in the previous chapter. This is in particular the case for the immigrationisation of crime control (and of prisons), which, as pointed out above, has remained vastly understudied in the crimmigration literature in contrast with the criminalisation of immigration (and of immigration detention). Whilst the approach

57 Demleitner, 1999, p. 160; Stumpf, 2006, p. 409.
58 Compare Bosworth et al., 2018, p. 43.
59 See e.g. O'Nions, 2008.
60 Compare Johnson et al., 2011. In addition, a number of other mechanisms such as electronic monitoring and other surveillance systems are employed to enforce the distinction both in relation to convicted offenders and certain categories of immigrants: Feeley & Simon, 1992, p. 457; Franko Aas, 2011; McLeod, 2012, p. 153.
61 Michael Flynn, 2011; L. L. Martin & Mitchelson, 2009.
62 Stumpf, 2006, p. 402.

here is thus focused on the macro-level, it should be taken into account that analysis focuses predominantly on countries in the Global North that have been central to much of the relevant literature. Ultimately, it remains imperative that future research fleshes out the macro level trends by including a wide variety of national contexts into its analytical scope.[63]

3.3.1 The 'criminalisation of immigration detention'

The first leg of the crimmigration development is that of the criminalisation of immigration detention. This means that immigration detention, which is traditionally geared towards administrative purposes and is therewith preventative rather than punitive in nature,[64] increasingly incorporates elements of punishment and condemnation. When looking at immigration detention at a global level, such conflation of rationales and purposes appears to occur on multiple levels simultaneously.

In various countries, immigration detention facilities increasingly mimic penal institutions up to the point where once can speak about 'immigration prisons'.[65] Parallel to the prison system, a vast network of immigration detention centres has indeed emerged that often use the same personnel, methods, and physical spaces as prisons.[66] Some detention facilities are in shared-use with prisons or jails,[67] others are self-standing but look, feel, and operate like prison – for example because they used to be prisons, because they were architecturally designed like prisons, or because they are managed by contractors that also operate on the prison market.[68] Hence, "[w]hilst immigration detention does not technically fall under the criminal justice umbrella, there is considerable overlap with prison ideology, practice and personnel".[69] Many immigration detention facilities function like prisons, "only worse" given that oversight and regulations are often weaker and conditions often more inferior

63 It should be noted that recent scholarship has started to flesh out such relationships. See for instance Ma, 2019 (on crimmigration in China) and Ramachandran, 2019a, 2019b (on crimmigration in India).

64 Turnbull, 2017, p. 3.

65 Bosworth, 2012, p. 127; Bosworth & Turnbull, 2014; Dow, 2007; Furman et al., 2016, p. 2; Gerard & Pickering, 2014, pp. 598–599; Longazel, Berman, & Fleury-Steiner, 2016, p. 989; Peterie, 2018; Sinha, 2015, p. 19; Turnbull, 2017.

66 Arnold, 2018; Moran, Conlon, & Gill, 2016; Silverman & Nethery, 2015, pp. 2–3; Sinha, 2015, p. 20.

67 Dow, 2007, p. 540; Sinha, 2015, p. 20; Wong, 2015, p. 128.

68 Bosworth, 2012, p. 127, 2017; Fiske, 2016, p. 209; Hernández, 2014; Silverman & Massa, 2012; Turnbull, 2017, p. 8. Bacon strikingly summarises this intimate connection in the UK context: "private guards are regularly transferred to immigration detention centres from prisons and in 1995, nobody was capable of explaining to Her Majesty's Inspectorate of Prisons (HMIP) what the difference was between a 'secure hostel' (the contractor's description of Campsfield House immigration detention centre) and a prison": Bacon, 2005, p. 6.

69 Liebling, 2013, pp. 221–222.

in the context of immigration detention than they are in the context of imprisonment.[70]

In addition, there is "a certain fluidity" between prisons and immigration detention facilities: in various countries, prisons occasionally facilitate detention spaces when immigration facilities are full, non-citizen prisoners are regularly transferred to immigration detention centres at the end of their sentence for deportation purposes, and in some countries immigration detainees who commit criminal offences whilst in detention can be transferred directly to prison.[71] Immigration detention is, furthermore, increasingly utilised as a form of incapacitation.[72] It is occasionally based on penal logics and at times implements penal practices in order to exclude the undesirable non-citizen from society.[73] In many countries, administrative detention has accordingly become "the cornerstone of securitisation of migration policy".[74] Immigration detention centres are therewith geared both towards administering immigration processes, and towards conveying censure. They are, therefore, both caring and coercive, empowering and disempowering, hospitable and hostile, and are as a result at times difficult to grapple with for staff, detainees, and the outside world alike.[75] This influences how immigration detention is experienced not only by staff and local communities in which such facilities are situated, but first and foremost also by detainees themselves who might increasingly feel like they are in prison.[76] As Golash-Boza considers in the US context,

> "[u]ndocumented migrants are not criminals. Detention is not prison. Deportation is not punishment. These are truths in the legal system of the United States. Undocumented migrants are treated like criminals. Detainees feel as if they are in prison. Deportees experience their removal as punishment. These are the realities people experience".[77]

Immigration detention therefore does not only turn immigrants increasingly into outlaws, but also makes immigrants increasingly *feel* like outlaws.[78]

Of course, this trend is by no means absolute and cannot be generalised across jurisdictions. Significant variations exist amongst states' approaches to immigration detention as well as the legal frameworks in which such

70 Fiske, 2016, p. 213; Furman et al., 2016; Sinha, 2015, p. 21; Stern, 2006, p. 146; S. Ugelvik & T. Ugelvik, 2013.
71 Silverman & Nethery, 2015, p. 3; Turnbull, 2017, p. 10.
72 Kogovšek Šalamon, 2019; Turnbull, 2017, p. 8.
73 Turnbull, 2017, p. 9.
74 Gerard & Pickering, 2014, p. 598.
75 Bosworth, 2017, p. 6; Khosravi, 2009, p. 53; Turnbull, 2017, p. 7.
76 This subjective experience of immigration detention as prison has for example been clearly demonstrated in the UK context: see Bosworth, 2017; Turnbull, 2017.
77 Golash-Boza, 2010, p. 81.
78 See also Arnold, 2018.

detention facilities are set, the way in which they operate in practice, and the precise populations that are detained.[79] At the same time, the impact of crimmigration on immigration detention facilities has been denoted by scholars from different disciplines across a variety of jurisdictions, including in Australia,[80] Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro, and Serbia,[81] Finland,[82] Greece,[83] India,[84] Israel,[85] Malta,[86] the Netherlands and Belgium,[87] Norway,[88] Slovenia,[89] South Africa,[90] Sweden,[91] the UK,[92] and the US.[93]

3.3.2 The 'immigrationisation of prisons'

The second limb of crimmigration consists of what will be labelled here the 'immigrationisation' of prisons: whereas prisons are traditionally geared towards *inter alia* punishment and condemnation, they increasingly incorporate elements of alienation. In the literature on crimmigration, this 'immigrationisation' of prisons has predominantly been denoted in the context of the *non-citizen* who is increasingly drawn into the penal net through the prosecution of migration-related offences and the 'overcriminalisation' of migration policy.[94] Consequently, prisons – and the penal system more generally – start to fulfil functions of immigration control in the sense that the execution of penal sentences for non-citizens is increasingly met with measures that envisage the segregation and ultimately the expulsion of the alien from the polity. Thus, "[w]hen deprived of their freedom, non-citizens are increasingly placed in separate institutions, or institutional arrangements, and afforded different procedural treatment and standard of rights than citizens".[95] In various countries, special 'foreign national prisons' nowadays even exist that function as

79 Compare Turnbull, 2017, p. 2. See however also Gerard & Pickering, 2014.
80 Grewcock, 2009; Groves, 2004; Peterie, 2018; Pugliese, 2008.
81 Kogovšek Šalamon, 2019.
82 Kmak, 2018.
83 Kotsioni, 2016, p. 52.
84 Ramachandran, 2019a, 2019b.
85 Rubins, 2019.
86 Mainwaring, 2016.
87 Van der Leun & De Ridder, 2013.
88 S. Ugelvik & Ugelvik, 2013; T. Ugelvik, 2016a.
89 Šalamon, 2017.
90 Alfaro-Velcamp & Shaw, 2016.
91 Khosravi, 2009; Puthoopparambil, Ahlberg, & Bjerneld, 2015.
92 Bacon, 2005, p. 6; Bosworth, 2012; Bosworth & Turnbull, 2014; Bowling & Westenra, 2018.
93 Dow, 2004; Golash-Boza, 2010; Hernández, 2014; Jorjani, 2010, p. 5; Kalhan, 2010, p. 47; Longazel et al., 2016.
94 Bosworth, 2008; Bosworth et al., 2018; J. Brouwer, 2017; Chacon, 2009, 2012, p. 614; Hester, 2015, p. 141; Loyd, Burridge, & Mitchelson, 2010, p. 90; Van der Leun & De Ridder, 2013.
95 Franko Aas, 2014, pp. 525–526.

part of the penal infrastructure yet incorporate immigration control rationales and mechanisms in lieu of traditional penal principles.[96] This includes a diminished focus on rehabilitation and reintegration and an increasing emphasis on deportation of the non-citizen after – or sometimes even prior to – the conclusion of the sentence.[97] Examples include prisoner transfer agreements and measures that incentivise foreign national prisoners ('FNPs') to leave the country more or less voluntarily, for instance in exchange for a partial sentence suspension.[98] Deportation is hence, as some have argued, not only a consequence of imprisonment but on many occasions also a substitute for it.[99] Franko Aas contends that an altogether distinct penal system guided by an immigration control rationale has hence developed parallel to the traditional penal system, which she calls 'bordered penality'.[100] By extension, such bordered penality has been guided by what has been called 'bordered penal populism'.[101] These processes are arguably geared towards the banishment and exclusion of non-citizens from society, which has been labelled as a 'banoptic' (rather than panoptic) rationality.[102] Immigration control has therewith seeped into penal practices and has arguably become a cornerstone of the contemporary carceral state.[103] It complements more traditional measures of immigration control where the latter are ineffective or incapable to expel the non-citizen from the community. Such bordered penality practices are increasingly identified in a number of countries around the globe.[104]

In addition to bordered penality, a more subtle process of immigrationisation can arguably also be distinguished in the context of the traditional penal system. When crimmigration is understood as a technique to effectuate novel categories of membership as established under the gaze of globalisation, it indeed also includes a more subtle and ingrained process in the domain of criminal justice that allows states to maintain stringent control over the

96 Bosworth, 2011a; J. Brouwer, 2017; Kaufman & Bosworth, 2013; Pakes & Holt, 2017; T. Ugelvik & Damsa, 2017.

97 See in this regard for instance J. Brouwer, 2017, 2018, who discusses how in the Netherlands policy measures are being implemented that stimulate the voluntary return of FNPs in return for substantial sentence reductions. In this sense, prisons clearly fulfil a core task of immigration control, i.e. that of removal of the alien from the territory of the state. As he highlights, this policy mechanism is problematic in light of the way immigration control goals are achieved as well as in light of the general principles underlying criminal law.

98 Bosworth et al., 2018, p. 40; J. Brouwer, 2017, 2018; De Ridder, 2016b.

99 Bosworth et al., 2018, pp. 39–40.

100 Franko Aas, 2014.

101 Todd-Kvam, 2018.

102 Bosworth et al., 2018, p. 43.

103 Hester, 2015, p. 141.

104 Although scholarship on this topic remains modest in scope and the topic remains underexplored in various national contexts. See however J. Brouwer, 2017; De Ridder, 2016b; Di Molfetta & Brouwer, 2019; Fernández Bessa & Brandariz García, 2018; Franko Aas, 2013, 2014; Todd-Kvam, 2018; Turnbull & Hasselberg, 2017; T. Ugelvik & Damsa, 2017; Vazquez, 2015.

conditionality of membership.[105] This relates closely to the 'punitive turn' in crime control.[106] Concretely, this concerns the extent to which prisons increasingly function to banish sub-citizens, who are included in formal conceptions of membership yet excluded from novel conceptions of membership, both physically, politically, socially, and symbolically from society. Indeed, "the prison may be regarded as a site of exclusion *par excellence*, serving to erect physical and symbolic boundaries between those who play by the rules of market society and those who do not".[107] Imprisonment in this sense can be used to enforce new membership boundaries by excluding – either temporary or permanently – those who are deemed to have lost their membership entitlements, a development that has been dubbed 'banishment modern style'.[108] The question *who* is precisely included in the category of sub-citizens may change over time and depends, importantly, on the society in question. Examples could include both dangerous and serious offenders,[109] poor offenders,[110] and offenders of particular criminal acts, having in common that they may to varying extents be villainised and that their membership status may accordingly be deduced to that of sub-citizens.[111]

As a result of such banishment functionalities, certain groups of prisoners are increasingly cast as foreigners.[112] This banishment process is two-fold. On the one hand, through the incapacitative capacities of prisons, states have the ability to exclude certain sub-citizens during the time that they are serving their sentence. This exclusion can be physical (e.g. through remote imprisonment), but also symbolic, legal, and practical in nature.[113] Bans on prisoner voting rights are, for instance, clear-cut examples of non-physical forms of exclusion.[114] As a body of research has emphasised, such prisoner voting

105 See also Reiter & Coutin, 2017.
106 De Ridder, 2016a, pp. 65–66; Feeley & Simon, 1992; Garland, 2001; Simon, 2007.
107 Bell, 2013, p. 46.
108 Van Swaaningen, 2005, pp. 295–296. See also Infantino, 2016, pp. 4–7; Schuilenburg & Scheepmaker, 2018. Banishment can also occur through other mechanisms than the prison: see for instance, Super, 2019, who discusses the South African context.
109 Reiter & Coutin, 2017.
110 Demleitner, 1999, p. 159.
111 This may include, for instance, sexual offenders: see Craissati, 2019.
112 Arnold, 2018.
113 Arnold, 2018; Bell, 2013, p. 49; Vaughan, 2000.
114 As I previously argued in the context of a ECtHR case concerning such voting bans, which will be addressed more in-depth in the next chapter of this book, "[c]riminal law indeed serves increasingly goals of exclusion and disenfranchisement, a development that could be labelled as one of 'ìmmigrationisation of criminals'. That does not so much concern so-called aliens in the criminal process in a literal sense, but rather the more ingrained development that certain categories of convicts are placed outside the society through physical removal and the revocation of fundamental citizenship and participation rights. Disenfranchisement through the curtailment of the right to vote as in the current case is an excellent example thereof: criminal convicts are not only punished, but also excluded of civic participation and the polity": Van Berlo, 2017a, p. 54, original in Dutch.

bans are increasingly applied in a wide range of countries around the globe.[115] In turn, the development of 'bifurcation' underlies this trend of exclusion whilst imprisoned. 'Bifurcation' is, as Cavadino and Dignan explain, "the strategy whereby lesser punishments are sought for less serious offenders whereas simultaneously new extra-long sentences are targeted on a sub-group of supposedly especially dangerous or serious offenders".[116] Accordingly, sentences can be inclusive or exclusive depending on whether the goal is to eventually keep offenders within the society or to cast them out, which in turn is dependent on whether the offender in question is regarded as an insider or an outsider. Exploring the example of the Netherlands, Cavadino and Dignan conclude that "[w]hat has happened has been more like a *redrawing of the boundaries of the community* – to exclude those offenders who are seen as incorrigible lost souls, but still to include less serious and less persistent offenders".[117] In Vaughan's words, "[p]unishment in the modern era has always been ambivalent but it is losing whatever sense of inclusiveness it has".[118] As some have consequently argued, prisons may increasingly transform from 'big houses' embodying correctional ideals into 'warehouses' that physically and symbolically remove social rejects (or 'undesirables'), who are not expected to return to society any time soon, from the law-abiding polity.[119] Kesby strikingly observes in relation to prisoner disenfranchisement that such stripping of rights is strikingly inconsistent with the recognition of citizenship status:

> "On the one hand, prisoners are acknowledged as bearers of human rights and equal citizens. Citizenship is a status which does not depend upon 'moral worthiness'. Yet, if a prisoner is particularly morally unworthy, as evidenced by the gravity of the offence and length of sentence, then the mask of citizenship is stripped revealing the 'natural man' beneath, and the denial of the right to vote is considered a proportionate measure. By lifting the veil of the formal equality of citizenship, distinctions between citizens (in particular between deviant and law-abiding citizens) come to the fore. The disenfranchised prisoner, like the slave of the ancient *polis*, is then considered to be 'without words' because their situation (here their moral unworthiness and imprisonment) has made them incapable of speech."[120]

115 Abebe, 2013; Demleitner, 1999; Dhami, 2005, p. 236; Dilts, 2014; Kesby, 2012, pp. 67–91; Macdonald, 2009, pp. 1393–1406; Penal Reform International, 2016. The report by Penal Reform International, for instance, concludes that in approximately 45% of the 66 jurisdictions studied, conviction to imprisonment automatically leads to disenfranchisement.
116 Cavadino & Dignan, 2006b, p. 82.
117 Cavadino & Dignan, 2006b, p. 120. See also Boone, 2012; Van Swaaningen, 2005, pp. 295–296.
118 Vaughan, 2000, p. 36.
119 Bell, 2013, pp. 49–53; Wacquant, 2001, pp. 95–99.
120 Kesby, 2012, pp. 78–79.

Still, as of yet such exclusion is generally not permanent: prisoners who are formally included in terms of membership are usually expected to return into society, which in turn questions the thesis that they are being subjected to any substantive alienation beyond the exclusion ingrained in utilitarian philosophies of penality. However, the second limb of this particular process of immigrationisation is informative in this regard. Indeed, on the other hand, on many occasions the alienation and exclusion that are gradually being incorporated in traditional penal practices stretch far beyond the execution of the prison sentence and continue to carve out the novel distinctions of membership post-imprisonment. This refers back to 'banishment modern style': banishment continues, but in novel and innovative ways that on many occasions mediate the absolute nature of banishment whilst maintaining its rationale and far-reaching implications.[121] In this sense, individuals may return to society, but their social segregation and exclusion, as a core aspect of banishment,[122] continues as a collateral consequence of sentencing.[123] Examples of such ongoing segregation and exclusion include the depletion of ex-convicts' rights,[124] their ongoing monitoring via registries and technological innovations,[125] the collateral consequences of criminal convictions for *inter alia* their position on the housing or labour market,[126] and restrictions on their political participation.[127] As Stumpf for example illustrates in the US context, "excluding ex-offenders […] from the activities of voting, holding public office, and jury service creates a palpable distinction between member and non-member, solidifying the line between those who deserve to be included and those who have […] shown themselves to be deserving of exclusion".[128] Consequently, losing these essential markings of citizenship demotes, according to Stumpf, convicted individuals to the status of non-citizen.[129] Jain draws attention to the significant impact of a criminal record, by maintaining that "harm arises over time, including from spiraling criminal justice debt and ubiquitous reliance on criminal records by employers and others".[130] In their edited volume on banishment and exclusion in the Netherlands, Schuilenburg and Scheepmaker furthermore emphasise the significant impact of spatial measures such as restraining and banning orders.[131]

121 Demleitner, 1999, p. 159; Van Swaaningen, 2005, pp. 295–296.
122 M. De Koster, 2018, p. 70.
123 Demleitner, 1999.
124 See e.g. Macdonald, 2009.
125 See e.g. Tewksbury, 2002.
126 See e.g. P.M. Harris & Keller, 2005; Van 't Zand-Kurtovic, 2017, 2018.
127 See e.g. Itzkowitz & Oldak, 1973; Petersilia, 2003, p. 9.
128 Stumpf, 2006, pp. 414–415.
129 Stumpf, 2006, pp. 405–406.
130 Jain, 2018, p. 1384.
131 Schuilenburg & Scheepmaker, 2018, p. 6.

Thus, sub-citizens who are formally included in terms of membership but who are excluded under novel paradigms of belonging in many instances do not recover their *full* position of insider-inside but remain excluded to varying extents.[132] Demleitner already noted in 1999 how this essentially led to "internal exile" and the relegation of ex-offenders to "second-class citizenship".[133] Kesby likewise highlights how this may lead to "a precarious citizenship of potential internal exiles".[134] In extreme cases, full alienation and even expulsion can be applied: consider, for example, contemporary debates and legislative action on the revocation of citizenship from 'homegrown terrorists'.[135] Likewise, criminal convicts may not *de jure* be expulsed from society but may still be excluded *de facto*. A clear example is the Julia Tuttle Causeway sex offender colony case in the US, which concerned a group of sex offenders is Miami (Florida) who took up residence in tents and shacks under a causeway as a result of the overly-strict restrictions on where former sex offenders were allowed to reside.[136] Formally they returned to a sphere of belonging after completing their prison sentences, but in practice their segregation and exclusion from society continued for years after their release.

Imprisonment as such may draw certain ex-offenders more or less permanently into a category of non-belonging.[137] This, it has been argued, may be the most far-reaching consequence of being captured by the penal net: as Karst puts it, "[t]he most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, denying them their very selves".[138] In fact, the implications for global membership entitlements may be even more far-reaching. For instance, whereas ex-offenders previously might have been considered outsiders-inside (or 'supra-citizens') by third states on the basis of their formal membership, on many occasions foreign authorities will now regard them as outsiders-outside (or 'non-citizens') on the basis of their perceived non-belonging. Many countries for example restrict visa-free travel for individuals who have previously been convicted for a criminal offence. The alienating effect of imprisonment – and of the criminal justice system more generally –thus does not only apply vis-à-vis the polity to which one formally belongs, but also applies in relation to other polities where criminal convictions are used as indicators to distinguish the outsider-inside – who is granted a

132 Still, given that this aspect of crimmigration has largely remained a blind spot in the literature, further research is needed to flesh-out these forms of exclusion in different national contexts. So far, it has primarily been denoted in the context of the US: see, e.g., Reiter & Coutin, 2017.

133 Demleitner, 1999.

134 Kesby, 2012, p. 90.

135 Macklin, 2014.

136 Rodriguez, 2010, pp. 1037–1038.

137 See also Demleitner, 1999, p. 158.

138 Karst, 1989, p. 4.

number of cosmopolitan entitlements and advantages – from the outsider-outside – who is subjected to tight control, oversight, monitoring, and potentially even to overall exclusion.

3.3.3 The shades of crimmigration

Spaces of penal and immigration confinement hence increasingly house the sum of those that were never envisaged to be part of the polity and those that have not upheld their end of the social contract, with membership either being gradually taken away or never being awarded in the first place. At the same time, this is by no means to say that these trends are global, uniform, or absolute. To the contrary, the various crimmigration processes appear fragmented and multifaceted not only when comparing different countries but also on a regional or even national level. Indeed, some jurisdictions may resort more frequently to immigration and/or criminal law measures to carve out membership than others, and the ways in which this is done may fundamentally differ. In this sense, whilst crimmigration has been denoted globally, it remains crucial to take the 'glocal' level into account when studying such trends.

Moreover, the merger between crime and migration control in confinement should not be regarded as absolute but rather as a sliding scale. Alienation and condemnation co-occur, but the extent to which they do so depends on the concrete context and the formal and informal membership entitlements of the individual concerned. As Bosworth, Franko, and Pickering rightfully point out, in denoting these trends we thus need to pay proper attention to competition between the systems of criminal justice and migration control as well as to "forms of resistance against the emerging hybrid rationalities".[139]

So far, the *congruence* between the punitive exclusion of non-belonging individuals through immigration detention on the one hand and through imprisonment on the other has not been traced widely, as a result of which little is known about this process overall. Still, in the literature, examples emerge that denote how immigrant detainees and prisoners are increasingly unified in an overarching category of non-members to be censured *and* expulsed. Van Swaaningen, for example, finds in the context of the Netherlands that policy priorities with respect to public safety are concerned with getting 'problem groups' out of sight: "[t]hey are removed to places where they are less of a nuisance be it by sending them to prison, trying to deport them to the country where the authorities think they come from or indeed to areas where they can do less harm".[140] In the context of the US, Reiter & Coutin denote similar developments: according to them, the US legal system "re-labels immigrants (as deportable noncitizens) and supermax prisoners (as dangerous

139 Bosworth et al., 2018, p. 42.
140 Van Swaaningen, 2005, pp. 295–296.

gang offenders). This re-labeling begins a process of othering, which ends in categorical exclusions for both immigrants and supermax prisoners".[141] As pointed out above, however, further research is needed to flesh out such developments, including analysis of the various shades of crimmigration that can potentially be recognised in different national contexts. The examination of the crimmigration elements of the case studies below *inter alia* attempts to contribute to this research endeavour. Before turning to the case studies, however, the nexus between crimmigration and commodification will first be explored.

3.4 THE CRIMMIGRATION-COMMODIFICATION NEXUS

Crimmigration and commodification are self-standing developments that merit individual scrutiny in their own right. At the same time, a link appears to exist between both developments which should not be neglected either, in particular in light of the potential challenges to international human rights law that both developments mount. This section will reflect on how crimmigration and commodification are frequently connected in at least three ways: it sketches how crimmigration frequently constitutes the fuel, the *modus operandi*, and, occasionally, the collateral damage of commodified confinement.

In exploring this nexus, it is important to keep in mind that it is not absolute nor uniform. Crimmigration does not only occur in cases of commodification, nor does it always occur in cases of commodification. Not all commodified spaces of confinement thus incorporate elements of crimmigration, or at least not to the same extent. Also, not all commodified spaces of confinement that incorporate elements of crimmigration do so in the same way, or with the same outcome. The point here is henceforth not that crimmigration and commodification *are* linked by definition, but that they *can be* – and, in fact, frequently are – and that, where such combinations occur in practice, this likely has far-reaching consequences from a human rights perspective.[142]

3.4.1 Crimmigration and the privatisation of prisons

Crimmigration is closely linked to the privatisation of prisons. First, crimmigration has inevitably fuelled the expansion of the prison-industrial complex. As a result of the crimmigration trend, the penal net has significantly widened over recent decades which has been key to the success of the private prison

141 Reiter & Coutin, 2017, p. 567.

142 Whereas analysis here focuses primarily on a number of countries in the Global North, further research is needed to specify these interrelationships between both trends both in the Global North and South.

industry in various countries.[143] There is an increasing demand for the punitive exclusion of those (placed) outside of the community, constituting a demand that private contractors have been willing to accommodate. In this sense, the continuing confinement of novel categories of non-members provides further impetus for the ongoing quest of private contractors to win new prison contracts in both traditional and less obvious prison markets. Not only have private actors stimulated a larger prison population, their presence has also prevented a decline in incarceration.[144] There is, indeed, a real concern that private contractors encourage lengthier sentences, stricter enforcement policies and more expansive exclusion "to keep bed spaces filled".[145] Crimmigration thus is an important reason for the expansion of the prison-industrial complex, yet conversely, the expansion of the prison-industrial complex has arguably also fostered crimmigration in what can be regarded as a circular process.

Secondly, crimmigration provides a *modus operandi* for a number of private penal institutions. That is to say, the development by which punishment is increasingly used to segregate and exclude certain populations from society has facilitated the implementation of profitable business models by private contractors, because it allows for (i) swift physical and symbolic removal of offenders from the community and (ii) the presence of a limited set of educational, social, and rehabilitative programmes. On the one hand, symbolic detachment of the individual from the community has accommodated the logic of a liberalised market: for-profit operators build prisons in remote rural places at a relatively low cost, which is enabled by local communities with their own micro-economy incentives.[146] By and large, the removal of sub-citizens from conceptions of membership has indeed allowed for cost-benefit analyses – where can a prisoner be housed cheapest? – to trump considerations of rehabilitation and inmate concerns – which location would be in the best interest of the prisoner?[147] As a result, either deliberate or not, private incarceration does not only symbolically remove the prisoner from the community but frequently also does so in a very physical sense. Of course, this is not to say

143 Doty & Wheatley, 2013, p. 435.

144 Friedmann, 2014, pp. 566–567.

145 Austin & Coventry, 2001, p. 16; Blessett, 2012; Cummings & Lamparello, 2016, pp. 430–431; Heitzeg, 2012; Smith & Hattery, 2012. As CCA strikingly illustrated, "[t]he demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them": CCA, as quoted in Doty & Wheatley, 2013, p. 435.

146 Moreover, as explained in the previous chapter, 'bed brokering' and 'out-of-state-imprisonment' became accepted business models in the US: N. Christie, 2000, pp. 136–138; Huling, 2002; R. S. King et al., 2003; Neill, 2012, pp. 105–106.

147 Aman, 2005, pp. 543–544.

that only private prisons are remotely located, nor that private prisons are by definition remotely located, yet the detachment of sub-citizens from membership entitlements has enabled for-profit contractors to employ remoteness as a cost-effective method of operations and as an acceptable alternative to publicly-run incarceration which can be sold to authorities in a variety of jurisdictions both in the vicinity and at a greater distance.

On the other hand, crimmigration may inform the method of operation by diverting attention away from rehabilitation and resocialisation and as such justifying that contractors provide less educational, social, and rehabilitative services to out-grouped populations in prisons. A striking example in this regard is the US context, in which these populations are often structured along racial lines: whilst ethnic minorities are overrepresented in public prisons, they are even further overrepresented in for-profit prison facilities.[148] As such, crimmigration allows private contractors in the US to house out-grouped individuals not only in far-away places, but also in regimes where less services are provided. Of course, not all private operators employ similar modes of operation, private facilities are not everywhere remotely located, and they do not everywhere provide less services than public correctional facilities, but they arguably *can* do so under the banner of crimmigration.

3.4.2 Crimmigration and the privatisation of immigration detention

Similar trends can be discerned in relation to private immigration detention facilities. On the one hand, criminalisation fuels the industrial complex as it continuously expands the scope of detainable people and thus requires an ever-growing detention enforcement apparatus.[149] In search of new profit, private contractors – often for-profit companies that are simultaneously operating on the prison market – have been eager to step into these emerging neo-liberal markets of confinement which promise to be rich sources of revenue.[150] Like

148 Brewer & Heitzeg, 2008b; Burkhardt, 2015; Deckert & Wood, 2011, pp. 231–232; Hallett, 2002, 2004; Heitzeg, 2012; Petrella, 2013; Petrella & Begley, 2013. As Petrella and Begley stress, "people of color are disproportionately siphoned away from public facilities, precisely the types of facilities that provide the most educational, pro-social, and rehabilitative programs. Instead, the overrepresentation of people of color in private, for-profit facilities – facilities with strikingly few rehabilitative programs relative to public corrections institutions – suggests that the containment of people of color, relative to 'non-Hispanic, whites,' functions primarily as a source of profit extraction": Petrella and Begley, 2013, pp. 141–142.

149 Doty & Wheatley, 2013, p. 435; Saldivar & Price, 2015, p. 40.

150 Ackerman & Furman, 2013; Andrijasevic, 2015; Aviram, 2014, p. 424; Doty & Wheatley, 2013, p. 435; Saldivar & Price, 2015, p. 40. In the US context, Doty and Wheatley furthermore draw attention to private involvement in practices of 'attrition through enforcement'. This notion is based on the idea that undocumented migrants can effectively be expulsed through the implementation of extremely sober and discouraging measures and strict enforcement policies. Like crimmigration, it is aimed at preventing the social embedding of deemed

in the penal realm, they have arguably not only met the demand but have, on the basis of their inherent profit motive, gone to greater lengths in order to expand the immigration detention market.[151]

On the other hand, crimmigration is also a *modus operandi* in many private immigration detention facilities. Indeed, in many cases the "persistence of criminal subjectivity is deeply embedded" in the institutional operations of private immigration detention facilities, which often operate as if they are prisons.[152] This is hardly surprising now that many private actors involved in the immigration detention market are simultaneously involved in the prison market and employ facilities, services, and staff interchangeably on both markets. Consider, for example, private immigration detention facilities in the UK. Of the eight designated Immigration Removal Centres (IRCs) in the UK, seven are currently being run by private contractors, many of which are also involved in the prison industry.[153] Such IRCs are used for administrative purposes but appear to incorporate punishment at their core. Indeed, "the links that exist between the state and the private sector in the management of non-citizens, as embodied in the corporations that run the removal centres, continue to intermingle punishment and capital in depressingly familiar ways".[154]

3.4.3 Crimmigration and the offshoring of prisons

As the previous chapter has outlined, up-to-date the only genuine offshoring of prisons has happened in the Netherlands in partnership with respectively Belgium and Norway. Since the Norwegian-Dutch cooperation in PI Norgerhaven is one of the central case studies of this research and its crimmigration aspects will be separately and more in depth discussed in section 3.5.2., it suffices here to only address some brief reflections in relation to the Belgian-Dutch cooperation.

Experiences with the Belgian-Dutch penal cooperation in PI Tilburg showcase that there is a real danger that the position of transferred prisoners is worsened. Indeed, the Flemish Community (*'Vlaamse Gemeenschap'*), which in Belgium is responsible for providing social services such as education, reintegration, and therapeutic services, was not represented in PI Tilburg as it had no extraterritorial authority – it consequently was labelled "the main

outsiders, yet in doing so it relies primarily on 'voluntary' self-deportation: Doty & Wheatley, 2013, pp. 434–435. See also García, 2013, pp. 1849–1850; Kobach, 2008; Theodore, 2012, pp. 95–98.

151 Bacon, 2005, p. 4; Menjívar, Gómez Cervantes, & Alvord, 2018.

152 Welch, 2014, p. 90.

153 Silverman & Griffiths, 2018.

154 Bosworth, 2008, p. 208. There is, in addition, a certain amount of cross-fertilisation, with publicly run immigration detention centres increasingly mirroring the incorporation of penal elements: see Bosworth, 2016, p. 5.

absentee".[155] Whilst this does not appear to be a deliberate construction, it did leave prisoners in the facility in a more precarious – and, arguably, a more excluded and alienated – situation as their access to a range of social services was hampered. Put differently, this absence may not so much be a deliberate part of the facility's *modus operandi* – PI Tilburg remained under Belgian command and functioned as an annex of a Belgian facility – but it certainly contributed to the marginalisation and exclusion of the prisoners confined in the offshore facility.[156]

Furthermore, whilst selection criteria had been set out in the Belgian-Dutch Treaty regulating which prisoners could be transferred, in practice PI Tilburg had become the preferred destination for the FNPs population of Belgium. Indeed, "over time, non-citizens convicted in Belgium have become the majority of inmates [in PI Tilburg]. This could be seen as [an] example of separating out foreign national prisoners, and, as such, an increasing trend".[157] As De Ridder rightfully points out, this overrepresentation of deportable FNPs in PI Tilburg is remarkable given that the Belgian-Dutch Agreement had explicitly ruled out the transfer of prisoners unauthorised to stay in the Netherlands.[158] Crimmigration therefore appears to be a real outcome of this type of commodification, although this does not mean that it is a matter of design nor that it is necessarily undesirable per se. Rather, crimmigration in this instance seems to be a collateral consequence.

3.4.4 Crimmigration and the offshoring of immigration detention

Crimmigration similarly plays an important role in a variety of offshore immigration detention facilities. It often is not only the catalyst for the creation of such facilities but also their *modus operandi*.

In extremis, Guantánamo Bay Naval Base functions simultaneously as a MOC and as a military prison used as a detention site for hundreds of aliens that face permanent exclusion from the US.[159] In this sense, Guantánamo Bay is characterised by an inherent crimmigration duality, with the site functioning simultaneously as prison and as immigration detention facility. In the 1990s, when Guantánamo Bay functioned as detention facility for Haitian asylum seekers and refugees, it moreover already clearly incorporated a crimmigration rationale given that offshore immigration detention was premised on the rationales of security and deterrence and operated in a prison-like fashion.[160]

155 League for Human Rights, 2011, pp. 9–13.
156 League for Human Rights, 2011.
157 Pakes & Holt, 2017, p. 71.
158 De Ridder, 2016b, p. 128.
159 See footnotes 196-214 of chapter 2 and accompanying text.
160 Barta, 1998, p. 323; Dastyari & Effeney, 2012, p. 57.

As outlined in the previous chapter, it was at times even used to exclude certain asylum seekers – those tested HIV-positive – from the US by their ongoing detention in dilapidated facilities surrounded by razor barbed wire and guarded by military personnel.[161]

As another example, Italy financed immigration detention facilities in Libya because of fears for impending "invasions" of migrants, terrorism, organised crime and criminal networks.[162] The conditions and safety of these facilities as well as the availability of services have subsequently been duly criticised.[163] In enforcing these offshore detention frameworks, Italy has returned individuals to Libya since 2004[164] and has furthermore initiated an interdiction policy in 2009 – which was later struck down by the European Court of Human Rights ('ECtHR') in *Hirsi Jamaa v. Italy*.[165] More generally, these offshore detention measures were accompanied by European initiatives encouraging third countries, including Libya, to criminalise the irregular departure of migrants to Europe.[166] In this sense, it is thus not only true that "[d]etention serves to implicitly punish those seeking to get to the EU by boat".[167] The focus was also very much on the incapacitation of potential threats and perceived criminal individuals in order to make sure that they would not reach the European continent.

The RPCs in PNG and on Nauru are likewise characterised by crimmigration aspects. The crimmigration elements of these facilities however closely resemble one another, and will thus be dealt with integrally in the next section, which is concerned with the crimmigration elements of the central case studies of this research.

3.5 Crimmigration on a local level: examining the case studies

3.5.1 RPC Nauru: a crimmigration perspective

The existence of RPC Nauru – and, for that matter, of RPC Manus – has consistently been premised on the conflation of irregular boat migration with the idea of deviant and/or criminal 'others'.[168] Indeed, such conceptions have been central to the offshore processing policy since its genesis in 2001 and

161 Barta, 1998, p. 332; Dastyari, 2015a, p. 97.
162 Andrijasevic, 2010, p. 7; Bialasiewicz, 2012, pp. 857–861; Michael Flynn, 2014, p. 191.
163 Gerard & Pickering, 2014, p. 600; Hamood, 2006.
164 Hamood, 2006, p. 23.
165 Returning boats to Libya without a proper review of the asylum claims of those on board violated Articles 3, 4, and 13 ECHR: ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), 22 February 2012, Application no. 27765/09. See also Gerard & Pickering, 2014, p. 596.
166 Carrera et al., 2018, p. 29; Gammeltoft-Hansen, 2017, p. 37.
167 Gerard & Pickering, 2014, p. 601.
168 This section is a modified version of part of a previously published article: Van Berlo, 2015a.

have persisted in the various offshore processing policy frameworks ever since.[169] With the introduction of OSB, offshore processing has become military-led and has further standardised that unauthorised maritime arrivals are fully barred from resettlement in Australia.[170] Hodge speaks in this regard about a "transfer of illegitimacy" and a "criminalisation of asylum seeker bodies", thereby firmly drawing the policy in the crimmigration debate.[171] The importance of the fact that border control has become a military affair cannot be underemphasised in this regard either: as Graham has stipulated in a broader context, we are witnessing a proliferation of militarised borders between countries all over the world "geared towards trying to separate people and circulations deemed risky or malign from those deemed risk-free or worthy of protection".[172]

On the one hand, crimmigration in this setting is thus very explicit: the use of military border patrols and prison-like, punitive facilities is a clear-cut example of crimmigration. Likewise rather explicitly, the offshore processing facilities involve private contractors that also operate in global prison markets, which runs the risk of conflated procedures, practices, and standards.[173] On the other hand, however, crimmigration is also a much more ingrained element of the policy framework as a whole. A sense of criminality and illegality is deeply entrenched in the Australian Government's rhetorical discourse on boat migrants, which has served as a prime justification for offshore processing ever since it was introduced in 2001.[174] Thus, in examining the Pacific Solution, Welch has argued that offshore processing under the Pacific Solution was effectuated by the Australian government through the combined use of 'walls of noise' (or 'loud panicking') and 'walls of governance' (or 'quiet manoeuvring').[175] On the one hand, political discourse was used to erect a 'wall of noise' about the arrival of irregular (or, to use the same language as the discourse at hand, 'illegal') migrants and to provide a subsequent basis for the respective governments to introduce restrictive legislation and policies to counter-act such arrivals.[176] As such, "discursive practice has served to construct a mythic image of a deviant and criminal asylum seeking population that has enabled the justification of increasingly restrictive and draconian legislation and policy".[177] On the other hand, the various governments utilised a variety of 'governance walls' – including offshore detention, privatisa-

169 Penovic & Dastyari, 2016, p. 143; Rajaram, 2003; Van Berlo, 2015a; Welch, 2012.
170 Grewcock, 2014; Hodge, 2015.
171 Hodge, 2015, p. 122.
172 Graham, 2011, p. 89.
173 Van Berlo, 2017d.
174 Welch, 2012.
175 Welch, 2012.
176 Welch, 2012.
177 Banks, 2008, p. 43.

tion, and media stonewalling –"behind which the state quietly manoeuvres on matters of crimmigration".[178]

In earlier work, I denoted similar crimmigration elements of the Pacific Solution's policy successor, OSB.[179] Thus, first, the Critical Discourse Analysis ('CDA') that I performed provided support for the view that the Australian government justified OSB by using 'walls of noise' and tactics of 'loud panicking'. The respective ideas that (i) Australia's national sovereignty and borders are under threat, (ii) such threat is the result of boat migration, and (iii) OSB is an effective policy framework to counter such threats are indeed explicitly – and in a rather loud sense – fostered by the discourse of the Australian government. References to the importance of protecting Australia's sovereign borders against criminal activities associated with boat migration recur frequently in the discourse, with a strict approach of deterrence ("stopping the boats") being approved on the basis of the allegedly large-scale problem.[180]

In this process, immigrant populations are distinguished on the basis of their mode of transportation and arrival, "creating an undesired crimmigrant group of allegedly illegal, threatening and non-deserving boat migrants who buy a place from smugglers at the black market".[181] Not only are boat migrants regarded as primarily "seeking upward socioeconomic mobility", thereby underemphasising their personal backgrounds, motivations, and protection claims,[182] but they are also drawn into a discourse of crime and criminality more explicitly since they are discursively linked on more than one occasion to instances of sexual assault and piracy. As a result of the discursive outlining of boat migrants as an undeserving and illegal population that ought to be deterred and expelled, their 'crimmigrant' imago is continuously fostered – yet in the absence of counter-narratives of asylum seekers themselves, these framings are "very difficult to refute".[183] Fleay and Briskman speak, in this context, about "hidden men", which seems strikingly apt in light of the discourse analysis.[184]

At the same time, boat migrants are not only discursively connected to illegality and criminality but are likewise – in a seemingly contradictory way –

178 Welch, 2012, p. 331.
179 Van Berlo, 2015a.
180 Van Berlo, 2015a, p. 101.
181 Van Berlo, 2015a, p. 101. See also Schloenhardt & Craig, 2015; Welch, 2014. A similar tendency has been identified by Rowe & O'Brien, 2014 in relation to 2011 parliamentary debates on the so-called Malaysia Deal in Australia. Indeed, in these debates, asylum-seekers arriving by boat were similarly labelled as illegal, "further delegitimizing this mode of arrival and the people who travel this way". As such, then, the mode of arrival has arguably become an implicit indicator of an asylum-seeker's legitimacy.
182 Van Berlo, 2015a, pp. 101–102. See generally also Bradimore & Bauder, 2011; Greenberg, 2000; Welch, 2014.
183 Van Berlo, 2015a, p. 102. See also Kneebone, 2008, p. 131.
184 Fleay & Briskman, 2013.

depicted as vulnerable persons that need to be protected from drowning at sea.[185] In this sense, the discourse emphasises both the agency of boat migrants (in an active sense) and their vulnerability and powerlessness (in a passive sense). The two narratives are connected with one another, in turn, by pointing towards the need to deter human smuggling specifically. As Kneebone and Missbach report, "the framing of asylum seeking within a smuggling model has been consistently used by the Australian government to 'securitise' the concept of asylum and to justify the introduction of discriminatory, punitive and deterrent measures against asylum seekers seeking to enter Australian territory".[186] On the one hand, then, OSB is aimed at keeping out the 'active' migrant using agency by becoming involved in smuggling (the migrant as a threat), whilst on the other hand it is aimed at protecting the 'passive' migrant from the dangerous trip at sea (the migrant as a victim). Whilst the policy is thus somewhat schizophrenic in the sense that it creates, through loud claims-making, a binary imaginary of irregular boat migrants as comprising both threats and victims, it does so in order to convincingly argue that a deterrence policy is, in the face of ongoing smuggling operations, the best overall solution both from a securitisation *and* a humanitarian perspective.

In addition to the use of 'walls of noise', OSB uses 'wall of governance' behind which the government has significant space to quietly manoeuvre. As I previously argued, the use of such 'walls of governance', and their stonewalling effect, becomes utmost clear from the discourse used by the Australian government.[187] Indeed, the discourse obfuscates issues of responsibility by referring to the opaque policy constructions in place. On the one hand, the offshore processing centres are discursively considered markedly Australian: Australia is indeed considered "to fund the construction and maintenance of the centres, to plan and manage operational matters and practical arrangements, to tender private contractors, to ensure health care, safety, dignity and respect for detained migrants, to have the power to independently bring detainees from the RPCs to Australia's mainland for investigative purposes, and to be able to restrict media access to offshore detention centres".[188] On the other hand, the discourse simultaneously maintains that the RPCs are run by – and remain the responsibility of – the authorities of Nauru and PNG, and that their operation is subjected to the respective Nauruan and PNG laws. Furthermore, the discourse highlights the important role of private contractors and their respective responsibilities. Through language of 'partnerships' and 'joint committees', responsibility is further diffused.

185 Van Berlo, 2015a, p. 102.
186 Kneebone & Missbach, 2018, p. 380.
187 Van Berlo, 2015a, p. 103. See also Andrew & Eden, 2011, p. 232.
188 Van Berlo, 2015a, p. 103.

In this sense, not only the use of remote confinement, private contractors, and media stonewalling techniques, but also the use discourse *itself* has by and large become a 'wall of governance' that allows the Australian government to manoeuvre relatively quietly and without much scrutiny. Thus, as I concluded elsewhere, since the Australian government's discursive practices dominate the discursive field,

> "they provide suitable platforms for the authorities to control which and how discourses are distributed and consumed. They therefore allow for a particular narrative to be expressed, leaving little room for both alternative narratives and critical approaches to be outlined. This stretches further than the stonewalling mechanism as identified by Welch: indeed, media – and as such, the public – are not only stonewalled through the withholding of information, but certain narratives also remain, through the choice of discursive practice, significantly underexposed. [D]iscourse *itself* has [thus] become a form of quiet manoeuvring – not only in what it conveys, but also in what it does *not* convey and what remains at the margins – or is even left out in its entirety – of the debate."[189]

Dominant discursive practices hence constitute building bricks not only for 'walls of noise', but also for 'walls of governance'.[190] Even more so, the Australian government's discursive practices do not only foster crimmigration by simultaneously creating loud panic and walls of governance, but these two practices moreover constantly feed into – and reinforce – one another. Thus, whereas loud panicking is used to *legitimise* the use of quiet manoeuvring tactics, the use of quiet manoeuvring tactics is conversely used to *legitimise* loud panicking as it mutes alternative narratives and leaves the dominant discourse of panicking largely unaffected.[191]

3.5.2 PI Norgerhaven: a crimmigration perspective

PI Norgerhaven likewise incorporated crimmigration elements, albeit much less obviously. Indeed, the Norwegian-Dutch cooperation was not so much – or at least, not directly – *fuelled* by crimmigration, but rather established on an ad hoc basis. Still, such offshore prisons operate on the premise that there is no fundamental problem in executing one's penal sentence in a different jurisdiction, thereby physically and symbolically removing prisoners not only far away from the community but also out of the polity altogether. Guarded by Dutch guards on Dutch territory, these populations were both physically and to some extent symbolically excluded from the territory and community in which they were charged and convicted. Compared to the Belgian-Dutch

189 Van Berlo, 2015a, pp. 103–104.
190 See similarly Tazreiter, 2017.
191 Van Berlo, 2015a, p. 104.

arrangements, this appears peculiar particularly in relation to the Norwegian-Dutch arrangements: indeed, the Norwegian penal system – like other penal systems in the Nordic countries – is based on the principle of normality, which basically entails that prisons should not *add* suffering. Thus, there should be no essential difference between prisons and other public establishments in order to keep prisoners included in society.[192] In light of the aim of rehabilitation underlying this 'Norwegian exceptionalism', "it makes sense that prisoners during their sentence are never truly removed from society".[193] In turn, Pakes and Holt maintain that "[i]f there is […] a process of bifurcation underway, the move to house prisoners sentenced in Norway to serve part of their sentence in the Netherlands certainly is by far its most eye-catching manifestation".[194] Put differently, central to these arrangements was the very fact that convicts can be transferred to confinement places far beyond the sovereign territorial border, therewith being physically and to some extent also symbolically removed from the community in which – and by which – they were sentenced. This removal was, furthermore, much more profound than the removal that was involved in the Belgian-Dutch arrangements, as the transfer of Norwegian prisoners was characterised by longer distances and significant differences in both language and culture.

In addition, similar to the Belgian-Dutch arrangements, in practice the inmate population at PI Norgerhaven consisted predominantly of FNPs, notwithstanding the extensive set of selection criteria in the Norwegian-Dutch Treaty. Thus, in 2016, 80% of the prison population of PI Norgerhaven did not have the Norwegian nationality.[195] Crimmigration thus appears to be a *collateral result* of the particular nodal arrangements in place, yet was not necessarily part of the facility's initial design and was not necessarily without merits. For example, relocation to the Netherlands came with certain benefits for transferred prisoners, who were allowed to phone or Skype call their family more frequently and who received slightly higher allowances.[196] For various FNPs who lived without their families in Norway, a transfer to the Netherlands was hence argued to be less problematic and potentially even beneficial.

Although the Norwegian-Dutch cooperation appears not to be fuelled by crimmigration, and although it at times may yield even positive results for those confined, the adverse impact of crimmigration measures on those confined in PI Norgerhaven should not be underestimated. Since the vast majority of prisoners in PI Norgerhaven did not have the Norwegian nationality, the prison *de facto* became one of two Norwegian prison facilities that primarily

192 Y.A. Anderson & Gröning, 2016, p. 224; Pakes & Holt, 2015, p. 85.
193 Pakes & Holt, 2015, p. 85.
194 Pakes & Holt, 2015, p. 88.
195 Barske, 2016; Brosens, De Donder, Smetcoren, & Dury, 2019, p. 9; Hotse Smit, 2016; Johnsen et al., 2017, p. 4; Pakes & Holt, 2015.
196 Hotse Smit, 2016.

housed FNPs, the other one being Kongsvinger prison which is fully dedicated to FNPs. As Todd-Kvam points out, the Norwegian government represents the FNP populations housed in both facilities as "requiring a different prison regime".[197] This bifurcation of prison regimes, amounting to bordered penality, is justified with reference to the fact that FNPs are not to be rehabilitated in Norway, but to be deported when their sentence has been executed.[198] The negative impact of such bifurcated regimes for FNPs has been detailed in the literature, both in the context of Norway and elsewhere.[199] Ugelvik and Damsa have consequently labelled Kongsvinger prison a 'crimmigration prison', and such label could to a large extent also be extended to PI Norgerhaven.[200] Even though PI Norgerhaven was under the Norwegian-Dutch cooperation not designed as a FNP facility as such, it indeed to a large extent fulfilled similar functions within the Norwegian penal infrastructure.

3.6 THE CRIMMIGRATION CHALLENGE TO INTERNATIONAL HUMAN RIGHTS LAW FROM A 'GLOCAL' PERSPECTIVE

So far, this chapter has problematised the notion of 'crimmigration' and has recalibrated it from the perspective of broader globalisation developments that ultimately reconfigure the way in which membership is understood and implemented in contemporary societies. In addition, it has contextualised such crimmigration developments in settings of confinement both at a macro level – looking at broad developments of the 'criminalisation of immigration detention' and the 'immigrationisation of prisons' – and at a micro level – by touching upon the crimmigration elements of RPC Nauru and PI Norgerhaven. As has become apparent, crimmigration can hardly be characterised as a coherent uniformity. Instead, it comprises a plethora of diverging developments affecting those straddling the criminal-immigrant divide. At their core, these developments have in common that they mark out the novel boundaries of belonging and enforce those boundaries through mechanisms of inclusion and exclusion that often are not only of a zoepolitical nature but also comprise biopolitical exclusionary elements.[201]

Given that it captures such a wide breadth of processes and practices, and given that it plays out markedly differently in different contexts, crimmigration is firmly embedded in the glocal level. Indeed, when only the macro level would be emphasised, 'crimmigration' as a construct is hardly illuminating

197 Todd-Kvam, 2018, p. 14. See also Y.A. Anderson & Gröning, 2016, p. 227.
198 Todd-Kvam, 2018, p. 14.
199 See e.g. Bosworth, 2011a; J. Brouwer, 2017; De Ridder, 2016b; Di Molfetta & Brouwer, 2019; Turnbull & Hasselberg, 2017; T. Ugelvik & Damsa, 2017.
200 T. Ugelvik & Damsa, 2017.
201 See also Franko Aas, 2011; Schinkel, 2010.

as it captures a wide and heterogeneous variety of developments by which membership entitlements are redrawn, reaffirmed, or denied through the combined use of laws, policies, discourses, and practices belonging to the respective fields of criminal justice and migration control. When only the micro level would be emphasised, on the other hand, 'crimmigration' processes, and the way in which they function to effectuate novel categories of membership and belonging, cannot be structurally denoted given that such an approach does not allow for local occurrences to be embedded in more globally recognisable trends. Similar to commodification, crimmigration is hence a bi-directional process that takes place at the glocal level: global trends of increasing mobility and connectivity have spurred the merger of both domains in increasingly intricate ways at the local level, yet such experiences at the local level have in turn informed the way in which mobility and connectivity at the global level have developed. Ultimately, the entire process of membership reconceptualisation does not take place solely at the global level, nor solely at the local level, but somewhere in between at the glocal level.

The previous chapter has, with reference to a first fundamental tenet of international human rights law, already outlined why commodification as a sub-trend of globalisation might be problematic for international human rights law accountability as well as for the system's effectiveness and legitimacy. As this section will analyse, crimmigration likewise poses a potential challenge to the very same elements of international human rights law: its progressive development at the glocal level affects possibilities to hold duty-bearers accountable and therewith potentially defies in whole or in part the effectiveness and legitimacy of international human rights law as a protection mechanism. Before providing further elucidation, however, attention should first be turned to international human rights law's second fundamental tenet.

3.6.1 The second fundamental tenet: equal individuals

Chapter 2 highlighted that human rights gained international traction with the development of the UDHR, which as part of the post-World War II sentiment rapidly became the blueprint or cornerstone of international human rights law. The UDHR places particular emphasis on equality and dignity both in its Preamble and in Article 1, which stipulates that "[a]ll human beings are born free and equal in dignity and rights". As broadly supported in the literature, this premise is central to human rights law.[202] To extend the metaphor of the previous chapter, it is the clay of which the cornerstone is made or the polyester film used to fabricate the blueprint. Consequently, human equality

202 Bantekas & Oette, 2013, p. 11; Blau & Esparza, 2016, p. 32; Carozza, 2013, p. 345; Gibney, 2016, p. 3; Hannum, 2016, p. 410; Howard & Donnelly, 1986, p. 801; Lowe, 2013, p. 523; Nolan, 2016a, p. 33; Ramcharan, 2015, p. 29.

and human dignity are according to some the most fundamental and pervasive concepts in the entire body of international human rights law.[203] Perry even speaks about the "emergence, in international law, of the *morality* of human rights".[204]

The reference to equal and autonomous individuals as beneficiaries of rights is exemplary for modern times and has often been traced to social contract theory.[205] According to such theory, in giving up some of their autonomy in return for collectively provided safety and security, citizens run the risk that governments will misuse the powers it has acquired. Fundamental rights, in turn, are the insurance of all citizens against governmental tyranny: they mitigate the risk of misuse of power by expressing the parameters of political bargaining and by proposing limits on the government's exercise of power.[206] Human rights to a certain extent are the modern global translation – or even transformation – of this 'insurance against tyranny', applying in theory not only to citizens but to all humans. Indeed, "[i]n the areas and endeavors protected by human rights, the individual is 'king', or rather, an equal and autonomous person entitled to equal concern and respect".[207]

This understanding has now become commonplace. Where human rights may once have been used as a tactic by the bourgeoisie to protect its self-interest, the logic of human rights as inalienable and universal claims protecting human dignity has "long since broken free"[208] and is now even argued to be "a key tenet of our world"[209] that is widely vaunted.[210] In fact, human dignity has served as a heuristic catchphrase to interconnect different categories of rights and entitlements under the generic header of human rights.[211] This happens up to the point where almost every claim is translated into one of human rights: thus, "[t]he idiom of [human] rights is used to support anything that anyone thinks necessary for dignity and freedom, however defined".[212]

This foundation of international human rights law consists of a number of typical characteristics, notably those of universality, equality, and inalienability. At least in theory, all individuals are hence equally entitled to – and

203 Carozza, 2013, p. 345.
204 Perry, 2005, p. 31 (emphasis added).
205 See for example Donnelly, 2011, p. 15; Douzinas, 2000, p. 9; Gearty, 2006, p. 23; L. Weber et al., 2014, p. 5.
206 L. Weber et al., 2014, p. 6.
207 Howard & Donnelly, 1986, p. 804.
208 Howard & Donnelly, 1986, p. 804.
209 Ramcharan, 2015, p. 40.
210 Grear & Weston, 2015, p. 21. That is not to say that the close connection between human rights and human dignity has normatively remained undisputed: see for example Schroeder, 2012.
211 Habermas, 2010, p. 468.
212 Spickard, 1997. This in itself is problematic however given that it may ultimately render the human rights notion into an empty vessel: see Posner, 2014b, 2014c.

endowed with – universal and inalienable human rights. As outlined by Donnelly,

> "[h]uman rights are typically understood […] as the rights that one has simply because one is human. They are *universal* rights: every human being has them. They are *equal* rights: one either is a human being – and thus has these rights equally – or not. And they are *inalienable* rights: one cannot stop being a human being, and thus cannot stop having these rights. […] Human beings are seen as equal and autonomous individuals rather than bearers of ascriptively defined social roles. […] A human rights conception […] insists that essential to their dignity, and to a life worthy of a human being, is the simple fact that they are human beings. This gives them an irreducible worth that entitles them to equal concern and respect from the state and the opportunity to make fundamental choices about what constitutes the good life – for them -, who they associate with, and how".[213]

Although apparently self-evident, it is nevertheless essential to underscore that the international human rights law framework was established on a *normative* ideal rather than an empirical truth. The idea that human rights are universal, equal, and inalienable rights for all humans simply because they are humans is a moral claim about how to organise social and political relations rather than a historical or anthropological fact – indeed, as many historical antecedents show, such a conception of social and political order has been highly unusual in societies and cultures both across time and space.[214] As Howard & Donnelly for example claim, all societies inhibit conceptions of human dignity but the conception of human dignity that underlies the international human rights law framework requires a particular liberal regime.[215] Human rights is thus a particular view of the world; a world in which all are equally worthy of esteem and each individual counts.[216] Nowadays, this view is entrenched in the legal domain, with human rights law being "law's tallest peak"[217] and a sacred ideal in today's world.[218] In turn, various authors have strenuously defended this universalist normative ideal and perspective, arguing that a basic set of human rights could be identified

213 Donnelly, 2011, pp. 13–14 (emphasis added).
214 Donnelly, 2011, pp. 14–15; Habermas, 2010; Schachter, 1983, p. 853; Spickard, 1997, p. 4.
215 In doing so, they refute earlier arguments by *inter alia* Khushalani that "the concept of human rights can be traced to the origin of the human race itself" and that "all the philosophies of our time" are committed to human rights: see Howard & Donnelly, 1986, p. 801; compare Khushalani, 1983.
216 Gearty, 2006, p. 4.
217 Gearty, 2006, p. 71.
218 Spickard, 1997, p. 3.

that would be claimed, affirmed, and defended by all and that such a system of basic human rights norms *should*, moreover, be "vigorously upheld".[219]

3.6.2 The crimmigration challenge to international human rights law

In light of this fundamental tenet, it *a priori* seems easily discernible why developments of crimmigration at the glocal level might structurally challenge international human rights law. Whereas international human rights law is fundamentally geared towards the protection of equal individuals on the basis of supposedly inalienable rights, through crimmigration novel categories of membership are created through complex processes of inclusion and exclusion that operate on both sides of states' sovereign territorial borders. At the same time, however, it should also be recognised that states have *always* distinguished between different categories of membership, with the traditional distinction between citizens and non-citizens being an archetypal example. Indeed, a classic criticism of traditional human rights philosophies is that they were too often equated to sets of rights for *citizens* as opposed to non-citizens.[220] This criticism for an important part has been overcome in more recent codification efforts, with entitlements in international human rights law specifically *not* being tied to citizenship status but extending to *everyone*. Viewed in this light, it is less obvious that the trend of crimmigration poses a challenge to international human rights law: whilst it may redraw the boundaries of belonging, such boundaries seemingly do not affect human rights entitlements in the books.

However, as will be explored below, structural developments of crimmigration at the glocal level *are* problematic from a human rights law perspective in present-day reality, as they potentially challenge human rights law both in the books and in action. As a result of crimmigration efforts, rights of particular populations are indeed limited on the one hand (circumscribing the allocation of entitlements in the books), whilst it becomes increasingly difficult for certain out-grouped populations to claim and effectuate their human rights law entitlements on the other hand (limiting avenues for answerability and enforcement in action). This argument in itself is not entirely novel: in relation to the rights of non-citizens, such criticism has indeed been

219 Ramcharan, 2015, pp. 62–71. Such claims are, however, not undisputed. In particular over recent decades, questions about the moral authority of human rights have attained prominence. As Gearty metaphorically maintains, "[d]espite its legal and political success, the idea of 'human rights' has been looking more and more like an awkward and ill-fitting old relative at the philosophical house parties of recent years, standing in the corner muttering about reality and 'a sense of moral obligation' while all about the young thinkers are jiving away grabbing what truth they can from the wordplay swirling about": Gearty, 2006, p. 11.

220 See e.g. Weissbrodt, 2008.

voiced before.[221] What is new, however, is that it are not all, and not only, non-citizens that face such difficulties as a result of contemporary conceptions of belonging. On the contrary, it are both those considered sub-citizens, and those considered proper non-citizens (that is, excluding those considered supra-citizens), for whom such difficulties come into play. This will be further explored below by looking at how crimmigration challenges respectively *accountability* under, and the *effectiveness* and *legitimacy* of, international human rights law.

3.6.2.1 The crimmigration challenge to international human rights law accountability

As explained in the previous chapter, international human rights law functions as a system of accountability in the sense that it creates both duty-bearers and rightsholders. To briefly recapitulate, every genuine system of accountability comprises (i) the allocation of responsibility for certain legal obligations, thereby creating duty-bearers, (ii) the answerability of these duty bearers for the exercise of their power in light of the norms constituted by their legal obligations, and (iii) the enforcement of sanctions in relation to norm-transgressions by duty bearers.[222] The allocation of responsibility to duty-bearers happens in the books (or *de jure*) whereas their answerability and the enforcement of sanctions materialises in action (or *de facto*). In turn, chapter 2 has shown that commodification constitutes a potential challenge to the 'law in books', and, where the 'problem of many hands' arises, also to the 'law in action'. As will be argued here, crimmigration also has the potential of challenging both elements. Specifically, it may challenge the fundamental tenet of international human rights law outlined above, both by spurring the limitation of *de jure* entitlements that particular out-grouped populations enjoy, and by restricting their *de facto* opportunities to hold actors answerable and to have sanctions enforced.

On the one hand, as a result of crimmigration, an ever-changing population of 'outsiders' find themselves excluded from society, for instance through the application of confinement. This in and of itself does not mean that confined individuals are no longer ontologically of equal deservingness, nor that they are not entitled to universal and inalienable human rights. Indeed, all individuals within a state's jurisdiction are in principle rightsholders under a given treaty, irrespective of their background, and such universal and inalienable rights cannot be fundamentally revoked by the implementation of membership measures,[223] notwithstanding the use of harsh rhetoric that at times seem

221 Including, notably, by Weissbrodt, 2008.

222 Kaler, 2002; Stapenhurst & O'Brien, 2000.

223 Although states do have options to derogate from their human rights obligations in times of emergency. Still, this is subjected to strict rules and does not apply to *all* human rights, with some being of a non-derogable nature. On this topic, see Doswald-Beck, 2011; Koji,

to imply the contrary.[224] In fact, human rights law exactly promises to *fill* the gaps that exist as a result of differentiated entitlements based on citizenship or, more generally, membership categorisations.[225] Human rights law is henceforth frequently considered emancipatory in the sense that it *should* be siding with the outsider, the marginalised, and the powerless, as it are those populations "who in any given culture or time are most likely to be invisible to those around them, who are most liable to find themselves pushed beyond the periphery of a community's field of vision, or who are viewed as non- or sub-human if they are seen".[226] For these 'underdogs', human rights protection matters most, a principle that has been translated in human rights' legal codification.[227]

However, in reality, various states have attempted to limit the rights guaranteed to certain populations, including those confined. Limits are accordingly not only placed on the right to liberty, which is obviously restricted through confinement, but also on a range of ancillary rights – such as those to privacy and family life – and at times even on rights concerning political activity such as suffrage.[228] In this sense, the use of confinement as a crimmigration mechanism may ultimately lead to restrictions on individuals' human rights entitlements. Indeed, as others have noted, this results in the treatment of non-belongers "not only as less than citizens but also as less than human beings".[229] Notwithstanding the fundamental premise of equal protection for all, therefore, some categories of individuals deemed non-belonging under novel conceptions of membership are potentially left with less protection than other populations in society.

On the other hand, crimmigration measures also seem to challenge accountability in action. Indeed, the more absolute the marginalisation and exclusion of an individual, the more difficult it arguably becomes to hold a duty-bearer answerable for the exercise of its power and to ensure that sanctions are enforced where appropriate.[230] This has led some to speak about the "myth of human rights": international human rights law may indeed promise to side with the underdog, but may remain mythical insofar as the promised standards of protection are not enforced in practice.[231]

In order to properly understand this discrepancy between *de jure* entitlements and *de facto* enforcement, it is important to return to the notions of 'walls of noise' and 'walls of governance' as introduced in the context of RPC Nauru

2001.

224 L. Weber et al., 2014, p. 16.
225 Dembour & Kelly, 2011, p. 2.
226 Gearty, 2006, p. 5.
227 Gearty, 2006, p. 157.
228 See e.g. Dilts, 2014; Targarona Rifà, 2015; Wong, 2015, pp. 27–64.
229 Demleitner, 1999, p. 161.
230 On this topic, see also Dembour & Kelly, 2011, pp. 9–10.
231 Larking, 2014.

in section 3.5.1. above. To reiterate, as Welch proposes, we should consider the process of crimmigration in a sonic way. On the one hand, crimmigration measures are fostered by loud claims-making (or loud panic) about novel categories of non-belonging populations "whereby a barrage of sound bites and political assertions amplify an array of (putative) threats".[232] Through these overwhelming and agitating 'walls of noise', an alarming image of an "infinite surplus of things to worry about" is created.[233] On the other hand, crimmigration also operates quietly behind 'walls of governance': processes of exclusion frequently operate with reduced transparency.[234] Both of these sides of the sonic spectrum are clearly recognisable in a variety of confinement settings that are characterised by crimmigration elements. Often, confinement of non-belonging populations straddling the criminal-immigrant divide is spurred by loud claims-making about the need to implement strict and punitive measures to protect society, or, more specifically, to protect the belonging population within society.[235] At the same time, such confinement realms often operate behind walls of governance: as Welch points out, crimmigration often operates through silencing techniques including stonewalling, outsourcing, and offshoring.[236] These measures make it simultaneously difficult for *outsiders* to look at what happens on the inside and for *insiders* to access legal services, representation, and publicity on the outside.[237]

Making duty-bearers answerable for their human rights obligations becomes a strenuous task in such situations. Indeed, on the one hand, loud claims-making fosters the felt need to restrict the rights of 'others'. Through 'walls of noise', the progressive depletion of outsiders' rights can thus be discursively justified in political and public debates. At times, states have even proposed that human rights should not apply *at all* to certain out-grouped populations.[238] The focus hence becomes more and more not on the rights of 'all', but on the rights and security of those considered to belong.[239] On the other hand, it is simultaneously difficult for those inside confinement to voice human rights issues and for those outside to hear and acknowledge such calls and

232 Welch, 2012, p. 329.
233 Welch, 2012, p. 329.
234 Welch, 2012, p. 331. See also Tazreiter, 2017.
235 See also Aiken, Lyon, & Thorburn, 2014, p. 3; Speedy, 2016; Van Berlo, 2015a; Welch, 2014, p. 81.
236 Welch, 2012, p. 331.
237 See e.g. Bosworth & Kellezi, 2016; Kalir, Achermann, & Rosset, 2019; Van Berlo, 2017d, pp. 65–67. Even more so, one could argue that many of those excluded already faced a lack of political and economic resources in the first place and that stonewalling tactics consequently only heighten their inability to struggle against their marginalised and excluded position: Dembour & Kelly, 2011, p. 9; Larking, 2014, pp. 135–136.
238 Consider, for instance, the refusal of the US government to treat prisoners of war in accordance with human rights law: see e.g. Luban, 2002; Sassòli, 2004.
239 Compare Gamal & Swanson, 2018, p. 381, who however link this to *citizenship* rights as "a marker of our times".

to follow-up upon them, whether it be by means of litigation, research, media coverage, or otherwise. Of course, this is a matter of degrees rather than of absolutism: crimmigration does not necessarily stonewall excluded populations completely, but on many occasions their visibility and agency are at least to some extent reduced. Combined, 'walls of noise' and 'walls of governance' thus have a significant potential to undermine states' accountability for their human rights obligations vis-à-vis excluded populations.

A complicating factor in this regard is that at times measures of crimmigration and commodification may be used conjointly. In such instances, the 'problem of many hands' does not simply arise due to the involvement of multiple actors, but is *intentionally* created and utilised as a 'wall of governance' to implement crimmigration measures without much human rights scrutiny. In this sense, crimmigration and commodification may intertwine in challenging international human rights law as a *de facto* protection mechanism. Ultimately, they seem to endlessly feed into one another: the exclusion of certain populations in commodified settings of confinement is justified by loud crimmigration measures that alienate them and make them excludable, whilst such exclusion in commodified settings consequently provides room for quiet manoeuvring that enables the process of crimmigration to continue in full swing. This once again highlights the importance of examining both trends consecutively.

In turn, the extent to which the purported challenges materialise ultimately depends on the precise context and the specific crimmigration measures at play. In particular, it should be acknowledged that those formally engaged in penal proceedings are generally much more protected by legal safeguards than those within immigration regimes.[240] In this light it has been argued that "immigration detention has not been criminalized enough".[241] In particular in penal settings, stonewalling will henceforth always be a matter of degree, for legal safeguards inherent to criminal and penal procedures generally mitigate such tactics. Immigration confinement contexts on the other hand provide, due to the lack of similar coherent and strong accountability mechanisms and safeguards, more room for quiet manoeuvring. Whilst states use both penal and immigration-related confinement in enforcing novel boundaries of citizenship, and whilst both domains increasingly merge and interrelate, the formal differences hence remain relevant.

240 See on this topic Bianchini, 2011, p. 390; Boone, 2003, p. 301; Bosworth, 2011b, p. 165; Chacon, 2009, p. 135; Chelgren, 2015; Hernández, 2014, p. 1346; Van Berlo, 2017d, p. 70; Wilsher, 2011; Zedner, 2007, p. 257.

241 Wilsher, 2011, p. 168.

3.6.2.2 The crimmigration challenge to international human rights law effectiveness

The issues of accountability identified above directly affect the effectiveness of international human rights law as a whole. This is rather self-explanatory: if the human rights entitlements of out-grouped populations are progressively limited, and if *de jure* duty-bearers cannot be held answerable *de facto* because they manoeuvre behind walls of governance that silences their actions and hides potential violations from scrutiny and public sight, international human rights law loses much of its potential as a protection mechanism. The limitation of rights and the use of the sonic spectrum discussed above thus to a large extent seem anathema to the human rights rationale, which is based on the idea that marginalised populations are provided with "a language with which to shout for attention, and then having secured it to demand an end to suffering and a better set of life-chances".[242] Such language seems, rather, to be muted by the walls of noise and the walls of governance. In fact, through the use of both types of walls as crimmigration strategies, rightsholders may be left double victimised: they may suffer from a lack of effective protection against the commission of wrongs in the first place and, where such wrongs have occurred, they may lack effective ways to hold responsible duty-bearers to account.[243]

3.6.2.3 The crimmigration challenge to international human rights law legitimacy

Crimmigration developments ultimately challenge international human rights law's legitimacy, as they seem to have significant implications for the express consent of states to the particular power relations propounded by international human rights law. Section 2.5.2.3. of the previous chapter has extensively elaborated upon the concept of 'legitimacy' – this will not be recounted here in full. It is of importance to stress here that crimmigration could indeed lead to a *delegitimation* of international human rights law's hegemonic position as an expression of power or, alternatively, to a *legitimacy deficit*.

Indeed, on the one hand, crimmigration may progressively delegitimise international human rights law. That is to say, states – as the primary subordinates of international human rights law – might withdraw their consent to being bound by international human rights norms where such norms impede their possibilities to carve out the new boundaries of belonging. Indeed, where international human rights law traverses the continuously restructured categories of membership, states may consider human rights law increasingly as a delegitimised framework. In this sense it seems problematic that states are the subordinates of international human rights law, but also its masters: if states decide to pull the plug and withdraw from human rights treaties, or

242 Gearty, 2006, p. 157.
243 Gibney, 2016, pp. 18–20.

if they alternatively decide to simply cold-shoulder international human rights obligations, international human rights law is comprehensively delegitimised and its power is minimised.[244]

Crimmigration in this sense constitutes a threat to the system's legitimacy, for its legitimacy may be retracted altogether where international human rights law become to be considered as too large of a stumbling block in the creation of novel boundaries of belonging. As human rights lawyers might argue, however, this is of course *always* a danger – in fact, the ever-present possibility of withdrawal or cold-shouldering of states of international human rights instruments is a demonstrative feature of the inherently precarious nature of the system. Nevertheless, from the perspective of legitimacy proper, this does not matter as a matter of principle: *if* the system is delegitimised by states, then this *consequently* is problematic – full stop. The assertion that crimmigration measures implemented by states conflict with the fundamental tenet of equal protection henceforth *is* problematic from a legitimacy perspective: where states draw novel boundaries of membership and, through walls of noise, sometimes even loudly claim that human rights should not extend to certain populations, any further push by the international human rights law machinery to nevertheless include these populations within its protection ambit may lead to the progressive delegitimation of the system as a whole, and, in turn, since delegitimation erodes legitimacy overall, this is problematic.

Of course, this does not mean that the international human rights law system should as a result cater to the needs and wants of states in order to avoid its own delegitimation: the determination that delegitimation might follow as a result of ongoing crimmigration developments indeed is not a normative call for action amounting to an accommodation thereof per se. Even more so, as to do so could entail that international human rights law increasingly faces a *legitimacy deficit* on the other hand. Allowing states to structurally extend protection only to particular categories of humans, on the basis of a mixed use of zoepolitical and biopolitical approaches, would indeed not be justifiable by reference to the shared beliefs of equal protection of dignity and wellbeing that underpin international human rights law.[245] As Gearty eloquently emphasises,

244 This does not mean that a withdrawal by states from human rights treaties is always accepted by courts. Various human rights norms have, furthermore, transformed into *jus cogens* norms of customary international law. On the relationship between human rights and jus cogens, see in particular Bianchi, 2008; De Wet, 2013. See more generally also Benhabib, 2009, p. 699; D'Amato, 1995. This however does generally not solve the problem of cold-shouldering discussed above.

245 See, e.g., Blau & Esparza, 2016, p. xi; Brysk, 2002, p. 3; Černič, 2015, p. 70; Gewirth, 1992, p. 10; Jägers, 2002, p. 256; Landman & Carvalho, 2010, p. 1; McKay, 2015, p. 620; Wallace, 2002, p. 232.

> "[i]n order to ensure its survival, the human rights idea needs to stand firmly against [the] distortion of its essence, [i.e. the] move to turn it into a basis for selective aggression abroad and an alibi for brutality at home. The moment the human rights discourse moves into the realm of good and evil is the moment when it has fatally compromised its integrity. For once these grand terms are deployed in the discussion, all bets are off as far as equality of esteem is concerned".[246]

The threat of progressive delegitimation should hence not be countered by creating a legitimacy deficit instead. Rather, it should inform a – rather wishful – call for action for those states that, when confronted with the legitimacy threat to international human rights law, wish to preserve the integrity of the international human rights law system either by their own volition or as a result of political, judicial, or social pressures. Indeed, in the end, whether or not crimmigration developments will structurally affect the legitimacy of the international human rights law system is a political choice that rests with states as human rights law's simultaneous subordinates and masters. Insofar as human rights law is concerned, *all* humans within a state's jurisdiction are included within its ambit on the basis of their mere humanity – it has, so to speak, done its part in preventing a legitimacy deficit from arising. Of course, as Part II of this book will address, international human rights law has *some* room to accommodate certain limitations of human rights without losing its legitimacy as such, but it is first and foremost up to states to live up to the human rights promises they have made to *all* individuals, or to alternatively disregard or abandon them. This latter approach would be a precarious path to go down, however, as it would call into question or even debunk arguments of genuine dedication to human rights norms and would structurally erode and delegitimise the international human rights law system as a whole.

3.7 Conclusion

In this chapter, crimmigration has been explored with a particular focus on its potential impact in settings of commodified confinement. Inspired by membership theory, the chapter has advocated a broad definition of the nomenclature 'crimmigration': it does not only refer to the importation of criminal grounds in migration control and vice versa, but covers a broad spectrum of rationales, rhetoric, and practices that ultimately serve to reshape contemporary understandings of membership and belonging. Crimmigration as such comes in many different shapes and forms: it is a multi-headed beast with only the faintest of contours. Through crimmigration processes, sub-citizens and non-citizens are increasingly excluded and expulsed from society through *inter alia* the use of confinement, to the benefit of citizens and supra-

246 Gearty, 2006, p. 136.

citizens as the winners of globalisation.[247] Whilst crimmigration is not only at play in the field of confinement, and whilst not all confinement is targeted at effectuating crimmigration, confinement assumes a prominent role in the field of crimmigration now that it enables for both the segregation and punishment of the non-member. To examine how this plays out, a glocal level analysis has been advocated here, taking into account both global developments, local occurrences, and their interlinkage.

Given that crimmigration is also at play in non-commodified facilities and that not all commodified facilities incorporate crimmigration to the same extent, one could wonder why commodification and crimmigration should be examined in conjunction. Such a focus is however warranted for at least two reasons. First, as this chapter shows, crimmigration and commodification are often intimately linked both explicitly and implicitly, with crimmigration frequently being the fuel, *modus operandi*, and/or collateral consequence of commodification, whilst commodification as a wall of governance allows crimmigration measures based on loud panicking to operate quietly. Commodified facilities are as such often quintessential examples of crimmigration in the confinement realm. Second, whilst both developments exist independently from one another, they both potentially have a significant impact on human rights protection, albeit on different grounds and for different reasons. Indeed, as this Part has pointed out, both crimmigration and commodification constitute potential challenges to international human rights accountability as well as to the effectiveness and legitimacy of international human rights law. From a human rights perspective, it is therefore particularly warranted to closely examine situations where crimmigration and commodification are combined – such as the case studies centralised in this research – as it are those situations where the largest challenge may arguably be expected from. The challenges posed by both globalisation developments to human rights in confinement, then, is the elephant in the room that will be central to the remainder of this book.

247 At the same time, as has been pointed out above, these categories are flexible: which category one belongs to depends not solely on formal citizenship status but on a range of constantly changing zoepolitical and biopolitical conditions.