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At the Intersection of Domestic Acts and Globalization: The Case of Irregular Migrants

Federico Daniel Burlon

The Paleolithic, Stone and Bronze Age races
The Celt, the Roman, Teutons, not a few
Diverse in dialects and hair and faces
The Fleming, the Dutchman, Huguenot and Jew
'This hard to prove by means authoritative
Which is the alien and which the native.¹

I. Introduction

Sixty-five percent of the Netherlands is below sea level: ten thousand miles of dykes, gates, and dams hold back the sea.ⁱⁱ As the water besieges the land, some politicians and scholars claim that immigrants are doing the same to the country.ⁱⁱⁱ On the other side of the Atlantic, immigration to the United States also has been compared to a tide that must be contained.^{iv} The fears surrounding immigration have been one of the focal points raised by former United Nations Secretary-General Kofi Annan and by his successor, Ban Ki-moon.^v As a result of the dramatic increase of migration flows and the large number of irregular migrants worldwide,^{vi} immigration has moved from low to high politics.^{vii} Fuelled by a mentality that sees domestic security as threatened, the salience of irregular immigration is grounded in parallels drawn between the control of illegal immigration and the control of crime.^{viii} According to Adam Crawford, the conflation of illegal immigration with crime has led Western governments to rule through the politics of fear of crime and insecurity.^{ix} The impact of these policies on irregular immigrants illustrates what John Tomlinson calls the reflexive nature of globalization.^x An insightful avenue to take in order to explore globalization is the study of human mobility.^{xi} Globalization has placed immigrants at the nexus of the increase in migration due to lower transportation costs,^{xii} the development of the international human rights regime,^{xiii} and the enactment of increasingly restrictive immigration policies by developed countries.^{xiv} The interplay between these processes crystallizes in detention centers, and renders immigrants vulnerable to human rights violations.^{xv} Studying globalization from a comparative perspective, this essay analyzes the impact of the International Human Rights Regime (IHRR) on American and Dutch immigration detention policies. In the last decades, detention has become the established way of dealing with irregular migrants. It lamentably obscures various essential examples of alternative legislation.

My interest in irregular immigration originated in my last year of high school in 2004. Walking in downtown Monfalcone, a city in northern Italy, a poster featuring a woman wearing a *hijab* under an anti-immigration caption caught my eye. It was an advertisement for the Lega Nord, a right-wing party. What struck me was the fact that while I was legally Italian, I had been born and raised in Argentina, which made me an immigrant, at least in the cultural sense. My personal interest is complemented by a willingness to delve deeper into the issue of irregular migration from an academic perspective. This study thus focuses on the human rights of migrants as well as the right of states to regulate entrance. A second reason to pursue this analysis is that while

irregular immigration has moved from “low” to “high” politics and is receiving increased attention by the media, it still remains a grey area. A third reason is that little has been done in terms of analyzing the impact of international regimes on domestic policies in this area.^{xvi} Despite the claim by David Martin that soft law exerts a greater influence on migration policy than international treaties, this analysis is limited to international human rights law because of its legally binding nature.^{xvii} The focus on hard law is also for the sake of brevity and for consistency with the existent literature on the IHRR.^{xviii}

Among the different conceptualizations of irregular immigrants, a compelling definition is that they are those “who have arrived in a state of employment or residence without authorization, who are employed there without permission, or who entered with permission and have remained after the expiration of their visas.”^{xix} This definition is nevertheless incomplete because it excludes asylum seekers. Asylum seekers are oftentimes detained because they are illegal aliens until they are paroled. As a percentage of the total population, there are twice as many irregular immigrants in the U.S. as in the European Union.^{xx} These figures must be considered with caution because they are based on estimates.

Four processes make the impact of the IHRR on domestic policy related to the detention of irregular immigrants an issue worth examining. The first one is what Zygmunt Bauman identifies as the reproduction of the division between deserving and undeserving populations caused by higher barriers to migration.^{xxi} One of the roots of the division between deserving and undeserving populations is the tension between economics of production based on factor mobility and welfare economics, which determines resource allocation within a finite economy.^{xxii} The shift from industrial to service economies, the emergence of two-income households, and low population mobility in developed countries increase the demand for irregular migration.^{xxiii} As a result, higher demand coexists with higher barriers. The second process is the set of changes in immigration policies, which blur the line between refugees, legal, and irregular immigrants. The new policies also reduce the opportunities for legal immigration, de facto increasing the number of irregular immigrants.^{xxiv} The third process is the shift from border to internal immigration controls by states. This is a consequence of the limitations to engage in mass deportations that the IHRR and European unification impose on states.^{xxv} Lastly, the fourth process is the development of a culture of control and the conflation of irregular immigration with crime.^{xxvi} According to Bauman, in the post-Cold War “liquid modernity,” the degree of mobility determines social stratification.^{xxvii} Having become the object of moral panic, the “underclass”—those who are redundant in contemporary consumer society—is subjected to varying forms of spatial confinement, the most radical of which is imprisonment.^{xxviii}

This essay presents a review of the literature followed by two case studies. Research in the U.S. focuses on academic sources and reports by international and non-governmental organizations. E-mail communication with *New York Times* journalist Nina Bernstein and with human rights scholars Jack Donnelly and David Forsythe provided valuable guidance. Research in the Netherlands is also based on reports by the Research and Documentation Center of the Ministry of Justice, as well as interviews with refugees, staff from Amnesty International, VluchtelingenWerk,^{xxix} and researchers from Regioplan.^{xxx}

II. Research Questions and Literature Review

A. Questions

The analysis of the impact of the IHRR on domestic policy related to the detention of irregular immigrants answers two questions: What is the legal framework for, and the nature of, illegal immigration to the U.S. and Netherlands? What are the human rights issues that arise in detention centers and how does the international human rights regime influence a government's approach to these issues?

B. Review of the Literature

This section discusses three main bodies of literature. These documents look at human rights regimes, international migration and migration control, and the criminalization of immigrants. International regime theory emerged in the 1970s, when liberals and realists attempted to explain the mutually baffling phenomenon of international cooperation.^{xxxix} As defined by Stephen Krasner, regimes are “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.”^{xxxix} This analysis focuses specifically on rules and decision-making procedures (i.e., institutions) because, according to Krasner, they determine the main aspects of any regime.^{xxxix} Definitions of the nature, purposes, and applicability of regime analysis to human rights vary among different groups of scholars.^{xxxix} In spite of the critique by Conway Henderson, and Eric Neumayer's claim that the internalization of international rules is correlated with the extent of democracy and the number of international non-governmental organizations (NGOs) operating in a country, framing irregular detainees' rights as part of an international regime is convenient.^{xxxix} A regime approach helps individualize the pertinent rules and decision-making procedures.^{xxxix} It also relates international rules and domestic politics, since the former are collectively created but individually implemented by states.^{xxxix} Following Henry Steiner, Philip Alston, and Ryan Goodman, this analysis assumes that the core principles enshrined in the Universal Declaration of Human Rights (UDHR) predate the Enlightenment and are shared by Western and non-Western cultures alike.^{xxxix} Nonetheless, the emergence of a human rights movement in the second half of the twentieth century and of an UN-centered regime open to every country are novel aspects, as reflected in the writings of David Forsythe, John Gerard Ruggie, and Jack Donnelly.^{xxxix}

The cornerstone of the rules of the IHRR that are applicable to detained irregular migrants is the International Bill of Human Rights. Its three components—the UDHR,^{xli} the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—apply to everyone without discrimination.^{xli} A key document related to migrants is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Convention on Migrants), which entered into force on July 1, 2003. It further elaborates on provisions contained in the International Bill of Human Rights, which is the reason why the treaties in Appendix I constitute a coherent and interdependent set of rules.^{xlii} Regrettably, only a scant thirty sending countries have ratified the Convention.^{xliii} In addition, according to Linda Bosniak, the Convention is “at once a ringing declaration of individual rights, and a staunch manifesto in support of state territorial sovereignty.”^{xliii} Bosniak believes that even if the Convention were ratified by receiving states, its impact on irregular migrants would be limited because it allows states to grant these migrants lesser protections than to regular migrants.^{xliii} It becomes clear that the rules of the IHRR are weak both in terms of the extent to which they protect migrants and the extent to which they have been accepted by the international community.

The institutions that legislate and monitor states' compliance with the IHRR are, on one hand, charter-based institutions and institutions authorized by a Charter organ, and treaty-based organs, on the other.^{xlvi} The jurisdiction and mandate of treaty-based organs are limited by the treaties establishing them.^{xlvii} The codification of human rights takes place in the framework of the U.N. General Assembly, while the monitoring of the activities is undertaken by treaty-based organs.^{xlviii} In the case of migrants, oversight is assigned to the Special Rapporteur on the human rights of migrants.^{xlix} Even though decisions are made at the international level, their implementation remains within the sphere of national governments. According to Donnelly, this situation makes the regime promotional in nature: normatively strong but procedurally weak.¹

The nature of irregular immigration is contingent upon legal migration policy. Therefore, literature on irregular migration is inextricably linked to writings on legal migration. The effect of irregular immigration is the subject of an ongoing debate tinted by economic, political, cultural, and security considerations on both ends of the spectrum (see Appendix II).ⁱⁱ The debate bears witness to the definitional confusion surrounding the term *irregular immigration* as well as the latter's effects on host countries.ⁱⁱⁱ As Reza Barmaki explains when discussing the criminalization of refugees, the conceptual confusion arises because definitions "have reflected the definers' theoretical perspective, ethical choices, political goals and/or economic interests."^{liii} The debate also suggests that certain aspects of irregular immigration, such as higher mobility, acceptance of lower wages, and overqualification, are conducive to economic growth.^{liv} This has been acknowledged by U.N. Secretary-General Ban Ki-moon in his address to the Global Forum on Migration and Development (GFMD) in 2007 and 2008.^{lv} However, growth requires irregular immigration to be properly harnessed, which is paradoxical since the regulation of irregular immigration would eliminate its intrinsic benefits.^{lvi}

States offer a wide range of justifications for their immigration control policies. These arguments share a common root in the notion that states have a right to exclude immigrants. For this reason, the analysis of the right of exclusion is critical to understanding the context in which the criminalization of immigrants occurs. This essay adopts James Nafziger's position that "although a state has no duty to admit all aliens who might seek to enter its territory, [they have] a qualified duty to admit aliens when they pose no danger to the public safety, security, general welfare, or essential institutions" for two reasons.^{lvii} First, the literature underscores that the right of exclusion originated in the 19th century, quite recent in the history of the nation-state.^{lviii} Second, although the IHRR grants individuals a right to emigrate, there is no right of admission except for refugees under the 1951 Refugee Convention.^{lix} States justify their right to exclude migrants based on their inherent powers, sovereignty, and domestic jurisdiction. However, Nafziger contends that these arguments are flawed.^{lx} In his opinion, invalid justifications for a right of exclusion originate in a misinterpretation of the 1758 treatise by Emerich de Vattel^{lxi} and from the outcome of landmark court cases in the U.S. and the United Kingdom between 1889 and 1893 in which lawyers failed to convincingly argue against restrictive policies.^{lxii} Nafziger finds that there is little ground for a right of exclusion on the basis of customary law both in quantitative terms and in terms of *opino juris*.^{lxiii} Stephen Castles and Alastair Davidson echo this view and assert that globalization affects citizenship by questioning "the notion of the relative autonomy of the nation state," so that citizenship means not only inclusion but also exclusion.^{lxiv} These two realities drive states into granting themselves a right to exclude immigrants and delimit citizenship, claiming defense of their autonomy.^{lxv}

The third body of literature relevant to this analysis details the criminalization of immigrants. Although *criminalization of migration* and *criminalization of immigration* are more common

terms, the choice in this essay responds to the fact that the subject of criminalization is not the *act* but the *individual*. As shown by research in the EU, criminalization cannot be approached as a top-down or bottom-up process between policy-making elites and the masses.^{lxxvi} As Gallya Lahav and Virginie Guiraudon find, the European public and elites have more ideas in common on the issue of immigration than expected. Furthermore, public opinion—though not being the decisive factor—sets the tone in which elites have to structure their discourse.^{lxxvii} Thus, rather than in a vertical scheme, criminalization is better construed as a discursive practice. As such, from a postmodernist perspective, it constructs reality, knowledge, and values because it is the language used in the interactions between political elites and the masses that shape policy.^{lxxviii} This makes criminalization different from penalization, which is a legal procedure. As Lahav and Guiraudon observe, policies are the outcome of “compromises between various interest groups, mediated by media pressure and party politics.”^{lxxix} Criminalization thus affects policy, shapes immigrants’ identities, and creates a connection the physical presence of irregular migrants with their detention.^{lxxx} In this way, criminalization epitomizes the reflexive nature of globalization.^{lxxxi} Criminalization discourse sees the presence of irregular immigrants as conducive to “various types of nuisance and crime,” assuming a correlation between illegality and criminality.^{lxxxii} This contrasts with the fact that “apart from the use of false or forged documents ... the majority of the interviewed illegal immigrants refrain from criminal activities.”^{lxxxiii} At the societal level, irregular immigrants as well as refugees are demonized by the media and portrayed as enemies.^{lxxxiv} At the government level, measures to control crime and to control immigration converge.^{lxxxv} Criminalization emphasizes the alleged consequences of immigration (i.e., crime) rather than their causes. It shifts the focus from the crime problem to the criminal problem so that mass imprisonment becomes the solution.^{lxxxvi}

Although the criminalization process originated in the U.S. and the United Kingdom in the 1970s and 1980s, expanding later to continental Europe, the consequences became evident in the 1990s.^{lxxxvii} Feelings of insecurity among natives related to the globalization of the economy, “the shrinking of the first labour market, and the rapid expansion of shadow economies as well as mass unemployment” are a few root causes of the criminalization effort.^{lxxxviii} Another reason is the change in the public image of immigrants resulting from shifts in their number and composition. Not only has the number of immigrants to the U.S. steadily increased since the 1930s, but also the influx of refugees from Central America has given way to an influx of Mexico’s poor.^{lxxxix} Since becoming an immigration country in the 1960s, the Netherlands has seen a reconfiguration of the image of immigrants from spontaneous guest workers to illegal immigrants.^{lxxx} Together with changes in the public image of immigrants, higher barriers to immigration and newly created deportable crimes have reduced opportunities for legal immigration.^{lxxxxi} As a consequence, irregular immigrants are pushed into a downward spiral of dependence on the informal sector and the underground economy.^{lxxxii}

The criminalization of immigrants embodies what David Garland calls criminology of the “other.”^{lxxxiii} Nurtured by a crime complex based on “images, archetypes, and anxieties, rather than on careful analyses and research findings,” immigrants are seen as a threat to society.^{lxxxiv} This contrasts with Barmaki’s idea that danger is perceived as a threat to personal safety.^{lxxxv} In the case of irregular immigrants, it is the social order that is perceived to be under siege. The criminology of the other “re-dramatizes crime, reinforces a disaster mentality, and retreats into intolerance and authoritarianism.”^{lxxxvi} The outcomes of the crime complex are social control policies, such as the creation of new deportable crimes in the U.S. and the increase in detention capacity in both the U.S. and the Netherlands.^{lxxxvii} Whereas the U.S. has traditionally operated

under the crime complex, its development in the Netherlands took place in the 1980s and 1990s.^{lxxxviii} Social control policies have the potential to foster the very behavior they seek to deter in a number of ways. First, there is an increase in the number of individuals detained and the duration of detention.^{lxxxix} Second, detention hinders deportation because many countries, such as Algeria and Morocco in the case of the Netherlands, do not want to take back their nationals, which gives immigrants an incentive to hide their identity.^{xc} Third, it leads immigrants to define their identities through public image, embracing rather than challenging the criminal status they are ascribed.^{xcⁱ} Fourth, criminalization distracts attention from more progressive criminology, which focuses on re-evaluating mass imprisonment strategies and exploring the causes, rather than the consequences, of crime.^{92xcii} Detention, according to Michael Welch and Liza Schuster, “is among the gravest acts a state can take against people.”^{xciii} Especially when detention lasts for indefinite periods of time, research in Australia shows that it has negative impacts on the mental health of detainees and leads to suicide, interpersonal violence, rioting, and the burning of detention facilities.^{xciv} Fifth, due to its punitive nature, as the following section shows, detention increases the vulnerability of irregular migrants and creates fertile soil for human rights violations.^{xcv}

III. Case Studies

The first part of each case study considers the domestic legal and institutional framework and the extent to which the treaties in Appendix I have been internalized by domestic law in the state in question. The second part analyzes the extent to which the IHRR is able to address salient human rights issues in detention centers. Appendix III divides detainees’ rights into the categories of presumption against detention, restriction on the use of detention, condition of detention, and general rights.^{xcvi} Detention practices in both countries are found to compromise the right to challenge the legality of detention. In the U.S., specific human rights issues are related to violations of the right of access to medical care. In the Netherlands, human rights issues are related to violations of the rights to humane conditions of detention and to the place of detention.

A. The United States

1. Legal and Institutional Framework

The United States has significantly limited the domestic impact of international law. First, it has neglected to ratify the ICESCR or to sign the Convention on Migrants. Second, it has declared the CERD, Articles 1 through 27 of the ICCPR, and Articles 1 through 16 of the CAT as non-self-executing. Louis Henkin indicates that the guiding principle behind declaring treaties to be non-self-executing is that changes in domestic law must be the outcome of a democratic process rather than a treaty.^{xcvii} Yet, he argues, “this argument impugns, of course, the democratic character of every treaty made or that shall be made by the President with the consent of the Senate.”^{xcviii} Moreover, Human Rights Watch argues that the reservations expressed by the U.S. to the CERD have limited the impact of the treaty, subordinating it to the U.S. Constitution.^{xcix} This would contravene the purpose of international law as well as Art VI, Clause 2, of the U.S. Constitution.^c However, Henkin shows that, “a reservation to avoid an obligation that the United States could not carry out because of constitutional limitations is appropriate, indeed necessary” in light of a Supreme Court ruling in *Reid v. Covert*.^{ci} In spite of its overall reticence toward

international human rights law, the U.S. has accepted the legitimacy of two treaty-monitoring bodies: the Human Rights Committee and the Committee against Torture.^{cii}

Domestic law grants immigrants constitutional rights under the Fifth Amendment, which prohibits punishment without the due process of law.^{ciii} The Supreme Court has stated that the rights protected under due process include “freedom from unreasonable bodily restraint, right to adequate food, shelter, clothing, medical care and adequate training of personnel required by these interests.”^{civ} The Court has also reaffirmed that the right of due process applies to all immigrants, even those subject to deportation, and it emphasized that arbitrary and indefinite detention of aliens is unconstitutional.^{cv} In September 2008, Immigration and Customs Enforcement (ICE), the agency in charge of immigration law enforcement, issued a set of 41 Performance-Based Detention Standards (PBNDS) that became effective in January 2010.^{cvi}

In terms of the legal basis for detention, immigration policies have become increasingly restrictive since the 1980s.^{cvi} The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) modifies the language used by the Immigration and Naturalization Service (INS) by replacing the word “entry” with “admission” and by referring to immigrants as “arriving aliens.”^{cvi} The IIRIRA contemplates different aspects of immigration “including border control, enforcement inside the country, alien smuggling, document fraud, apprehension, detention and removal.”^{cix} It has enacted provisions that eliminate judicial review of detention and deportation cases, allowing the use of secret evidence by the INS (now ICE) and creating new deportable crimes that apply retroactively.^{cx} The Act is complemented by the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).^{cx} In the post-9/11 period, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) has expanded the range of aliens who can be excluded or deported. It establishes the policy of holding immigrants considered to be a threat to national security without bond pending deportation, and allows for indefinite detention of non-deportable aliens.^{cxii} A military order issued in November 2001 also establishes that Al-Qaeda members and noncitizens can be tried by military tribunals, “in which the military would act as prosecutor, judge, jury, and executioner, without appeal to a civilian court.”^{cxiii} In March 2007, the Security through Regularized Immigration and a Vibrant Economy Act (STRIVE) tightened border and interior immigration law enforcement, making it unlawful “to hire, recruit or refer for a fee an unauthorized alien.”^{cxiv} The legal outcome of 9/11 is congruent with Karl Marx’s idea that crises produce legislation that restricts existent freedoms.^{cxv}

Regarding the institutional framework, immigration enforcement activities have been undertaken since 2003 by two agencies working under the Department of Homeland Security (DHS): Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). The former oversees enforcement at ports of entry and the latter operates within the country.^{cxvi} Working under the ICE, the Office of Detention and Removal Operations (DRO) is in charge of the identification, apprehension, and removal of illegal aliens.^{cxvii}

2. Irregular Migrants in Custody

Although illegal entry into the U.S. is a federal crime, illegal residence is a violation of civil, not criminal, law.^{cxviii} This is also the case in the Netherlands and means that irregular migrants are not legally considered criminals. According to Sec 236(a) of the IIRIRA, “On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether

the alien is to be removed from the U.S.” An immigrant is deemed as irregular—or “unauthorized” according to U.S. law—when he or she enters the territory without proper (or with forged) documentation, when the person has been lawfully admitted but remains in the country after the expiration of the visa or when the individual violates the terms of the visa.^{cxxix} Arrests may happen at the border, during inspections in workplaces and households, during traffic stops by local police, or after conviction for a criminal offense.^{cxx}

As in the Netherlands, a distinction can be made between border and interior detention. Ninety-two percent of detentions are performed by the Border Patrol, in which case the immigration office inspecting the alien’s documents determines whether that person is entitled to admission.^{cxxxi} If the ICE Field Officer denies admission, the alien may be detained and is not entitled to a judicial review by an immigration judge.^{cxxii} When detained within the borders, irregular migrants can be released on a bond of no less than \$1,500 or on conditional parole after judicial review of their cases, which takes place only if requested.^{cxxiii} The distinction between border and interior detention is overridden by “mandatory detention.” This type of detention applies to immigrants who have committed a wide array of crimes such as small drug possessions and does not allow for custody review.^{cxxiv} Contrary to traditional legal practice, if a detainee challenges mandatory detention, the burden of proof falls on her or him, rather than on ICE.^{cxxv}

The DHS estimates that there were 10.8 illegal immigrants in the United States in early 2009, a decrease from the 11.6 million present in January 2008.^{cxxvi} Irregular immigrants are detained in fifteen detention centers and in a large number of state and local jails. Eight detention centers are run by ICE and seven run by private companies.^{cxxvii} The total number of local facilities is approximately 350.^{cxxviii} This makes the United States the country with the largest immigrant detention infrastructure in the world.^{cxxix} Immigrant detainees in the U.S. are the fastest growing prison population, having increased by 400 percent since 1994.^{cxxx} According to ICE data, there were 32,000 irregular immigrants in detention on January 25, 2009.^{cxxxi} The causes of the surge are changes in immigration legislation as well as tighter enforcement after 9/11.^{cxxxii} The current detention capacity is 33,400, compared to 27,500 in 2006 and 6,785 in 1994.^{cxxxiii}

The remainder of this section focuses on the conditions of detention; more specifically, on the provision of healthcare to immigrant detainees. This issue has been identified as significant by *New York Times* reporter Nina Bernstein in a personal communication.^{cxxxiv} In September 1998, Human Rights Watch found that “medical and dental care were substandard in many of the jails holding detainees.”^{cxxxv} A decade later the same organization published a report on poor HIV/AIDS services for immigrants in U.S. detention centers.^{cxxxvi} In June 2008, a report on the Northwest Detention Center, located in Tacoma, Washington, noted that “after waiting uncomfortably in line for several hours, [immigrant detainees] would often receive ineffective medical treatment.”^{cxxxvii} Concerns raised by the media and NGOs after the death of two detainees in mid-2008 prompted a review of the cases by the Office of the Inspector General of the DHS. The report, published in July 2008, indicates that although ICE “adhered to important portions of the detainee death standards” there are “compliance problems related to certain medical standards at various facilities.”^{cxxxviii} This report echoes a 2006 report by ICE which concluded that in the particular case of a Virginia jail “detainee healthcare is in jeopardy.”^{cxxxix} Oftentimes ICE ignores detention standards, such as detainees’ rights to a medical screening upon arrival, to a comprehensive screening within fourteen days of admission, and to schedule appointments with outside medical providers when necessary.^{cxl} An example of this negligence is the case of Hiu Lui Ng, who died in August 2008 with a fractured spine and cancer in an

advanced stage, which “had gone undiagnosed for months” in spite of his complaints.^{cxli} A more recent case is that of Guido R. Newbrough, who died in November 2008 in Piedmont Regional Jail from a bacterial infection in his heart that went untreated despite his requests.^{cxlii}

The aforementioned reports indicate that ICE practices compromise several rights related to the condition of detention.^{cxliii} Inasmuch as it is in clear breach of Article 10 (1) of the ICCPR, the treatment of prisoners in U.S. detention centers contravenes the right to humane conditions while in detention. ICE’s treatment of immigrant detainees also contravenes Article 12 of the ICESCR on the right to physical and mental health care.^{cxliiv} It is also in clear breach of domestic legislation, particularly the Fifth and Eighth Amendments, the PBNDS, and rulings by federal courts establishing the government’s duty to provide medical care to detainees.^{cxliv} The U.S. attitude toward the ICCPR and the CAT is indicative of what Julie Mertus calls “U.S. exceptionalism,”^{cxlvii} a practice similar to Peter Spiro’s concept of “New Sovereignism.”^{cxlviii} This posture has been criticized by the U.N. Human Rights Committee, which deems U.S. reservations about the ICCPR to be incompatible with the purpose of the treaty and thus invalid.^{cxlix} The contentious relationship between international agreements and domestic laws makes remedies to human rights violations in American detention centers elusive.^{cxlix}

The role played by U.N. monitoring bodies (i.e., decision-making procedures) has been considerably subverted by American exceptionalism. This exceptionalism is grounded in a stringent view of sovereignty^{cl} and on the popular belief that “immigration is the leading cause of the deterioration of the country.”^{cli} It also stems from the increase in xenophobia post-9/11. The documentation of an increase in xenophobia by the Special Rapporteur on the Human Rights of Migrants, after a visit to the U.S. in early 2008, is congruent with the literature on criminalization, especially Carl Levy.^{clii} In early 2007, the Special Rapporteur on the Human Rights of Migrants conducted a mission to the U.S. Although the report produced by this mission does not address the subject of medical treatment directly, it underscores the weak commitment by the U.S. to its duties under the international human rights regime and to its lack of a “clear, consistent, long-term strategy to improve respect for human rights of migrants.”^{cliii}

The subordination of international treaties to domestic law, and restrictive immigration control policies, create an environment propitious for a lax enforcement of irregular detainees’ human rights. This lends support to the idea that the IHRR is a promotional regime in which enforcement only becomes possible at the domestic level. This case study shows the way in which irregular immigrant detainees’ human rights are compromised by domestic law and practice, especially the right of access to medical care. These violations are indicative of the limited impact that the international human rights regime has on government policy with respect to the detention of irregular migrants.

B. The Netherlands

1. Legal and Institutional Framework

The Netherlands has ratified all the treaties in Appendix I except for the Convention on Migrants.^{cliv} Its reservations about the ICCPR limit the domestic applicability of the treaty significantly less than the reservations by the U.S. Nevertheless, because “ideas about the treatment of prisoners are so liable to change,” the country does not consider itself bound by Paragraphs 2 and 3 of Article 10, which is about the conditions of detention.^{clv} As in the U.S., unlawful residence is not a penal offence.^{clvi} Thus, immigrants are placed under administrative

detention.^{clvii} In contrast with the U.S., the literature reviewed focuses less on immigrants' rights under domestic law and more on the extent to which the state respects the limits set on detention practices.^{clviii} One of the reasons why the literature is more focused on domestic rules is that the incorporation of international norms into domestic law is more extensive than in the U.S.^{clix} A second reason is that, as Anton Van Kalmthout argues, foreign prisoners are generally treated in a similar way as Dutch nationals.^{clx} If citizens and immigrants are treated comparably, the reasoning goes, whatever violation of human rights exists will affect both groups. In such case, resorting to domestic law seems more efficient than using international human rights law. However, this is neither true in theory, nor in practice. As the following paragraphs show, there are both legal and practical differences in the way in which irregular immigrants and Dutch nationals are treated in detention, to the disadvantage of the former.

The Aliens Act 2000 (Vreemdelingenwet 2000) entered into effect on April 1, 2001.^{clxi} It is supplemented by the Aliens Decree 2000 (Vreemdelingenbesluit 2000) and the Aliens Circular (Vreemdelingencirculaire 2000), which elaborate upon procedural practices.^{clxii} These documents are only available in Dutch and, regrettably for the study, the informative leaflet produced by the Ministry of Justice only devotes two paragraphs to the issues of identity checks and deportation.^{clxiii} In a personal communication, the Ministry of Justice acknowledged the likelihood that there are no English translations of the Act. The only translation available is from the United Nations High Commissioner for Refugees' website, but the text differs from the original Dutch.^{clxiv}

The Act has increased the police power to stop migrants by transferring administrative functions from the police to the Immigration and Naturalization Service and municipalities, and by "objectifying" stopping procedures.^{clxv} An assessment of the changes requested by the Ministry of Justice shows a dramatic increase in the number of aliens stopped and a significant level of cooperation between local police forces and the Aliens Police.^{clxvi} Remarkably, this cooperation is rare in the U.S.^{clxvii} The assessment contrasts with the testimony of Francine Hermsen from the Asylum Seeker Center in Heerlen. Hermsen underscores the differences in policy implementation between the national and local level due to municipalities using their budget to support local organizations.^{clxviii} Maril Donders and Miekje Flinterman, from VluchtelingenWerk, echo Hermsen's perspective, pointing out that most of VluchtelingenWerk's budget comes from the municipality. In addition, despite the organization's focus on asylum seekers, it is able, under certain conditions, to help irregular immigrants.^{clxix}

Regarding the domestic institutional framework with respect to irregular immigrants, operational supervision is the main task of the Aliens Police, a division of each regional police department; which may explain the cooperation.^{clxx} Border patrol is conducted by the Royal Military Constabulary, an agency of the Ministry of Defense. A separate unit of the National Agency of Correctional Institutions (DJI), called Temporary Unit Special Provisions, operates detention centers. This unit was created in 2003. Although it falls under the Ministry of Justice as the DJI, it is directed by the Minister for Immigration and Integration.^{clxxi} Consistent with the literature examined above, the relocation of immigration matters from the Home Affairs Ministry to the Justice Ministry "reinforces the perceived link between immigration, integration, crime and security."^{clxxii}

2. Irregular Migrants in Custody

Aliens can be detained under Article 6 or 59 of the Aliens Act 2000.^{clxxxiii} Article 6 is used to prevent illegal entrance and is regulated by the Regulation on Border Accommodation (RBA), a framework specifically for immigrant detainees.^{clxxxiv} However, in the majority of cases, detention occurs under Article 59 when irregular aliens are found within the borders.^{clxxxv} Detention in this instance is intended for the purpose of deportation and is regulated by the Penitentiary Principles Act (PPA), a framework developed for the detention of criminals.^{clxxxvi} The use of detention practices devised for criminals contravenes the principle that irregular migrants are not criminals in the legal sense: while RBA only allows for administrative measures, PPA authorizes the use of force on detainees.^{clxxxvii} Moreover, although foreign and Dutch nationals can be sentenced to the same sanctions, a set of non-binding guidelines “meant to establish more equality in sentencing practice” excludes immigrants from lighter sanctions.^{clxxxviii} Also, whereas penal detention requires judicial review within a few days, there is no such requirement in the case of irregular immigrants.^{clxxxix}

According to the Ministry of Justice, there were between 74,000 and 184,000 irregular migrants living in the Netherlands between April 2005–2006.^{clxxx} Every year, more than 20,000 irregular migrants and asylum seekers are detained for a period that lasts on average between 80 and 100 days.^{clxxxi} The number of detainees has increased by 280 percent (from 783 in 2002 to 2,170 in 2006), a slower but similar trend as that in the U.S.^{clxxxii} Detainees are housed in seven detention centers, two penitentiary institutions for pre-trial detainees, and one institution for men, women, and children.^{clxxxiii}

Among the four categories of rights in Appendix III, salient issues in the Netherlands are the violation of rights regarding conditions of detention and the limits imposed on the use of detention. A report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT) addresses breaches of the right to humane conditions in detention. It recommends discontinuing the use of boats and of physical means of restraint as well as decreasing the level of humidity in detention boats. It underscores the poor conditions of outdoor exercise space and the unavailability of recreational activities, concerns duly echoed by NGOs.^{clxxxiv} Although the Dutch government has avoided mixing immigrant detainees with remand prisoners, in so doing it subjects the former to conditions of detention similar or worse than those of convicted criminals.^{clxxxv} A case that epitomizes the violation of the right to humane conditions of detention is the fire at the detention center Schiphol-Oost. On the night of 26 October 2005, a fire broke out in a cell and expanded to other cells in the same wing, killing eleven detainees and injuring fifteen.^{clxxxvi} The Dutch Safety Board, an agency that investigates “individual or categories of occurrences in all sectors,” produced a report, which concludes that the detainee’s right to humane conditions of detention was jeopardized.^{clxxxvii} Not only was “the organization of the Detention Centre Schiphol-Oost ... insufficiently prepared and setup for an outbreak of fire,” but also the reasons for the late arrival of the fire brigade lie partially with the management of the detention center.^{clxxxviii} As the report concludes, “the management of DJI bears responsibility for the safety of cell occupants and staff.”^{clxxxix}

Regarding the right to access to medical care, the report indicates that medical staff should be always on call and that someone qualified to provide first aid should always be present.^{cxc} Dr. Carolien Koning from Regioplan argues that this right is not as compromised as it is in the U.S.^{cxcii} Yet, two recent deaths in a Rotterdam detention center raise concerns about the respect for the detainees’ right to adequate healthcare.^{cxcii} Regarding contact with the outside world, the report recommends that the Dutch government “verify the situation regarding the cost of telephone calls and the possibility of other forms of communication.”^{cxciii} Data on the number of

detainees is hard to access. This echoes Donders's claim that "nobody knows what happens to illegal immigrants because nobody sees them."^{cxci} Regarding the restrictions on the use of detention, the innovative provisions in the Aliens Act 2000 that expedited judicial review and instituted automatic reviews every four weeks were reversed in September 2004 due to the backlog of cases.^{cxv} This reversion subverts detainees' right to challenge the legality of detention before a judicial body, enshrined in Article 2 [3 (b)] and 9 [3] of the ICCPR and Article 16 [8] of the Convention on Migrants.

Personal communications with refugees show that conditions for them are better than those for immigrant detainees.^{cxvi} A Russian political refugee (identity withheld) said that, "the police was very nice to me: they even fetched my luggage and gave me coffee; there are not many violations of human rights here in the Netherlands." This was echoed by an Iraqi refugee, initials A. R., who explained that he was given what he considered to be enough information about the asylum application procedure and an Arabic translator was made available for his first interview. He underscored the importance of having a prompt response about his status by the IND in order to mitigate the uncertainty.^{cxvii}

Regarding the role of U.N. monitoring agencies, the Iraqi and Russian refugees emphasized that they did not notice the involvement of any international organization. Both identified the importance of domestic non-governmental organizations. In A.R.'s case, VluchtelingenWerk has been significantly faster than the Central Agency for the Reception of Asylum Seekers (COA) in providing housing and information. Flinterman also emphasized the negligible role played by international human rights organizations "on the ground." According to Flinterman, "in this group [VluchtelingenWerk staff] nobody knows anything about human rights; most people come for social feelings. [Their motivation] is helping people who are not able to help themselves. It is complicated [for refugees], so we try to give them equal opportunities."^{cxviii} In addition, Flinterman acknowledged that while the International Organization of Migration performs a remarkable job at gathering information and statistics, VluchtelingenWerk has little contact with them.

IV. Lessons and Conclusion

The case studies show that the effects of globalization on the United States and the Netherlands converge to a significant extent. First, both countries have attempted to limit the impact of the IHRR. As the U.S. case study suggests, the problem does not lie with the subordination of international norms to the Constitution, but with the reluctance to bring domestic law in line with international law. This compels domestic and international actors to refer mainly to domestic legislation when seeking remedies for human rights violations. Second, in the wake of an increase in the number of immigrants, both countries have enacted restrictive immigration policies. Third, these policies are both cause and consequence of a process of criminalization of immigrants, which is compounded by a crime complex. In light of this complex, the detention of irregular immigrants is perceived to be the solution to the crime problem. Fourth, detention practices significantly jeopardize detainees' rights. In both countries, the right to challenge the legality of detention is compromised. While in the U.S. the DHS compromises the right of access to medical care, in the Netherlands it is the right to humane conditions of detention that is more endangered by the DJI.

Looking at globalization in a comparative perspective, the foregoing analysis leads to several lessons. The first lesson is that the impact of the IHRR on domestic policy concerning the

detention of irregular immigrants is limited. In light of Krasner's argument that regimes are weakened when practices become inconsistent with principles, norms, rules, and decision-making procedures, it is clear that the IHRR has been debilitated.^{cxci} This is true of both the rules and decision-making procedures of the IHRR. The former are weakened by a country's refusal to ratify international treaties, by the limits set on the domestic applicability of international norms, and by the possibility of upgrading domestic legislation. In his discussion of the Convention of Migrants, Patrick Taran argues that although the text was available in 1990, it was not published until 1996.^{cc} In addition to the lack of enforcement power and resources, the institutions of the IHRR are weakened by the ethos of domestic organizations.^{cci} In this respect, Flinterman confirms Taran's claim that, "a strong organizational ethos remains common to many national and local CSOs [Civil Society Organizations], privileging localism and expressing hostility and distrust of international initiatives."^{ccii} While the IHRR exhibits low salience in the U.S., its salience is higher in the Netherlands because norms seem to have entered the national discourse through ratification but have failed to produce institutional change.^{cciii}

The second lesson contrasts with Yasemin Soysal's argument that, "world level pressures ... have led to the increasing incorporation of foreigners into existing membership schemes."^{cciv} In spite of higher mobility and the development of international human rights treaties, it is clear from the analysis that citizenship plays a significant role in the adjudication of universal entitlements. The third lesson, also an avenue for further research, is that the actors with the greatest potential to help states internalize the IHRR are local NGOs collaborating with international organizations. This is so because while the latter derive rhetorical power from their status as decision-making bodies of the IHRR, the former are rooted in the country in question, are trusted by immigrants, and have greater contextual knowledge.

Although these lessons shed some light on one of the many facets of globalization, several avenues remain open for further research. One such question is the extent to which diverse models of international norm diffusion apply in the U.S. and the Netherlands. Another could be a study of the role of local NGOs and civil society. A third path, considering Susan Martin's argument, could be the analysis of the role played by soft law, especially when used by domestic organizations.^{ccv} The lessons drawn from the U.S. and Dutch case studies call into question the "States-led process" that U.N. Secretary-General Ban Ki-moon extolled.^{ccvi} In the opening of the Second Global Forum on Migration and Development, he introduced this process as a way of harnessing the benefits and confronting the fears of immigration. However, this analysis has shown that state-led approaches are insufficient and must be complemented with more local initiatives. When addressing violations of the human rights of irregular immigrants in detention centers, it is important to augment the rhetorical strength of the international human rights regime with the grassroots resources, knowledge, and ethos of domestic organizations.

Appendix I: Legally Binding Universal Treaties Relevant to Irregular Migrants

Treaty	Date	Entered into force	Sig	Parties	United States		Netherlands	
					Signature	Ratification, Accession (a), Succession (d)	Signature	Ratification, Accession (a), Succession (d)
Vienna Convention on Consular Relations (CCR) ^{ccvii}	24 Apr 1963	19 Mar 1967	48	172	24 Apr 1963	24 Dec 1969		17 Dec 1985 (a)
International Convention on the Elimination of All Forms of Racial Discrimination (CERD) ^{ccviii}	7 Mar 1966	4 Jan 1969	85	173	28 Sep 1966	24 Oct 1994	14 Oct 1966	10 Dec 1971
International Covenant on Civil and Political Rights (ICCPR) ^{ccix}	16 Dec 1966	23 Mar 1976	72	164	5 Oct 1977	8 Jun 1992	25 Jun 1969	11 Dec 1978
International Covenant on Economic, Social and Cultural Rights (ICESCR) ^{ccx}	16 Dec 1966	3 Jan 1976	69	160	5 Oct 1977		25 Jun 1969	11 Dec 1978
Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ^{ccxi}	10 Dec 1984	26 Jun 1987	76	146	18 Apr 1988	21 Oct 1994	4 Feb 1985	21 Dec 1988
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Convention on Migrants) ^{ccxii}	18 Dec 1990	1 Jul 2003	30	41				

Appendix II: The Debate on the Effects of Immigration

On the anti-immigration end of the spectrum, focusing on the Netherlands, Roodenburg argues that despite inconclusive evidence, previous immigration waves “have left the taxpayer with a number of unpaid bills” and concludes that, “labour migration seems to be more suitable to countries with a frugal welfare state and a low population density.”^{ccxiii} Van Ours argues that unrestricted labor migration is no solution to Dutch economic problems, and advocates a selective immigration policy. Opponents of immigration also argue that immigrants exert an adverse effect on the employment opportunities and wages of natives through an increase in labor supply.^{ccxiv} In general, anxieties about immigration include concerns about population growth, environmental and demographic problems, and depression of wages and working conditions.^{ccxv}

In contrast, other scholars claim that immigration in general and irregular immigration in particular can have a benign impact on the host country. Immigrants are assumed to be unskilled and are expected to face significant obstacles in “catching up” with natives.^{ccxvi} However, they have a strong willingness to work, in many cases are overqualified for the low-skill jobs they perform, and in some cases display a rapid rate of economic assimilation in terms of earnings increase.^{ccxvii} Moreover, they migrate into an aging society, especially in the case of Europe.^{ccxviii} Immigrants’ ease of mobility and choice of cities with the highest wages are thus beneficial for the host country’s economy because they help to reduce wage differentials.^{ccxix} This reflects the aforementioned tension between the economics of production and welfare economics identified by Jordan and Düvell and echoed by Albrecht.^{ccxx} In this respect, studies show that despite the fact that immigrants use more welfare than natives, their contributions in terms of taxes is higher.^{ccxxi}

Appendix III: Presumption against Detention

Right to liberty	Treaties	ICCPR (1966) – Article 9 Convention on Migrants (1990) – Article 16(1)
	TM Bodies	General Comment no 8 (1982) of the HRC, Humane treatment of persons deprived of their liberty (Art 9 ICCPR) – Art 1
Freedom of movement	Treaties	ICCPR (1966) – Article 12 (1) (3) International Convention on the Elimination of All Forms of Racial Discrimination (1969) – Article 5 (d) (i)
	TM Bodies	General Comment no 27 (1999) of the HRC, Freedom of movement (Art 12 of ICCPR) – Para 2, Para 4, Para 14, Para 15
Prohibition of detention on the basis of illegal entry or presence	Other	Report of the UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodriguez Pizarro, E/CN. 4/2003/85 – Para 43 Recommendations: Para 73, Para 74.

Restrictions on the Use of Detention

Prohibition of arbitrary detention	Treaties	ICCPR (1966) – Article 9(1) International Convention on Migrants (1990) – Article 16(4)
	TM Bodies	General Comment no 8 (1982) of the HRC, Right to Liberty and Security of Persons (Art 9 of ICCPR) – Para 1. General Recommendation no 30 (2004) of the Committee on the Elimination of Racial Discrimination, Discrimination Against Non-Citizens – Para 19 A. v. Australia, HRC Communication no 560/1993 C. v. Australia, HRC Communication no 900/1999
Exceptional Grounds for Detention	Treaties	ICCPR (1966) – Article 9(1), Article 12(1) Convention on Migrant (1990) – Article 16(4)
	TM Bodies	General Comment no 8 (1982) of the HRC, Humane treatment of persons deprived of their liberty (Article 9 of the ICCPR) – Para 4 A. v. Australia
Right to be informed of the reasons for detention	Treaties	ICCPR (1966) – Article 9(2) Convention on Migrants (1990) – Article 16(5)
Right to challenge the lawfulness of detention before a judicial body	Treaties	ICCPR (1966) – Article 2(3) (a) (b) (c), 9(4) Convention on Migrants (1990) – Article 16(8)
	TM Bodies	General Comment no 8 (1982) – Paragraph 1 C. v. Australia A. v. Australia Torres v. Finland, HRC Communication no 291/1988: Finland 04/05/90. CCPR/C/30?D/91/1988
Access to counsel and right to legal assistance and interpretation	Treaties	Convention on Migrants, 1990 – Article 16(7), Article 18(3)(d)
	TM Bodies	General Comment no 20 (1992) of the HRC, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of ICCPR) – Paragraph 11 Concluding Observations of the HRC: United Kingdom of Great Britain and Northern Ireland, 06/12/2001. CCPR/CO/73?UK – Para 16
Right to compensation	Treaties	ICCPR, 1966 – Article 2(3) (a, b,c), Article 9(5), Convention on Migrants, 1990 – Article 16(9)
	TM Bodies	General Comment no 3 (1981) of the HRC on Implementation at the national level (Article 2 of the ICCPR) C v. Australia, Human Rights Committee Communication no 900/1999: Australia. 13/11/2002/ CCPR/C/76/900/1999 A v. Australia, Human Rights Committee Communication no 560/1993: Australia. 10/04/97. CCPR/C/59?560/1993

Conditions of Detention

Protection against torture, cruel, inhuman or degrading treatment	Treaties	ICCPR, 1966 – Article 7, Article 10(1) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 – Article 2(1), (2), (3), Article 11, Article 16(1)
	TM Bodies	General Comment no 20 (1992) of the HRC, replaces comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR) – Para 2, Para 3, Para 6, Para 7
Humane conditions in detention	Treaties	ICCPR, 1966 – Article 10(1) Convention on Migrants – Article 17(1), (3), (7)
	TM Bodies	General Comment no 21 (1992) of the HRC, replaces general comment 9 concerning humane treatment of persons deprived of liberty – Para 3 General Comment no 15 (1986) of the HRC, The position of aliens under the ICCPR – Para 7 General Comment no 9 (1982) of the HRC: Humane treatment of persons deprived of liberty, (Article 10 of the ICCPR) – Para 1 General Recommendation no 30: Discrimination Against Non Citizens: The Committee on the Elimination of Racial Discriminations, 01/10/2004 – Para 19 C v. Australia, HRC, Communication no 900/1999: Australia., 13/11/2002. CCPR/C/76/D/900/1999
Communication with the outside world (family and organizations)	Treaties	Convention on Migrants, 1990 – Article 17(5)
	TM Bodies	General Comment no 20 (1992) of the HRC, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of ICCPR) – Para 11
Communication with consular officials	Treaties	Convention on Migrants – Article 16(7) (a, b, c), Article 23 Vienna Convention on Consular Relations, 1963 – Article 36(1), (a, b, c)
Access to medical care	Treaties	ICESCR, 1966 – Article 12(1) (2) (d) Convention on Migrants – Article 28
	TM Bodies	General Comment no 20 (1992) of the HRC, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR) – Para 11 General Comment no 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health, (Article 12 of the ICESCR) – Para 34 C v. Australia, HRC, Communication no 900/1999: Australia. 13/11/2002. CCPR/C/76/D/900/1999
Place of detention	TM Bodies	General Comment no 20 (1992) of the HRC, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR) – Para 11
Record keeping and inspection	IM Bodies	General Comment no 20 (1992) of the HRC, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7 of the ICCPR) - Para 11

General

Non-discrimination and proportionality	Treaties	ICCPR, 1966 – Article 2(1), 12(3), 26 Convention on Migrants – Article 7, 39(1,2)
	TM Bodies	General Comment no 31 (2004) of the HRC on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant (ICCPR) – Para 10 General Comment no 27 (1999) of the HRC, Freedom of movement (Art 12 of the ICCPR) – Para 2, 4, 14, 15. General Comment no 18 (1989) of the HRC on Non discrimination (ICCPR) – Para 1 General Comment no 15 (1986) of the HRC on the Position of Aliens under the

		Covenant (ICCPR) – Para 1, 2 A v. Australia, HRC Communication NO 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993
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Notes

ⁱ Quoted in Teresa Hayter, *Open Borders: The Case Against Immigration Controls* (London: Pluto Press, 2004), p. 13. The poem originally appeared in the *Pall Mall Gazette* in 1909.

ⁱⁱ Angie C. Marek, “Below Sea Level? No Problem,” *U.S. News & World Report* (18 March 2007), accessed online on 20 March 2009 at usnews.com/usnews/news/articles/070318/26dike.htm.

ⁱⁱⁱ Didier Bigo, “Criminalisation of ‘Migrants’: The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion,” in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, edited by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak 64 (Leiden: Martinus Nijhoff Publishers, 2004); Michael Walzer, quoted in Satvinder Singh Juss, *International Migration and Global Justice* (Burlington, Ver.: Ashgate Publishing Company, 2006), p. 43; and Pim Fortuyn, quoted in Eric Weinberger, “On the Edge: How Democratic Values May Be Threatened by Europe’s Efforts to Appease its Radical Muslim Enclaves,” *The Boston Globe* (12 March 2006), accessed online on 28 June 2009 at boston.com/ae/books/articles/2006/03/12/on_the_edge/.

^{iv} James Goldsborough, “Out-of-Control Immigration,” *Foreign Affairs* 79, no. 5 (2000): 92, 93. See also Bigo 2004, p. 85; Phillip L. Martin and Mark J. Miller, “European–American Immigration Convergence,” *International Migration Review* 28, no. 3 (1994): 64; and Michael Welch, “Ironies of Social Control and the Criminalization of Immigrants,” *Crime, Law & Social Change* 39 (2003): 319.

^v United Nations, “Secretary-General, in Lecture on International Flows of Humanity Says Human Rights Must be at Heart of Migration Policies,” SG/SM/9027 (21 November 2003), accessed online on 16 November 2008 at un.org/News/Press/docs/2003/sgsm9027.doc.htm; United Nations, “Secretary-General, Addressing Global Forum on Migration and Development Calls for Policy Action to Benefit Migrants, Families, Communities,” SG/SM/11084 (10 July 2007), accessed online on 25 June 2009 at un.org/News/Press/docs//2007/sgsm11084.doc.htm; and United Nations, “Address to the Second Global Forum on Migration and Development” (28 October 2008), accessed online on 25 June 2009 at un.org/apps/news/infocus/speeches/search_full.asp?statID=354.

^{vi} The world migration stock has increased from 75 million in 1960 to more than 190 million in 2005 (United Nations, World Migrant Stock: The 2005 Revision Population Database). The International Organization for Migration (IOM) estimates that there are more than 200 million migrants in the world today. There are 20 to 30 million irregular immigrants worldwide, which comprise 10 to 15 percent of the world migrant stock (International Organization for Migration, “Global Estimates and Trends, Facts and Figures,” accessed online on 3 June 2009 at iom.int/jahia/Jahia/about-migration/facts-and-figures/global-estimates-and-trends, paragraphs 1 and 6. Between 2.5 and 4 million migrants cross national borders without authorization each year. (Global Commission on International Migration, “Migration at a Glance,” accessed online on 3 June 2009 at gcim.org/attachements/Migration%20at%20a%20glance.pdf, p. 4). See also United Nations, “Secretary-General, Addressing Global Forum” (2007).

^{vii} Goldsborough argues that immigration became problematic in the late 1970s and early 1980s due to the influx of Central American, Haitian, and Cuban refugees (Goldsborough 2000, pp. 92, 93). A different perspective is that of Welch, who says that this happened after the 1993 attack on the World Trade Center (Welch 2003, p. 319). In Western Europe, according to Welch and Schuster, immigration became a salient issue as a result of a conceptual shift from spontaneous guest workers to illegal immigrants (Michael Welch and Liza Schuster, “Detention of Asylum Seekers in the US, UK, France, Germany and Italy: A Critical View of the Globalizing Culture of Control,” *Criminal Justice* 5 (2005): 348). See also Klaus F. Zimmermann, “Tackling the European Migration Problem,” *The Journal of Economic Perspectives* 9, no. 2 (1995): 46; Hans-Jörg Albrecht, “Fortress Europe?—Controlling Illegal Immigration,” *European Journal of Crime, Criminal Law and Justice* 10, no. 1 (2002): 19; Sarah Collinson, *Europe and International Migration* (London: Printer Publishers Ltd., 1993), p. 109; Gallya Lahav, *Immigration and Politics in the New Europe* (Cambridge: Cambridge University Press, 2004), pp. 31, 42; Gallya Lahav, “Public Opinion toward Immigration in the European Union: Does it Matter?,” *Comparative Political Studies* 37, no. 10 (2004): 1160; Paul Minderhoud, “Coping with Irregular Migration: The Dutch Experience,” in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, edited by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak, 387–406 (Leiden: Martinus Nijhoff Publishers, 2004), p. 38; and David Konet and Jeanne Batalova, “Spotlight on Immigration Enforcement in the United States,” *Migration Information Source*, accessed online on 18 November 2008 at migrationinformation.org/USfocus/display.cfm?ID=590#2.

^{viii} This is more so, according to Welch and Schuster, because fear of criminals has become indistinguishable from fear of immigrants (Welch and Schuster 2005, p. 384). See also Albrecht 2002, p. 6; Bigo 2004, p. 70; and Minderhoud 2004, p. 389.

^{ix} Crawford, quoted in Reza Barmaki, "Criminals/Refugees in the Age of Welfareless States: Zygmunt Bauman on Ethnicity, Asylum and the new 'Criminal,'" *International Journal of Criminology and Sociological Theory* 2, no. 1 (2009): 252. See also Francis Pakes, "The Politics of Discontent: The Emergence of a New Criminal Justice Discourse in the Netherlands," *The Howard Journal* 43, no. 3 (2004): 284; Albrecht 2002, p. 2; Welch 2003, p. 322; and Welch and Schuster 2005, p. 344. See also Aristide Zolberg and Peter Benda, *Global Migrants, Global Refugees: Problems and Solutions* (Oxford: Berghahn Books, 2001), pp. 1–9.

^x John Tomlinson, *Globalization and Culture* (Cambridge: Polity Press, 1999), pp. 24, 25. See also Ulrich Beck, *What is Globalization?* (Cambridge: Polity Press, 2000), pp. 100, 101.

^{xi} Globalization entails a shortening of social distances and a compression in the scale of time, according to Anthony Giddens, through the separation of time and space, the disembedding of social systems, and in the reflexive ordering and reordering of social relations (Anthony Giddens, *The Consequences of Modernity*, Oxford: Polity Press, 1990, pp. 15, 16). See also Stephen Castles and Alastair Davidson, *Citizenship and Migration: Globalization of Politics of Belonging* (London: Macmillan Press Ltd., 2000), p. ix; Bigo 2004, p. 61; Beck 2000, p. 20; David Harvey, *The Condition of Postmodernity; An Enquiry into the Origins of Cultural Change* (Oxford: Blackwell, 1989), p. 240ff; and Scott Lash and John Urry, *Economies of Signs and Spaces* (London: Sage, 1994), pp. 252–278.

^{xii} Collinson 1993.

^{xiii} Jack Donnelly, "International Human Rights: A Regime Analysis," *International Organization* 40, no. 3 (1986): p. 614; and Juss 2006, pp. 5–7.

^{xiv} Collinson 1993; Juss 2006, p. 5; Lahav 2004, p. 42; and Barmaki 2009, p. 252; and J. Doomernik, "The Myth of Restrictive Immigration Policy," *Justitiële Verkenningen* 27, no. 8 (2001), accessed online on 22 February 2009 at english.wodc.nl/images/jv0108_summaries_tcm45-57044.pdf.

^{xv} Jacqueline Bhabha, "Internationalist Gatekeepers? The Tension Between Asylum Advocacy and Human Rights," *Harvard Human Rights Journal* 15 (2002): 161.

^{xvi} Andrew P. Cortell and James W. Davis Jr., "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms," *International Studies Quarterly* 40, no. 4 (1996); Andrew P. Cortell and James W. Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda," *International Studies Review* 2, no. 1 (2000); and Jeffrey T Checkel, "Norms, Institutions, and National Identity Policy in Contemporary Europe," *International Studies Quarterly* 43, no. 1 (1999).

^{xvii} David Martin, “Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy,” *International Migration Review* 23, no. 3 (1989): 554, 555. This excluded non-binding resolutions and declarations, such as the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention and the Basic Principles for the Treatment of Prisoners. See United Nations Economic and Social Council, Standard Minimum Rules for the Treatment of Prisoners (Resolution 663 C I (XXIV)), accessed online on 16 November 2008 at uncjin.org/Standards/Rules/r01/r01.html; United Nations General Assembly, Resolution 43/173 (9 December 1988), accessed online on 16 November 2008 at un.org/documents/ga/res/43/a43r173.htm; and United Nations General Assembly, Resolution 45/111 (14 December 1990), accessed online on 16 November 2008 at un.org/documents/ga/res/45/a45r111.htm.

^{xviii} In spite of the lack of widely accepted and effectively enforceable legal instruments to protect detained irregular migrants’ rights, the rights approach “offers a normative vocabulary that facilitates both the framing of claims and the identification of the rights holder” (Juss 2006, p. 5). See also Donnelly 1986, p. 605; Kiyoteru Tsutsui and Christin Min Wotipka, “Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations,” *Social Forces* 83, no. 2 (2004): 609; Cortell and Davis 1996, p. 83; and Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54, no. 2 (2000): 223.

^{xix} Linda S. Bosniak, “Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers’ Convention,” in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, edited by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyzszak, 311–341 (Leiden: Martinus Nijhoff Publishers, 2004), p. 317; and International Organization for Migration [IOM], “Irregular Migration,” Types of Irregular Migration, accessed online on 30 April 2009 at iom.int/jahia/Jahia/aboutmigration/managingmigration/cache/offonce/pid/674;jsessionid=C3AC8380B805FC9DA68588C6DC987DD1.worker01; and Global Migration Group, “International Migration and Human Rights” (October 2008), accessed online on 20 November 2008 at globalmigrationgroup.org/pdf/Int_Migration_Human_Rights.pdf, p. 7.

^{xx} Irregular migrants numbered 10.8 in early 2009. Figures for the European Union (EU 25) in 2005 range between a minimum of 2,805,361 and a maximum of 8,000,000 (Hamburg Institute of International Economics [HWWI]. “Database on Irregular Migration: Europe,” accessed online on 30 April 2009 at irregularmigration.hwwi.net/typo3_upload/groups/31/3.Database_on_IrregMig/3.1.EU_Estimate/IrregularForeignResidents_EU25_2005_Feb09.xls; European Commission press release IP/07/678, “Toward a Comprehensive European Migration Policy: Cracking Down on Employment of Illegal Immigrants and Fostering Circular Migration and Mobility Partnerships” (16 May 2007), accessed online on 30 April 2009 at europa.eu/rapid/pressReleasesAction.do?reference=IP/07/678&format=HTML&aged=1&language=EN&guiLanguage=en. Whereas irregular migrants in the U.S. account for 3.78 percent of the total population, they represent between 0.61–0.97 percent and 1.31–1.73 percent of the total population in the EU 25.

^{xxi} De Giorgi, quoted in Welch and Schuster 2005, p. 6 (referring to Castells' idea of new forms of inclusion and exclusion); Zygmunt Bauman, *Globalization: The Human Consequences* (New York: Columbia University Press, 1998), p. 39 (refers to "global hierarchy of mobility").

^{xxii} Bill Jordan and Frank Düvell, *Irregular Migration: The Dilemmas of Transnational Mobility* (Northampton, Mass.: Edward Elgar Publishing, Inc., 2002), p. 26; Castles and Davidson 2000, p. 7; Zimmermann 1995; L. Lucassen, "Migration Policies in a Historical Perspective," *Justitiële Verkenningen* 27, no. 8 (2001), accessed online on 22 February 2009 at english.wodc.nl/images/jv0108_summaries_tcm45-57044.pdf; H. W. Overbeek, "Migration as a Global Affair," *Justitiële Verkenningen* 27, no. 8 (2001), accessed online on 22 February 2009 at english.wodc.nl/images/jv0108_summaries_tcm45-57044.pdf; H. Roodenburg, "Labour Immigration; Winners, Losers and Unpaid Bills," *Justitiële Verkenningen* 27, no. 8 (2001), accessed online on 22 February 2009 at english.wodc.nl/images/jv0108_summaries_tcm45-57044.pdf; and J. Van Ours, "Labour Immigration; Good for Us?," *Justitiële Verkenningen* 27, no. 8 (2001), accessed online on 22 February 2009 at [/english.wodc.nl/images/jv0108_summaries_tcm45-57044.pdf](http://english.wodc.nl/images/jv0108_summaries_tcm45-57044.pdf).

^{xxiii} This is so because although wage differentials across regions should create internal migration patterns, the cost of relocating is high for natives. Thus, by clustering in high-wage areas, immigrants help equalize wages across the country. Jordan and Düvell 2002, p. 31; and Zimmermann 1995. A similar pattern was found for the U.S. by George J. Borjas, "Does Immigration Grease the Wheels of the Labor Market?," *Brookings Papers on Economic Activity* 2001, no. 1 (2001).

^{xxiv} In the case of the U.S., new immigration offenses have created new crimes and therefore new criminals (Welch 2003, p. 377). In the European Union, its geographical expansion has led to constant redefinitions of legality and illegality. See also Welch and Schuster 2005, p. 346; Albrecht 2002, p. 4.

^{xxv} Albrecht 2002, p. 21; Juss 2006.

^{xxvi} Ibid., p. 1; Eytan Meyers, "Theories of International Immigration Policy – A Comparative Analysis," *International Migration Review* 34, no. 4 (2000); Godfried Engbersen and Joanne Van Deer Leun, "The Social Construction of Illegality and Criminality," *European Journal of Criminal Policy and Research* 9 (2001): 52, 56.

^{xxvii} Bauman 1998, p. 86.

^{xxviii} Barmaki 2009, pp. 259, 260; Zygmunt Bauman, "The Moth Seeks out the Lamp," *New Statesman* 215, no. 4308 (1996): para 1.

^{xxix} VluchtelingenWerk Nederland is an organization created in 1979 by the merger of different ecclesiastical and political organizations that worked with refugees. According to their website, it is the only organization in the Netherlands that helps refugees throughout all the stages of the

immigration process. The organization is divided into 17 regional and 320 local branches. It is supported through the work of volunteers and paid staff. Its funds come from the government and private donors. Since its creation, it has helped more than 200,000 refugees.

^{xxx} Regioplan Policy Research is a Dutch research institution whose clients are, among others, the European Commission and the Dutch Ministry of Justice. For more than 25 years, Regioplan has specialized in social and economic research. Some of the areas of expertise are population, migration and integration, crime and security, and healthcare.

^{xxxi} Fred Gale, "Cave 'Cave! Hic Dragones': A Neo-Gramscian Deconstruction and Reconstruction of International Regime Theory," *Review of International Political Economy* 5, no. 2 (1998): 254.

^{xxxii} Principles are "beliefs of fact, causation and rectitude." Norms are "standards of behavior defined in terms of rights and obligations." Rules are "specific prescriptions or proscriptions for actions." Decision-making procedures are "prevailing practices for making and implementing collective choice." Stephen D Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36, no. 2 (1982): 186. Another definition of regime is that provided by Haas, according to whom regimes are "norms and decision-making procedures accepted by international actors to regulate an issue area" (qtd in Donnelly 1986, p. 602).

^{xxxiii} Krasner 1982, p. 187.

^{xxxiv} Oran Young, Raymond Hopkins, and Donald Puchala consider regimes as a pervasive structure in international relations. Others such as Susan Strange dismiss the importance of regimes for they confuse the role of more significant power and economic relations. A third group, including Jack Donnelly, Arthur Stein, Robert Keohane, and Robert Jervis, takes a middle way. They underscore the importance of regimes but acknowledge that they are not the source of all regularities in international relations. They argue that regimes arise "only when actors (at least in part) conform their conduct to norms and procedures they accept as legitimate." These three groups were named by Krasner "Grotians," "Structuralists," and "Neorealist or Neostructuralists" respectively, though the logic behind these labels remains obscure, for there seems to be little in common between the writings of Hugo Grotius and the arguments put forward by regimists. Donnelly 1986, p. 602 (emphasis in original).

^{xxxv} Henderson concludes that the use of regime analysis offers no new insights to the study of human rights (p. 543). He argues that because whether a state violates human rights is not a matter of concern for other states, moral interdependence—the idea that violators will be sensitive to international disapproval—is a bogus concept (p. 530). However, Henderson loses sight of the case of refugees and irregular migrants in which host countries are affected by human rights violations in sending states. A valid point Henderson makes is that regimists fail to appropriately account for the role of NGOs in the promotion of human rights (p. 542). As the case studies show, although they are not part of the United Nations centered human rights regime, NGOs play a significant role at the domestic level, especially when there is a lack of rule

enforcement by United Nations agencies or by domestic governments. Conway Henderson, "Human Rights and Regimes: A Bibliographical Essay," *Human Rights Quarterly* 10, no. 4 (1988): 543. Neumayer argues that, "in the absence of civil society and/or in pure autocracies, human rights treaty ratification often makes no difference and can even make things worse. [...] Ratification is more beneficial the stronger a country's civil society, that is, the more its citizens participate in international NGOs." Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?," *The Journal of Conflict Resolution* 49, no. 6 (2005): 950.

^{xxxvi} According to Juss, "a rights approach offers a normative vocabulary that facilitates both the framing of claims and the identification of the rights holder. The power of rights dialogue lies in its use of a normative language to make moral claims" (Juss 2006, p. 7).

^{xxxvii} Donnelly 1986, p. 617.

^{xxxviii} John Gerard Ruggie, "Human Rights and the Future International Community," *Daedalus* 112, no. 4 (1983): 93; Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals*, 3rd ed. (New York: Oxford University Press, 2008), pp. 133–34; Mary Ann Glendon, *A World Made New* (United States: Random House Publishing Group, 2002), p. 221.

^{xxxix} According to a personal communication with Jack Donnelly, David Forsythe and the International Studies Association, Forsythe's paper was the first time human rights were referred to as an international regime in the literature. However, the paper was not available from the author, from Donnelly, or from the International Studies Association. See Steiner, Alston, and Goodman 2008, p. 133; David P. Forsythe, "A New Human Rights Regime: What Significance?," paper presented at the Annual Conference of the International Studies Association, March 1981); Ruggie 1983, p. 106; and Donnelly 1986, p. 599.

^{xl} As a Declaration, the UDHR is a "recommendation by the General Assembly to Member States" pursuant Article 13 of the UN Charter, rather than a convention submitted to member states for ratification (Steiner 2008, p. 135). Despite being not legally binding, the UDHR has become the "springboard to treaties" and "remains the constitution of the entire [human rights] movement" (Steiner 2008, p. 135).

^{xli} UDHR Article 2; ICCPR Article 2.1; ICESCR Article 2.2

^{xlii} Donnelly 1986, p. 607.

^{xliii} As of June 2009, there are only 30 signatories and 41 parties to the Convention, which entered into force on July 1, 2003. United Nations Treaty Collection, Databases, accessed online on 30 March 2009 at treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml; and Bosniak, "Human Rights, State Sovereignty," p. 316.

^{xliv} Bosniak 2004, p. 335.

^{xlv} Ibid.

^{xlvi} Charter-based institutions are, for example, the Economic and Social Council and the General Assembly. Institutions authorized by the latter bodies are, for instance, the Office of the High Commissioner for Human Rights and the Sub Commission of the Promotion and Protection of Human Rights. Examples of treaty-based organs are the ICCPR Committee and the ICESCR Committee.

^{xlvii} Steiner 2008, p. 741.

^{xlviii} United Nations, Office of the United Nations High Commissioner for Human Rights, “Monitoring Civil and Political Rights,” accessed online on 16 November 2008 at ohchr.org/english/bodies/hrc/index.htm.

^{xlix} This position was created in 1999 by the Commission on Human Rights. See United Nations, Office of the United Nations High Commissioner for Human Rights, “Special Rapporteur of the Commission on Human Rights on the Human Rights of Migrants,” accessed online on 16 November 2008 at ohchr.org/english/issues/migration/rapporteur/.

¹ Ruggie 1983, p. 104; Donnelly 1986, pp. 608, 614; Richard Plender, “Recent Trends in National Immigration Control,” *The International and Comparative Law Quarterly* 35, no. 3 (1986): 537; Moravcsik 2000, p. 217; Bosniak 2004, p. 316; and Neumayer 2005, p. 926.

^{li} Despite the fact that scholarship about irregular migration is based on a host of considerations (i.e., political, economic, social, security), the focus of this section will be on the economic effects. Also, this section only considers the impact of migration on host countries, which are the loci for the analysis in this essay. This means that discussions of issues that affect both source and host countries, such as brain drain, are left out. For an analysis of the impacts of brain drain see Donald Lien and Yan Wang, “Brain Drain or Brain Gain: A Revisit,” *Journal of Population Economics* 18 (2003); David M Hart, “From Brain Drain to Mutual Gain,” *Issues in Science and Technology* (Fall 2006); and Annie Vinokur, “Brain Migration Revisited,” *Globalisation, Societies and Education* 4, no. 1 (2006).

^{lii} Consider the case of Kosovo refugees in Italy, who were admitted as refugees during the Kosovo war, but turned into irregular immigrants as soon as the war ended. (Welch and Schuster 2005, p. 346.) With respect to the unclear effects of immigrants on host countries’ labor markets, see George J. Borjas, “Economic Theory and International Migration,” *International Migration Review* 23, no. 3 (1989): pp. 481, 482.

^{liii} Barmaki 2009, p. 252.

^{liv} Jordan and Düvell 2002, p. 33; George J Borjas, “The Economic Benefits from Immigration,” *The Journal of Economic Perspectives* 9, no. 2 (1995): 19; Borjas 2001, p. 70; and Susan Martin, B. Lindsay Lowell, and Philip Martin, “U.S. Immigration Policy: Admission of High Skilled Workers,” *Georgetown Immigration Law Journal* (Spring 2002).

^{lv} United Nations, “Secretary-General, Addressing Global Forum”; United Nations, “Address to the Second Global Forum.”

^{lvi} Van Ours 2001; Arvind Panagariya, “Migration: Who Gains, Who Loses,” *Brookings Trade Forum* (2006).

^{lvii} James A. R. Nafziger, “The General Admission of Aliens under International Law,” *American Journal of International Law* 77 (1983): 805. See also Martin 1989, p. 547; Hayter 2000; and Juss 2006.

^{lviii} Nafziger 1983, p. 807; Martin 1989, p. 547.

^{lix} Nafziger 1983, p. 841; Hayter 2000, p. 151; and Juss 2006, p. 2.

^{lx} Justifications in terms of the inherent powers of the state to ensure self preservation are weak because it is not clear what measures are necessary or reasonable (Nafziger 1983, p. 817). Arguments made in terms of state sovereignty are also weak because sovereignty should be exercised according to international law (p. 819). The fact that migration is an international issue implies that the third justification—domestic jurisdiction—does not totally apply to the admission of aliens (p. 820).

^{lxi} Emmerich De Vattel, “The Law of Nations or the Principles of Natural Law” (Novi, Mich.: Longang Institute, **1758**), accessed online on 7 May 2009 at lonang.com/exlibris/vattel/. See also Nafziger, “The General Admission,” p. 812.

^{lxii} Nafziger 1983, p. 829.

^{lxiii} *Ibid.*, p. 840.

^{lxiv} Castles and Davidson 2000, p. 6.

^{lxv} *Ibid.*, p. 10.

^{lxvi} Gallya Lahav and Virginie Guiraudon. “Actors and Venues in Immigration Control: Closing the Gap between Political Demands and Policy Outcomes,” *West European Politics* 29, no. 2 (2006).

^{lxvii} Lahav and Guiraudon 2006, p. 213. Indeed, the public is generally well informed and its preferences reflect not personal but sociotropic considerations. See Lahav 2004, pp. 1156, 1158, 1165.

^{lxviii} *Encyclopaedia Britannica* vs. “postmodernism”; Albrecht 2002, p. 19; Minderhoud 2004.

^{lxix} Lahav and Guiraudon 2006, p. 204.

^{lxx} Dina Siegel and Frank Bovenkerk, "Crime and Manipulation of Identity among Russian-Speaking Immigrants in the Netherlands," *Journal of Contemporary Criminal Justice* 16, no. 4 (2000): 427.

^{lxxi} Tomlinson 1999, pp. 24, 25; and Beck 2000, pp.100, 101.

^{lxxii} Engbersen 2001, p. 54; Zimmermann 1995, p. 46.

^{lxxiii} Engbersen and Van der Leun 2001, p. 56.

^{lxxiv} Barmaki 2009, p. 252.

^{lxxv} Bigo 2004; Albrecht 2002.

^{lxxvi} Welch and Schuster 2005, pp. 332, 334.

^{lxxvii} According to Bigo, immigrants started to be seen as a danger by politicians from the beginning of the eighties (Bigo 2004, p. 63). Albrecht argues that immigration has been associated with crime since the early sixties and with terrorism since the seventies (Albrecht 2000, pp. 4, 5). Minderhoud dates the rise of the criminalization discourse in the Netherlands during the nineties (Minderhoud 2004, p. 390). Engbersen argues that the presence of irregular migrants has been considered a social problem since the beginning of the nineties (Engbersen and van der Leun 2001, p. 54). See also Welch and Schuster 2005.

^{lxxviii} Albrecht 2002, p. 6; and Jordan and Düvell 2002. Especially in Western Europe, stricter policies regarding unemployment benefits were enacted and illegality became associated with an "abuse of public provisions" (Engbersen and van der Leun 2001, p. 55).

^{lxxix} Migration Policy Institute, "Immigration to the United States by Decade," MPI Data Hub (2007), accessed online on 18 November 2008 at migrationinformation.org/DataHub/charts/final.immig.shtml. The U.S. received an influx of refugees from the Vietnam War in the seventies, followed by Cuban refugees of the Mariel boatlift in 1980, and later by Central American refugees and Mexico's poor (Goldsborough 2000, p. 92).

^{lxxx} In contrast with the U.S., the Netherlands has only in the last thirty years reluctantly turned into an immigration country. Arend Odé, "The Position of Immigrants in the Netherlands," Regioplan (2008), accessed online on 13 March 2009 at migrationeducation.org/fileadmin/uploads/NLmigration_arend_ode_corr.pdf, p. 1; and Peter Scholten and Ronald Holzhaacker, "Bonding, Bridging and Ethnic Minorities in the Netherlands: Changing Discourses in a Changing Nation," *Nations and Nationalism* 15, no. 1 (2009): 87. Since the sixties, the Netherlands has experienced immigration from former overseas territories, from countries in the Mediterranean areas, from non EU-countries and of asylum seekers. Since the end of the 1980s, the number of asylum seekers has increased (Engbersen and van der Leun

2001, p. 55). Moreover, immigrant composition has changed from “repatriates” after decolonization to guest-workers in the fifties and sixties to refugees in recent years (Scholten and Holzhaacker 2009, p. 87). The influx of immigrants has been common to Europe, which “historically used to be a source of out-migration” (Mark Gradstein and Maurice Schiff, “The Political Economy of Social Exclusion, with Implications for Immigration Policy,” *Journal of Population Economics* 19 (2006): 328).

^{lxxxix} Welch 2003, p. 319.

^{lxxxix} According to Engbersen and van der Leun, the degree of involvement in criminal activities is partially explained by the embeddedness in their respective ethnic groups. Criminalization has increased irregular immigrants’ reliance on their ethnic group while overwhelming the latter. “Thus, legal forms of exclusion by the State and informal forms of exclusion by ethnic groups may encourage illegal immigrants to go further underground” (2001, pp. 62, 63, 64). See also Global Migration Group 2008, p. 43.

^{lxxxix} Garland, 2001, p. 135, qtd in Welch and Schuster 2005, p. 334.

^{lxxxix} Welch and Schuster 2005, p. 334.

^{lxxxix} Barmaki 2009, p. 259.

^{lxxxix} Welch and Schuster 2005, p. 334.

^{lxxxix} Welch 2003, p. 319; L. M. Moerings and M. Boone, “The Prison Cell Boom; Detainees, Convicts, Aliens, Youths and Persons under Dutch TBS-Order,” *Justitiële Verkenningen* 33, no. 4 (2007); G. De Jonge, “Dutch Prison Policy Since World War II,” *Justitiële Verkenningen* 33, no. 4 (2007); Anton Van Kalmthout, “The Detention Regime for Illegal Immigrants; Making Up the Balance after 25 Years,” *Justitiële Verkenningen* 33, no. 4 (2007); and D. E. G. Moolenaar, B. Diephuis, M. van Gammeren-Zoeteweyj, S. Kalidien, E. C. Leertouwer, F. P. van Tulder, “Forecasting the Demand on the Dutch Justice System until 2013,” *Cahiers* 6 (2008), accessed online on 20 February 2009 at english.wodc.nl/onderzoeksdatabse/actualisering-ramingen-tm-2013.aspx.

^{lxxxix} Pakes 2004, pp. 284, 293.

^{lxxxix} In the EU immigrants are “the most important single category of sentenced and unsentenced prisoners [which] demonstrates quite clearly that Europe is closer to the US than is normally assumed.” Albrecht 2002, p. 14; Welch and Schuster 2005, p. 345.

^{xc} Engbersen and van der Leun 2002, p. 60.

^{xc} Siegel and Bovenkerk, 2000.

^{xcii} Welch and Schuster 2005, p. 348; Van Kalmthout 2007, p. 89.

^{xciii} Welch and Schuster 2005, p. 332.

^{xciv} Australia has been the locus for research because in 2002 it established a policy of indefinite, mandatory detention of all asylum seekers arriving by boat or without valid entry documents. Derrick Silove, Patricia Austin, and Zachary Steel, “No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia,” *Transcultural Psychiatry* 44, no. 3 (2007): 359; Derrick Silove and Mina Fazel, “Detention of Refugees,” *British Medical Journal* 332, no. 7536 (2006): 251.

^{xcv} Welch and Schuster 2005, p. 345.

^{xcvi} Amnesty International, “Migration-Related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-Seekers and Refugees” (1 November 2007), accessed online on 11 March 2009 at amnesty.org/en/library/asset/POL33/005/2007/en/f07d6dce-ad6b-11dc-a4b5-ef6c4a573348/pol330052007eng.pdf.

^{xcvii} Louis Henkin, “U.S. Ratification of Human Rights Convention: The Ghost of Senator Bricker,” *The American Journal of International Law* 89, no. 2 (1995): 346.

^{xcviii} *Ibid.*, p. 346.

^{xcix} Human Rights Watch, “A Violent Education” (August 2008), accessed online on 16 November 2008 at hrw.org/reports/2008/us0808/, p. 109.

^c According to Human Rights Watch, the subordination of international law to the U.S. Constitution is evident in the reservations and declarations made about the CERD: “nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America” (United Nations Treaty Collection, Databases, accessed online on 30 March 2009 at treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml). This contravenes Article VI, Clause 2 of the Constitution, which reads: “This Constitution, and the Laws of the US which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the US, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” (“The Constitution of the United States,” Article 6, Clause 2).

^{ci} Henkin 1995, p. 342. The Supreme Court ruling in the case *Reid v. Covert* says that nothing in Article VI of the U.S. Constitution “intimates that the treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor there is anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result” (*Reid v. Covert*, No. 701, Supreme Court of the U.S., 10 June 1957, p. 16).

^{cii} Pursuant to Article 41 of the ICCPR and Article 21, part 1 of the CAT respectively.

^{ciii} Seattle University School of Law International Human Rights Clinic and One America, “Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center” (June 2008), accessed online on 15 November 2008 at hatefreezone.org/downloads/Detention%20Center%20Study.pdf, p. 5.

^{civ} Seattle University 2008, p. 5. See also *Zadvydas v. Davis*, No. 99–7791, Supreme Court of the U.S., 28 June 2001.

^{cv} Seattle University 2008, p. 5.

^{cvi} In September 2000, Immigration and Customs Enforcement (ICE) issued 36, later becoming 38, non-binding National Detention Standards (NDS) focused on procedure and seeking to “ensure that detainees housed in these facilities are safe, secure, and such facilities provide the basic services needed by federal detainees” (Karen Tumlin, “Immigration Detention Centers under the Microscope: Recent Reports Reveal Widespread Violations of the National Detention Standards,” *Immigrants’ Rights Update* 21, no. 6 (2007)). See also United States Department of Justice, The Detention Standards and Compliance Division, accessed online on 16 November 2008 at usdoj.gov/ofdt/standards.htm; United States Immigration and Customs Enforcement, “ICE Announces New Performance-Based National Detention Standards for all ICE Detention Facilities,” News Releases, accessed online on 30 March 2009 at ice.gov/pi/nr/0809/080912washington.htm.

^{cvii} The 1952 Immigration and Nationality Act (INA) replaced previous race-based with nationality-based quotas and created the Immigration and Naturalization Service (INS) for their administration. However, the 1980s marked a shift towards a more restrictive immigration policy, especially in the context of increasing number of Cuban, Haitian and Central American immigrants (Detention Watch Network, “A Rapidly Expanding Detention System,” *The History of Immigration Detention in the U.S.*; accessed online on 19 May 2009 at detentionwatchnetwork.org/node/2381). The Immigration Reform and Control Act of 1986 was enacted to stem the flow of irregular immigrants, especially by prohibiting employers from hiring them (Miriam J. Wells, “The Grassroots Reconfiguration of U.S. Immigration Policy,” *International Migration Review* 38, no. 4 (2004): 1308). Also, the Immigration Marriage Fraud Amendment was passed in the same year to reduce the number of immigration-related marriage fraud (United States Citizenship and Immigration Services, “Immigration and Marriage Fraud Amendments of 1986,” accessed online on 30 March 2009 at uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ec4295c4f635f010VgnVCM1000000ecd190aRCRD&vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD). The Immigration Act of 1990 removed nationality quotas and aimed at reducing the number of immigrants under family reunification and at increasing the number skilled workers visas.

^{cviii} Cornell University Law School, “Immigration Law: An Overview,” Legal Information Institute, accessed online on 30 March 2009 at topics.law.cornell.edu/wex/Immigration.

^{cix} Eytan Meyers, *International Immigration Policy: A Theoretical and Comparative Analysis* (New York: Palgrave Macmillan, 2004), p. 51.

^{cx} Welch 2003, p. 319.

^{cx}i Wells 2004, p. 1309.

^{cx}ii Shirin Sinnar, "Patriotic or Unconstitutional? The Mandatory Detention of Illegal Aliens under the USA Patriot Act," *Stanford Law Review* 55, no. 4 (2003): 1428.

^{cx}iii The military order is called "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism" and was passed on November 13, 2001. David Cole, "Enemy Aliens," *Stanford Law Review* 54, no. 5 (2002): 954.

^{cx}iv Library of Congress, H.R. 1645, accessed online on 30 March 2009 at thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01645:@@D&summ2=m&; and Nachman & Associates, P. C., "Summary of Security through Regularized Immigration and a Vibrant Economy Act of 2007," accessed online on 30 March 2009 at visaserve.com/CM/Articles/STRIVE%20Act%202007%20-%20Long%20Summary.pdf.

^{cx}v Karl Marx, quoted in Welch 2003, p. 319.

^{cx}vi Muzaffar Chishti and Claire Bergeron, "Reports Spur Debate over Immigrant Detention Conditions," Migration Information Source, accessed online on 16 November 2008 at migrationinformation.org/usfocus/display.cfm?ID=688.

^{cx}vii U.S. Immigration and Customs Enforcement, "Programs," Office of Detention and Removal, accessed online on 18 November 2008 at ice.gov/pi/dro/index.htm.

^{cx}viii National Immigrant Justice Center, "Briefing Materials," para. 1; and Amnesty International 2008, p. 4.

^{cx}ix In more general terms, under U.S. law there are three types of migrants: lawful permanent residents, non-immigrants, and undocumented migrants. Kevin Jernegan, "A New Century: Immigration and the U.S.," *Migration Information Source* (February 2005), accessed online on 30 March 2009 at migrationinformation.org/Profiles/display.cfm?ID=283. See also Congress of the United States, Congressional Budget Office (CBO), "Immigration Policy in the United States" (February 2006), accessed online on 19 May 2009 at cbo.gov/ftpdocs/70xx/doc7051/02-28-Immigration.pdf, p. 11.

^{cx}x Amnesty International 2008, p. 4. See also Wells 2004, p. 1323.

^{cx}xi Pursuant to Sec 235 (b) (2) of the INA. See Konet and Batalova.

^{cxvii} Amnesty International 2008, p. 6. According to the INA, “in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 240” (United States Citizenship and Immigration Services, Immigration and Nationality Act (McCarran-Walter), 1952, Public Law No. 82–414: Ch. 2, Sec 235 (b) (2)). In 1997, an expedited removal process was introduced, whereby aliens attempting to enter the U.S. with forged documents or lack of proper identification can be deported without being granted a judicial review; the alternative to expedited removal are voluntary departure and formal deportation, the latter conducted before an immigration judge. (Congress of the United States, Immigration Policy, p. 14).

^{cxviii} In order to be released one “must show that he or she does not present a danger to persons or property, is not a threat to national security and does not pose a flight risk” (Amnesty International 2008, p. 16) See also Sec 236 (a) of the INA.

^{cxvix} Mandatory detention was instituted under the INA (Sec 235 (a)) and expanded by the IIRIRA (Sec 302). Sec 302 (a) of the IIRIRA amended Sec 235 of the INA, thus the latter now reads “MANDATORY DETENTION. — Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed” (Welch, “Ironies of Social Control”).

^{cxv} Amnesty International 2008, p. 20.

^{cxvii} Michael Hoeffler, Nancy Rytina and Brian C. Baker, “Estimates of the Unauthorized Immigrant Population in Residing in the United States: January 2009,” accessed online on 11 February 2010 at dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf, p. 1. See also Michael Hoffer, Nancy Rytina, and Bryan Baker, “Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008,” accessed online on 30 April 2009 at dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf.

^{cxviii} U.S. Immigration and Customs Enforcement, “Programs,” Office of Detention and Removal Operations, accessed online on 18 November 2008 at ice.gov/pi/dro/index.htm.

^{cxvix} Dora Schriro, *Immigration Detention Overview and Recommendations* (6 October 2009), accessed online on 24 March 2010 at ice.gov/doclib/091005_ice_detention_report-final.pdf, p. 2.

^{cxv} Global Detention Project, “Introduction,” para. 1. The number of detention centers differs according to the source. While the Global Detention Project says there are 961 facilities used for detention, Amnesty International claims that there are 350 state and county jails, 7 privately contracted centers and 8 ICE owned facilities (Amnesty International 2008, p. 3), and a report by the Associated Press indicates the existence of 260 sites (Michelle Roberts, “AP Impact: Immigrants Face Detention, Few Rights,” *ABC News*, 15 March 2009, accessed online on 19 May 2009 at abcnews.go.com/US/wireStory?id=7087875).

^{cxxx} Human Rights Immigrant Community Action Network—National Network for Immigrant and Refugee Rights, *Over-Raided, Under Siege* (June 2008), accessed online on 15 November 2008 at nnirr.org/resources/docs/UnderSiege_web2.pdf, p. 12.

^{cxxxix} Roberts 2009, para. 3.

^{cxxxix} Seattle University 2008, p. 12.

^{cxxxix} In 2004, Congress authorized the addition of 40,000 beds, raising detention centers' capacity to 80,000 beds by 2010 (Seattle University 2008, p. 3).

^{cxxxix} Nina Bernstein, personal communication, 17 May 2009.

^{cxxxix} Seattle University 2008, p. 3.

^{cxxxix} The report pointed to the failure to consistently deliver anti-retroviral medications, to conduct necessary laboratory tests in a timely manner, to prevent opportunistic infections, to ensure continuity of care, and to ensure confidentiality of medical care. Human Rights Watch, "Chronic Indifference: HIV Services for Immigrants Detainees by the United States" (December 2007), accessed online on 15 September 2008 at hrw.org/reports/2007/us1207/us1207webwcover.pdf, pp. 19–20.

^{cxxxix} Seattle University 2008, p. 46.

^{cxxxix} Department of Homeland Security, "ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities" (June 2008), accessed online on 16 November 2008 at dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf, p. 1.

^{cxxxix} Nina Bernstein, "Another Jail Death, and Mounting Questions," *The New York Times* (27 January 2009), accessed online on 30 March 2009 at nytimes.com/2009/01/28/us/28detain.html?_r=1.

^{cxl} Chishti and Bergeron, "Reports Spur Debate."

^{cxli} Nina Bernstein, "Ill and in Pain, Detainee Dies in U.S Hands," *The New York Times* (13 August 2008), accessed online on 19 September 2008 at nytimes.com/2008/08/13/nyregion/13detain.html.

^{cxlii} Bernstein, "Another Jail Death."

^{cxliii} According to the Human Rights Watch report, "Under federal law, the Department of Homeland Security possesses ultimate authority over administration of all immigration-related matters" (2007, p. 55).

^{cxliv} In addition, it contradicts the Human Rights Committee General Comment No. 10, which in its role of interpreter of the ICCPR affirmed that states have a “positive duty toward persons who are particularly vulnerable because of their status as persons deprived of liberty” and they “enjoy all the rights set forth in the Covenant” (United Nations Human Rights Committee, General Comment 21, Forty-fourth session, 1992, accessed online on 16 November 2008 at umn.edu/humanrts/gencomm/hrcom21.htm, para. 3). With respect to Article 12 of the ICESCR, it could be argued that because the U.S. has not ratified the ICESCR it is not compelled to comply with its provisions. Such an argument is fallacious because signatory states cannot violate the provisions under the Covenant even if the latter has not been ratified.

^{cxlv} Human Rights Watch 2007, p. 55–57.

^{cxlvi} Exceptionalism, according to Mertus, is the use of double standards whereby “human rights are something the US encourages for other countries, whereas the same international standards do not apply in the same manner in the US.” Julie Mertus, *Bait and Switch*, 2nd ed. (New York: Routledge, 2008), p. 2.

^{cxlvii} “New Sovereignism” implies that rather than becoming isolationist the U.S. chooses the international conventions that are convenient to its purposes while rejecting or ignoring the rest (Peter J. Spiro, “The New Sovereignists,” *Foreign Affairs* (November/December 2000)).

^{cxlviii} Willem van Genugten, “The United States’ Reservations to the ICCPR: International Law versus God’s Own Constitution,” *Kluwer Law International* (1998), accessed online on 16 November 2008 at papers.ssrn.com/sol3/papers.cfm?abstract_id=969438, p. 35.

^{cxlix} Peter Costantini, “Rights: Anti-immigrant Surge Tramples International Norms,” Inter Press Service News Agency (16 November 2008), accessed online on 24 November 2008 at ipsnews.net/news.asp?idnews=40398.

^{cl} According to a member of the Centre for Immigration Studies, “as for the U.N. or other international agencies, I would say I can’t think of any role for them to help. Who we allow into our country is a domestic matter” (Costantini, “Rights: Anti-immigrant”).

^{cli} Seattle University 2008, p. 51.

^{clii} United Nations Human Rights Council, “Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America,” A/HRC/7/12/Add.2, accessed online on 28 June 2009 at detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/UNSR%20Report.doc, p. 2; Carl Levy, “The European Union after 9/11: The Demise of a Liberal Democratic Asylum Regime?,” *Government and Opposition* 40, no. 1 (2005): 28; Barmaki, “Criminal/Refugees in the Age,” p. 252.

^{cliii} United Nations Human Rights Council, “Report of the Special Rapporteur,” p. 2.

^{cliv} According to former UN Secretary-General Kofi Annan, the lack of commitment to embrace international legal frameworks by developed states is a significant obstacle in the area of migration (United Nations, “Secretary-General in Lecture”).

^{clv} Article 10 of the ICCPR reads:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

The reservation expressed by the Netherlands reads: "The Kingdom of the Netherlands subscribes to the principle set out in paragraph 1 of this article, but it takes the view that ideas about the treatment of prisoners are so liable to change that it does not wish to be bound by the obligations set out in paragraph 2 and paragraph 3 (second sentence) of this article."

^{clvi} Bosniak 2004, p. 334.

^{clvii} Unless the individual had been declared a *persona non grata* (Van Kalmthout 2007, p. 649).

^{clviii} Van Amersfoort and Penninx briefly consider immigrants rights under domestic law and contend that, “all inhabitants are in principle equal and should have equal opportunities.” Found in Hans Van Amersfoort and Rinus Penninx, “Regulating Migration in Europe: The Dutch Experience, 1960–92,” *Annals of the American Academy of Political and Social Science* 534 (1994): 141. Reports by Amnesty International and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) focus on European and international human rights law (Amnesty International, “The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers,” (27 June 2008), accessed online on 11 March 2009 at amnesty.org/en/library/asset/EUR35/002/2008/en/4c629481-482d-11dd-a377-f5461cc8d4de/eur350022008eng.pdf; Council of Europe, Committee for the Prevention of Torture, “Report to the Authorities of the Kingdom of the Netherlands on the Visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in June 2007” (5 February 2008) CPT/Inf (2008), accessed online on 12 March 2009 at unhcr.org/refworld/docid/47a86f912.html , p. 2. An assessment made by independent researchers considers domestic law such as the Penitentiary Principles Act and decrees and circulars regulating the detention of immigrants (Van Kalmthout 2007, p. 633).

^{clix} Compared to the U.S., the Netherlands has signed and ratified the ICESCR, has ratified other instruments significantly earlier, has not subordinated international treaties to domestic law, and has not declared them to be non-self executing. According to the authors, the incorporation of

international laws into domestic law is one of the ways in which international institutions' rules become institutionalized at the domestic level (Cortell and Davis 1996, p. 453).

^{clx} Anton M. Van Kalmthout, B. A. M. Hofstee-van der Meulen, F. Dünkel, *Foreigners in European Prisons*, Vol. 1 (Nijmegen: Wolf Legal Publishers, 2007), p. 659.

^{clxi} It establishes the legal bases for immigration regulation and detention and replaces the Act of 1965 amended in 1994. For the purpose of immigration law, irregular migrants are “aliens living in the Netherlands without official permission” such as rejected asylum seekers, refugees whose temporary residence permit is terminated, and immigrants whose temporary residence permit has been discontinued (The Netherlands: Ministry of Justice, “The Aliens Act 2000. Aliens in the Netherlands: Admission and Reception” (March 2004) Code 4710, accessed online on 12 March 2009 at unhcr.org/refworld/docid/47fdfaea0.html, p. 14.

^{clxii} Amnesty International 2008, p. 17.

^{clxiii} The Netherlands, Ministry of Justice, The Aliens Act, p. 14.

^{clxiv} Aliens Act 2000 (Complete revision of the Aliens Act) [Netherlands], 1998–1999; 26 732 (1 April 2001), accessed online on 12 March 2009 at unhcr.org/refworld/docid/3b5fd9491.html.

^{clxv} According to a study by the Research and Documentation Center of the Dutch Ministry of Justice, “The most drastic changes to operational foreign national surveillance set out in the new Aliens Act relate to the power that police officers have to stop individuals, take them away for questioning and detain them in order to establish their identity, nationality and position in terms of the right of residence (Section 50) and the power to enter a house without the occupant’s consent (Section 53)” (Research and Documentation Center, Operational Surveillance of Foreign Nationals: Evaluation of the Powers of the Police for the Surveillance of Foreign Nationals in the Aliens Act 2000, Ministry of Justice (8 May 2007), accessed online on 1 March 2009 at english.wodc.nl/onderzoeksdatabase/02.067c-evaluatie-operationeel-toezichtvreemdelingendiensten-vreemdelingenwet2000deelproject3.aspx?nav=ra&l=opsporing_en_handhaving&l=vreemdelingentoezicht.

^{clxvi} Research and Documentation Center 2007, p. 209.

^{clxvii} Wells 2004, p. 1308.

^{clxviii} Francine Hermsen, interview by author, 15 January 2009.

^{clxix} Maril Donders, interview by author, 21 May 2009. Miekje Flinterman, interview by author, 28 May 2009.

^{clxx} Supervision comprises “domestic police surveillance geared towards the combating of illegal residence by foreign nationals, as well as surveillance geared towards the provision of support for repatriation and removal policy” (Research and Documentation Center 2007, p. 207).

clxxi Van Kalmthout et al. 2007, p. 629.

clxxii Pakes 2004, p. 291.

clxxiii Aliens are defined by the Dutch Ministry of Justice as “someone who is not a Dutch national” (The Netherlands, Ministry of Justice, The Aliens Act 2000, p. 8).

clxxiv Pursuant to Article 3 of the Aliens Act 2000 and Article 13 of the Schengen Border Code, when a person does not fulfill visa requirements, he shall be imposed a formal entry refusal.

clxxv Amnesty International, “The Netherlands,” p. 17. Illegal residents are defined by the Aliens Act 2000 explanatory leaflet as “aliens living in the Netherlands without official permission” (The Netherlands, Ministry of Justice, The Aliens Act 2000, p. 14).

clxxvi Amnesty International 2008, p. 19.

clxxvii Ibid., p. 38.

clxxviii Sanctions “such as task penalty, electronic monitoring, in-patient and outpatient hospital order and internment of persistent offenders order.” (Van Kalmthout et al. 2007, p. 626.)

clxxix Van Kalmthout et al. 2007, p. 650.

clxxx It is estimated that between 0.38 and 0.92 percent of the Netherlands’ total population were irregular foreign residents in 2006 (Peter Van den Heijden, Gen van Gils, Maarten Cruijff and Dave Hessen, “Een schatting van het aantal in Nederland verblijvende illegale vreemdelingen in 2005,” *Utrecht IOPS* (2005), accessed online on 2 April 2009 at irregular-migration.hwwi.net, p. 26. In contrast to the observed increase in the number of immigrants in detention, the Research and Documentation Center of the Ministry of Justice expects the number of irregular migrants from Europe and from non-European countries to decrease. This is due to the enlargement of the European Union and to a regularization scheme enacted since June 2007 (M. H. C. Kromhout, H. Wubs, E. M. Th Beenackers, “Unlawful Residence in the Netherlands: A Review of the Literature,” *Cahiers* 3 (2008): pp. 75–79, accessed online on 20 February 2009 at english.wodc.nl/onderzoeksdatabase/1631a-literatuuronderzoek-illegalen.aspx?cp=45&cs=6799, p. 76.

clxxxi Van Kalmthout et al. 2007, p. 54; Amnesty International 2008, p. 17.

clxxxii Van Kalmthout 2007, p. 627.

clxxxiii Ibid., p. 629.

clxxxiv The report also indicates that the “narrow corridors and low ceilings on boats led to an oppressive environment and the boats [are] poorly ventilated” (Council of Europe, Report to the

Authorities, para. 57). See also “Netherlands: Schiphol Fire: Victim Sent to Jail,” *Statewatch News Online* (August 2007), accessed online on 11 March 2009 at statewatch.org/news/2007/aug/04schipol-fire.htm; “Netherlands: Two Deaths in Immigration Detention in 2 Months,” *Statewatch News Online*, accessed online on 11 March 2009 at statewatch.org/news/2008/mar/08neth-migrant-deaths.htm, para. 4; “Criticism of Detention of Aliens in the Netherlands,” *Surprising Europe*, accessed online on 11 March 2009 at surprisingeurope.com/index.php?pageid=96&sub=105; and Dominic Hughes, “Dutch Float ‘Migrant Prison’ Scheme,” *BBC News*, accessed online on 11 March 2009 at news.bbc.co.uk/2/hi/europe/7096186.stm. With respect to the conditions of detention, van Kalmthout et al. point out that, “All in all, per week the irregular migrant has the right to 1 hour of visits, 1,5 hour of sports/physical exercise, 6 hours of recreation activities and 7 hours of airing (1 hour per day)” (Van Kalmthout 2007, p. 653). See also Human Rights Watch, “Locked Away: Immigration Detainees in Jails in the United States” (September 1998), accessed online on 16 November 2008 at hrw.org/reports98/us-immig/Ins989-02.htm#TopOfPage.

clxxxv Hughes 2009. See also Van Kalmthout 2007, p. 653.

clxxxvi “Fire at the Detention Centre Schiphol Oost,” The Hague, Dutch Safety Board (21 September 2005, accessed online on 25 February 2009 at onderzoeksraad.nl/docs/rapporten/report_fire_schiphol_oost.pdf, p. 16; and Luke Harding, “Fire at Dutch Airport Prison Kills 11 Illegal Immigrants,” *The Guardian* (28 October 2005), accessed online on 11 March 2009 at guardian.co.uk/world/2005/oct/28/lukeharding.mainsection.

clxxxvii “Fire at the Detention Centre,” p. 2.

clxxxviii *Ibid.*, pp. 170, 171.

clxxxix *Ibid.*, p. 172.

cx^c Council of Europe, “Report to the Authorities,” para. 70.

cx^{ci} Dr. Carolien Kining, personal communication, 9 March 2009.

cx^{cii} “Netherlands: Two Deaths in Immigration Detention in 2 Months,” *Statewatch News Online*, accessed online on 11 March 2009 at statewatch.org/news/2008/mar/08neth-migrant-deaths.htm.

cx^{ciii} Council of Europe, “Report to the Authorities,” para. 72.

cx^{civ} Maril Donders interview, 21 May 2009.

cx^{cv} Amnesty International 2008, pp. 18, 19.

cx^{cvi} These interviews were conducted due to the difficulties encountered in visiting detention centers. Contact information provided by the Ministry of Justice proved fruitless. In 2006, local journalist Robert van de Griend worked for several weeks undercover in the Rotterdam detention boat. Van de Griend published a report on 25 March and 1 April 2006, available in Dutch.

Robert Van de Griend, "Undercover op en Illegale boot," *Vrij Nederland* (25 March 2006), accessed online on 21 June 2009 at vn.nl/Verhalen/Dossiers/DossierImmigratie/ArtikelDetentieboot/UndercoverOpDeIllegaleboot.htm.

^{cxvii} A. R. arrived in December 2008 to Amsterdam and remained at the Schiphol reception center until January 6. Then he was sent to Eindhoven, where he had his first interview on February 26, and on to Heerlen. His second interview took place on April 6, and on May 15 he obtained a positive answer, a five-year residence permit.

^{cxviii} Miekje Flinterman interview, 28 May 2009.

^{cxix} Krasner 1982, p. 189.

^{cc} Patrick A. Taran, "Globalization/Migration: Imperatives for Civil Society and International Organizations," in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, edited by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak, 285 (Leiden: Martinus Nijhoff Publishers, 2004).

^{cci} As Taran points out, the Special Rapporteur on the Human Rights of Migrants "has only part-time assistance, minimal travel allocations and gets no compensation other than the coverage of travel expenses and per-diem while on official mission" (*Ibid.*, p. 285).

^{ccii} *Ibid.*, p. 286.

^{cciii} Cortell and Davis 1996, p. 456.

^{cciv} Yasemin N. Soysal, *Limits of Citizenship* (Chicago: University of Chicago Press, 1994), p. 29.

^{ccv} Martin 1989, p. 555ff.

^{ccvi} United Nations, "Address to the Second Global Forum."

^{ccvii} United Nations Treaty Collection, Databases.

^{ccviii} *Ibid.*

^{ccix} *Ibid.*

^{ccx} *Ibid.*

^{ccxi} *Ibid.*

^{ccxii} *Ibid.*

^{ccxiii} Roodenburg 2001.

^{ccxiv} George J Borjas, "The Labor-Market Impact of High Skill Immigration," *The American Economic Review* 95, no. 2 (2005).

^{ccxv} Martin, Lowell and Martin, 2002, p. 621.

^{ccxvi} Borjas 1989, p. 477ff.

^{ccxvii} George, J. Borjas, "The Economics of Immigration." *Journal of Economic Literature* 32, no. 4 (1994): 1667; Jordan and Düvell 2001, p. 10; Martin, Lowell, and Martin 2001, pp. 619, 620; and Ilana Redstone Akresh, "U.S. Immigrants' Labor Market Adjustment: Additional Human Capital Investment and Earnings Growth," *Demography* 44, no. 4 (2007): 866.

^{ccxviii} Simon Hix and Abdoul Noury, "Politics, Not Economic Interests: Determinants of Migration Policies in the European Union," *International Migration Review* 41, no. 1 (2007).

^{ccxix} Borjas 2001.

^{ccxx} Albrecht 2001, p. 3.

^{ccxxi} Borjas 1994.