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Detection, detention, deportation : criminal justice and migration control through the lens of crimmigration

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7.1 INTRODUCTION

In recent years many Western states have made what has been referred to as a 'deportation turn' (Gibney, 2008). As return of unauthorised migrants to their country of origin is increasingly seen as a crucial part of migration policy, many governments have strengthened their return enforcement (Rosenberger & Koppes, 2018). Besides rejected asylum seekers and unauthorised migrants, criminally convicted non-citizens (CCNCs)² are an important group targeted for return. Yet enforcing returns is often complicated, resulting in what is termed a deportation gap: a difference between the number of migrants targeted for return and those who actually leave the territory of the host country (Gibney, 2008). There are several reasons for this gap, which has been observed for decades: uncooperative countries of origin, concerns about the safety of migrants upon return, or difficulties with establishing a migrant's identity and nationality (Broeders & Engbersen, 2007). Migrants can also decide to resist their own return. In the absence of valid identity and travel documents, migrants who do not wish to return can try to obstruct their own deportation, by refusing to give up their identity and nationality or providing false information. As a result, many states are struggling with the existence of a group of so-called 'undepotable deportable migrants' (Leerkes & Broeders, 2010) or 'undesirable but unreturnable migrants' (Cantor, Van Wijk, Singer, & Bolhuis, 2017).

States have employed a range of tactics to increase the effectiveness of their return policies, ranging from trying to become more effective in their own organisational chain and making deals with countries of origin to policies aimed at increasing cooperation with return among unauthorised migrants (Rosenberger & Koppes, 2018). Regarding the latter, a range of policies have been adopted aimed at stimulating non-citizens to agree with their return

1 Under review for publication in *Migration Studies*, as: J. Brouwer. Can I stay or should I go? The deportation of criminally convicted non-citizens in the Netherlands.

2 In this paper, criminally convicted non-citizen (CCNC) refers to a non-citizen with a criminal conviction and without legal stay in the host country. This can be because he/she had no legal stay to begin with or because his/her legal stay was revoked as a consequence of his/her criminal conviction. It does not include legally staying foreigners with a criminal conviction.

decision and leave the country where they are staying, preferably without the use of force (Cleton & Chauvin, 2019). As Walters (2016, p. 438) suggests, the aim “is to provide a sufficient level of material inducement such that the migrant places themselves on the plane, without the need for guards, restraints or any spectacle of enforcement.” Leerkes, Van Os & Boersema (2017, p. 8) refer to this as ‘soft deportation’ to acknowledge

“that such return has deportation-like properties, while acknowledging that it depends less on force and deterrence, and more on perceived legitimacy and – should the return be ‘assisted’ – on payments.”

States try to achieve soft deportation through both carrots, such as financial and reintegration assistance, and sticks, such as the threat of detention or policies aimed at making life in the host country as complicated as possible (Brouwer, 2018).

The incentives used to achieve cooperation with return can come from a variety of policy domains. For CCNCs, elements from the criminal justice system are increasingly employed to realise deportation. Such developments fit within the larger trend of crimmigration, a term used to refer to the merging of the previously largely separate systems of crime control and migration control (Stumpf, 2006; Van der Woude, Van der Leun, & Nijland, 2014). Not only have migratory acts increasingly been criminalised, the criminal justice system has also adopted practices and aims that are traditionally within the domain of migration control (Aas, 2014). In the area of punishment and deportation, two developments stand out: criminal convictions lead more easily to migration consequences, while criminal punishment is increasingly designed to result in deportation. The latter can be seen in the creation of special prisons and the adoption of specific release policies for CCNCs (Kaufman, 2014; Turnbull & Hasselberg, 2017; Ugelvik & Damsa, 2018).

To date very few studies have been conducted on the legal and social situation of criminal deportees in Europe (Cantor et al., 2017). And although there is a growing body of research on the determinants of return of a wide range of different migrant groups, empirical research into the experiences of CCNCs and how these experiences relate to return intentions is still limited. Yet, as Bosworth (2012, p. 127) argues, “first-hand accounts from detainees can flesh out the burden of living without citizenship while appreciating how these individuals try to assert alternative, identity-based claims.” This article therefore aims to start filling this gap, by means of a case study of the Netherlands. In recent years, the country has not only repeatedly restricted its policy on deportations following a criminal conviction, but also introduced a variety of policies aimed at increasing the return rate of CCNCs. It has created a dedicated prison for CCNCs, embedded with so-called departure supervisors of the Repatriation and Departure Service (DT&V), the central government agency responsible for organising the return of unauthorised migrants. Despite these

significant developments, empirical research on CCNCs in the Netherlands is non-existent (Bolhuis, Battjes, & van Wijk, 2017).

Drawing on extensive empirical research, this article seeks to provide insight into what policies aimed at the deportation of CCNCs look like, how they are implemented by departure supervisors, and what role they play in CCNCs' intentions and decisions regarding return. The first paragraph below discusses the Dutch criminal deportation regime, highlighting how over the last decade an increasing number of migrants have become subjected to criminal deportation and how the state is trying to achieve deportation. This is followed by a discussion of the available literature on return migration, including the various factors influencing return decisions. After a brief methodological paragraph, the empirical section of this paper examines how departure supervisors try to achieve return of CCNCs, how this is understood and experienced by CCNCs, and to what extent this affects their willingness to cooperate with return. The article finishes with a conclusion and a discussion of the effectiveness of increasingly restrictive policies dealing with CCNCs.

7.2 THE DUTCH CRIMINAL DEPORTATION REGIME

There are two elements to the Dutch criminal deportation regime: 1) the decision to revoke someone's right to stay following a criminal conviction, and 2) the policies aimed at effectuating return. Both elements underwent significant changes in recent years.

7.2.1 Losing your residence permit following a criminal conviction

In the Netherlands, whether a criminal conviction results in withdrawal of a residence permit is decided on the basis of a sliding scale policy that takes into account the seriousness of the offense and the duration of legal residence. The sliding scale is thus a balancing act between the interests of society and those of individual CCNCs. The basic presumption of this policy is that the longer someone lives in the Netherlands, the more serious the offense needs to be to terminate his/her legal stay. This stems from the idea that over time immigrants build up considerable social ties in their new country and deportation should therefore gradually warrant more serious criminal conduct (Stronks, 2013). In recent years the policy has repeatedly been restricted, most notably in 2002, 2010, and 2012 (Stronks, 2013; Van der Woude et al., 2014). The sliding scale policy has also become considerably more complicated, with separate scales for serious crimes and repeat offenders.

Until 2002, legally staying migrants living in the Netherlands for less than three years could lose their residence permit following a conviction for an offense punishable by nine months of imprisonment. Following the changes

in 2012, this threshold has been lowered to one day of imprisonment.³ And whereas previously anyone staying legally in the Netherlands for twenty years or more could no longer be deported, this is no longer the case, as the end term of the scale has been removed. After fifteen years of legal residence, non-citizens can lose their residence permit following repeated convictions or following a conviction to 65 months of imprisonment for a violent, sexual or drug offence.⁴ This means that offenders who came to the Netherlands at a young age and never obtained Dutch citizenship, remain eligible for deportation later in life (Stronks, 2013). Denizens – lawful permanent residents who for whatever reason do not obtain legal citizenship (Golash-Boza, 2016) – are thus “eternal guests” (Kanstroom, 2000, p. 1907) with an interminable form of “probationary membership” (Stumpf, 2006, p. 401). These restrictions have been motivated by a clear crime control rationale. In a 2009 letter informing parliament about the second round of proposed restrictions, the Minister of Justice wrote:

“Reducing crime and improving security in the Netherlands are important objectives of the government. In this letter, the government presents its vision on the migration law-based public order policy. (...) This vision is linked to the measure taken by the government to contribute to fighting crime among foreign nationals in the Netherlands.”⁵

These repeated restrictions have not been without effect. An impact evaluation study in 2012 estimated that the percentage of foreigners with a criminal conviction falling within the scope of the sliding scale policy increased from 6.9% in 2009 to 35.1% in 2012, although this was partly driven by a growing number of foreigners convicted for serious crimes. The number of terminations of lawful residence are estimated to have increased from 69 in 2002 to 475 in 2012. This is an increase from 0.6% of the total population of foreigners with a criminal conviction to 3.4% of this population and includes a significant increase in the number of long-term legal residents. The increase is to a certain extent limited by the need for the state, arising from European human rights law and provisions, to prove in each individual case that the revocation is proportionate, balancing the interests of society with personal consequences for the concerned individual. This includes assessing the cultural and social

3 April 17, 2012, Official Gazette of the Kingdom of the Netherlands, no. 158.

4 Following Article 3.86 Alien Decree 2000, there are various reasons to withdraw the residence permit of a foreigner legally residing in the Netherlands for more than fifteen years. The first option is a conviction for at least 65 months for a violent, sexual or drug offense. The second option is a combined total of fourteen months if imprisonment for a repeat offender who committed at least three criminal offenses. The third option is 48 months of imprisonment for an offense qualified as ‘serious crime’. This can be either drug trafficking or a serious violent or sexual offense.

5 Parliamentary Documents II 2009/2010, 19637, no. 1306.

connection with the Netherlands and the right to respect for private and family life (Berdowski & Vennekens, 2014).

Besides deportation, CCNCs are issued an entry ban for the entire EU/EEA and Switzerland for a period of five, ten, or twenty years.⁶ Individuals who cannot be issued such an entry ban – in most cases because they are EU-citizens – are pronounced ‘undesirable alien’ and barred from entering the Netherlands for a period of time, usually five or ten years.⁷ Whereas illegal stay in the Netherlands itself is not a criminal offense, article 197 of the Dutch criminal code does criminalise staying in the Netherlands after having been issued an entry ban or being pronounced an undesirable alien. This act is punishable with six months of imprisonment, but punishment can only be imposed when all return procedures have failed. In other words, deportation takes primacy over punishment. This highlights the instrumental nature of such crimmigration laws and policies (cf. Sklansky, 2012).

7.2.2 Ensuring the deportation of criminally convicted non-citizens

As CCNCs constitute a priority group in the Dutch return policy, the government puts in considerable efforts to ensure they are deported. To that end, a specialised department has been created within the DT&V that deals with CCNCs. Moreover, through the adoption of the so-called VRIS-protocol,⁸ better cooperation has been established between the various agencies of the criminal justice system and migration control system, such as the Alien Police, the Immigration and Naturalisation Service (IND), the Custodial Institutions Agency (DJI) and DT&V. The main aim of this protocol is to more effectively detect criminal non-citizens and make sure they are deported immediately after they have served their criminal sentence.

One outcome of the VRIS-protocol has been the creation of a prison that exclusively holds CCNCs, also referred to as a ‘crimmigration prison’ (Ugelvik & Damsa, 2018). This prison is located in the small village of Ter Apel, in the somewhat remote northeast of the country (Di Molfetta & Brouwer, 2019). Ter Apel is primarily known for housing the country’s central asylum reception centre. The prison is located on the same terrain as this reception centre, making Ter Apel not only a symbolic point of entry for asylum seekers, but also a symbolic point of exit for former asylum seekers and other foreigners who have been convicted of a criminal offense and lost their right to stay in the Netherlands. The prison’s regime is specifically focussed on encouraging CCNCs to return to their country of origin. To that end, departure supervisors

6 Article 66A Alien Act 2000. This is the Dutch implementation of the 2008 EU Return Directive.

7 Article 67 Alien Act 2000.

8 VRIS stands for Alien in the Criminal Justice Chain (Vreemdeling in de Strafrechtsketen).

have their offices located inside the prison. Their aim is to organise the return of CCNCs, preferably directly upon completion of their prison sentence and without the use of force. To that end, they enjoy considerable discretionary freedom in dealing with CCNCs (Cleton & Chauvin, 2019). Departure supervisors do not have any decision-making power, as the decision to revoke someone's right to stay is made by the IND.

To stimulate CCNCs to cooperate with their own return, a new release policy was introduced in 2012. Since then, CCNCs are excluded from the regular procedures dealing with early release from prison. Instead, a separate system was introduced called 'sentence suspension' – *strafonderbreking*, or SOB in Dutch. Under this policy, CCNCs can be granted early release *only* when they agree to leave the Netherlands directly from prison. Moreover, if they subsequently return to the Netherlands, they will need to serve the remainder of their sentence. The government has repeatedly stated that the measure is aimed at increasing CCNCs' willingness to leave the Netherlands and to stimulate them to cooperate with their own identification and return.⁹ Both the criminal migration prison and the SOB-measure are key examples of how the criminal justice system is increasingly being employed to achieve aims in the field of migration control.

7.3 THEORETICAL BACKGROUND

In recent years there has been a growing body of literature dealing with return migration, including research specifically focussing on return decisions (Brouwer, 2018; Koser & Kuschminder, 2015; Leerkes et al., 2017). Most of this research conceptualises return migration, like initial migration decisions, as the result of a combination of the aspiration and ability to return (Carling & Schewel, 2018). As Schewel (2019, p. 7) argues, "the aspiration-capability framework holds promise because it provides the conceptual tools to analyse processes that lead to both mobility and immobility outcomes." In this context, aspiration refers to the willingness of a migrant to return to his/her country of origin, while ability refers to the possibility to actually do so (Carling & Schewel, 2018). However, for migrants facing forced return, the conceptualisation of ability changes. As the host state intends to return them against their will if they do not leave the country on their own, it refers to the ability of the host state to return a migrant to his/her country of origin and not to a migrant's individual ability to move to another place.

Both aspiration and ability are the result of an interaction between individual characteristics and perceptions, and macro-level social, economic, cultural, and political factors (Brouwer, 2018; Schewel, 2019). When it comes

9 Parliamentary Documents 2016/2017, 19637, no. 2335

to forced return, migrants generally possess very little agency, rendering it questionable to use the term return 'decision'. Migrants might successfully resist their deportation, by refusing to cooperate with the state's identification proceedings, but the best possible outcome is continued illegal stay in the host country. Leerkes, Galloway and Kromhout (2010) therefore speak of having to choose between the lesser of two evils, while Klaver, Telli and Witvliet (2015) summarize this as a trade-off between the perceived life opportunities in the country of origin and the perceived life opportunities as an unauthorised migrant in the host country. This trade-off is informed by a wide array of different factors related to the personal situation of the migrant, current life in the destination country, and the perceived situation in the country of origin. Important factors that have been identified are the perceived risk of forced return, the perceived safety in the country of origin, and a migrants' social network, in particular direct family members (Brouwer, 2018; Leerkes et al., 2017). Research also finds that the longer someone lives in a place, the less likely it becomes they will leave, as people build up both social and economic connections (Schewel, 2019).

Particularly relevant for this article is a recent study by Leerkes and Kox (2017), who looked at the effect of deterrence and perceived legitimacy of immigration detention on continued illegal stay. They found that migrants made a sort of cost-benefit analysis to see whether immigration detention was worth continued stay in the Netherlands. However, migrants who developed more positive return intentions during their time in immigration detention not only mentioned the hardships of detention as an important reason to decide to return, but also perceived their detention as more legitimate. This led the authors to argue that compliance with return decisions is most likely "when the *product* of perceived severity, perceived certainty and perceived legitimacy reaches a kind of optimum (p. 904)." Translated to the situation of CCNCs, it could be argued that a similar kind of trade-off needs to be made. Because of the SOB-measure, they effectively have to make a trade-off between a longer time in prison and life as an unauthorised migrant on the one hand, and deportation on the other hand. The question is then which state intervention is perceived as more painful.

Regarding deterrence, criminological research has long stressed that imprisonment brings with it a set of distinct 'pains' in the form of a number of deprivations (Crewe, 2011; Sykes, 1958). Recent research has found that foreign prisoners often experience a distinct set of pains, which are related to their status as foreigner in the criminal justice system and their immigration status (Ugelvik & Damsa, 2018; Warr, 2016). Deportation, on the other hand, is legally speaking a preventive measure and not a form of punishment. The same applies to the entry ban and undesirable alien pronouncements. However, it has been argued that since it is so directly linked to a criminal conviction and often perceived as punishment, it cannot be seen as merely an administrative practice, but instead creates a form of double punishment (Di Molfetta &

Brouwer, 2019; Turnbull & Hasselberg, 2017). Kanstroom (2000) has in this regard argued for a distinction between deportation that is part of *border control* and deportation that is part of *social control*. He argues that the second form of deportation, based on post-entry criminal conduct, “is more analogous to criminal law and often seems more punitive than regulatory” (p. 1898).

Regarding legitimacy, criminal justice studies have long shown that the perceived legitimacy of the law, legal actors, and legal procedures is at least as important in achieving compliance as coercion and deterrence stemming from potential sanctions (Tyler, 2003). Studies focussing on return migration have also stressed the importance of fairness and legitimacy in order for migrants to cooperate with return (Van Alphen, Molleman, Leerkes, & Van Hoek, 2013). When people believe that rules are fair and that they are enforced in a just manner by trusted actors, they are more likely to follow these rules or accept the outcome of legal proceedings. A lack of perceived legitimacy, on the other hand, may result in resistance (Leerkes & Kox, 2017).

7.4 METHODOLOGY

This paper draws on data collected for a research project on the punishment and deportation of CCNCs in the Netherlands. Empirical data was collected between April and September 2016 and consists of 37 in-depth interviews with foreign national prisoners and seventeen interviews with departure supervisors.¹⁰ All interviews with CCNCs were conducted in Ter Apel prison, whereas interviews with departure supervisors took place in both this prison and the prison at Schiphol International Airport. Nearly all CCNCs are imprisoned in these two prisons: the prison at Schiphol International Airport primarily houses foreigners in pre-trial detention, whereas convicted male FNPs are moved to Ter Apel prison. Departure supervisors of the DT&V have offices in both these prisons. Besides these formal interviews, for a period of about one and a half year (February 2015–September 2016) and on an irregular basis, I spent an average of one day per week at the offices of DT&V at Schiphol. Here I could read transcripts of departure talks between departure supervisors and CCNCs, observe everyday working activities, and hold informal conversations with departure supervisors and managers. I also observed several interviews of departure supervisors with CCNCs and a presentation of several men at a consulate aimed at establishing their nationality. This relatively long-term informal fieldwork period provided me with great insights in the day-to-day operations of organising return.

Formal semi-structured interviews with CCNCs and departure supervisors were conducted towards the end of this fieldwork period. CCNCs were sampled

¹⁰ I also conducted interviews with prison officers but have not used these for this specific paper.

with the aim of capturing as much diversity as possible in terms of nationality, age, prison sentence, remaining prison time left and time spent in the Netherlands. Every respondent signed an informed consent form before the interview started and was given the opportunity to ask questions about the interview, the research project or the researcher. Interviews lasted between twenty minutes and more than an hour. Where possible respondents were interviewed in their native language or another preferred language; translators were never used. To that end, the interviews were conducted by different researchers. Whereas this greatly increased the number of potential respondents and the diversity of the final sample, factors such as age, gender, nationality, and personality of the interviewers are likely to have influenced the interview and therefore the nature of the data. At the same time, recent research on CCNCs in Norway by two completely different researchers suggests that such differences do not necessarily lead to different findings (Damsa & Ugelvik, 2017). Moreover, findings that came back in interviews collected by different researchers can be said to be particularly strong.

Interviewed departure supervisors all worked for the team dealing with CCNCs. They differed in their years of experience and some also worked with other migrants groups, such as rejected asylum seekers. These interviews lasted between forty minutes and two hours. I conducted some of these interviews alone, while others were conducted together with another researcher. All of the interviews, both with CCNCs and departure supervisors, were recorded and transcribed verbatim, except for two CCNCs who preferred not to be recorded. In those cases notes were taken during the interview, which were turned into a detailed interview report immediately after the interview. Transcripts of interviews in another language than English have been translated by the interviewer. For the data analysis, all interview transcripts have been coded according to relevant research themes using the qualitative software program NVivo.

7.5 THE IMPLEMENTATION AND LIVED EXPERIENCES OF CRIMINAL DEPORTATION

Compared to other migrant groups, the return rate for CCNCs in the Netherlands is relatively high and has slightly increased since 2012. In recent years, more than 75% of CCNCs who had completed their criminal sentence were subsequently deported. The slight decrease in 2015 is primarily the result of a dispute between the Netherlands and Morocco, as a result of which the Moroccan authorities refused to take back any citizens. To compare, for all unauthorised migrants combined the return rate was 52% in 2016 and 42% in 2017.¹¹ At the same time, this also means that around 25% of the CCNCs are eventually released into Dutch society again as unauthorised migrants.

11 Kerncijfers Asiel en Migratie.

<i>Year</i>	<i>Total released</i>	<i>In the Netherlands</i>	<i>Deported</i>	<i>Deported (%)</i>
2018	1.140	250	890	78%
2017	1.150	250	890	77%
2016	1.090	240	850	78%
2015	1.200	300	900	75%
2014	1.220	260	960	79%
2013	1.120	260	860	77%
2012	910	220	690	76%
2011	800	220	580	72%
2010	780	220	550	70%

Table 7.1 Release and return, 2010 – 2017, numbers rounded to tens¹²

7.5.1 When the state is able to deport: “I have little hope they will release me here”

Organising return involves first and foremost planning all practical arrangements necessary for departure. This can be a straightforward process when a CCNC possesses a valid travel document and is accepted by his/her country of origin. Departure supervisors indicated that this was often the case, which meant that organising return posed little problems. This means that for many CCNCs structural factors determine whether they will leave the Netherlands after completing their criminal sentence, and their agency is limited to the conditions of their return. Respondents who cooperated with their own return therefore showed different degrees of voluntariness, depending on the perceived painfulness of deportation.

Whereas most academic literature on deportation describes this as a painful and violent state interference (Turnbull & Hasselberg, 2017), a relatively large number of interviewed CCNCs actually did not perceive their deportation as such. Because these respondents often had family members in their country of origin, they wanted to leave prison as soon as possible and were sometimes explicitly looking forward to their return. Not surprisingly, this was especially the case for respondents who had no family or other social attachments in

¹² Data about the return of unauthorised migrants is published on the website of the DT&V (<http://www.dienstterugkeerenvertrek.nl/mediatheek/vertrekcijfers/index.aspx>). The statistics for CCNCs come from the bi-annual Rapportage Vreemdelingenketen (Report of the Immigration Chain).

the Netherlands, as was often the case for CCNCs who had been arrested at the border or who had only been in the Netherlands for a relatively short period of time. Mario (Italy), for example, had been arrested two hours after arriving in the Netherlands. Since most of his social life was in Italy and he had no desire to stay in the Netherlands or return in the future, he was looking forward to leave prison and return to his country of origin:

"I cannot wait more to come back to Italy. I told them to send me to Italy straight away and give me ten years of entry ban in the Netherlands. I don't care at all about staying in the Netherlands."

The same applied to various respondents who had been arrested at Schiphol International Airport for attempted drug smuggling and either had a family to support in their country of origin or had reasons to not be too worried about return. John (Suriname) was one of them, serving a prison sentence of thirty months for attempted drug smuggling – something he readily confessed he did. He had no desire to stay in the Netherlands and could return to his old job in Suriname, where he also still had an apartment. At the time of the interview, he was even considering giving up his ongoing appeal process so that he could return shortly with SOB (in order to qualify for SOB, the criminal process needs to be finalised). Such examples illustrate that whereas deportation is a painful state interference for those who have their loved ones in the country they are deported from, it can actually be a form of relief for those who are imprisoned and have family in their country of origin. In other words, the painfulness of deportation is highly subjective and dependent on a range of personal factors.

Whereas some respondents were actively looking forward to leaving the Netherlands, this was definitely not the case for all. One of the respondents who struggled with this was Milos (Bosnia and Herzegovina). As a child, he had been granted asylum in the Netherlands. Repeated convictions for minor offences meant he had never been able to obtain Dutch citizenship, but he was a legal permanent resident. Because his residence permit had been revoked following his last conviction for a violent crime, he now faced deportation to Bosnia and Herzegovina. Whereas he preferred to stay in the Netherlands, he still had family in Bosnia and Herzegovina who could accommodate him, making return slightly less daunting. As he was contemplating whether to cooperate with his own return, he took into account the possibility of early release with SOB and his chances of actually staying in the Netherlands if he would not cooperate:

"Because on the other hand, I am thinking about it like this: my residence permit has been revoked and my appeal has been dismissed, so there is little left to do about that. And I have little hope that, even if I serve my full sentence, they will release me here. I don't think they will put someone without papers on the street. For all I know, you could serve your whole sentence and be deported anyway."

And I've nearly served half of my sentence now, so that's why I am thinking about SOB."

Quite importantly, Milos did not downright disagree with his deportation. Although he struggled with accepting this, he tried to understand the situation from the state's perspective. This seemed to help him to accept it.

"I don't think it is really fair. But well, I have also done things that are unacceptable. So yes, I try to weigh this against each other. I have a long criminal record, I have been in prison before. (...) My mum always warned me: 'be careful, don't do all these crazy things'. But well, you hang out with the wrong people. You do things that are not okay. You get arrested, go to prison. And well, it did not happen once or twice. And that is what they look at."

It was clear that Milos had little hope that he would be able to avoid deportation, a sentiment echoed by many other CCNCs. The institutional setting of Ter Apel prison – with its remote location, sober regime without resocialisation activities, and especially the permanent presence of departure supervisors – played an important role in this. Speaking specifically about the remote location of the prison, Khalid (the Netherlands) said:

"They did that on purpose. If you look closely, they did that on purpose, that you don't get any visits. You understand? You are being stressed and then you will give up. You understand?"

Several respondents believed the system to be designed as tough as possible on purpose to 'break their resistance' and make them cooperate with return. Departure supervisors generally believed that the institutional setting contributes to CCNCs believing that they are permanently excluded from the Dutch society and that deportation is inevitable, and therefore has a considerable deterrent effect. As one of them explained when asked what had changed with the creation of the crimmigration prison:

"What I do feel, but I can't substantiate that, is that when people arrive here, they realize much more that it is really over."

This was also acknowledged by some of the CCNCs, who seemed to feel that there was little chance to be released in the Netherlands from Ter Apel prison. As Ermir (Albania) explained:

"When you don't have a Dutch residence permit, you don't qualify for regular prisons. So you're transferred to Ter Apel, final destination."

Several other respondents equally indicated they felt they had nothing to win by trying to avoid their deportation and therefore pragmatically decided to

cooperate with the state in order to qualify for SOB. For these respondents the accumulation of imprisonment and deportation was a matter of fact, and SOB at least provided the possibility to reduce their prison time. Whereas non-cooperation previously came with little extra risks – the worst-case scenario was deportation – the introduction of the SOB-measure means that successfully avoiding deportation results in serving a longer prison sentence, while one can never be entirely sure to not get deported anyway. In these cases, SOB thus only becomes a factor in the decision-making process of CCNCs because deportation is seen as unavoidable. However, even CCNCs who do not want to return are frequently deported with SOB. Although the government explicitly frames SOB as a favour and not a right, departure supervisors also apply for SOB for CCNCs who do not want to return. Obviously, granting SOB against someone's will seems to somewhat undermine the idea of a favour.

7.5.2 When the state is unable to deport: "I already planned to not cooperate anyway"

When a CCNC does not have a valid travel document, departure supervisors need to obtain a replacement document (a so-called *laissez-passer*) from the perceived country of origin. Usually a CCNC will be presented at an embassy or consulate, where the foreign authorities have to confirm his/her identity and nationality. However, there are a number of countries notoriously unwilling to cooperate with foreign authorities in order to take back their citizens, especially when these have a criminal conviction and/or are forcibly returned (Ellermann, 2008). For example, both Algeria and Morocco are countries that have been reluctant to cooperate with the Dutch authorities on forced return; the majority of CCNCs released without deportation come from these two countries. Ali (Morocco), who had come with his family to the Netherlands more than thirty years ago when he was a teenager, claimed that the Moroccan authorities simply refused to issue the necessary travel documents in order for him to be deported.

"I arrive there and he [the Moroccan consul, JB] says: 'this man lives here since more than thirty years, he has a Dutch wife, a Dutch child, what is he supposed to do in Morocco? Because he has nobody there. His whole family is here, what should he do there?' (...) He told me: 'Listen, I can send you back to Morocco, but you have no money, you have no house, you have no family to support you. So what will you do? Commit crimes in order to survive.'"

Similarly, Karim (Morocco) had grown up in Amsterdam, where his wife and most of his family still lived. Therefore, being deported to Morocco seemed particularly painful to him. Although his departure supervisor had informed him that he could be released after serving half of his sentence if he agreed to leave the Netherlands, he said he preferred to just serve his full sentence

and then either stay illegally in the Netherlands or try to move to Belgium or Germany with his wife on his own terms. He explained how he could easily avoid being deported by simply informing the Moroccan authorities that he did not want to return:

“Maybe you have heard about that as well, that Morocco has problems with the Netherlands and they no longer cooperate. (...) They take people from here all the way to the consulate, but they are simply sent back, because Morocco no longer cooperates. (...) Anyway, I already planned to not cooperate anyway. Even if I go all the way with them to the consulate, I am just going to talk honestly to this head of the consulate. I am just going to tell him: ‘I do not want to return.’ Done.”

Whenever the government is not able to deport a CCNC, departure supervisors’ only choice is to try to motivate him to cooperate with return. To that end, they engage in various conversation techniques that are aimed at creating relationships with CCNCs and winning their trust (Cleton & Chauvin, 2019). To convince CCNCs to cooperate with return, they employ various incentives to try to change the mind of reluctant CCNCs and convince them that return would be better than staying.

The main stick to discourage CCNCs from staying in the Netherlands is the relatively tough circumstances they will encounter after their release. Since the early 1990s the Netherlands has a far-reaching ‘discouragement policy’ aimed at making life as an unauthorised migrant as unattractive as possible, by excluding them from legal work, housing, most medical help, and a range of social services (Leerkes & Broeders, 2010). Moreover, unauthorised migrants always run the risk of being arrested again and returned to prison. Departure supervisors tried to use these circumstances to convince CCNCs that their life upon release would be very tough.

“I try to let the migrant explain what he will encounter as an illegal in Netherlands. So let him mention the downsides of illegality himself: ‘You always have to look over your shoulder, you can’t start a family, you can’t work legally, can’t build up an existence, will regularly return here to this prison.’ (...) Let them describe it as extensively as possible, so that they become aware of what their future in the Netherlands really is like. Or rather, the lack of a future.”

In terms of carrots, departure supervisors have rather limited possibilities for CCNCs, especially in comparison with other categories of unauthorised migrants. Rejected asylum seekers, for example, can receive substantial return and reintegration assistance, which includes both monetary support and skills development, but CCNCs are generally excluded from these programmes. However, the SOB-measure could be seen as both a carrot (offering early release from prison to cooperating CCNCs) and a stick (more time in prison for non-cooperative CCNCs). Most departure supervisors were positive about the SOB

measure, although none of them thought it had a substantial effect on motivating foreign national prisoners to agree to return.

“It is an incentive to cooperate with return, but I wonder if it also an incentive to cooperate if you first did not want to. Some people would not have cooperated without SOB, but I do not think it is a large percentage. I think it is only an incentive for a small percentage to finally give up who they are.”

Departure supervisors usually spoke of a few people they believed had been convinced to leave due to the possibility of SOB, but generally indicated this was not a very substantial group. They believed many CCNCs would have been deported anyway – either because they want to leave the Netherlands or because they could be forcibly returned – and that it would not change the mind of CCNCs who desperately intend to stay in the Netherlands. Instead, nearly all of them believed the measure was primarily intended to save money on the imprisonment of CCNCs.

Indeed, despite the attempts of departure supervisors, many CCNCs preferred serving their full prison sentence and subsequently having to live as an unauthorised migrant over cooperating with their own return. Particularly noticeable among these respondents was that they explicitly challenged the legitimacy of their deportation. Two arguments were commonly used to substantiate their claim that they should be allowed to stay in the Netherlands, both of which stem directly from the two elements of the sliding scale policy: the lack of seriousness of their offense and the long time they had been living in the Netherlands. A similar result was found by Griffiths (2017, p. 536), who illustrated how foreign criminals in the United Kingdom “present themselves as either Almost Citizens or Good Migrants, reflecting the two categories – foreign and criminal – that produce the category.”

Regarding the seriousness of their offense, several respondents believed their criminal history was not serious enough to warrant deportation from the Netherlands. Some of them denied having committed the crimes they had been convicted for; others readily admitted to committing these crimes, but argued they were not serious enough to justify deportation. These respondents generally did not challenge the legitimacy of deporting CCNCs (cf. Hasselberg, 2014a). Rather, they challenged their own position in it. As Ali (Morocco) said:

“It is not the system. (...) As I already said, when you killed someone or you are a real big criminal, or a terrorist, then I can understand that you are not welcome, then you are a danger to society. But someone who has been a bit naughty in the past, doesn’t matter what, as long as you don’t kill someone, or whatever, then you have to give him a chance. You know, that’s what I think. And not just for me, but for everyone. There are more people like me here.”

Besides dismissing the seriousness of their crimes, another argument frequently invoked by CCNCs was related to the duration of stay in the Netherlands and

the social life they had built up. Respondents drew on different reasons why they believed they had a legitimate claim to membership in the Netherlands: their long period of residence in the Netherlands, often including their formative years; the presence of Dutch family members, especially children; the lack of ties to their country of origin, which was often unknown to them; or long periods when they had been ‘good citizens’ holding legal jobs and paying their taxes, thus contributing to Dutch society. Respondents also frequently explained how they had become very Dutch over the years. For example, Juan (Ecuador) had been living in the Netherlands for more than thirty years. He had an extensive family in the Netherlands and that deporting him and separating him from his family for at least ten years was highly unfair. In explaining why he believed he was Dutch, he drew on ideas about Dutch culture as being progressive and the importance of arriving on time for an appointment.

“There are people here who are not Dutch, but I call myself Dutch. Because of the small details about equality, but also I came here [for the interview, JB] and I knew that I had to be five minutes early.”

Numerous authors have shown how deportation often exposes the tensions between legal citizenship and subjective sense of belonging (Golash-Boza, 2016; Griffiths, 2017; Kaufman & Bosworth, 2013). Long-term residents who had lost their right to stay in the Netherlands struggled with the erosion of a status they had held until their last conviction. For them, the migration-related consequences of their punishment constituted an attack on their sense of self, as they believed themselves to be insiders. Many of them felt they had more in common with prison officers than with other prisoners. Speaking about psychological issues that led him to be aggressive, Yusuf (Turkey) accepted that he could be a danger to others. However, as he claimed his problems were at least in part the result of his life trajectory in the Netherlands, he argued it would be unjust to deport him to Turkey.

“This hits me hard, you know. It is not like I just arrived here, three years ago from Turkey and I have a huge criminal record. No, it is twenty-eight years, I already came here when I was four years old. So I have lived here, I am not born as a criminal, nobody is born like that. So everything that happened, happened here in the Netherlands. (...) I have had two businesses here. Everything happened here. I say, look at my body, all my traumas, it happened here, in the Netherlands. Here in this country I took, but I have also given.”

This sentiment was echoed by Mohammed (Morocco), who after many years in the Netherlands felt different from most other CCNCs around him:

“He is alien to me. I am not an alien, I have lived here all these years. And that is... I believe they should make a distinction there. But they don’t. You know, and

then I think to myself: 'but you cannot compare me with him. You can't. He is completely different than me.'"

CCNCs who had been living in the Netherlands since a long time and had a family in the country, had considerably more to lose when they would be deported. They also generally considered their deportation as fundamentally unfair and illegitimate. As a result, there was little chance they would cooperate with their own return.

7.6 CONCLUSION AND DISCUSSION

This article has looked at the deportation of CCNCs from the Netherlands, examining the deportation regime, its implementation in practice, and how this is experienced by CCNCs. The far-reaching integration of the criminal justice system and the migration control system, both in terms of processes and actors, has contributed to a relatively high return rate of this specific migrant population. For many CCNCs, structural factors determine whether they will leave the Netherlands after completing their criminal sentence. In other words, the ability of the state to move towards hard deportation is the most important factor in achieving soft deportation. As a result, CCNCs who 'cooperate' with their own return show different degrees of voluntariness, ranging from wishing to return to seeing no alternative than cooperation. For some CCNCs deportation felt like punishment, whereas for others it was a form of relief.

Nonetheless, there is a sizeable group of CCNCs who cannot be returned without their own cooperation. Aided by the specific institutional setting of Ter Apel prison, departure supervisors try to convince these CCNCs to cooperate with return through conversational techniques and various incentives. They primarily emphasise the hardships of life as an unauthorised migrant and the possibility of early release from prison. However, in many cases these 'decisions' of CCNCs are the result of factors that lie beyond the sphere of influence of departure supervisors. Interviews with CCNCs illustrate how deterrence and legitimacy interact with each other and other return-relevant factors to inform the willingness to cooperate with their own return. Personal circumstances – in particular the presence of family members and duration of stay in the Netherlands – heavily influenced the deterrent effect, as well as the perceived legitimacy, of deportation.

The decision on whether or not to cooperate was in essence the result of a trade-off between prolonged imprisonment followed by life as an unauthorised migrant and deportation. Not surprisingly, deportation was most painful for respondents who had been living in the Netherlands for a long time and had built up considerable relationships, whereas imprisonment was generally more painful for respondents who had little attachment to the Netherlands and had their loved ones in their country of origin. This is in line with the

argument of Kanstroom (2000), who argues for a distinction between deportation as a form of border control and deportation as a form of social control, and claims the latter form should be seen as a form of punishment. This makes it questionable whether it is just that non-citizens are confronted with a second form of punishment after their prison sentence. It also raises the question what the justification is for the distinction between long-term legal residents and citizens, except for legal technicalities. Moreover, it has repeatedly been argued that criminal deportations are really only successful on a local level, especially in combination with the current specialised foreign national-prisons, as instead of addressing the criminal risk an individual poses, this risk is simply exported to elsewhere (Grewcock, 2011; Kanstroom, 2000).

Besides these normative arguments, this article has also suggested that the effectiveness of these measures is limited. Recently there has been growing attention for undesirable and unreturnable migrants, who frequently live in legal limbo and pose considerable challenges to national governments (Cantor et al., 2017). Whereas it was hoped that the SOB-measure would provide a motivation for these CCNCs to return to their country of origin, the percentage of deportations has risen only slightly since its introduction. Despite the combined threat of a longer prison sentence and life as an unauthorised migrant, around twenty-five percent of CCNCs are ultimately not deported. In part, this seems to stem from the government's own legal changes, which have resulted in a growing number of long-term residents losing their residence permit. As these CCNCs are generally less willing to return and countries of origin are hesitant to accept them back, it is considerably harder to deport this group. In light of the literature on so-called 'survival crime' by unauthorised migrants (Engbersen & van der Leun, 2001), the restrictions of the sliding scale policy might therefore even be counterproductive. Moreover, because all these CCNCs have been issued an entry ban or pronounced undesirable, their stay in the Netherlands constitutes a criminal act and they risk getting caught in a vicious circle of arrest, imprisonment and release. This illustrates the limits of crime control, migration control *and* crimmigration control in finding an acceptable solution for this group.