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

Berlo, P. van

PART II

The tuskless elephant

A promise under strain? The veracity and resilience of international human rights law in the books

4 The last among equals?
Limiting human rights in confinement

4.1 INTRODUCTION

The story obviously does not end with the preliminary conclusion drawn in Part I that the international human rights law system may be challenged in settings of confinement characterised by commodification and crimmigration. To the contrary, international human rights law is not static but is ongoingly developed and shaped in accordance with present-day realities. Extending the metaphor of elephants, whilst most elephants usually die when deprived of their tusks by poachers, recent research indicates that contemporary populations of African elephants showcase an "artificial genetic drift to tusklessness" as a response to ivory harvesting, with the tusked phenotype slowly disappearing in the African landscape.[1] This may indicate that elephant populations start to adjust themselves to external forces that threaten their continued existence, and as such, that they ultimately can survive as a species even in the face of the most imminent threat. As Raubenheimer & Miniggio conclude, this could "serve as the biological change that may provide hope for the survival of this splendid animal".[2] At the same time, however, these adjustments are "suboptimal, rendering the herds unable to dig for water, feed adequately, or fend for themselves".[3] The prospects, therefore, are mixed: survival may be secured through direct resilient response to outside forces, but remains precarious in the long run. Comparing these developments to the challenges posed by commodification and crimmigration to international human rights law, the question hence becomes whether international human rights law equally finds novel pathways to resiliently secure its continued existence as a protection framework – in other words, whether it is able to accommodate the commodification and crimmigration challenges to its fundamental premises – and if so, how durable these solutions are in the long run.

This chapter will begin with a brief elaboration of the way in which the two fundamental tenets of international human rights law rather paradoxically interrelate *and* are at odds with one another. Indeed, international human rights law is ultimately a Janus-faced phenomenon in the sense that it addresses moral claims in a legal framework, resulting in a certain tension between both

1 Raubenheimer & Miniggio, 2016.
2 Raubenheimer & Miniggio, 2016, p. 335.
3 Raubenheimer & Miniggio, 2016, p. 335.

tenets. In turn, the fact that international human rights law is Janus-faced simultaneously *provides for*, and *limits,* the ability to accommodate crimmigration and commodification challenges within its internal logic. That is to say, its inherent duality allows for the international human rights law system to show a certain amount of resilience in the face of globalisation challenges, whilst requiring it at the same time to remain sufficiently veracious to its underlying fundamental tenets.

The purpose of this Part is to understand the extent to which international human rights law has been able to show resilience in the face of crimmigration and commodification without losing its veracity as such. In pursuit of this endeavour, chapters 5-7 and the concluding intermezzo will discuss the way in which international human rights law has dealt both veraciously and resiliently with *commodification*. Since this is arguably a complex process, this issue will be dealt with in multiple consecutive chapters. The present chapter on the other hand will, after outlining the paradoxical interrelationship of both fundamental tenets of international human rights law, turn to the way in which international human rights law has shown both veracity and resilience in the face of *crimmigration* challenges. It will do so, particularly, by looking at the extent to which international human rights law has allowed for rights to be limited or interfered with by state governments. The focus will be on *treaties* rather than on customary international human rights law,[4] addressing in particular two selected human rights instruments that apply to one or both of the case studies central to this research: the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). This choice is informed by the idea set out below that limiting the rights of confined populations can be based either on their confinement itself, which limits *civil* rights, or on the basis of their depleted membership status, which limits *political* rights. This chapter therefore deliberately focuses on two core instruments codifying such civil and political rights.

As previously noted, throughout this part, the focus will remain both on global developments – outlining broad developments under respective treaty regimes – and on the local contexts of RPC Nauru and PI Norgerhaven. This allows for conclusions to be drawn at the 'glocal' level.

4 In support of such approach, see e.g. D'Amato, 1995. In fact, establishing whether the customary law requirements of consistent state practice and *opinio juris* are fulfilled for concrete human rights remains a strenuous task: Chinkin, 2014, pp. 81–82; Dimitrijevic, 2006, pp. 4–5; Skogly, 2006, pp. 109–110.

4.2 The fundamental tenets: international human rights law as a Janus-faced phenomenon

As Part I has examined, territorial states are the primary duty-bearers of international human rights law obligations, whilst the corresponding entitlements are "grounded in human dignity, which inheres in all individuals regardless of who is in a position to affect these obligations".[5] This, however, makes international human rights law a rather paradoxical legal domain. Whilst the rights created are supposedly universal, the obligations are markedly parochial.[6] Some have denoted this paradoxical nature as a distinction between *lex ferenda* and *lex lata*;[7] others denote it as a distinction between the *sollen* and the *sein* of human rights law.[8] As Gammeltoft-Hansen indicates, "as positive law the normative ideals are awkwardly sought reconciled with an existing normative framework structured around idealised but ever strong principles of national sovereignty".[9]

The international human rights law relationship thus incorporates simultaneously universal aspirations, based in moral conceptions of human dignity, and local responsibilities, based in positive law. As Habermas argues, this represents the 'Janus face' of human rights law:

> "[b]ecause the *moral promise* of equal respect for everybody is supposed to be cashed out in *legal currency*, human rights exhibit a Janus face turned simultaneously to morality and to law […]. Notwithstanding their exclusively moral *content*, they have the form of enforceable subjective rights that grant specific liberties and claims. They are designed to be *spelled out in concrete terms* through democratic legislation, to be *specified* from case to case in adjudication, and to be *enforced* in cases of violation. Thus, human rights circumscribe precisely that part (and only that part) of morality which *can* be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights".[10]

In denoting the 'right to have rights', Hannah Arendt also points to the significant discrepancy between the normative promise and the legal translation of human rights: notwithstanding the proclamation of human rights as universal and inalienable, their embedding in a binary relationship between nation states and those within its jurisdiction – typically the nation state's citizens – leaves various individuals with no avail insofar as human rights protection is concerned.[11] According to Arendt, we should thus focus on what she calls

5 Ronen, 2013, p. 21.
6 See similarly Donnelly, 2011, p. 18; Gibney, 2016, p. 10; Grear & Weston, 2015; Lohmann, 2007, p. 4.
7 Ronen, 2013.
8 Gammeltoft-Hansen, 2011, pp. 276–277.
9 Gammeltoft-Hansen, 2011, p. 276.
10 Habermas, 2010, p. 470 (original emphasis).
11 Arendt, 1951.

the 'human condition' – or our ability to act – in order to make sure that human rights are effectively protected in practice, rather than on the 'human' as a fundament for the legitimacy of any human rights notion.[12]

Notwithstanding these negative connotations underlying human rights law as a Janus-faced phenomenon, both faces have obvious merits. The *human* aspect of human rights protects an important sense of dignity; it codifies a grand claim of an arguably utopian world vision that functions as a particular moral sorter. The *rights* aspect of human rights on the other hand provides a certain level of enforceability; it translates open-ended moral standards into potentially strong judicial claims and instruments to fight both repression and more subtle denials of justice for the weak. At times, however, it may appear that one face has to be preferred over the other – indeed, various scholars have argued to either scrutinise or expand human rights law's reach on the basis of its moral underpinning, or to accept the limited reach of human rights law as opposed to the broader moral notion of human rights.

Both positions have been veraciously defended. A good example of the former is Ronen, who claims that nothing in human rights theory

> "precludes the imposition of legal obligations on actors other than states. Indeed, states are hardly the only entities capable of infringing upon human dignity. Optimally, protection of human rights should therefore extend to all situations in which these rights are threatened, irrespective of who puts them in jeopardy. […] The present international legal structure, under which human rights obligations are imposed only on states, is therefore neither self-evident nor immutable".[13]

Identifying the contemporary legal human rights system as a "nightmare [that] has to end", Gibney similarly calls for a reconfiguring of legal human rights protection guided by "a return to core, universal principles".[14] Thus, according to him, "the term 'human rights' should convey the understanding that all people have human rights and that all States have the responsibility to protect those rights – for all people".[15] Some even coin the idea that identifying human rights law as "a noble lie" may help to mobilise energy and support for establishing real justiciable rights with moral grounding.[16]

Hannum, on the other hand, maintains the latter position. According to him,

> "the contemporary content of human rights is defined most clearly and most powerfully as law. […] [t]he status of human rights as law needs to be protected

12 Arendt, 1951.
13 Ronen, 2013, pp. 21–22.
14 Gibney, 2016, p. 2; 20.
15 Gibney, 2013, p. 47. For Gearty, human rights law is a means to an end and should be condemned if it fails to secure this end: see Gearty, 2006, p. 4.
16 O'Neill, 2005, pp. 429–430.

> and […] the distinction between legal obligations and other obligations of a moral or political nature needs to be maintained. 'Human rights' may mean all things to all people, but 'international human rights law' cannot".[17]

Likewise, Buchanan argues that "[h]uman rights law, not any philosophical or 'folk' theory of moral human rights, is the authoritative lingua franca of modern human rights practice".[18] He maintains that human rights "are what they are: legal rights; and legal rights need not be embodiments of corresponding moral rights. Nor need legal rights be justified by appealing to moral rights".[19]

In turn, others warn against the undue favouring of either of both faces over the other. Habermas, for instance, observes that "this ambivalence can lead us all too easily into the temptation either to take an idealistic, but noncommittal, stance in support of the exacting moral requirements, or to adopt the cynical pose of the so-called realists" – rather, one should "think and act realistically without betraying the utopian impulse".[20] Accordingly, this approach requires delicate balancing of both sides of international human rights law's Janus face.

In the end, international human rights law seems *necessarily* based both on normative ideals *and* on the body of positive law, incorporating elements of both human rights' *sollen* and human rights' *sein*.[21] Indeed, international human rights law can only be properly understood when regarding both its normative universal aspirations and its positivist legal footing, constituting two distinct yet interconnected and interdependent sides of the same Janus-faced phenomenon.[22] Both international human rights law's positivist legal footing and its telos can, after all, not be neglected nor erased, as both go to its core as a system of both legal *and* moral values. Just like elephants, international human rights law hence has essentially two tusks, consisting of a moral promise of equal protection on the one hand and of legal capacity to hold power-bearers responsible on the other.

This also means that the challenges posed by crimmigration and commodification can only be accommodated within the international human rights law system insofar as the two tenets of international human rights law are not fundamentally neglected. Put differently, the development of international human rights law should show *resilience* in the face of globalisation challenges in order to remain relevant, whilst simultaneously remaining *veracious* to its fundamental tenets in order to maintain integrity – a task that requires a delicate balance that may be difficult to strike. Indeed, accommodating global-

17 Hannum, 2016, p. 411.
18 A. Buchanan, 2013, p. vii, emphasis omitted.
19 A. Buchanan, 2013, p. 11.
20 Habermas, 2010, p. 478.
21 Gammeltoft-Hansen, 2011, pp. 276–277.
22 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 1.

isation challenges in a way that takes into account both the ultimate goals of equal and universal protection, *and* the limitations and particularities of human rights' embeddedness in positive law, is anything but a sinecure. No matter the arduousness of such endeavour, a proper balance between veracity and resilience needs to be struck for international human rights law to remain legitimate. Indeed, as Part I of this book has explored, both where international human rights law would not adjust itself to contemporary globalisation developments, and where it adjusts itself too much to such developments, it runs the risk of losing its legitimacy overall as a result of the ensuing illegitimacy, legitimacy deficit, and/or delegitimation of the system.

Concretely, in contexts of *commodified* confinement, this means that international human rights law has to accommodate commodification within its framework in order to provide unabated protection to all populations confined by a nodal network of governance actors, whilst simultaneously staying veracious to its fundamental tenet that human rights obligations are, *in principle*, obligations of territorial states. This delicate effort will be addressed in chapters 5-7 and the intermezzo that concludes this Part. In the context of *crimmigration* in confinement, on the other hand, this means that international human rights law has to account for crimmigration within its framework by closely regulating nuances in human rights protection for confined 'outsiders', yet in doing so it should continuously stay veracious to its fundamental tenet that human rights entitlements pertain, *in principle*, to all human being equally. This will be the prime concern of the remainder of this chapter. Overall, resilience consequently requires that the fundamental tenets are sufficiently bent, yet certainly not beyond their breaking point.

4.3 Interfering with human rights entitlements

Chapter 3 has shown how confinement can be used as a crimmigration strategy. As was also outlined in the same chapter, various states have, as part of their crimmigration arsenal, argued that particular groups of 'outsiders' should be entitled to less human rights protection. This includes certain confined populations: some states have indeed proven to be particularly reluctant to recognise their human rights entitlements.[23] At the same time, international human rights law's fundamental tenet of equal protection as based in morality does not, at least not in principle, allow for such reluctance. Wong observes in this regard that "chasmal gaps" exist between normative discourse on human rights on the one hand, and state rhetoric and practices on the other.[24]

Informed by this apparent gap, this section discusses the extent to which international human rights law has been able to remain veracious to its funda-

23 See e.g. Wong, 2015, p. 28.
24 Wong, 2015, p. 28.

mental tenet of equal protection for all, whilst showing resilience in the face of limitations placed upon human rights entitlements by states. Specifically, it looks at the extent to which limitations have been accommodated for within the human rights law system and how this relates to the promise of equal protection. As will be shown, being a Janus-faced phenomenon, international human rights law has as a positivist doctrine of law allowed states to place certain limitations on the enjoyment of supposedly universal and equal rights. International human rights law in this sense has always recognised that at times, states may legitimately deviate from some of their human rights responsibilities, with a difference being marked between absolute rights (that cannot be deviated from) and relative rights (that can be deviated from).[25] For instance, international human rights law allows states to derogate from some of their obligations in times of emergency, although subjected to strict conditions.[26] Moreover, of particular relevance for the issue at hand, the doctrine of international human rights law has acknowledged that some of the rights of certain populations, including those of confined sub-citizens or non-citizens, may be interfered with by states as part of their sovereign prerogative. Specifically, it allows for some *civil* rights to be limited on the basis of the fact that those individuals are *confined*, and for some *political* rights to be limited on the basis of the fact that those individuals do not enjoy (full) *membership*. These two broad categories will now be discussed in turn by looking at selected rights that illustrate the complexity of veracity and resilience in the face of crimmigration challenges.

In doing so, immigration detention and prison facilities will be addressed separately. As chapter 3 has touched upon, whilst immigration detention and imprisonment increasingly function alike, the formal differences between both settings of confinement remain relevant as they may provide those confined with different forms of legal protection. As this section will show, this is also the case in relation to human rights: although those confined in immigration detention and those confined in prison are increasingly lumped together in one category of non-belonging, subtle differences continue to underpin the human rights entitlements that they enjoy.

25 See also De Schutter, 2014, p. 295. One of the most discussed absolute rights is the prohibition of torture and other cruel, inhuman, or degrading treatment: see e.g. Addo & Grief, 1998; Gewirth, 1981; Mavronicola, 2012. It should be noted, however, that the question whether this prohibition is genuinely 'absolute' continues to be debated in the literature. See in particular, in relation to ECtHR *Gäfgen v. Germany*, 1 June 2010, Application No 22978/05, Graffin, 2017; Greer, 2011, 2018; Mavronicola, 2017.

26 See also Doswald-Beck, 2011; Koji, 2001.

4.3.1 Interfering with civil rights on account of individuals' confinement

4.3.1.1 The core right at stake: the right to liberty

The limitation of some rights enshrined in international human rights treaties is inherent to legitimate confinement. This concerns first and foremost the right to liberty as enshrined in Article 9(1) ICCPR and Article 5(1) ECHR, which can be legitimately interfered with if certain conditions are fulfilled. The rationale behind such accepted interferences is largely self-explanatory: although the right to liberty is a fundamental right that even predates thinking on the sovereign state itself, it is not absolute as there may be outweighing public interests that warrant the deprivation of liberty as a form of state control.[27] The right to liberty is thus not absolute but rather safeguards against *arbitrary* or *unlawful* detention.

As the wording of Article 9(1) ICCPR highlights, "[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Since the provision itself does not specify in which situations detention is permitted,[28] what it exactly encompasses has been borne out by the UN Human Rights Committee ('HRCee')[29] and the UN Working Group on Arbitrary Detention.[30] As these bodies have established, detention is prohibited when it is arbitrary or in violation of the legality principle. The drafting history makes clear that these conditions of non-arbitrary and lawful detention are cumulative: deprivation of liberty is only accepted to the extent that it is both in line with principles of justice, appropriateness, predictability, proportionality, and the rule of law, *and* in accordance with procedures laid down in domestic law.[31] Whilst the latter condition can be established relatively straightforwardly, the former is less tangible. As Cornelisse points out, however, the principle of proportionality has often been used by monitoring bodies such as the Working Group on Arbitrary Detention "as a yardstick to evaluate state practice".[32]

---

27 Cornelisse, 2010, pp. 249–250.

28 The drafters could not reach an agreement on the permissible grounds for the deprivation of liberty: Cornelisse, 2010, p. 251. The remaining paragraphs of Article 9 ICCPR only set out *procedural* safeguards inherent to the right to liberty. For a more detailed view of these provisions, see Cornelisse, 2010, pp. 256–259.

29 The Human Rights Committee is the UN monitoring body of the ICCPR.

30 The UN Working Group on Arbitrary Detention was established by Resolution 1991/42 of the UN Commission on Human Rights, and was tasked with investigating instances of alleged arbitrary deprivation of liberty and detention otherwise inconsistent with international legal instruments.

31 Cornelisse, 2010, pp. 252–253, see also HRCee, *Mukong v. Cameroon*, 21 July 1994, Comm. no. 458/1991, UN Doc. CCPR/C/51/D/ 458/1991, para 9.8.

32 Cornelisse, 2010, pp. 253–254.

Likewise, Article 5(1) ECHR points out that deprivation of liberty should be "in accordance with a procedure prescribed by law". There hence always has to be a basis for the deprivation of liberty in domestic law that is characterised by a sufficient level of accessibility and preciseness,[33] including clear time limits.[34] Although it does not – different from Article 9(1) ICCPR – refer to the prohibition of *arbitrary* detention, case law has borne out that the fact that Article 5 ECHR protects the right to liberty *and security* should be interpreted as encompassing protection against arbitrary deprivations of liberty as well.[35] The right to liberty under the ECHR can thus only be interfered with insofar as it is prescribed by law *and* compatible with the provision's goal of preventing arbitrary detention. Furthermore, different from Article 9(1) ICCPR, Article 5(1) ECHR *does* contain an exhaustive list of cases in which the deprivation of liberty is allowed.[36]

Under the ICCPR, it has been recognised that immigration detention is not prohibited as such by Article 9 as there may be legitimate reasons for the state to detain non-citizens, for example with the aim of regulating their entry or removal.[37] Given the requirements of legality and non-arbitrariness, such detention should be provided for in domestic law and should not be of an arbitrary nature, requiring that detention is proportional in light of factors particular to the detained individual.[38] In light of the latter principle, the Working Group has postulated that immigration detention "shall be the last resort and permissible only for the shortest period of time and that alternatives to detention should be sought whenever possible".[39] Moreover, states have to make provisions to render detention unlawful if, for whatever reason, "carrying out removal from the territory does not lie within their sphere" – not to do so would effectively render detention arbitrary.[40] As part of this process, maximum periods of detention that are not excessive should be

33 See e.g. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, Application no. 13178/03, para. 97; ECtHR, *Khlaifia and Others v. Italy*, 15 December 2016, Application no. 16483/12, para 117.

34 ECtHR, *Mathloom v. Greece*, 24 April 2012, Application no. 48883/07, paras. 68-71; ECtHR, *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, Application no. 30471/08, para 135; ECtHR, *Rashed v. Czech Republic*, 27 November 2008, Application no. 298/07, paras. 75-76.

35 ECommHR, *Adler and Bivas v. the Federal Republic of Germany*, 16 July 1976, Application nos. 5573/72 and 5670/72, p. 146.

36 It furthermore provides, similar to Article 9 ICCPR, a list of procedural safeguards. For further analysis of these provisions, see Cornelisse, 2010, pp. 285–290.

37 HRCee, *A. v. Australia*, 3 April 1997, Comm. no. 560/1993, UN Doc. CCPR/C/59/D/560/1993, para. 9.4.

38 Cornelisse, 2010, pp. 253–254.

39 UN Human Rights Council ('HRC'), Report of the Working Group of Arbitrary Detention, Tenth session, Agenda item 3, A/HRC/10/21, 16 February 2009, para. 67.

40 UN HRC, Report of the Working Group of Arbitrary Detention, Tenth session, Agenda item 3, A/HRC/10/21, 16 February 2009, para. 67.

prescribed by law.[41] Using detention to deter or penalise particular populations of non-citizens, or for criminal law purposes more generally, is in any event prohibited.[42]

The ECHR provides an exhaustive list of cases in which the deprivation of liberty is allowed. One of these cases relates directly to immigration detention: as Article 5(1)(f) ECHR outlines, deprivation of liberty can be permissible in cases of "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." As the ECtHR has elucidated in relation to deportation procedures, all that is required under this particular provision is that action is being taken with a view to deportation: detention, as such, does not have to be reasonably considered necessary for the purpose of deportation.[43] Article 5(1)(f) ECHR therefore does not afford those in immigration detention the right to contest the proportionality of the detention order,[44] an approach that differs from the approach developed in the context of Article 9 ICCPR as outlined above. At the same time, deprivation of liberty under this provision "will be justified only for as long as deportation proceedings are in progress", and, furthermore, such deportation proceedings have to be "prosecuted with due diligence".[45] Detention should thus not continue any longer than is reasonably required for the envisaged purposes,[46] and a realistic prospect of expulsion needs to continuously exist.[47] Still, this does not mean that detention cannot continue for a prolonged period of time, as long as the authorities operate on the basis of the required level of due diligence.[48] Moreover, as the ECtHR emphasises, "detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; [and] the place and conditions of detention should be appropriate".[49] An example of the requirement of good faith was provided in *Rahimi v. Greece*, in which the Court considered that

41 UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para 20.

42 Cornelisse, 2010, p. 272.

43 ECtHR, *Chahal v. United Kingdom*, 15 September 1996, Application no. 22414/93, para. 112; ECtHR, *Čonka v. Belgium*, 5 February 2002, Application no. 51564/99, para. 38.

44 ECtHR, *Batalov v. Lithuania* (Admissibility Decision), 15 November 2005, Application no. 30789/04, page 7.

45 ECtHR, *Chahal v. United Kingdom*, para. 112; ECtHR, *S.K. v. Russia,* 14 February 2017, Application no. 52722/15, para. 111; ECtHR, *M. and Others v. Bulgaria,* 26 July 2011, Application no. 41416/08, para. 61; ECtHR, *Auad v. Bulgaria,* 11 October 2011, Application no. 46390/10, paras 128-135.

46 ECtHR, *Saadi v. United Kingdom* (Grand Chamber), 29 January 2008, Application no. 13229/03, paras. 72-74.

47 ECtHR, *Mikolenko v. Estonia*, 8 October 2009, Application no. 10664/05, para. 68; ECtHR, *Kim v. Russia,* 17 July 2014, Application no. 44260/13, paras. 52-57.

48 See e.g. ECtHR, *K.G. v. Belgium,* 6 November 2018, Application no. 52548/15.

49 ECtHR, *Saadi v. United Kingdom* (Grand Chamber), para. 74; ECtHR, *S.K. v. Russia,* para. 111; ECtHR, *Mathloom v. Greece,* para. 64.

in the course of detaining a minor in an adult immigration detention facility, the Greek authorities had not considered the best interests of the child and had not explored less drastic alternatives. The Court on this basis doubted the authorities' good faith in carrying out detention and therefore held that the deprivation of liberty had not been permissible.[50] In *Suso Musa v. Malta*, the Court furthermore emphasised that where the place and conditions of detention are inappropriate, and "the national system failed as a whole to protect the applicant from arbitrary detention", Article 5(1) ECHR had been violated.[51] In sum, as long as there is a legal basis for detention, as long as deportation proceedings are in progress and pursued with due diligence, and as long as detention conforms with these broad parameters of good faith, close connectivity, and appropriate detention conditions, the deprivation of liberty will be considered justified under Article 5 ECtHR, even where there is reason to question for example the proportionality of such measures. By extension, the Court has by and large taken a similar approach in relation to the use of pre-admittance detention.[52] Since there is less scope to challenge the arbitrariness of immigration detention under the ECHR, this instrument seems to provide a lower level of protection than the ICCPR.[53]

In prison contexts, on the other hand, interferences with the right to liberty under the ICCPR and the ECHR have been structured somewhat differently. International human rights law has always recognised the sovereign powers of states to imprison individuals on the basis of a criminal conviction. Imprisonment is therefore generally considered to be a legitimate interference with the right to liberty, which is only different where it is arbitrary or unlawful. This has, for instance, been recognised by the HRCee in the context of the ICCPR.[54] The HRCee indeed clarified that imprisonment is not an unwarranted restriction of Article 9 ICCPR as long as it is based on the rule of law and does not result from a manifestly unfair trial.[55] As an example, unauthorised imprisonment beyond the length of prisoners' sentences is both arbitrary and unlawful and henceforth prohibited.[56]

Likewise, the ECHR recognises that imprisonment can be a legitimate limitation of the right to liberty. In fact, Article 5(1)(a) ECHR mentions explicitly that liberty may be deprived in case of "the lawful detention of a person after

50 ECtHR, *Rahimi v. Greece,* 5 April 2011, Application no. 8687/08, paras. 109-110.
51 ECtHR, *Suso Musa v. Malta,* 23 July 2013, Application no. 42337/12, paras. 94-107.
52 ECtHR, *Saadi v. United Kingdom*, 11 July 2006, Application no. 13229/03; ECtHR, *Saadi v. United Kingdom* (Grand Chamber). For further analysis, see Cornelisse, 2010, pp. 292–296; Hailbronner, 2007, pp. 165–166; O'Nions, 2008.
53 Cornelisse argues in this regard that the marginal test applied by the ECtHR is at odds with the general principles underlying the ECHR: Cornelisse, 2012, p. 59. See also Cornelisse, 2010, p. 295.
54 HRCee, *General Comment no. 35*, 16 December 2014, UN Doc. CCPR/C/GC/35, paras 10-11.
55 HRCee, *General Comment no. 35*, paras 10-11 and 17.
56 HRCee, *General Comment no. 35*, paras 10-11.

conviction by a competent court".[57] This includes any conviction that occasions the deprivation of liberty pronounced by a competent court: no distinction is made on the basis of the legal character of the offence or on the basis of how the offence is classified in domestic law.[58] Similar to deprivation of liberty under the ICCPR, the right to liberty can thus be limited on the basis of criminal convictions by competent courts, as long as such restrictions meet the requirements of lawfulness and non-arbitrariness. For example, where the domestic criminal law provisions on which a conviction is based are not sufficiently accessible, precise, or foreseeable in their application, the ensuing deprivation of liberty may be deemed unlawful.[59] Likewise, "in circumstances where a decision not to release or to re-detain a prisoner was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary", and therefore prohibited.[60]

In relation to the right to liberty, international human rights law hence remains veracious to its fundamental tenet of equal protection for all – *everyone* is safeguarded against arbitrary and unlawful detention – whilst simultaneously resiliently accommodating that the right to liberty of certain confined populations is, at times, limited for legitimate purposes. In this sense, international human rights law forestalls to a large extent the crimmigration challenge to this particular right, as it embeds the accepted interferences in the notions of legality and non-arbitrariness.[61] A creeping problem could arise, however, where states increasingly start to rely on these accepted limitations in expanding the reach of confinement. Thus, where states continue to expand the reach of both immigration detention and imprisonment, situations may arise where the right to liberty of an increasing population of 'outsiders' may

57 Furthermore, Article 5(1)(c) ECHR acknowledges that liberty may be deprived in cases of "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

58 ECHR, *Guide on Article 5 of the European Convention on Human Rights*, para 49. See also ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, Application nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 68; ECtHR, *Galstyan v. Armenia*, 15 November 2007, Application no. 26986/03, para. 46.

59 See e.g. ECtHR, *Medvedyev and Others v. France*, Grand Chamber Judgment, 29 March 2010, Application no. 3394/03, para 80; ECtHR, *Del Río Prada v. Spain* (Grand Chamber), 21 October 2013, Application no. 42750/09, para 125; ECtHR, *Creangã v. Romania* (Grand Chamber), 23 February 2012, Application no. 29226/03, para 120.

60 ECtHR, *James, Wells and Lee v. the United Kingdom*, 18 September 2012, Application nos. 25119/09, 57715/09 and 57877/09, para 195.

61 See also Cornelisse, 2010, p. 273.

effectively be depleted, a situation that international human rights law is not able to counter effectively where such measures are extensively provided for in domestic law and where they are not exercised manifestly arbitrarily. For instance, through the criminalisation of migration-related offences, or even of illegal stay as such, more and more non-citizens could be captured by the penal net and could be incarcerated in prison facilities on the basis of a lawful conviction. The same holds true for penal approaches towards particular populations of sub-citizens that are deemed to have forfeited (parts of) their membership entitlements. On the other hand, as a result of the increasingly significant immigration-related implications of criminal convictions, more and more individuals could be captured by the administrative net and end up in immigration detention with the goal of expediting their expulsion. As long as these processes stay within the confines of legality and non-arbitrariness, which is likely given that both the execution of prison sentences and expulsion proceedings have been recognised as legitimate grounds for the deprivation of liberty, international human rights law may thus prove unable to fundamentally counter such trends.

4.3.1.2 The prohibition of forced or compulsory labour

The exercise of some ancillary rights can also be interfered with in confinement. One of these rights is the prohibition of forced or compulsory labour as enshrined in Article 8(3)(a) ICCPR and Article 4(2) ECHR. Both provisions read the same: "No one shall be required to perform forced or compulsory labour". These provisions are, however, qualified by Articles 8(3)(b) and 8(3)(c) ICCPR and Article 4(3) ECHR, outlining situations that do not fall within the prohibition's scope. In this sense, under both the ICCPR and the ECHR, it has been recognised that certain populations – including in confinement – can be expected to perform particular work activities, amounting to unfree and coercive labour, without violating the prohibition of forced or compulsory labour.

Specifically, Article 8(3)(b) ICCPR outlines that the prohibition of forced or compulsory labour "shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court". In turn, Article 8(3)(c)(i) ICCPR provides that the term 'forced or compulsory labour' does not include "[a]ny work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention". Article 4(3)(a) ECHR closely resembles this latter provision, stating that the term 'forced or compulsory labour' does not include "any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during

conditional release from such detention". It are these latter two provisions that this subsection focuses upon.

The limitations on the prohibition of forced or compulsory labour set out in these provisions seem to be primarily geared towards labour in prison facilities. In relation to Article 8(3)(c)(i) ICCPR, the *travaux préparatoires* of the ICCPR reveal that forced or compulsory labour in prisons was considered legitimate and was therefore not considered to violate human rights.[62] As the British representative highlighted, "persons confined by due course of law were required to work and were therefore doing forced or compulsory labour. It was therefore necessary to make some exception for work done by such persons."[63] The Lebanese representative even discussed obligatory work in prison facilities as "not really exceptions to forced or compulsory labour, but merely usual forms of labour".[64] In this sense, what was considered 'ordinary prison work' remained permissible, including "routine work performed in the course of detention and work done to promote the delinquent's rehabilitation".[65]

As the ECHR's *travaux préparatoires* reveal, the drafting of Article 4(3)(a) ECHR was inspired by Article 8(3)(c)(i) ICCPR.[66] Although the ECtHR acknowledges that its "case-law concerning prison work is scarce", it has occasionally elaborated upon this provision.[67] It thus clarified that it is "grounded on the governing ideas of general interest, social solidarity and what is normal in the ordinary course of affairs".[68] It furthermore sets out that 'work required to be done in the ordinary course of detention' should be interpreted in light of prevailing standards in the member states.[69] The ECtHR also notes, however, that Article 4(3)(a) ECHR does not serve to *limit* the exercise of the right enshrined in Article 4(2) ECHR, but rather to *delimit* the very content of this right – in this sense, it serves as an interpretation aid rather than as a proper

62 UNGA, *Agenda Item 28 (Part II), Annexes, Annotations on the text of the draft International Covenants on Human Rights*, UN Doc. A/2929 (New York, 1955), para. 22.

63 Commission on Human Rights, *6th session, Summary Record of the Hundred and Forthy-Third Meeting*, UN Doc. E/CN.4/SR.143, 10 April 1950, para. 13.

64 Commission on Human Rights, 6th session, *Summary Record of the Hundred and Forthy-Third Meeting*, UN Doc. E/CN.4/SR.143, 10 April 1950, para. 34.

65 UNGA, *Agenda Item 28 (Part II), Annexes, Annotations on the text of the draft International Covenants on Human Rights*, UN Doc. A/2929 (New York, 1955), para. 22; Commission on Human Rights, *6th session, Summary Record of the Hundred and Forty-Second Meeting*, E.CN.4/SR.142, 10 April 1950, para. 64; Commission on Human Rights, *6th session, Summary Record of the Hundred and Forty-Third Meeting*, UN Doc. E/CN.4/SR.143, 10 April 1950, para. 32.

66 ECommHR, *Preparatory work on Article 4 of the Convention*, DH(62)10, p. 15-19; ECommHR, *Preparatory work on Article 4 of the European Convention on Human Rights*, CDH(70)5, p. 6-7.

67 ECtHR, *Stummer v. Austria* (Gand Chamber), 7 July 2011, Application no. 37452/02, para. 121.

68 ECtHR, *Stummer v. Austria* (Gand Chamber), para. 120; ECHR, *Van der Mussele v. Belgium*, 23 November 1983, Application no. 8919/80, para. 38.

69 ECtHR, *Stummer v. Austria* (Gand Chamber), para. 128; ECtHR, *Van Droogenbroeck v. Belgium*, 24 June 1982, Application no. 7906/77, para. 59.

limitation.[70] This again goes to show that penal labour has traditionally been regarded as outside the scope of protection against forced or compulsory labour: the fact that it does not violate human rights provisions has not been a matter of progressive limitation, but has rather been a matter of definitional constraints from the very beginning.

Whereas the meaning of these provisions for the exclusion of *penal* labour from the definition of forced and compulsory labour has, albeit somewhat scarcely, been elaborated upon, their meaning for non-voluntary labour in immigration detention settings has hardly been addressed. This in part may be explained on the basis of the fact that, contrary to penal labour,[71] non-voluntary detainee labour in immigration detention regimes is not a traditional phenomenon that has been reckoned with. For instance, during the drafting stages of the ICCPR, questions were raised as to the proper meaning of the term 'detention' in Article 8(3)(c)(i) ICCPR. The term was said to cover "*all* forms of compulsory residence in institutions in consequence of a court order",[72] which, as the UK representative emphasised, could even capture "inmates of establishments other than prisons – for example, approved schools".[73]

However, as some authors have begun to critically examine, just like the continuing presence of penal labour,[74] non-voluntary work in immigration detention settings is a phenomenon today.[75] Scholarship is only at the very beginning of fleshing out these relationships between immigration detention and coercive labour, yet "the increased use of immigration detention on an international scale means that this practice is likely to be expanding".[76] Bales & Mayblin, for example, speak about "a captive immigrant workforce" when discussing labour within UK immigration detention facilities.[77] As they outline, detainee labour is a key example of "state-sanctioned exploitative, coercive and unfree labour amongst a hyper-precarious group of the population", therewith to a large extent resembling penal labour.[78] In turn, however, they simultaneously acknowledge that such labour is not necessarily *forced* labour as a matter of definition, and therefore does not by definition fall – similar

70 ECtHR, *Stummer v. Austria* (Gand Chamber), para. 120; ECHR, *Van der Mussele v. Belgium*, para. 38.

71 On the genealogy of convict labour, see the edited volume by Giuseppe de Vito & Lichtenstein, 2015, tracing penal labour back to the Roman empire.

72 UNGA, *Agenda Item 28 (Part II), Annexes, Annotations on the text of the draft International Covenants on Human Rights*, UN Doc. A/2929 (New York, 1955), para. 22 (emphasis added). See also Commission on Human Rights, *8th Session, Summary Record of the Three Hundred and Twelfth Meeting*, UN Doc. E/CN.4/SR.312, 12 June 1952, pp. 14-15.

73 Commission on Human Rights, *6th session, Summary Record of the Hundred and Forthy-Third Meeting*, UN Doc. E/CN.4/SR.143, 10 April 1950, para. 25.

74 See e.g. N. Christie, 2000, pp. 133–136; Van Zyl Smit & Dünkel, 2018.

75 See notably Bales & Mayblin, 2018; Sinha, 2015.

76 Bales & Mayblin, 2018, p. 191.

77 Bales & Mayblin, 2018.

78 Bales & Mayblin, 2018, p. 191.

to penal labour – within the scope of human rights protection against forced or compulsory labour.[79]

Both penal labour and detainee labour may thus, by definition, not constitute 'forced or compulsory labour' and such regimes may, consequently, continue to exist without violating the prohibitions codified in Article 8(3)(a) ICCPR and Article 4(2) ECHR. In this sense, international human rights law has, through interpretative pathways, allowed states to subject those confined to regimes that are at least mandatory, non-voluntary, and coercive in nature, without violating the prohibition of forced or compulsory labour. Put differently, international human rights law on the one hand appears resilient in the face of crimmigration developments that curtail the freedoms of sub-citizens and non-citizens through their subjection to coercive labour regimes, whether it be for rehabilitative purposes, as part of 'routine work', or for other reasons, whilst on the other hand, it remains veracious to its fundamental tenet of equal protection as it equally protects all against 'forced or compulsory labour'. This approach appears somewhat schismatic, however, as in practice the material differences between forced and compulsory labour on the one hand and penal labour and detainee labour on the other may be considered to be, and may be experienced as, academic. The definitional differences instilled in international human rights law may consequently reflect a paper reality that does not necessarily align with observed or experienced coercion and exploitation. Rather, with the rising use of confinement as a crimmigration strategy, it seems that the differentiation in terms of entitlements along the novel lines of membership are, if anything, accommodated rather than contested by these particular provisions of international human rights law.

4.3.1.3 The right to family life

Another ancillary right that can be limited due to the nature of confinement is the right to family life as enshrined in Article 17(1) ICCPR ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation") and Article 8(1) ECHR ("Everyone has the right to respect for his private and family life, his home and his correspondence"). As the texts of these provisions show, the right to family life is often connected to rights to privacy, home, and correspondence as core civil rights protecting individuals' private life. It should be noted that the HRCee maintains a broad reading of the term 'family' in Article 17(1) ICCPR, envisaging that it includes "all those comprising the family as understood in the society of the State party concerned".[80] States therefore cannot limit the right to family life simply by deciding that certain

79 Bales & Mayblin, 2018, pp. 191–192.

80 HRCee, *General Comment no. 16*, 8 April 1988, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), para. 5.

persons are, contrary to hegemonic societal conceptions, no longer to be considered family of those confined.

Both the ICCPR and the ECHR acknowledge that this right can be interfered with, including in contexts of confinement. In fact, it appears inherent to the nature of confinement in prisons or immigration detention facilities that this right is, as a matter of course, limited: the invasiveness and pervasiveness of confinement necessarily involve at least some restriction on the unfettered enjoyment of family life. As the ECtHR puts it, "any detention which is lawful for the purposes of Article 5 of the Convention […] entails by its nature various limitations on private and family life".[81] The Human Rights Council (HRC) has likewise confirmed that the right to family life in Article 17(1) ICCPR can be limited in confinement, provided that particular conditions are fulfilled.[82]

The reference to 'arbitrary or unlawful interference' in Article 17(1) ICCPR serves to convey that whilst the rights enshrined therein are not absolute in nature, limitations are only permissible insofar as they are envisaged by domestic laws that comply with the provisions, aims, and objectives of the Covenant, and insofar as the limitation itself is in accordance with the provisions, aims, and objectives of the Covenant and, "in any event, reasonable in the particular circumstances".[83] In this sense, the way in which Article 17(1) ICCPR can be legitimately limited resembles the way in which the right to liberty ex Article 9(1) ICCPR can be limited, and much of what was considered in relation to the appropriate standards in section 4.3.1.1. thus applies *mutatis mutandis* here. To establish whether an interference with the right to family life under the ICCPR is 'arbitrary', the HRCee has established a multi-factor balancing test.[84] It thus tests arbitrariness by taking into account a wide variety of contextual factors, weighing the interests of the state against the interests of the individual(s) concerned.[85]

---

81 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, 25 July 2013, Application nos. 11082/06 and 13772/05, para. 835.

82 HRC, *Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development*, 15 January 2016, UN Doc. A/HRC/31/37, para. 34.

83 HRCee, *General Comment no. 16*, paras. 3-4.

84 See also Mrazik & Schoenholtz, 2010, p. 664.

85 Most cases concern deportation proceedings: see HRCee, *A.B. v. Canada*, 16 March 2017, UN Doc. CCPR/C/117/D/2387/2014; HRCee, *A.H.G. v. Canada*, 5 June 2015, UN Doc. CCPR/C/112/D/2091/2011; HRCee, *Jama Warsame v. Canada*, 1 September 2011, UN Doc. CCPR/C/102/D/1959/2010; HRCee, *Stefan Lars Nystrom v. Australia*, 1 September 2011, UN Doc. CCPR/C/102/D/1557/2007; HRCee, *Mehrez Ben Abde Hamida v. Canada*, 11 May 2010, UN Doc. CCPR/C/98/D/1544/2007; HRCee, *John Michaël Dauphin v. Canada*, 7 September 2009, UN Doc. CCPR/C/96/D/1792/2008; HRCee, *Jonny Rubin Byahuranga v. Denmark*, 9 December 2004, UN Doc. CCPR/C/82/D/1222/2003; HRCee, *Madafferi v. Australia*, 26 August 2004, UN Doc. CCPR/C/81/D/1011/2001; HRCee, *Winata v. Australia*, 16 August 2001, UN Doc. CCPR/C/72/D/930/2000. See also Mrazik & Schoenholtz, 2010, pp. 665–666. The balancing approach has also been applied to cases concerning other types

The HRCee has occasionally dealt with arguments that the right to family life was arbitrarily interfered with in settings of confinement specifically. An example is the case of *Shikhmuradova v. Turkmenistan,* although the Committee in this case held that the claims under Article 17(1) ICCPR did not have to be considered separately now that it found a violation of Article 7 ICCPR (the prohibition of torture or cruel, inhuman or degrading treatment or punishment).[86] In *Tornel v. Spain,* the Committee dealt with a case concerning the medical treatment for HIV, and the eventual death, of Mr. Morales Tornel who had been sentenced to 28 years imprisonment.[87] Applicants claimed that both their right to family life and the right to family life of Mr. Morales Tornel ex Article 17(1) ICCPR had been violated, since (i) Mr. Morales Tornel was denied the right of contact with his family because of the distance of the prison from his family, (ii) the authorities rejected his request to be transferred to another prison, and (iii) the family was not informed of the seriousness of his medical condition.[88] The HRCee held that the claim under Article 17 ICCPR in relation to the *applicants* was insufficiently substantiated and therefore inadmissible.[89] In relation to the right to family life of Mr. Morales Tornel, it reiterated that "arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant".[90] On the basis of the particular facts of this case, and given that the respondent state had not demonstrated the reasonability of the interference, the Committee consequently found a violation of Article 17(1) ICCPR.[91] In reaching this decision, the HRCee thus confirmed its balancing approach on the basis of contextual particularities. This is further corroborated by the case of *Amanklychev v. Turkmenistan,* in which the Committee held that the denial of applicant to see his family and relatives while in prison or to exchange correspondence with them was, in light of the fact that the respondent state had not refuted the allegations, in violation of Article 17(1) of the Covenant.[92]

As some have argued, the HRCee's approach was inspired by the approach taken by the ECtHR under Article 8 of the Convention.[93] Mrazik and Schoen-

---

of interferences: see, e.g., HRCee, *A.M.H. El Hojouj Jum'a et al. v. Libya,* 25 August 2014, UN Doc. CCPR/C/111/D/1958/2010, para. 6.7.

86 HRCee, *Shikhmuradova v. Turkmenistan,* 28 April 2011, UN Doc. CCPR/C/112/D/2069/2011, para. 6.8.

87 HRCee, *Isabel Morales Tornel, Francisco Morales Tornel and Rosario Tornel Roca v. Spain*, 24 April 2009, UN Doc. CCPR/C/95/D/1473/2006.

88 HRCee, *Tornel v. Spain*, para. 3.4.

89 HRCee, *Tornel v. Spain*, para. 6.5.

90 HRCee, *Tornel v. Spain*, para. 7.3.

91 HRCee, *Tornel v. Spain*, para. 7.4.

92 HRCee, *Annakurban Amanklychev v. Turkmenistan,* 11 May 2016, UN Doc. CCPR/C/116/D/2078/2011, para 7.5.

93 Mrazik & Schoenholtz, 2010, p. 656.

holtz thus note that the ECtHR applies, as it does in relation to various rights, a multi-step analysis, including (i) whether family life exists, (ii) whether the state's action constitutes an interference with family life, and (iii) whether the interference was justified, on the basis of Article 8(2) ECHR, "as in accordance with law and necessary in a democratic society in the interests of national security, public safety, or economic well-being; the prevention of disorder or crime; or the protection of health, morals, or, the rights or freedoms of others".[94] As they likewise point out, whilst Article 8(2) of the Convention provides a range of justifications for interference, the condition that interferences have to be 'necessary in a democratic society' amounts, in practice, to a balancing test similar to that applied by the HRCee.[95] This balancing exercise takes into account whether a pressing social need exists – mere usefulness, reasonability, or desirability of an interfering measure is thus insufficient – and whether the interference is proportionate to the legitimate aim pursued.[96] Whilst national authorities enjoy a certain margin of appreciation in this regard, their decisions remain subject to review by the ECtHR.

Similar to the HRCee, various of the ECtHR's decisions revolved around expulsion cases.[97] The Court has, however, also decided upon cases involving the right to family life both in prison and in immigration detention.[98] In relation to the right to family life of prisoners, it emphasised that prisons authorities should assist prisoners in maintaining contacts with close family.[99] According to a 2017 judgment, in fact, the margin of appreciation left to states in this regard, in particular where the regulation of visiting rights is concerned, "has been narrowing".[100] As a result of the balancing of state interests against individual interests, the Court has consequently found violations of Article 8 ECHR *inter alia* in cases where states imposed limitations on the number of family visits, closely supervised family visits, or subjected prisoners to special visit arrangements.[101] Where the interests of the states weighed more heavy,

94 Mrazik & Schoenholtz, 2010, p. 657.
95 Mrazik & Schoenholtz, 2010, p. 657.
96 ECtHR, *Dudgeon v. UK,* 22 October 1981, Application no. 7525/76, paras. 51-53.
97 See, for analysis, Mrazik & Schoenholtz, 2010, pp. 659–664.
98 It also dealt extensively with prisoners' right to *correspondence* with relatives, but since this section is primarily concerned with the right to family life as a separate sub-right enshrined in Article 8(1) ECHR, such case law will not be further elaborated upon here.
99 ECtHR, *Messina v. Italy (no. 2),* 28 September 2000, Application no. 25498/94, para. 61; ECtHR, *Kurkowski v. Poland,* 9 April 2013, Application no. 36228/06, para. 95; ECtHR, *Vintman v. Ukraine*, 23 October 2014, Application no. 28403/05, para. 78.
100 ECtHR, *Polyakova and Others v. Russia,* 7 March 2017, Application nos. 35090/09 and 3 others, para 89.
101 ECtHR, *Piechowicz v. Poland*, 17 April 2012, Application no. 20071/07, para. 212; ECtHR, *Van der Ven v. the Netherlands,* 4 February 2003, Application no. 50901/99, para. 69; ECtHR, *Khoroshenko v. Russia* (Grand Chamber), 30 June 2015, Application no. 41418/04, paras 106 and 146; ECtHR, *Mozer v. the Republic of Moldova and Russia* (Grand Chamber), 23 February 2016, Application no. 11138/10, paras. 193-195; ECtHR, *Vidish v. Russia*, Application no. 53120/08, 15 March 2016, para. 40.

conversely, it deemed restrictions to prisoners' rights to receive visits necessary and proportionate.[102] The Court also found a violation of article 8 ECHR where the state had refused to transfer a prisoner to a prison facility closer to the home town of the prisoner's parents, as well as in cases where the state provided insufficient legal safeguards against potential abuse related to the geographical distribution of prisoners.[103] The state's discretion in the distribution of prisoners may thus generally be wide, but is not absolute, as the Court emphasised for example in *Rodzevillo v. Ukraine*:

> "While the Court has accepted that the domestic authorities must enjoy a wide margin of appreciation in matters relating to the execution of sentences, the distribution of the prison population should not remain entirely at the discretion of the administrative bodies. The interests of prisoners in maintaining at least some family and social ties must somehow be taken into account".[104]

The Court clarified elsewhere, however, that Article 8 of the Convention does not cover requests for *inter*-state prison transfers.[105] These cases concerning intra- and inter-state prisoner transfers will be returned to below in the case study context of PI Norgerhaven.

In relation to the right to family life in administrative detention, the Court has primarily dealt with the rights of children in detention. In its case law, the Court has emphasised that the fact that a family unit is maintained in settings of detention does not mean that the right to family life is therefore safeguarded – rather, confinement in a detention centre, subjecting families to custodial living conditions, may be considered an interference with Article 8(1) ECHR.[106] Such interference is only justified if it is proportionate to the aim pursued by the authorities and should, where families are concerned, take the best interests of the child into account.[107]

Similar to the right to liberty, international human rights law hence embeds accepted interferences with the right to family life in the notions of legality and non-arbitrariness. By introducing explicit balancing exercises, however,

---

102 ECtHR, *Enea v. Italy* (Grand Chamber), 17 September 2009, Application no. 74912/01, para. 131.

103 ECtHR, *Vintman v. Ukraine*; ECtHR, *Khodorkovskiy and Lebedev v. Russia*, paras. 831-851; ECtHR, *Rodzevillo v. Ukraine*, Application no. 38771/05, 14 January 2016, paras 85-87; ECtHR, *Polyakova and Others v. Russia*, para. 116.

104 ECtHR, *Rodzevillo v. Ukraine*, para. 83.

105 ECtHR, *Serce v. Romania*, 30 June 2015, Application no. 35049/08, paras. 55-56; ECtHR, *Palfreeman v. Bulgaria,* 8 June 2017, Application no. 59779/14, para. 36; ECtHR, *Plepi v. Albania & Greece* (Admissibility Decision), 4 May 2010, Applications nos. 11546/05, 33285/05 and 33288/05.

106 ECtHR, *Popov v. France,* 19 January 2012, Application nos. 39472/07 and 39474/07, para. 134; ECtHR, *Bistieva and Others v. Poland,* 10 April 2018, Application no. 75157/14, para. 73.

107 EctHR, *Popov v. France,* para. 140.

international human rights law seemingly shows more veracity to its fundamental tenet of equal protection: different from the tests developed in relation to interferences with the right to liberty, interferences with the right to family life may indeed be deemed impermissible if the individual's interests outweigh those of the state. This, then, leaves less margin for states to pursue the effective depletion of such rights through crimmigration measures that rely on interferences. The finding of the ECtHR that states' margin of appreciation is, in certain regards, 'narrowing'[108] illustrates such veracity and limited susceptibility for resilient accommodation of crimmigration developments.

4.3.2 Interfering with political rights on account of membership status: disenfranchisement

A second basis for the limitation of confined individuals' human rights is that of their precarious membership status. A prime example is the right to vote, that, as chapter 3 indicated, states increasingly seek to restrict in carving out membership under the banner of crimmigration.[109] This right, according to Nowak "without doubt the most important political right",[110] is enshrined in Article 25(b) ICCPR:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: […] [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

The right to vote has also, albeit in a somewhat more implicit fashion, been codified in Article 3 of Protocol No. 1 to the ECHR: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".[111] Like the selected civil rights analysed above, suffrage can however legitimately be interfered with: it is, as such, not an absolute right.

Logically, this revolves around the right to vote of *prisoners* with the nationality of the state that confines them, rather than on *immigrant detainees* who lack formal membership status. As the HRCee for instance notes, the right enshrined in Article 25(b) ICCPR contrasts with other rights and freedoms recog-

---

108 ECtHR, *Polyakova and Others v. Russia*, para 89.

109 Abebe, 2013; Demleitner, 1999; Dhami, 2005, p. 236; Dilts, 2014; Macdonald, 2009, pp. 1393–1406; Penal Reform International, 2016.

110 Nowak, 1993, p. 443

111 The only countries that have signed but not ratified Protocol No. 1 are Monaco and Switzerland.

nised by the Covenant as it protects the rights of *citizens* rather than those of all individuals within a state's territory and subject to its jurisdiction.[112] Consequently, for non-citizens, the right to vote does not come into question in the first place,[113] at least not in relation to the jurisdiction in which they are detained, and the remainder of this section therefore exclusively deals with the way in which international human rights law has allowed for the limitation of *prisoners'* voting rights, that is, for criminal disenfranchisement.

In relation to Article 25(b) ICCPR, the HRCee has noted that suffrage "may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable".[114] In turn, it explicitly recognised that conviction for a criminal offence may be considered a basis for suspending the right to vote: "the right to vote and to be elected is not an absolute right, and […] restrictions may be imposed on it provided they are not discriminatory or unreasonable".[115] Furthermore, the HRCee has held that "[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote".[116] The HRCee thus uses 'proportionality' as a yardstick to measure the objectiveness and reasonability of limitations. In sum, the right to vote of sub-citizens who are confined on the basis of a criminal conviction may be restricted, as long as such restriction is based in law and is proportional in light of the nature of the offence and the severity of the sentence.[117]

The question whether the disenfranchisement of prisoners meets the standard of proportionality under Article 25(b) ICCPR is little straightforward. A first indication of proportionality is provided by the Covenant itself: Article 10(3) ICCPR provides that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". Read in conjunction with this provision, Article 25(b) ICCPR should be understood as allowing limits to the right to vote for prisoners only insofar as disenfranchisement furthers the goals of reformation and rehabilitation.[118] As Macdonald furthermore convincingly argues, the ICCPR's object

112 HRcee, *General Comment no. 25,* 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, para. 3.
113 As Beckman notes, there are some exceptions to this rule but these remain marginal: Beckman, 2009, p. 63. See also, however, Hayduk, 2006.
114 HRcee, *General Comment no. 25,* para. 3.
115 See e.g. HRCee, *Denis Yevdokimov and Artiom Rezanov v Russia*, 21 March 2011, Comm. no. 1410/2005, UN Doc. CCPR/C/101/D/1410/2005, para. 7.4; HRCee, *Gabriel Crippa, Jean-Louis Masson and Marie-Joe Zimmermann v. France,* 28 October 2005, Comm. nos. 993/2001, 994/2001 and 995/2001, UN Doc. CCPR/C/85/D/993-995/2001, para. 6.13; HRCee *Marie-Hélène Gillot et al. v. France,* 15 July 2002, Comm. no. 932/2000, UN Doc. CCPR/C/75/D/932/2000, para 12.2.
116 HRcee, *General Comment no. 25,* para. 14.
117 See also Abebe, 2013, pp. 423–425.
118 See also Macdonald, 2009, p. 1379.

and purpose necessitate an expansive interpretation of the right to vote and a narrow interpretation of the 'reasonable restrictions' standard.[119] Likewise, the drafting history of the ICCPR makes clear that the term 'unreasonable restriction' was primarily used to refer to issues of eligibility to vote,[120] whereas the drafters maintained a strong preference for a presumption in favour of universal suffrage which was, by a majority, considered to be one of the most fundamental concepts.[121] This also supports an expansive approach vis-à-vis the right to vote as enshrined in Article 25 ICCPR. Although the drafters admitted that *some* restriction of the right to vote was unavoidable, criminal disenfranchisement was not mentioned.[122]

On the basis of these sources seemingly favouring a restrictive interpretation of the proportionality standard, the possibilities for legitimate disenfranchisement of prisoners thus seem to be severely curtailed. The requirements for legitimate interferences with the right to vote have been further elaborated upon by the HRCee. The issue came to the fore in 1993, when Luxembourg's laws mandating voting disenfranchisement were examined by the Committee.[123] These laws allowed for mandatory disenfranchisement for anyone convicted of a serious crime (including murder and rape) and for temporary disenfranchisement for anyone convicted of a minor crime, whilst the re-enfranchisement of individuals was dependent on a decision by the Grand Duke of Luxembourg.[124] In its suggestions and recommendations, the HRCee expressed its concern in relation to these laws and suggested their abolishment.[125] Concerns over Luxembourg's approach were reiterated in 2003.[126] The Committee made similar suggestions in relation to Hong Kong's laws allowing for disenfranchisement up to 10 years, as it "may be a disproportionate restriction on the rights protected by Article 25".[127] In 2001, the UK was urged to reconsider its laws restricting the right to vote for all convicted prisoners, as the Committee considered that there was no contemporary justification for such practice, in particular not when considered in light of the goals of reformation and rehabilitation as set out in Article 10 ICCPR.[128] In 2006, in concluding observations in relation to the US, the HRCee reiterated the importance of proportionality and considered that the US practice of disen-

119 Macdonald, 2009, p. 1384.
120 Nowak, 1993, p. 445.
121 Macdonald, 2009, p. 1385.
122 Macdonald, 2009, pp. 1385–1386.
123 UNGA, *Report of the Human Rights Committee*, 7 October 1993, UN Doc. A/48/40 (Part I).
124 UNGA, UN Doc. A/48/40 (Part I) (Oct. 7, 1993), para. 132.
125 UNGA, UN Doc. A/48/40 (Part I) (Oct. 7, 1993), para. 145.
126 HRCee, *Concluding Observations of the Human Rights Committee: Luxembourg*, 15 April 2003, UN Doc. CCPR/CO/77/LUX, para. 8.
127 HRCee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, 9 November 1995, UN Doc. CCPR/C/79/Add.57, para. 19.
128 HRCee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, 6 December 2001, UN Doc. CCPR/CO/73/UK, para. 10.

franchisement of individuals having committed felony offences was incompatible with the ICCPR, in particular now that it had significant racial implications and did not meet the goals of reformation and rehabilitation of Article 10 ICCPR.[129] In 2011, the HRCee held in *Yevdokimov* that Russia's automatic, blanket ban on voting for anyone sentenced to imprisonment was not reasonable and therefore violated Article 25 ICCPR.[130]

Macdonald analyses which types of disenfranchisement are, in light of these considerations, likely to be permissible under the ICCPR.[131] He concludes that there is a high likelihood of invalidity of disenfranchisement laws (i) where such laws affect all imprisoned individuals, (ii) where they affect particular groups of imprisoned individuals on the basis of the length of incarceration (as there is no proportionality determination for specific crimes), and (iii) where disenfranchisement continues post-incarceration insofar as they fail to take the goals of Article 10 ICCPR into account.[132] He conversely concludes that there is a high likelihood of validity of disenfranchisement laws (i) where they affect particular groups of imprisoned individuals on the basis of the crimes that they committed, as long as a legislative proportionality determination is included that relate disenfranchisement to specific offences, such as political offences, and (ii) where disenfranchisement laws allow for disenfranchisement to be an explicit component of the sentence, as long as legislative and judicial determinations of proportionality are included, therewith for instance targeting political offences.[133] Key for valid interferences under Article 25 ICCPR is, henceforth, that disenfranchisement should be a proportionate part of the punishment.[134]

In the ECHR context, the ECtHR has significantly substantiated the accepted interferences with prisoners' right to vote as enshrined in Article 3 of Protocol No. 1 to the ECHR, arguably providing more tangible criteria than the HRCee has done. Landmark decision in this regard is *Hirst v. UK (No. 2)*.[135] This case concerned section 3 of the UK's Representation of the People Act 1983, which stated that "[a] convicted person during the time that he is detained in a penal institution in pursuance of his sentence […] is legally incapable of voting at any parliamentary or local election", and as such constituted a blanket voting ban for prisoners.[136] In debating this provision in UK Parliament, the UK government has maintained that disenfranchisement was considered part of

129 HRCee, *Concluding Observations of the Human Rights Committee: United States of America*, 28 July 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 35.
130 HRCee, *Denis Yevdokimov and Artiom Rezanov v Russia*, para 7.5.
131 Macdonald, 2009, pp. 1393–1406. See also Abebe, 2013, p. 425.
132 Macdonald, 2009, p. 1406.
133 Macdonald, 2009, p. 1406.
134 Macdonald, 2009, p. 1407.
135 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), 6 October 2005, Application no. 74025/01.
136 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 21.

a convicted prisoner's punishment.[137] In assessing the complaint, the ECtHR first generally acknowledged that the rights in Article 3 of Protocol No. 1 are not absolute, that there is room for implied limitations, and that member states have a wide margin of appreciation in this regard.[138] Still, given that "[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates", limitations are only legitimate to the extent that "the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate".[139] Subsequently, the ECtHR dealt with the restriction of voting rights for prisoners specifically. It did so, first, by reiterating that at times political rights may be removed from prisoners, for instance where persons are convicted for 'un-citizen-like conduct' such as "gross abuses in their exercise of public life during the Second World War", or where persons are convicted for specific offences involving public dishonour such as the refusal to report for military service.[140] Secondly, it acknowledged that the present case is different now that it is "the first time that the Court has had occasion to consider a general and automatic disenfranchisement of convicted prisoners".[141] In turn, the Court maintained that "there [is not] any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion".[142] This does not mean that democratic societies cannot protect themselves against activities that aim at destroying the rights or freedoms as codified in the Convention: to the contrary, states can for example restrict the right to vote of prisoners who have seriously abused their public office or who have threatened to undermine the rule of law or democratic foundations of the state.[143] However, disenfranchisement is a severe measure and should not be resorted to lightly: "the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned".[144] As such, the ECtHR's approach closely resembles the approach taken by the HRCee in relation to Article 25 ICCPR, requiring for legitimate restrictions of the voting rights of prisoners under the Convention that such restrictions are *proportionate* in light of the conduct and circumstances of the prisoner concerned. Furthermore, as pointed out above, such limitations should be based on a legitimate aim.

137 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 24.
138 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), paras 60-61.
139 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 62.
140 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 65.
141 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 68.
142 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 70.
143 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 71.
144 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 71.

As the application of these principles in various cases highlights, various 'legitimate aims' may underly limitations of prisoners' voting rights, including the aims of preventing crime, enhancing civic responsibility, and respect for the rule of law.[145] In addition, case law has provided indications of when disenfranchisement of prisoners does, and when it does not, suffices the condition of proportionality. Thus, whilst states continue to enjoy a wide margin of appreciation, such disenfranchisement is not proportionate where, as in the case of *Hirst*, an automatic, blanket ban on prisoners' voting rights applies.[146] This has been confirmed in various subsequent cases involving the UK,[147] as well as in relation to automatic and indiscriminate prisoners' voting bans in Turkey,[148] Russia,[149] Bulgaria,[150] and Georgia.[151]

Whether interferences not amounting to a blanket ban are legitimate ultimate depends on the particularities at hand, as subsequent case law illustrates. For instance, in *Frodl v. Austria*, the Court noted in relation to domestic legislation disenfranchising prisoners serving a prison sentence of more than one year for offences committed with intent that disenfranchisement in this case violated Article 3 of Protocol No. 1 as disenfranchisement was not imposed by a judge taking into account all particular circumstances, and as there was no proper link between the offence committed and issues relating to elections and democratic institutions.[152] In *Scoppola v. Italy (No. 3)*, on the other hand, the Grand Chamber considered that domestic legislation disenfranchising prisoners who were convicted of certain offences against the state or the judicial system, or who were sentenced to at least three years'

145 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), paras 74-75; ECtHR, *Scoppola v. Italy (No. 3)*, 22 May 2012, Application no. 126/05, para. 90; ECtHR, *Anchugov and Gladkov v. Russia*, 4 July 2013,Application nos. 11157/04 and 15162/05, para. 102; ECtHR, *Kulinski and Sabev v. Bulgaria*, 21 July 2016, Application no. 63849/09, para. 35

146 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 82. As the Court notes, "[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1."

147 ECtHR, *Greens and M.T. v. UK*, 23 November 2010, Application nos. 60041/08 and 60054/08; ECtHR, *Firth and Others v. UK*, 12 August 2014, Application nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09; ECtHR, *McHugh and Others v. UK*, 10 February 2015, Application no. 51987/08 and 1.014 others.

148 ECtHR, *Söyler v. Turkey*, 17 September 2013, Application no. 29411/07,; ECtHR, *Murat Vural v. Turkey*, 21 October 2014, Application no. 9540/07. The Court even considers that "considers that the restrictions placed on convicted prisoners' voting rights in Turkey are harsher and more far-reaching than those applicable in the United Kingdom": see *Söyler v. Turkey*, para. 38.

149 ECtHR, *Anchugov and Gladkov v. Russia*.

150 ECtHR, *Kulinski and Sabev v. Bulgaria*. See for further analysis of the case also Van Berlo, 2017c, in which I also explicitly link the ensuing disenfranchisement in this case to the process of crimmigration.

151 ECtHR, *Ramishvili v. Georgia*, 31 May 2018, Application no. 48099/08.

152 ECtHR, *Frodl v. Austria*, 8 April 2010, Application no. 20201/04, paras. 34-35.

imprisonment, did not violate Article 3 of Protocol No. 1.[153] In this judgment, the Grand Chamber seems to refute the consideration in *Frodl* that disenfranchisement has to be decided on by a judge as a matter of principle. Rather,

> "[w]hile the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed".[154]

Consequently, the Italian voting ban in *Scoppola* was deemed to be in conformity with Article 3 of Protocol No. 1. It did not lead to the disenfranchisement of prisoners convicted for minor offences or offences with sentences of less than three years' imprisonment, which satisfied the condition that the circumstances of individual cases and offenders' personal situations have to be taken into account, and did not prevent convicted persons to recover their franchise.[155] On this basis, it appears that the conclusions drawn by Macdonald in relation to the ICCPR by and large also apply to the ECHR context, with disenfranchisement only being allowed in limited cases that include proportionality determinations.[156]

At first sight the right to vote as enshrined in both the ICCPR and the ECHR thus seems to have developed with significant veracity to international human rights law's fundamental tenets: attempts by states to restrict such rights in prisons have been met with significant resistance from the relevant monitoring bodies, which have subjected limitations *inter alia* to conditions of proportionality. At the same time, both provisions have also proven resilient, or flexible, in the face of states' attempt to disenfranchise prisoners. The HRCee, for instance, has on various occasions *suggested* the reconsideration of disenfranchisement laws but has only occasionally demanded a country to change its laws.[157] Likewise, the ECtHR continues to grant states a wide margin of appreciation, as was for instance confirmed in *Scoppola*.[158] Whether or not classified as reluctant, such efforts have throughout allowed states to limit suffrage as a core political right, provided that such limitations are not automatic and indiscriminate but are proportionally targeted at particular offender groups either by legislation or the judiciary. This, however, does not obviate the problematic aspects of crimmigration per se: to the contrary, as

153 ECtHR, *Scoppola v. Italy (No. 3)*.
154 ECtHR, *Scoppola v. Italy (No. 3),* para. 99.
155 ECtHR, *Scoppola v. Italy (No. 3),* paras. 108-109.
156 See footnotes 131-134 and accompanying text. Although the precise content of such determinations may still differ: see Abebe, 2013, p. 425.
157 See similarly Macdonald, 2009, p. 1388.
158 ECtHR, *Scoppola v. Italy (No. 3),* para. 83.

chapter 3 of this book has explicated, crimmigration endeavours are precisely *targeted* at specific populations of sub-citizens, including for example dangerous and serious offenders,[159] poor offenders,[160] and offenders of particular criminal acts.[161] Indeed, crimmigration is not problematic because it would amount to indiscriminate and automatic exclusions of membership entitlements, but is problematic precisely because it targets particular populations in redistributing membership entitlements. Requiring states to base disenfranchisement on "a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned", as the ECtHR puts it in *Hirst*,[162] therefore does not *a priori* appear a tenable approach to prevent states from progressively segregating and excluding particular imprisoned populations of sub-citizens through their disenfranchisement. To the contrary, it even runs the risk of being used to legitimise such crimmigration developments, with the standard of proportionality becoming a tool for states to pursue crimmigration agenda's whilst seemingly conforming with international human rights law obligations. This is even more so now that the ECtHR in *Scoppola* has retracted on its previous case law in *Frodl*, allowing states to offset the requirement of proportionality by providing for it through the general application of the law as an alternative to specific judicial decisions.[163] In this sense, the conditions imposed upon interferences seem to only marginally circumscribe the increasing and global use of prisoner voting bans as strategies of crimmigration.

4.4 The case study contexts

Chapter 3 has detailed the crimmigration features of RPC Nauru and PI Norgerhaven. As this chapter so far has shown, international human rights law has accepted that non-absolute rights can be interfered with where particular conditions are fulfilled. In this sense, international human rights law has showcased both resilience in the face of *inter alia* crimmigration developments by which rights of certain populations are gradually depleted – by allowing for interferences – and veracity to its fundamental tenet of equal protection – by subjecting interferences to a substantive set of stringent conditions allowing them only under exceptional circumstances. This section will apply these findings to the contexts of RPC Nauru and PI Norgerhaven, examining whether particular interferences can be justified under this binary approach. It will do

159 Reiter & Coutin, 2017.
160 Demleitner, 1999, p. 159.
161 See e.g. Craissati, 2019.
162 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 71.
163 Likewise, as noted above, legislative proportionality determinations seem to suffice in the context of the ICCPR: Macdonald, 2009, p. 1406.

so by focussing on two rights that have been analysed above and that seem to be most problematic in the case study contexts: the right to liberty in the context of RPC Nauru,[164] and the right to family life in the context of PI Norgerhaven.

4.4.1 RPC Nauru

To examine whether the right to liberty as codified in Article 9(1) ICCPR has been interfered with in RPC Nauru, and if so, whether this interference is legitimate, a distinction has to be made between the period of time prior to the introduction of open centre arrangements in October 2015 and the period after such arrangements were introduced. Both periods of time will therefore be addressed separately.

4.4.1.1 Prior to the introduction of open centre arrangements

There is little question that detention in RPC Nauru, prior to the introduction of open centre arrangements, interfered with the right to liberty of those confined. As outlined above, the ICCPR requires that such interference complies with the requirements of legality and non-arbitrariness in order to be valid. It can readily be established that the interference *in casu* complies with the principle of legality, as detention in RPC Nauru is provided for in the *Asylum Seeker (Regional Processing Centre) Act 2012* of Nauru ('the RPC Act') and in respective Immigration Regulations being subordinate legislation under the *Immigration Act 1999* and the *Immigration Act 2014*. As the header of the RPC Act provides, one of its goals is to "regulate the operation of centres at which asylum seekers and certain other persons brought to Nauru under the *Migration Act 1958* of the Commonwealth of Australia are required to reside". Such requirement to reside in the RPC is based in the Immigration Regulations, that have, however, been amended at several times.

Thus, when offshore processing was reintroduced in 2012, the *2000 Immigration Regulations* were amended, establishing that asylum seekers transferred to Nauru were provided with 'regional processing centre visas', and that one of the conditions attached to such visas was that holders were required to reside "in premises notified to the holder by a service provider as being premises set aside for the holder", until a health and security clearance is

164 Given the lack of citizenship or formal residence of those confined in RPC Nauru, the right to vote in national elections in Nauru or Australia does not arise: see also HRcee, *General Comment no. 25,* para. 3. Moreover, during the processing of their asylum claims on Nauru, those confined are not allowed to work, and the prohibition of forced or compulsory labour therefore does not raise particular issues in this context: see, e.g., Nauru's *Immigration (Amendment) Regulations 2012,* SL No. 3 of 2012, inserted section 9A(3)(d).

granted.[165] When such clearance was granted, asylum seekers were required to be in the RPC between 7pm and 7am, except in cases of emergency or other extraordinary circumstances, and in any event always were required to be in the company of a service provider or another person approved by a service provider when outside the premises.[166] The right to leave the premises could furthermore be restricted "due to the conduct of the holder or to a public health risk or public safety risk".[167]

New Immigration Regulations were introduced in 2013.[168] The *2013 Immigration Regulations* tightened the conditions to which regional processing centre visas were subjected, including, in section 6, that the holder had to reside in the RPC, *even* where a health and security clearance certificate was granted. The only exceptions to this rule were cases of emergency or other extraordinary circumstances, or where absence was organised by a service provider and the holder was either (i) under the care and control of that service provider (where the holder has no health and security clearance), or (ii) in the company of a service provider (where the holder does have a health and security clearance). These conditions were reiterated in section 9(6) of the *2014 Immigration Regulations*. In 2015, the Immigration Regulations were again amended several times. The condition that asylum seekers with a health and security clearance had to be in the company of a service provider when absent from the RPC was omitted in February 2015, although the requirement that absence had to be organised or permitted by a service provider continued to apply.[169]

Nauruan law thus provided for the confinement of regional processing centre visa holders and the arrangements hence met the basic requirements of legality. Whether they also met the requirement of non-arbitrariness is somewhat more obscure, but important guidance has been provided by the Working Group on Arbitrary Detention and the HRCee. As outlined above, the Working Group has held that the requirement of non-arbitrariness requires proportionality, which in turn means that (i) immigration detention should be a last resort, (ii) it is permissible only for the shortest period of time, and (iii) alternatives to detention have to be sought where possible.[170] In cases concerning Australia's mandatory detention regimes, the HRCee has likewise considered that detention for asylum processing is not *as such* arbitrary,[171] but that mandatory detention based on general considerations, instead of on

165 *Immigration (Amendment) Regulations 2012,* inserted sections 9A(3)(a) and 9A(3)(b).
166 *Immigration (Amendment) Regulations 2012,* inserted sections 9A(3)(c).
167 *Immigration (Amendment) Regulations 2012,* inserted sections 9A(3)(c).
168 As amended by the *Immigration (Amendment) Regulations 2013,* SL No. 6 of 2013.
169 *Immigration (Amendment) Regulations 2015,* SL No 4 of 2015, amended section 9(6)(c)(ii).
170 UN Human Rights Council, *Report of the Working Group of Arbitrary Detention, Tenth session, Agenda item 3*, 16 February 2009, UN Doc. A/HRC/10/21, para. 67.
171 HRCee, *A. v. Australia*, para. 9.4.

individual justifications, is impermissible.[172] In one of these cases on Australia's mandatory detention regime, the HRCee – finding a violation of Article 9 ICCPR – *inter alia* considered that

> "[i]n particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant".[173]

Applied to the conditions and circumstances of detention in RPC Nauru prior to the introduction of open centre arrangements, the interference with the right to liberty of those confined seems to violate Article 9 ICCPR as it arguably does not meet the standard of non-arbitrariness. Detention was, indeed, not used as a last resort, but as a default for all transferees; individuals were subjected to prolonged detention, with status determination procedures sometimes taking multiple years to conclude; and alternatives for detention were not sought, even though the imposition of reporting obligations, sureties, or other conditions could have achieved the ends of Nauru's immigration policies, in particular given that Nauru is a relatively small island nation and asylum seekers' movements could therefore be closely monitored. Furthermore, similar to the case of *Baban v. Australia* cited above, those confined in RPC Nauru had no opportunity to challenge their continued confinement in court, as judicial review in Nauru is restricted to an assessment of the *lawfulness* of detention. Thus, Article 5(4) of the Nauruan Constitution states that

> "[w]here a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the complaint and, unless satisfied that the detention is *lawful*, shall order that person to be brought before it and shall release him" (emphasis added).

Whereas judicial review is thus possible, such review can only inquire into the lawfulness of detention, not into the compatibility of detention with the

172 HRCee, *Baban v. Australia*, 18 September 2003, Comm. no. 1014/2001, UN Doc. CCPR/C/78/D1014/2001, para. 7.2.

173 HRCee, *Baban v. Australia*, para. 7.2.

requirement of non-arbitrariness under the ICCPR. This is illustrated by the 2013 Judgment of the Supreme Court of Nauru concerning a habeas corpus challenge brought by asylum seekers on Nauru, claiming that their detention in RPC Nauru was invalid in light of the right to liberty in Article 5(1) of the Nauruan Constitution.[174] Judge Von Doussa dismissed the application, as applicants were deprived of their liberty on a valid ground as set out in Article 5(1)(h) of the Nauruan Constitution, which allows for the deprivation of liberty, as authorised by law, "for the purpose of preventing [a person's] unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru." Interestingly, however, Judge Von Doussa based such lawfulness of confinement not on the fact that detention was needed to prevent applicants unlawful entry into Nauru, but rather was needed for the purpose of effecting expulsion, extradition or other lawful removal. Indeed, on the one hand, he found that since Nauru had provided regional processing centre visas to applicants, they already had entered Nauru and therefore did not pose a risk of unlawfully entering the country.[175] On the other hand, he found that the detention of applicants, as a condition to the regional processing centre visas, serve the purpose of determining claims for refugee status, and for purposes "that will have to be addressed leading up to their removal from Nauru when their applications for refugee status have been finally determined".[176] Indeed, as he also points out, it has never been the intention of Nauru that asylum seekers would stay permanently: after their refugee status determination has been completed, they would either be removed to a third country for resettlement, or to their home country.[177] On this basis, he concluded that "the provisions of the Immigration Act and the regulations which permit the detention of RPC visas are valid as the detention is for the very purpose of ultimately 'effecting …lawful removal from Nauru' of the holder".[178] He henceforth relied on the compatibility of detention with domestic legal requirements, and in doing so even drew a number of comparisons with the ECHR, but did not consider issues of non-arbitrariness as demanded under the ICCPR. The Supreme Court of Nauru ultimately cannot consider arguments that the individual detention was arbitrary in terms of the ICCPR, given that, as Judge Von Doussa points out, "ultimately the function of the courts in Nauru is to apply the Constitution of Nauru according to its terms".[179]

174 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice* [2013] NRSC 10.
175 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice,* paras. 60-61.
176 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice,* para. 71.
177 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice,* para. 72. It should be noted, though, that Nauru in 2014 agreed to provide refugees with temporary resettlement visa: see also *Immigration (Amendment) Regulations 2014,* No. 4 of 2014, inserted new Regulation 9A.
178 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice,* para. 76.
179 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice,* para. 64.

In light of Article 9 ICCPR, confinement in RPC Nauru until the introduction of open centre arrangements thus seems to amount to arbitrary detention. The UNHCR reached a similar conclusion in its submission to the Universal Periodic Review of Nauru in March 2015, maintaining that "[w]hen viewing the legal parameters and practical realities of the regional processing centre in their totality, […] the mandatory detention of asylum-seekers in Nauru amounts to arbitrary detention, which is inconsistent with international law".[180]

4.4.1.2 After the introduction of open centre arrangements

Through amendments of the RPC Act and the Immigration Regulations in 2015, open centre arrangements were embedded in the legal framework.[181] Only where a person poses a risk to public health, safety, security, or him- or herself or others may the Operational Manager, in consultation with a medical practitioner, require the person to remain in the RPC.[182] The condition outlined in section 9 of the Immigration Regulations that those confined had to remain within the RPC except in cases of emergency or where the absence was organised by a service provider, was repealed.[183]

Whether the right to liberty of individuals at RPC Nauru was still interfered with after the introduction of open centre arrangements in October 2015 is not self-evident. The novel arrangements indeed raise the question whether the 'liberty' of individuals was interfered with in the first place. According to the HRCee, "[l]iberty of person concerns freedom from confinement of the body, not a general freedom of action".[184] Moreover, "[d]eprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12".[185] As addressed in the introductory chapter, the Nauruan government claimed that with the introduction of open centre arrangements, detention had ended.[186] This would mean that RPC Nauru no longer constituted an interference with the right to liberty of those residing there.

Some scholars have however taken issue with such conclusion. Notably, Dastyari compares the situation of RPC Nauru with the case of *Guzzardi v. Italy* before the ECtHR, which concerned the transfer of a suspect awaiting trial to

180 UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Nauru*, March 2015, p. 6.

181 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2015, Act. No. 23 of 2015, amended section 18C(1) and 18C(2).

182 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2015, amended section 18C(4) and 18C(5).

183 Immigration (Amendment) Regulations No. 3 2015, SL No. 15 of 2015.

184 HRCee, *General Comment no. 35,* para. 3.

185 HRCee, *General Comment no. 35,* para. 5.

186 Government of Nauru, 2015c.

the small Italian island of Asinara.[187] As the ECtHR concluded, in light of the circumstances of the case, confinement on such a small island may constitute an unjustified deprivation of liberty ex Article 5(1) ECHR. Comparing the circumstances in this case to those involved in RPC Nauru, Dastyari concludes that there is sufficient reason to likewise consider RPC Nauru as a space of detention:

> "[c]umulatively and in combination, the restrictions placed on asylum seekers participating in the open centre arrangement at the RPC can likewise be seen to constitute deprivation of liberty […]. Mr Guzzardi's situation is similar in some respects to asylum seekers participating in the open centre arrangement. However, Asinara, an Italian island of 52 square kilometres, is considerably larger than the island of Nauru, which occupies a mere 21 square kilometres. Furthermore, unlike Mr. Guzzardi, asylum seekers participating in the open centre arrangement cannot leave the island of Nauru; cannot work; are much more limited in their contact with the outside world; and cannot be visited by family members from outside Nauru".[188]

According to her, the introduction of open centre arrangements hence does not mean that the right to liberty is no longer interfered with.

However, the comparison seems to be flawed for a number of reasons. First, individuals are housed at RPC Nauru during their asylum processing *by Nauru*. The fact that Nauru is smaller than the Italian island of Asinara is irrelevant in this regard, for Nauru is, frankly, not bigger than it is and the individuals concerned are therefore not, similarly to Mr. Guzzardi, transferred to a remote island constituting only a small part of Nauru's sovereign territory. To the contrary, different from Mr. Guzzardi, the individuals concerned are – after the introduction of open centre arrangements – free to roam around the entire sovereign territory, however small, of the country in whose territorial jurisdiction they find themselves. Second, relatedly, the fact that individuals cannot leave the island of Nauru is not comparable to the situation of Mr. Guzzardi, since – again – the territory of Nauru does not extend beyond that very same island. In this regard, it would be deeply troublesome to argue that Nauru deprives individuals of liberty where in fact it allows these individuals to move freely within its entire sovereign territory. Third, the fact that asylum seeking individuals cannot work on Nauru is not comparable to the situation of Mr. Guzzardi, who was confined awaiting *criminal* proceedings. Indeed, the fact that asylum seekers are not allowed to work before being granted refugee status is not controversial, and in any event does not imply that a state

187 ECtHR, *Guzzardi v. Italy,* 6 November 1980, Application no. 7367/76.
188 Dastyari, 2015b, pp. 679–680.

deprives asylum seekers of liberty.[189] Fourth, the fact that those on Nauru cannot be visited by family members from abroad does not appear to be an indicator of deprivation of liberty. The conclusion that the "severity of the restrictions on asylum seekers in Nauru under the open centre arrangement […] means their situation can be characterised as detention under article 9 of the ICCPR",[190] thus does not seem warranted. This is even more so now that the ECtHR in *J.R. and Others v. Greece* has held that the introduction of semi-open centre arrangements, allowing confined populations to leave during both day and night, ended the deprivation of their liberty and amounted merely to a restriction of movement.[191]

On this basis, it does not appear that the right to liberty of those confined in RPC Nauru ex Article 9 ICCPR was interfered with after the introduction of open centre arrangements, even though their rights to liberty of movement as enshrined in Article 12(1) ICCPR may to a certain extent have been interfered with. This in turn also seems to be questionable, however, particularly now that it is not within Nauru's sole or key sovereign prerogative to extend individuals' freedom of movement *beyond* its national territory. Indeed, as the HRCee has considered, "[e]veryone lawfully within the territory of a State enjoys, *within that territory*, the right to move freely and to choose his or her place of residence."[192] In this sense, any potential claim under Article 12(1) ICCPR would have to concern the restriction of the right to choose one's place of residence, as the right to move freely within Nauru's territory is no longer interfered with. No issue furthermore arises under Article 12(2) ICCPR as Nauru does not principally restrict the right to leave the country.

4.4.2 PI Norgerhaven

The Norwegian-Dutch cooperation appears to raise questions in light of the right to family life enshrined in Article 17(1) ICCPR and Article 8(1) ECHR. Indeed, as part of their negative obligation under both provisions, states have a duty to refrain from interferences in individuals' family life that already exists in the country.[193] As has been considered above, virtually all forms

189 Even more so, the HRCee has pointed out that a ban on performing work does not provide grounds for claiming that the right to liberty has been violated: see HRCee, *Manuel Wackenheim v. France,* 15 July 2002, Comm. No. 854/1999, UN Doc. CCPR/C/75/D/854/1999, para. 6.3.

190 Dastyari, 2015c, p. 681.

191 ECtHR, *J.R. and Others v. Greece,* 28 January 2018, Application no. 22696/16, para 86.

192 HRCee, *General Comment no. 27,* 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9, para. 4 (emphasis added).

193 As the ECtHR has maintained, this negative duty is "the essential object of Article 8": ECtHR, *Kroon and Others v. the Netherlands,* 27 October 1994, Application no. 18535/91, para 31.

of confinement interfere to a certain extent with the enjoyment of the right to family life,[194] and there is no reason to consider that this would be different in PI Norgerhaven. Even more so, in this particular context the interference with the right to family life appears more substantial than in, say, domestic Norwegian prisons, as a significant physical and practical distance is created between those confined and their families, provided that they reside in Norway. As such, there appears to be little controversy over the question *whether* the right to family life is interfered with in PI Norgerhaven,[195] although subsection 4.4.2.2. will further reflect upon this assertion by looking at the implications of the large percentage of FNPs that are imprisoned there.

Less obvious is the question whether such interference is permitted. To briefly recap, under both the ICCPR and the ECHR, interferences with this right are permissible only if they are based in provisions of domestic law and if they comply with the prohibition of arbitrariness. In the context of the ICCPR, this latter requirement is taken to mean that limitations should comply with the provisions, aims, and objectives of the Covenant and should, in any event, be reasonable in light of the particular circumstances. In the context of the ECHR, this requirement has been substantiated by the tests of (i) whether the interference pursues a legitimate aim and (ii) whether the interference is necessary in a democratic society. The reasonability test within the context of the ICCPR, and the test of being necessary in a democratic society under the ECHR, in turn have been interpreted as necessitating a balancing exercise between the interests of the state and the interests of the individual.

Recent case law of the ECtHR on the permissibility of imprisoning individuals in remote prison facilities, far away from their families, provides important guidance as to the permissibility of the interference with the right to family life in PI Norgerhaven. Such jurisprudence was briefly touched upon above, but will now be returned to in order to examine what such cases mean for the Norwegian-Dutch cooperation. The remainder of this section hence focuses on the ECtHR's case law.[196]

4.4.2.1 Identifying the relevant principles from the case law of the ECtHR

First, it should be reiterated that the Court has essentially distinguished between the *intra*-state geographical distribution of prisoners and requests for *inter*-state prison placements. In the latter cases, the Court has held that Article 8 ECHR does not provide a right to inmates to being transferred to a

194 See also ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 835.

195 See also ECommHR, *Wakefield v. the United Kingdom*, 1 October 1990, Application no. 15817/89.

196 The ECtHR's case law on this particular right is considered highly authoritative, to such an extent that the HRCee even looks to the ECtHR for guidance: Mrazik & Schoenholtz, 2010, p. 656.

prison facility in their home country in order to be close to their family members. In *Serce v. Romania,* in which the applicant claimed that his right to family life was breached now that the Romanian authorities had refused to transfer him to Turkey to serve his prison sentence close to his wife and children, the ECtHR thus pointed out that "the Convention does not grant prisoners the right to choose their place of detention and that separation and distance from their family are an inevitable consequence of their detention following the exercise by the Romanian State of its prerogatives in the area of criminal sanctions".[197] However, although confinement under the Norwegian-Dutch cooperation amounted to an inter-state transfer of prisoners, it did not concern rejected *requests* by prisoners for transfer to their home country. Rather, PI Norgerhaven functioned as an annex of Ullersmo prison and therefore operated as part of the Norwegian penal estate. Although technically transfers to PI Norgerhaven were of an inter-state nature, in a legal sense they closely resemble *intra*-state transfers. Therefore, not the case law on inter-state transfers, but the case law on intra-state transfers, should guide the analysis of accepted interferences with the right to family life in PI Norgerhaven.

However, close examination of the Court's case law on intra-state transfers reveals an ambiguous approach to the way in which interferences with the right to family life should be evaluated under Article 8 of the Convention. A starting point is the decision of the ECommHR in *Wakefield v. the United Kingdom*.[198] In this case, applicant complained that the refusal of the British authorities to transfer him from a prison facility in Yorkshire to Scotland in order to be near his fiancée violated his rights under Articles 3 and 8 of the Convention. In relation to the claim under Article 8 of the Convention, the Commission held, after establishing that the refusal indeed constituted an interference with applicant's rights under this provision, that in light of the serious nature of the offences for which applicants had been convicted and his high-risk classification, the restrictions furthered the legitimate aim of preventing disorder or crime. Furthermore, it considered that the authorities' proposal to transfer applicant temporarily to a prison in Scotland, under strict security conditions, in order to facilitate visits of applicants' fiancée was proportionate to the legitimate aim and that the interference was therefore justifiable as necessary in a democratic society. No violation of Article 8 ECHR was henceforth established.

More than two decades later, the ECtHR dealt with a similar issue in *Khodorkovskiy & Lebedev v. Russia*. In this case, applicants relied on Article 8 ECHR in complaining that they had been sent to very remote penal colonies – situated thousands of kilometers from their homes – to serve prison sentences which according to applicants "had seriously hindered their contacts with the outside

197 ECtHR, *Serce v. Romania,* para. 55. See similarly ECtHR, *Palfreeman v. Bulgaria,* para. 36; ECtHR, *Plepi v. Albania & Greece* (Admissibility Decision).

198 ECommHR, *Wakefield v. the United Kingdom*.

world, and, in particular, with their families and their lawyers".[199] The Court established that the geographical particularities affected applicants significantly, as they probably received fewer visits than they would have received had they been located closer to their home city of Moscow, and therefore found that the measure had interfered with applicants' rights under Article 8 of the Convention.[200] In subsequently examining whether the interference was justified, it first considered its lawfulness. The Court briefly reflected upon the legal basis for applicants' remote imprisonment, recalling that "the principle of subsidiarity dictates that the Court will not overrule interpretations of the domestic law given by the domestic courts, except in specific circumstances".[201] As an apparent consequence, it maintained that it is not necessary to review the findings of the Russian judiciary as to the lawfulness of the interference, and considered that it "is prepared to accept, for the purposes of the present case, that the interference with the applicants' family and private lives was compatible with the domestic legal provisions".[202] The Court consequently assessed whether the interference pursued a legitimate aim. According to the Court, the motivations of the government – protecting applicants against vengeful convicts or other persons, and avoiding overcrowding in Moscow-based prison facilities – appeared genuine and contributed to the legitimate aims of (i) preventing disorder and crime and (ii) securing the rights and freedoms of others.[203] In turn, the Court examined whether the interference was proportionate to the legitimate aims in order to be necessary in a democratic society. In relation to the legitimate aim of protecting applicants' own safety, the Court considered that both the risk of vengeance, and the assumption that the remote penal colonies were less dangerous, had not been substantiated by the Russian government, and that therefore the interference could not be justified on this ground.[204] In relation to the legitimate aim of preventing prison overcrowding, the Court questioned that there was no available prison capacity closer to Moscow than the penal colonies where applicants had been sent to.[205] In deciding whether their remote imprisonment was nevertheless proportionate to the aim of avoiding prison overcrowding, it ultimately balanced the interests of the state – taking into account difficulties in managing the prison system and the historical availability of penal colonies in remote and deserted areas – against the interests of applicants – considering their interests in maintaining at least some family and social ties, as well as the lack of a measure of legal protection against their potential arbitrary geographical distribution that they could resort

199 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 822.
200 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 838.
201 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 841.
202 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 842.
203 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, paras. 843-845.
204 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 846.
205 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 849.

to.[206] Whilst acknowledging that Russia should be granted a certain margin of appreciation, on the basis of this balancing exercise the Court found that the interference was not proportionate to the pursued aim and therefore violated Article 8 of the Convention.[207]

The Court took a similar approach in the case of *Vintman v. Ukraine*, in which applicant complained about the authorities' refusal to transfer him to a prison closer to home, even though his mother was unfit for long-distance travel.[208] The Court held that there was an interference with applicant's rights under Article 8 of the Convention, as the authorities' refusal denied him any personal contact with his mother.[209] In relation to the question whether the interference was in accordance with domestic law, the Court concluded that "[a]lthough the formalistic and restrictive approach followed by the authorities in their interpretation and application of the relevant legislation does raise questions […], the Court is prepared to accept that their decisions were based on sufficiently clear and foreseeable domestic legislation".[210] The Court subsequently found that the interference generally can be regarded as pursuing a legitimate aim, such as the prevention of prison overcrowding and the ensuring of adequate discipline in prison establishments.[211] The Court however concluded that the interference had not been proportionate to the pursued aims, as (i) the authorities had failed to provide details as to the prisons that had been considered for a potential transfer, (ii) no evidence was available that the authorities had in fact considered his transfer closer to his home region, (iii) applicant had been transferred even further away whilst serving his prison sentence, (iv) the authorities had not differentiated between applicants' requests for mitigation of his prison regime and his requests for transfers to prisons of the same security level closer to his home region, (v) the authorities had not disputed the physical inability of applicant's mother to visit him in the remote prison facility, and (vi) applicant's personal situation and his interests in maintaining family ties had never been assessed by the authorities.[212] It therefore found a violation of Article 8 ECHR. In the subsequent case of *Rodzevillo v. Ukraine,* the Court upheld this approach by reaching the same conclusion on more or less the same basis.[213]

In *Wakefield*, *Khodorkovskiy & Lebedev*, *Vintman*, and *Rodzevillo*, the Court's application of its three-pronged approach appears rather consistent. In the 2017 case of *Polyakova & Others v. Russia*, however, the Court seems to diverge significantly from this approach. In this case, applicants complained that their

206 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 850.
207 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, paras. 850-851.
208 ECtHR, *Vintman v. Ukraine*, para. 60.
209 ECtHR, *Vintman v. Ukraine*, paras. 82-83.
210 ECtHR, *Vintman v. Ukraine*, para. 92.
211 ECtHR, *Vintman v. Ukraine*, paras. 94-99.
212 ECtHR, *Vintman v. Ukraine*, paras. 100-104.
213 ECtHR, *Rodzevillo v. Ukraine*, paras. 84-87.

rights under Article 8 ECHR were violated given that their imprisonment in remote penal facilities, and their inability to obtain prison transfers, inhibited their families from visiting them.[214] In dealing with the question whether the interference was in accordance with domestic law, the Court did not rely on findings of the domestic courts as to the lawfulness of the interference (as it did in *Khodorkovskiy & Lebedev*), or on an assumption of lawfulness based on a marginal reading of the domestic provision (as it did in *Vintman*),[215] but seemingly intensified scrutiny and even expanded the appropriate test. Thus, the Court outlined that it "reiterated" that the condition of 'in accordance with the law' "requires the impugned measure both to have some basis in domestic law *and to be compatible with the rule of law*, which is expressly mentioned in the Preamble to the Convention and is inherent in the object and purpose of Article 8 of the Convention".[216] According to the Court, in cases concerning the geographical allocation of prisoners, what is required of domestic law is consequently

> "not that it defines a yardstick to measure the distance between a prisoner's home and a penal facility or exhaustively lists grounds for derogation from the applicable general rules, but rather that it provides for adequate arrangements for an assessment by the executive authority of that prisoner's and his or her relatives' individual situation, having due regard to various factors affecting the practical possibility of visiting a prisoner in a particular facility."[217]

In casu, the Court concluded that the interference was not 'in accordance with the law' and therefore violated Article 8 ECHR.[218] It based such conclusion on three findings in particular: Russia's relevant domestic law (i) contained no requirement that obliged the Russian Federal Penal Authority to consider the implications of the geographical location of a penal facility on the right to family life of prisoners and their families, (ii) provided no realistic opportunity to transfer prisoners to other penal establishments on grounds pertaining to Article 8 rights, and (iii) do not enable prisoners to obtain judicial review of the Federal Penal Authority's decisions as to their geographical placement.[219] Since domestic law therefore did not satisfy the 'quality of law' requirement,

> "the Russian domestic legal system did not afford adequate legal protection against possible abuses in the field of geographical distribution of prisoners. The applicants

214 ECtHR, *Polyakova & Others v. Russia,* para. 61.
215 And *mutatis mutandis* in *Rodzevillo:* see ECtHR, *Rodzevillo v. Ukraine,* para. 84.
216 ECtHR, *Polyakova & Others v. Russia,* para. 91 (emphasis added).
217 ECtHR, *Polyakova & Others v. Russia,* para. 92.
218 ECtHR, *Polyakova & Others v. Russia,* paras. 118-119.
219 ECtHR, *Polyakova & Others v. Russia,* para. 118.

> were deprived of the minimum degree of protection to which they were entitled under the rule of law in a democratic society".[220]

Having found a violation, the Court did not consider it necessary to examine the other requirements of Article 8(2) of the Convention.

The Court hence focussed on scrutinising domestic legislation, looking not only at whether a basis exists, but also at whether such basis is of sufficient quality. This is a clear adjustment to its previous approach: in *Khodorkovskiy & Lebedev,* it for instance explicitly relied on mere residual control.[221] In *Vintman* (and, *mutatis mutandis*, in *Rodzevillo*) it acknowledged that the quality of law is part of the analysis of 'lawfulness', but nevertheless assumed that the interference had been lawful.[222] It continued to rely on this assumption even though significant contra-indications as to the quality of the law existed in that case.[223] In *Polyakova,* on the other hand, the Court engages in a full-fledged analysis of the quality of domestic law, including its compliance to the rule of law. As a result, whereas in *Khodorkovskiy & Lebedev* the fact that applicant could not obtain judicial review of the relevant authorities' decision was seen an indicator that the interference had not been proportionate to the legitimate aim pursued, in *Polyakova* it was dealt with as an indicator that the interference was not in accordance with domestic law in the first place.

Accordingly, the case law of the Court has not excelled in terms of clarity. One could wonder, however, why this would be a matter of concern: one way or the other, the fact that domestic law does not afford adequate legal protection against possible abuses arising from the geographical distribution of prisoners will generally mean that an interference with Article 8 ECHR is not justified, whether it be because such interference is unlawful, or because it is not proportionate to the aim pursued. However, it should be emphasised that the Court applies different tests to establish both consecutive conditions: whereas the requirement that the interference should be 'in accordance with the law' is substantiated with a number of objective criteria, for example accessibility and foreseeability, that are conditions *sine qua non* for its fulfilment, the requirement that the interference should be proportionate to the legitimate aim pursued is examined on the basis of a balancing exercise as explained above. Therefore, whereas in *Polyakova* the availability of adequate legal protection against possible abuses was considered a condition *sine qua non* for lawfulness, in *Khodorkovskiy & Lebedev* it was one of many interests that were weighed in a balancing act. The approach in *Polyakova* thus seems

220 ECtHR, *Polyakova & Others v. Russia,* para. 118.
221 ECtHR, *Khodorkovskiy and Lebedev v. Russia,* para. 841.
222 ECtHR, *Vintman v. Ukraine*, paras. 84-93. See also ECtHR, *Rodzevillo v. Ukraine,* para. 84.
223 For instance, domestic law lacked any statutory ground for accepting a request for a prison transfer to a facility closer to home, which in turn was used by the authorities in maintaining a formalistic and restrictive approach to the domestic legal framework: see ECtHR, *Vintman v. Ukraine*, paras. 84-93.

to provide more extensive protection under Article 8 of the Convention, with the Court assuming a more central role in assessing the quality of domestic legal frameworks.

This ambiguous approach cannot readily be explained on the basis of legal doctrine: although the Convention is a 'living instrument' and the margin of appreciation accorded to states may change over time, when the Court issued its judgment in *Polyakova* in March 2017, hardly four years had passed since the Court's previous reliance on a 'residual' approach in *Khodorkovskiy & Lebedev*. It consequently remains to be seen to what extent the Court will maintain its new course, or whether it will revert back to a more residual approach vis-à-vis the lawfulness test. In this regard it is interesting to note that in two recent cases, both against Russia, the Court heavily relies on *Polyakova* in concluding that the interference with applicants' rights to family life were not 'in accordance with the law' within the meaning of Article 8(2) ECHR.[224] This seems to imply that the newer approach prevails, although it remains to be seen how the test is applied in cases involving other respondents. Whatever the case may be, until settled, such ambiguity should be taken into account when interpreting the application of the principles to the case study of PI Norgerhaven.

4.4.2.2 Applying the principles to PI Norgerhaven

In light of the ECtHR's case law, it *a priori* seems uncontested that the imprisonment of Norwegian prisoners in the Netherlands generally amounts to an interference with their right to family life ex Article 8 ECHR. This was addressed above: the significant physical and practical distances that are created by confining Norwegian inmates in the Dutch town of Veenhuizen impedes upon the family life of those imprisoned, as well as on that of their families, as it likely hampers relatives' opportunities to visit.[225]

As chapter 3 has outlined, however, a 'collateral consequence' of the nodal arrangements in place is that a large majority of those that were confined in PI Norgerhaven – about 80% – did not hold the Norwegian nationality.[226] In particular in relation to this population of FNPs, cases may arise where

224 ECtHR, *Abdulkadyrov & Dakhtayev v. Russia,* 10 July 2018, Application no. 35061/04, paras. 90-97; ECtHR, *Voynoy v. Russia,* 3 July 2018, Application no. 39747/10, paras. 49-52. As the Court explicitly notes, "the national authorities' approach to the interpretation of domestic law in this field has not evolved since the delivery of the *Polyakova and Others* judgment": ECtHR, *Voynoy v. Russia*, para. 51.

225 See similarly ECtHR, *Vintman v. Ukraine,* para. 79; ECtHR, *Khodorkovskiy and Lebedev v. Russia,* para. 838.

226 Barske, 2016; Brosens et al., 2019, p. 9; Hotse Smit, 2016; Johnsen et al., 2017, p. 4; Pakes & Holt, 2015.

prisoners do not enjoy *de facto* family life in Norway in the first place.[227] Consequently, it is not *a priori* clear that confinement in PI Norgerhaven constitutes an interference with the right to family life under Article 8 of the Convention, at least not on an individual level: where no such family life exists in Norway, imprisonment on Norwegian soil close to the (former) place of residence of convicts has no added value from the perspective of Article 8 ECHR.[228] In fact, as chapter 3 addressed, relocation to the Netherlands comes with a number of benefits for transferred prisoners, such as more extensive opportunities to phone or Skype call their family members.[229] In relation to prisoners with no family ties in Norway, this appears an important contra-indication for establishing an interference with the right to family life. Conversely, in such cases, imprisonment in PI Norgerhaven does not "go beyond 'normal' hardships and restrictions inherent to the very concept of imprisonment" in the context of Article 8 ECHR.[230] It is therefore vitally important to consider individual cases on the basis of their own merits: only where a prisoner enjoys *de facto* family life in Norway, transfer will likely amount to an interference with Article 8 ECHR. At the same time, it should be noted that the large amount of FNPs in PI Norgerhaven does not mean that such prisoners generally enjoy no family life in Norway, and that the problematic aspects of offshore imprisonment as an interference with the right to family life should therefore not be marginalised. In what follows, analysis will focus on those prisoners with sufficient *de facto* family ties in Norway.

The first question that arises is whether the interference with prisoners' right to family life is lawful. The transfer of prisoners to PI Norgerhaven is regulated in the Execution of Sentences Act *('Straffegnennomføringsloven')* and the Guidelines for conducting criminal proceedings in the Netherlands *('Retningslinjer for straffegjennomføring i Nederland'*, hereinafter: 'the Norwegian Guidelines'). Section 1a of the Execution of Sentences Act allows the Norwegian Correctional Service to execute prison sentences in other countries with which Norway has entered into an agreement. This provision is temporary and will be repealed on 1 September 2020. Section 14 of the Act outlines a number of situations in which the Correctional Service can transfer prisoners to another prison facility. One of these situations, and the one relied upon by the Norwegian authorities in transferring individuals to PI Norgerhaven, is where – as listed under (e) in Section 14 – building or manning conditions or shortages of prison capacity necessitate a transfer. Transfers to PI Norgerhaven are therefore in accordance with domestic law.

---

227 As the Court has detailed, the existence of 'family life' is based on an assessment of the *real* existence, in practice, of close personal ties: ECtHR, *Paradiso and Campanelli v. Italy* (Grand Chamber), 24 January 2017, Application no. 25358/12, para. 140.

228 ECtHR, *Khodorkovskiy and Lebedev v. Russia,* para. 836.

229 Hotse Smit, 2016.

230 ECtHR, *Khodorkovskiy and Lebedev v. Russia,* para. 837.

However, as the Court has noted in *Vintman* and *Polyakova,* for the condition of lawfulness to be fulfilled, interferences should not only be allowed for in domestic law, but such domestic law should also meet the conditions of the *quality* of law.[231] Similar to the Court's assessment in *Polyakova,* in the present case the most pressing requirement in this regard is that the domestic law should provide for "adequate arrangements for an assessment by the executive authority of that prisoner's and his or her relatives' individual situation, having due regard to various factors affecting the practical possibility of visiting a prisoner in a particular facility."[232] In casu, specific safeguards have been entrenched in the Norwegian Guidelines. As Section 2.4. outlines, when the Correctional Service decides on the transfer of prisoners, it has to take into account *inter alia* the prisoner's health conditions and, importantly, his family situation.[233] Specifically, Section 2.4. under (g) provides that a convicted person who receives, or is to receive, regular visits from his *children* that he normally lives with or has contact with cannot be transferred to PI Norgerhaven, unless such transfer does not entail a greater restriction on the child's right to cohabitation, or unless the prisoner himself consents.[234] Section 2.12. of the Norwegian Guidelines add that transferred prisoners who are to receive visits from their children are to be transferred to Norway whenever the execution of their criminal sentence in the Netherlands inhibits such visits. In this sense, decision-making incorporates concern for the right to family life, with a particular focus on the rights of the child. In addition, where transfers are non-voluntary, Section 3.4. of the Norwegian Guidelines provide that advanced notice of the decision to transfer has to be provided to the convicted person, who must be given a reasonable period of time to submit a comment. There are, furthermore, opportunities to lodge complaints in relation to transfer decisions.[235]

Hence, Norway's domestic legal system obliges the Correctional Service to consider the implications of the relocation to PI Norgerhaven on the right to family life of prisoners and their relatives. Domestic law moreover provides particular safeguards against transfers when the relationship between prisoners and their children is at stake. Furthermore, there are realistic opportunities

231 ECtHR, *Polyakova & Others v. Russia,* para. 91; ECtHR, *Vintman v. Ukraine*, paras. 84-93. See also ECtHR, *Rodzevillo v. Ukraine,* para. 84.

232 ECtHR, *Polyakova & Others v. Russia,* para. 92.

233 As the provision reads, *"[b]eslutningen tas av kriminalomsorgen etter en individuell helhetsvurdering der blant annet domfeltes helsesituasjon, familiesituasjon og det straffbare forholdets art må tas i betraktning"*.

234 *"Følgende domfelte kan ikke overføres: […] domfelte som mottar eller skal motta regelmessig besøk av egne barn de ellers bor fast sammen med eller har samvær med, med mindre overføring uansett ikke medfører en større begrensning i barnets rett til samvær enn den besøksordningen eller samværsordningen som er eller blir etablert […]. Dersom domfelte samtykker, kan overføring gjennomføres selv om han faller inn under bokstav g og h"*.

235 See https://www.regjeringen.no/no/aktuelt/kriminalomsorgen-bestemmer-hvor-fanger-skal-sone/id2429407/ (last accessed 25 February 2019).

to transfer prisoners to penal establishments in Norway when required on grounds pertaining to prisoners' rights under Article 8 ECHR, for example in order to facilitate visits of their children under Section 2.12. of the Norwegian Guidelines. Prisoners can moreover lodge a complaint in relation to the Correctional Service's decision to transfer them to PI Norgerhaven, with the same complaint mechanisms as applicable to intra-state transfers being available. As such, considered together, the safeguards implemented in the Norwegian legal framework seem to fulfil the quality threshold incapsulated in the requirement of lawfulness.[236] It therefore can be concluded that the interference with Article 8 ECHR fulfils the first requirement of being 'in accordance with the law'.

The subsequent question is whether such interference serves a legitimate aim. As outlined above, the main aim of transfers is to offset the lack of prison capacity within Norway and to prevent the creation of a significant backlog.[237] The ECtHR has previously decided that preventing prison overcrowding is a legitimate aim under Article 8(2) of the Convention, and it can therefore readily be established that transfers to PI Norgerhaven generally serve a legitimate aim.[238]

Finally, the interference has to be proportionate to the legitimate aim in order to be necessary in a democratic society. As was also clarified by the Norwegian Borgarting Court of Appeal in relation to a case concerning a forced transfer to PI Norgerhaven, the decision to relocate a prisoner involuntary to PI Norgerhaven does not *in itself* constitute a breach of the right to private and family life under the ECHR.[239] Rather, all relevant factors should be taken into account in a balancing exercise establishing the proportionality of the interference. It should be reiterated in this regard that the importance of family life is taken into account when transfer decisions are made; that the prison regime in PI Norgerhaven provides more extensive allowances to phone or Skype call family members, with the facility even having a special Skype room; and that particular arrangements for a temporary re-transfer to a facility in Norway are in place for visits of prisoners' children. Furthermore, it has been reported that inmates generally felt that PI Norgerhaven made good arrangements for their visitors.[240] Some, notably the Dutch government, have in addition argued that whilst the distance between Norway and the Netherlands is significant, the size of Norway would render imprisonment in Northern Norway as remote for a prisoner from Oslo as would his imprisonment in

236 Compare ECtHR, *Polyakova & Others v. Russia,* para. 118.
237 See also Struyker Boudier & Verrest, 2015, pp. 909–910.
238 ECtHR, *Khodorkovskiy and Lebedev v. Russia,* para. 845; ECtHR, *Vintman v. Ukraine,* para. 99; ECtHR, *Rodzevillo v. Ukraine,* para. 84.
239 Sivilombudsmannen, 2016, pp. 10–11.
240 Sivilombudsmannen, 2016, pp. 36–37.

the Netherlands.[241] However, such argument is irrelevant in the context of the proportionality test under Article 8 of the ECHR: intra-state imprisonment in remote areas of Norway could *also* be a disproportionate interference with the right to family life, and in any event such possibility is not an indicator for the proportionality of transfers to PI Norgerhaven.

On the other hand, as the Norwegian Ombudsman has emphasised, PI Norgerhaven continues to raise a number of concerns in light of the right to family life.[242] For instance, visitors must cover their own travel and accommodation expenses, which can be rather expensive. Furthermore, based on interviews and statistics, the Ombudsman points out that very little inmates in PI Norgerhaven received visits from family or friends, much less than if they had served their sentences in Norway. According to many prisoners, this was due to the fact that it was too far, too costly, and too much time-consuming for their relatives to travel to Veenhuizen. This, according to the Ombudsman, is problematic not only in light of the intrinsic importance of family life, but also in light of rehabilitation goals as well as in light of the disproportionate impact of these measures on low-income families.[243]

Whether or not the arrangements in place amount to a proportionate interference depends on a weighing of these factors. On the one hand, significant efforts have been made to alleviate, as much as possible, the interference with the enjoyment of family life. On the other hand, it remains questionable whether the significant barriers to family life can be justified in light of the aim pursued. As previously pointed out, the weighing of interests should always take *individuals*, rather than collectivities, into account. It is therefore not possible to provide, in the abstract, a conclusive assessment of the proportionality of the use of PI Norgerhaven as an interference with the right to family life of prisoners with family ties in Norway: the aforementioned conditions could be weighed differently in light of different personal circumstances, including differences in the availability of financial resources.

4.5 Conclusion

Chapter 3 introduced that certain groups of confined individuals find themselves increasingly subjected to measures that aim at depleting their rights in the interest of carving out novel boundaries of belonging. Taking this as its starting point, the present chapter has examined how international human rights law has been able to resiliently accommodate these challenges whilst

241 As Dutch then-Minister for Migration stated, "they are used to distances": see, for the relevant debate in Dutch Parliament, *Handelingen II*, 2014-2015, 91, item 8, p. 5 (translated from Dutch).

242 Sivilombudsmannen, 2016, pp. 36–37.

243 Sivilombudsmannen, 2016, p. 36.

simultaneously staying veracious to its fundamental tenet of equal protection. As outlined, such exercise is crucial for the preservation of legitimacy, yet at the same time renders the development of international human rights law a delicate project.

This chapter has analysed how international human rights law has attempted to stay veracious to its fundamental tenet of equal protection whilst taking a sufficiently resilient approach vis-à-vis crimmigration developments. On the one hand, since international human rights law continues to be premised on the moral assumption that equal protection to all should be guaranteed, certain absolute norms of international human rights law have been identified that cannot be interfered with under any circumstances.[244] On the other hand, international human rights law has, practically since its inception, acknowledged that other, non-absolute rights *can* at times be limited. This approach has been duly inspired by international human rights law's legal dimension, being geared towards enforceable subjective rights that provide specific protection. This chapter has examined interferences with a number of such non-absolute rights in settings of confinement, including rights that are limited due to the nature of detention (the right to liberty, the prohibition of forced or compulsory labour, and the right to family life), and rights that are limited due to the depleted membership status of individuals (the right to vote). As has been shown, each of these rights can legitimately be interfered with by states in settings of confinement, although such interferences have been subjected to specific conditions. Some of these conditions were explicitly instilled in international human rights law at the drafting stage, whereas others have, over the years, been clarified and expanded by the relevant monitoring bodies. Still, the conditions that have been developed generally reflect that interferences with non-absolute human rights ought to remain exceptions, and ought to remain restricted as much as possible, and it can therefore be concluded that international human rights law has, throughout its resilient efforts, attempted to remain veracious to its fundamental tenet of equal protection.

From the perspective of crimmigration, this approach nevertheless raises a number of issues. For instance, as was already pointed out in relation to interferences with the right to liberty, problems could arise where states increasingly enlarge the group of confinable people whilst providing for their confinement in domestic law and preventing arbitrariness. It is, indeed, precisely *through* crimmigration legislation – e.g. the criminalisation of migration-related offences, or the importation of criminal convictions as grounds for deportation – that states may increasingly, both lawfully and non-arbitrary, start to rely on confinement mechanisms. This in turn also means that they may increasingly subject individuals to penal labour and detainee labour that

244 As previously noted, however, such absolute nature is subject to debate: Graffin, 2017; Greer, 2011, 2018; Mavronicola, 2017.

are, as a matter of definition, not included under the prohibition of forced or compulsory labour. As argued above, likewise, in the context of interferences with prisoners' voting rights, the requirements that international human rights law imposes seem *a priori* insufficient to prevent states from furthering crimmigration measures through effective disenfranchisement. Under the right to family life, on the other hand, interferences have been subjected to significant thresholds that require states to implement legal safeguards, provide objectifiable aims, and to operate proportionally to such aims. With regard to this right, arguably, international human rights law has thus struck a more adequate balance in the face of crimmigration developments.

Examining international human rights law's veracity and resilience in the face of crimmigration developments consequently leads to a mixed picture. To some extent international human rights law has remained veracious to its fundamental tenet whilst resiliently accounting for crimmigration measures, yet at times it seems that, in relation to particular rights, it has not been able to structurally secure equal protection for all. This image also arises when taking the case study contexts into account. In relation to RPC Nauru, on the one hand international human rights law has been successful in granting entitlements by subjecting interferences with the right to liberty to strict conditions: according to the strict conditions in place, the detention of those confined prior to the introduction of open centre arrangements amounted to an arbitrary and unjustified form of detention. On the other hand, however, such successes should be critically acclaimed for at least two reasons. First, as this chapter has indicated, after open centre arrangements were introduced, the right to liberty was arguably no longer interfered with, even though the *de facto* situation of those that were previously confined did not change significantly. Whilst they were free to leave the RPC at all times, they were still confined to the small territory of Nauru and continued to reside within the facility, a situation that international human rights law could however not effectively deal with under the provisions guaranteeing the right to liberty. Second, as will be further addressed in Part III of this book, whilst according to international human rights law confinement in RPC Nauru prior to the introduction of open centre arrangements was arbitrary and therefore not justified, *in practice*, Nauru and Australia continued such confinement practices unabatedly given the lack of answerability and enforcement.

In the context of PI Norgerhaven, Article 8 of the ECHR seemingly allows that Norway transferred prisoners to the Netherlands in order to prevent issues of prison overcrowding, as long as the transfers – interfering with the right to family life – are proportionate to such aim. However, as pointed out in this chapter, for the right to family life to come into play in the first place, the existence of family life in Norway is required. Where prisoners, including notably FNPs, lack such family ties in Norway, they are not protected by the right to family life, even though they may have other social or support networks in Norway. Their right to receive visits from such support groups is

not protected by the right to family life, and such prisoners can therefore not rely upon it to challenge their transfer.[245] Whilst this technically means that such prisoners are equally protected – they have an equal claim to family life – in practice it may nevertheless lead to a disparity, as it justifies that certain groups of out-grouped prisoners are transferred to prison facilities far away from the polity in which they were sentenced.

These localised examples show how the global framework of international human rights law is, as a protection mechanism, only to a limited extent able to effectively account for crimmigration developments. Particularly at the glocal level, such tensions between international human rights law's framework as based on both veracity and resilience on the one hand, and state practices in particular confinement contexts on the other hand, surface. Taking into account that the way in which veracity and resilience have been incorporated in a unique sense in relation to each human rights provision, and taking into account the hybridity and heterogeneity of contemporary crimmigration developments, such tension is likely to be only amplified when more rights, or more contexts, are included in the analytical scope. As such, the challenge to international human rights law's legitimacy as posed by crimmigration appears to continue unabatedly and has, in any event, not yet been adequately or holistically accounted for.

245 An argument could be developed that the right to receive visits from others than family members is protected by the right to respect for *private* life as likewise enshrined in Article 8 ECHR. As the ECtHR states, "it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings": ECtHR, *Niemietz v. Germany*, 16 December 1992, Application no. 13710/88, para 29. However, the ECtHR has not had the opportunity to elucidate whether opportunities for prisoners to receive visits from others than family members also fall within the ambit of this provision. So far, it has predominantly dissected the right to respect for private life into rights relating to privacy, surnames, sexual lifestyle, clothing, medical treatment, sexual integrity, and physical integrity: see also Gómez-Arostegui, 2005; Roagna, 2012. As such, the right to respect for private life primarily protects physical, psychological, and moral integrity, as well as the freedom to express one's personality: see also De Hert, 2005, pp. 180–184. A right to receive visits has, accordingly, not (yet) developed under this standard and consequently only comes into play where *family* life is concerned.