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

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Summary

Border control has changed significantly in recent decades. Whereas globalisation processes seem to have diminished the relevance of international borders, states have simultaneously sought ways to regain some form of control over cross-border mobility. In this process, alternative and novel means of border enforcement have emerged. The main aim of this dissertation is to provide an understanding of what these bordering practices actually look like in practice and how they are experienced by those subjected to them. To that end, it looks at bordering practices in the Netherlands through the lens of crimmigration, the term used to refer to the growing intertwinement of criminal justice and migration control. This is a bi-directional process: it encompasses both the criminalisation of migration and the use of migration control in response to crime. The central research question of this dissertation is:

To what extent are contemporary bordering practices in the Netherlands characterised by crimmigration, who is targeted by these bordering practices, and how are they experienced and understood by those implementing them and those subjected to them?

The empirical part of the dissertation consists of two case studies, on intra-Schengen migration policing and on punishment and deportation. The five empirical chapters discussing these case studies examine the various ways these bordering practices are shaped by, and shape the criminal justice system. They draw on extensive empirical fieldwork: participatory observations during migration policing controls, focus group discussions with migration policing officers, a survey among people who have been stopped during intra-Schengen migration policing controls, and qualitative interviews with prison officers, departure supervisors of the Repatriation and Departure Service (DT&V) and criminally convicted non-citizens (CCNCs) targeted for deportation.

PART I – CRIMMIGRATION AND THE MEDIA

The first empirical chapter of this dissertation provides the broad discursive context for the two cases studies. Because media discourse is generally seen as influencing laws, policies, and practices, the chapter looks at media coverage

of unauthorised migrants. It takes as a starting point a bill introduced in 2010 to formally criminalise illegal stay in the Netherlands. Based on the notion that the media play a crucial role in putting issues on the public agenda and discursively constructing certain migrant groups as disproportionately criminal, the study examines whether this bill was preceded by increasing amounts of media attention for crime committed by unauthorised migrants. It does so by examining all newspaper articles about unauthorised migrants by Dutch national newspaper during the period 1999 – 2013.

Several interesting and unexpected findings of the study stand out. First, the bill to criminalise illegal stay was introduced at what was practically the lowest point with regard to media attention for unauthorised migrants. The annual number of newspaper articles on unauthorised migrants was relatively stable between 1999 and 2006, but subsequently strongly decreased for four years in a row until the introduction of the bill to criminalise illegal stay in 2010. Second, the terminology employed by Dutch newspapers was noteworthy. In many Anglo-Saxon countries there is much debate about using the term ‘illegal’, as it is seen as stigmatising and criminalising. Various press agencies and news outlets have therefore decided not to use the term illegal migrant anymore. This was not the case for Dutch newspapers, as in more than 95 percent of the instances they use the term illegal – instead of irregular, undocumented, or other alternatives – to denote unauthorised migrants. Moreover, in most cases newspaper articles used the term as a noun (illegals) and not as an adjective (illegal migrant).

Third, the results showed that numerical terms were often used to describe ‘illegals’. This included both concrete numbers and more vague descriptions, such as ‘thousands’, ‘many’, and ‘groups’. Fourth, perhaps the most significant finding was that ‘criminal’ was one of the most prevalent adjectives for the noun ‘illegals’. This signals that unauthorised migrants are relatively often described as criminals. However, most of these references occurred during the initial years that were studied and the number of times the term ‘criminal illegals’ surfaced gradually decreased over time. With media attention for unauthorised migrants decreasing in the years before the bill was introduced and focussing less on issues of crime, the bill to criminalise illegal stay does not seem to be the result of growing and increasingly negative media coverage of unauthorised migrants. At the same time, media attention for other migrant groups, in particular from new EU countries such as Bulgaria and Romania, seemed to increase. It is likely that to a certain extent this has replaced news coverage of unauthorised migrants following the 2007 EU enlargement of the EU.

PART II – CRIMMIGRATION AND INTRA-SCHENGEN MIGRATION POLICING

The first case study of the dissertation focusses on intra-Schengen migration policing at the Dutch land borders with Belgium and Germany. Following the implementation of the Schengen agreement, the Dutch state lost a considerable amount of control over these borders. To compensate for this, and address growing political concerns about illegal migration and cross-border crime, in 1992 it introduced the so-called Mobile Security Monitor (MSM): mobile identity checks in intra-Schengen border areas carried out by the Royal Netherlands Marechaussee (RNM). These checks are carried out on roads, in international trains, and on intra-Schengen flights: the case study focusses on controls on roads, which are the most extensive. To avoid these checks being too similar to border control – which is prohibited by the Schengen Border Code – they may only be conducted for a period of six hours per day and a total of ninety hours per month per road. RNM officers selecting vehicles for a check have a high level of discretion when deciding whom to stop, as they do not need to have a reasonable suspicion of illegal stay or a criminal offense.

Initially the MSM was aimed at preventing illegal immigration; if RNM officers happen to detect a criminal offense, they would have to hand over the case to the Dutch police. However, since 2006 the official aim of the MSM expanded and came to include the fight against migrant smuggling and identity fraud. This was later matched with an informal name change in the policy discourse around the MSM; whereas previously the full name of the instrument was Mobile Alien Monitor, this was changed to Mobile Security Monitor. Moreover, official policy documents started to describe the aim of the MSM as preventing illegal immigration and fighting different forms of cross-border crime. It is for this reason the dissertation argues that at least the policy framework of the MSM fits within the trend of crimmigration.

First, *chapter 3* focusses on the decision-making processes of RNM officers. In particular, it examines how street-level officers understand their own task and the aim of the MSM, and to what extent and how this influences the way they use their discretionary freedom. The study shows that the ambiguous policy aims of the MSM, in which migration control overlaps with crime control, increased the discretionary freedom of street-level RNM officers. This was further reinforced by the unofficial name change that has taken place. It allowed street level officers to let their own ideas and beliefs about their work play a role in their decisions.

The empirical results discussed in this chapter show that street-level RNM officers navigated between migration control and criminal detection, and that they differed in what they considered more important or interesting. Much like regular police officers, RNM officers had different work styles. Some of them primarily focussed on migration control, while others were more focussed on fighting crime. This last group was strongly driven by a desire to make

the Netherlands safer. For these officers 'catching criminals' was not only more exciting, it was also perceived as more rewarding than stopping potential unauthorised migrants. As the chapter shows, officers' ideas about the aim of the MSM and their own tasks influenced the way they used their discretionary freedom. Overlapping legal frameworks – in this case migration law and criminal law – can result in increased discretionary freedom for street-level actors, since they can pick and choose from a wider array of powers. In the context of the MSM, even the assumption of more powers, combined with the ambiguous aim of the instrument, already led to more discretionary freedom. Especially RNM officers who focussed more on fighting crime during the MSM often found their existing powers too limited to carry out their tasks. To deal with that, they regularly used their powers in what they called a 'creative manner', making use of a range of tools that stem from both migration law and criminal law to target both potential unauthorised migrants and criminals.

In this way these street-level officers further contributed to the fading boundaries between migration control and crime control. They can first form a judgment about a certain individual or situation and subsequently find the most effective tool to base their decision on. The result is that it is not always transparent on which grounds certain decisions are made, especially not for the individuals that are stopped for a check. Moreover, criminal law based enforcement comes with considerably more procedural safeguards than administrative forms of enforcement, such as migration control.

Next, *chapter 4* examines how officers decide whom to stop for a check, and what role ethnic, racial, and national categorisations play in this. As officers generally had very little time to decide whether to stop a vehicle or not, they relied primarily on their own beliefs and experiences to make decisions about whom to stop. The chapter shows that these decisions were shaped by organisational policies, rules, and ambiguity regarding the objectives of the MSM, as well as the prevailing societal climate in the Netherlands.

Several factors were invoked to recognise potential unauthorised migrants, with skin colour being one of the most important ones. During the controls primarily black and Arab-looking people were stopped, as the mostly white male RNM officers saw this as an indicator of 'foreignness'. Officers were aware of the sensitivities of using racial or ethnic categories, but argued that when trying to identify unauthorised migrants they had little choice than to rely upon these indicators. They also frequently made clear that a stop was always based on a combination of several factors, which included the national origin of the license plate, the state of the vehicle, the number of passengers, and clothing. At the same time, during observations it regularly seemed that a stop was based on perceived foreign appearance alone.

Stops for crime-related reasons were based on perceptions about the disproportionate involvement of certain ethnic or national groups in crime. Moroccans, or more generally North Africans, were primarily identified on

the basis of their appearance, while people from Central and Eastern Europe, in particular Bulgarians and Romanians, were mainly identified on the basis of the origin of the license plate of the vehicle. These profiles were not necessarily static: a Polish license plate was for a long time considered to be a reason to stop a vehicle, but in recent years most officers believed there was little chance they would find something wrong. Most officers perceived such selection decisions on the basis of national categories as less controversial than selection decisions based on ethnic or racial categories.

Most of the perceptions underlying selection criteria were the result of knowledge shared among street-level officers. On an organisational level there was little guidance or instructions on how to select vehicles during the MSM. New officers learned what to look for from more experienced colleagues; more generally, experience was seen as crucial for good profiling. This leaves little space for alternative profiles and creates the risk of overlooking new developments, something further exacerbated by the lack of attempts to measure the success rate of specific profiles.

As the final chapter of this case study, *chapter 5* contrasts the perceptions of RNM officers with the experiences of people that are stopped in the context of the MSM to examine the legitimacy of these controls. Relying on procedural justice theory, the study primarily looks at the perceived fairness of decisions made by officers and the treatment during interactions. The vast majority of non-Dutch citizens had few problems with the MSM checks or even perceived them as positive. This included EU citizens from other countries, despite the fact that they believed they were stopped because they were foreign. The same was observed with Dutch majority group members, who on average perceived the MSM as even more positive than non-Dutch citizens. Dutch ethnic minority group members were considerably more critical about the MSM, especially when they self-identified as Dutch. This seemed to stem primarily from the perception that they were stopped on the basis of their skin colour, combined with a lack of clarity about the reasons of the check. Although respondents in this group were generally not negative about their treatment by RNM officers, this did not substantially effect their overall judgement of the MSM.

As discussed in more detail in *chapter 4*, RNM officers targeted distinct groups to make stops on both migration-related and crime-related grounds. They did not perceive this as unfair, as they saw it as a form of justified profiling. Officers also emphasized the importance of treating the people they stop in a respectful and friendly manner, something generally corroborated by the observations. RNM officers were generally aware of the importance of explaining the aim of the MSM and the reasons for a specific stop. At the same time, the observations indicated that this was often done in such a brief way that people did not pick up on this, and respondents were often confused about whether this was a migration control or a police stop. However, the negative experiences of some respondents primarily seemed to stem from a fundamental

discrepancy in how these controls were experienced by RNM officers and by some of the respondents. RNM officers generally saw the impact of being stopped in the context of the MSM as very limited, as it often took only a few minutes to carry out the check. However, they sometimes failed to take the communicative power of these controls into account. For Dutch ethnic minority group members being selected for a stop, it felt like their status as a full citizen was denied and they were not seen as fully.

PART III – CRIMMIGRATION, PUNISHMENT, AND DEPORTATION

The second case study focusses on the punishment and deportation of criminal-ly convicted non-citizens (CCNCs): non-citizens serving a criminal sentence and with no legal right to stay in the Netherlands. Although in the Netherlands the number of foreigners in prison actually decreased in the last years, in line with the overall prison population decline, the number of *deportable* foreign prisoners increased substantially. An important reasons for this is that the sliding scale policy, which determines whether a criminal conviction results in the cancellation of a non-citizen's legal stay, has repeatedly been restricted. The most striking changes have been that non-citizens staying in the Netherlands for less than three years can lose their right to stay following a conviction to at least one day of imprisonment, and that there is no longer an end date when legally staying non-citizens cannot lose their right to stay anymore. Previously, anyone residing legally in the Netherlands for more than twenty years could no longer have their legal stay revoked. As a result, increasing numbers of legally residing migrants are targeted for deportation, including long-term legal residents who have been living in the Netherlands for many years.

As CCNCs have been designated a priority group in the Dutch return policy, several policy measures have been adopted in the last years that are aimed at increasing their return rate. Better cooperation between various agencies working in the criminal justice system and migration control is intended to result in the detection of CCNCs in an early phase and ensure they are deported directly from prison following their criminal punishment. To that end, nearly all CCNCs are placed together in a designated all-foreign national prison in the small town of Ter Apel. As these prisoners are not supposed to return into Dutch society after completing their sentence, rehabilitation activities are largely absent here and prisoners are not entitled to a range of common prison privileges. Instead, departure supervisors of DT&V are embedded in the prison to work on organising CCNCs' return to their country of origin upon finishing their sentence. In order to give these departure supervisors an extra tool to convince CCNCs to cooperate with their own return, CCNCs only qualify for early release – something readily available to regular prisoners – if they leave

the Netherlands directly from prison. In all other cases, they will need to serve 100% of their sentence.

Chapter 6 takes a closer look at the unique prison in Ter Apel in order to provide an understanding of how this constellation of criminal punishment and migration control is experienced by both prison officers and CCNCs. The concentration of more than sixty different nationalities in one prison, lack of meaningful activities, and focus on deportation all impacted on the experiences of both these groups.

Most prison officers already worked in the prison in Ter Apel before it became a dedicated foreign national prison and were therefore used to working in a regular prison. Despite having no prior experience in dealing with this specific sub-group of prisoners, they received no training to equip themselves to deal with the new circumstances. They sometimes struggled to have good contact and build up relationships with prisoners, primarily because of language barriers. They also found it hard to find meaning and satisfaction in their work with the new regime they had to work in, as they had limited opportunities to prepare prisoners for life after release. Finally, officers sometimes struggled with the exclusionary outcomes of migration law, especially when they perceived someone as being Dutch.

Existing studies on foreigners in prison show they often experience isolation and uncertainty about their migration status and possible release or deportation. The specific set-up of the prison in Ter Apel to a certain extent mitigated some of these feelings. Due to the presence of departure supervisors of DT&V, prisoners were generally well informed about their migration status and potential return date, especially when they were willing to leave the Netherlands. Furthermore, the presence of fellow prisoners who come from the same country or speak the same language helped to counter internal isolation. At the same time, the relatively remote location of the prison meant that many respondents felt they were held far away from relatives and loved ones, either elsewhere in the Netherlands or in other countries. This contributed to strong feelings of external isolation.

The specific features of the institution and the regime affected the identity that is imposed on FNPs. The fact that Ter Apel prison acts as a precursor for deportation emphasizes non-belonging, and CCNCs were constantly reminded of their permanent exclusion from society. Nearly all respondents were well aware that they enjoyed fewer rights than regular prisoners in the Netherlands. How they responded to this depended largely on how they perceived themselves. Those who perceived themselves as foreigner primarily argued that all prisoners should enjoy the same rights, regardless of their citizenship status. However, they did not challenge their placement in an all-foreign prison in itself. Those who perceived themselves as legitimate members of Dutch society primarily felt they did not belong in a prison designed for foreign nationals.

These prisoners felt foreign and alienated in an institution where they believed they did not belong.

Finally, *chapter 7* deals with the deportation regime for CCNCs. It examines how departure supervisors subsequently try to return CCNCs to their country of origin, how CCNCs experience and respond to this and to what extent this indeed results in CCNCs being deported. The primary aim of departure supervisors is to organise the return of CCNCs directly from prison. To that end, they profited from the increasing cooperation between various agencies in the criminal justice and migration control systems, as well as their embeddedness in the all-foreign national prison. Because in many cases CCNCs possess valid travel documents, the return rate of this population is relatively high in comparison with other groups of unauthorised migrants. At the same time, there was still a considerable group of CCNCs who could not be easily deported without their own cooperation, mostly because their country of origin was reluctant to take them back. To convince these CCNCs to cooperate with their own return, departure supervisors used several incentives to try to motivate them to cooperate. In particular, they highlighted the negative aspects of life as an unauthorised migrant and emphasized that CCNCs could reduce their prison time if they agreed to leave the Netherlands.

Interviews with CCNCs illustrate how those who possessed some agency over their deportation needed to make a trade-off between a longer prison sentence and life as an unauthorised migrant on the one hand, and deportation on the other hand. Whether imprisonment or deportation was considered harsher depended on several factors that were generally beyond the sphere of influence of departure supervisors, in particular the presence of family members and duration of stay in the Netherlands. Many long-term residents perceived their deportation as illegitimate. They relied on two broad arguments why they should be allowed to stay in the Netherlands: their criminal offense was not serious enough, or they had been living in the Netherlands for so long that they had a legitimate claim to membership. As a result of this, they generally refused to cooperate with departure supervisors and return to their country of origin. This illustrates the need for a distinction between deportation as a form of border control and deportation as a form of social control. It also highlights the limitations of responding to criminal behaviour with migration control tools.

CONCLUSION

The bordering practices studied in the two case studies were all at least to some extent characterised by crimmigration. The first case study showed how the MSM has gradually changed from an instrument that almost exclusively focussed on migration control to an instrument that combined this focus with

at least a partial focus on crime control. Moreover, the focus on crime fighting during the MSM seems to be more significant in practice than on paper. Looking at the punishment and deportation of CCNCs, the second case study discussed three recent policy changes that were all consistent with the crimmigration thesis: migrants more easily lose their residence permit following a criminal conviction, after which they are placed in a dedicated all-foreign national prison aimed at deportation instead of return to society, and where early release is only granted if they leave the Netherlands.

The case studies showed how different groups are targeted by these bordering practices. The discretionary and proactive nature of the MSM means that citizenship status means relatively little about whether one is targeted or not. Instead, how one is perceived is of crucial importance. As the MSM targets people both for potential illegal stay and criminal activities, the groups of people targeted by this bordering practice are wide-ranging and diverse. This includes Dutch citizens perceived as potential criminals or non-citizens and EU citizens from countries associated with high levels of cross-border crime. The categories of people targeted by bordering practices discussed in the second case study differ substantially. In this case, formal legal status is of crucial importance. Due to the growing restrictions in the sliding scale policy, the number of people targeted by this bordering practice has considerably increased in recent years, including growing numbers of long-term residents. Crimmigration thus leads to more people, including long-term residents and even citizens, being targeted by bordering practices.

The dissertation looked at three different groups of state actors and how they deal with their mandates in light of the growing merger of crime control and migration control. RNM offices and departure supervisors, both officially working on migration control, generally did not see the far-reaching integration of crime control and migration control as something problematic. Instead, they often saw it as a welcome development to conduct their tasks in a more effective way. Prison officers, working in the criminal justice system, were more critical of the crimmigration process. In particular, they struggled to find meaning and satisfaction in their work, now that resocialisation was no longer a key element of the prison regime.

Finally, the dissertation examined how the studied bordering practices were experienced by the individuals subjected to them. Most people stopped during the MSM did not perceive this as problematic, even when they were European citizens and should enjoy freedom of movement. However, a notable exception to this were ethnic minority Dutch citizens, who were in general very critical about this bordering practice. Nearly all these respondents described themselves as being Dutch, but felt they were not perceived and treated as such. Most of them believed their physical appearance, in particular their skin colour, was the main reason for this. Similarly, primarily those CCNCs who thought of themselves as Dutch challenged being subjected to immigration control. Although on many levels the two case studies are incomparable, they share

one important similarity. In both cases primarily individuals who perceived themselves as insiders challenged the legitimacy of being subjected to bordering practices.

This leads to the conclusion that crimmigration results in a growing number of people being subjected to bordering practices, including individuals who are or see themselves as insiders. This ultimately presents challenges to the legitimacy of these bordering practices.