Breaking down anonymity.

Digital surveillance on irregular migrants in Germany and the Netherlands

Dennis Broeders

Breaking Down Anonymity.
Digital surveillance on irregular migrants in Germany and the Netherlands

Afgebroken anonimiteit.
Digitaal toezicht op illegale migranten in Duitsland en Nederland

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Who are you?
Who, who, who, who?

The Who, 1978

CONTENTS

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LIST OF ABBREVIATIONS

ACP:	African, Caribbean and Pacific (countries)
ACVZ:	Adviescommissie Vreemdelingenzaken (Dutch advisory Council on Aliens Affairs)
AFIS:	Automated Fingerprint Identification System
AZR:	Ausländer Zentral Register (German central aliens registry)
BGS:	Bundes Grenzschutz (German Federal Border Guard authority)
BKA:	Bundes Kriminalamt (German Federal Office of Criminal Investigation)
CDU:	Christlich Demokratische Union (German Christian Democratic Party)
CEC:	Commission of the European Communities
CEE:	Central and Eastern European
CEU:	Council of the European Union
CSU:	Christlich-Soziale Union (Christian Social Union, Bavarian sister party of the CDU)
CWI:	Centra voor Werk en Inkomen (Dutch employment agency/social security services)
DJI:	Dienst Justitiële Inrichtingen (Dutch Prison Agency)
DT&V:	Dienst Terugkeer en Vertrek (Dutch immigration unit for return and departure)
EEC:	European Economic Community
EP:	European Parliament
EU:	European Union
EURODAC:	European Dactylographic System
FIOD:	Fiscale Inlichtingen en Opsporingsdienst (Dutch Fiscal Intelligence and Research Unit)
FKS:	Finanzkontrolle Schwarzarbeit (German branch of the Customs authority for labour market fraud)
FRONTEX:	Frontières Exterieures (EU agency for external border control)
GBA:	Gemeentelijke Basis Adminstratie (Dutch municipal population Registry)
GNP:	Gross National Product
HAVANK:	Het Automatisch Vinger Afdrukkensysteem Nederlandse Kollektie (Central fingerprint database of the Dutch police)
ICT:	Information and Communication Technology
IND:	Immigratie – en Naturalisatiedienst (Dutch Immigration and Naturalization authorities)
IOM:	International Organization for Migration
IT:	Information Technology
JVA:	Justizvolzuganstalt (German regular prison)
KMar:	Koninklijke Marechaussee (Dutch Royal Constabulary)
n.a.	Not Available
NGO:	Non Governmental Organization
OM:	Openbaar Minsterie (Dutch Public Prosecution Department)
PV:	Proces Verbaal

	(Dutch report of offence)
PSH-V:	Politie Suite Handhaving - Vreemdelingen (Dutch Police registry, incorporating the older VAS)
SIOD:	Sociale Inlichtingen en Opsporingsdienst (Dutch Social Intelligence and research Unit)
SIRENE:	Supplement d'Information Requis a l'Entrée National
SIS (II):	Schengen Information System (II)
SPD:	Sozialdemokratistische Partei Deutschlands (German Social Democratic party)
UN:	United Nations
UNHCR:	United Nations' High Commissioner for Refugees
VAS:	Vreemdelingen Administratiesysteem (Dutch central Aliens Registry)
VIS:	Visa Information System
WAV:	Wet Arbeid Vreemdelingen (Dutch Aliens Employment Act)
WIT:	Westland Interventie Team (Dutch labour market fraud team focused on horticulture in the westland district)
WRR:	Wetenschappelijke Raad voor het Regeringsbeleid (Dutch Scientific Council for Government Policy)

1 INTRODUCTION AND RESEARCH QUESTIONS

1.1 The irregular migrant as a policy problem

The presence of irregular migrants causes a tough problem for policy makers. Political and popular aversion against the presence of irregular migrants has mounted in most West-European societies for years, yet their presence remains. Their exact numbers are obviously unknown - only estimates of various kinds and sources are available[1] - making the perceived magnitude of their 'threat' to the social order to a large extent a matter of political opinion. In recent years irregular migrants have almost become a 'public enemy' in many countries of the EU. Television and newspaper images such as those of irregular migrants storming the barbwire fences of the Spanish enclave Ceuta in 2005 confirm both the image of irregular migrants desperate to reach Europe's shores as well as the image of a Fortress Europe, a continent desperate to keep them out. Especially since the 1990s policy attention for this category of immigrants has increased manifold, albeit with distinct differences in approach and intensity among the various EU member states. National governments, especially in Northern Europe, and the European Union have placed the fight against illegal immigration at the top of their political agenda.

Irregular migrants did not always have such a bad image in Western Europe. Not so long ago, in the 1960s and 1970s, illegal immigration was seen as a 'normal' by-product of the guest worker schemes. Many immigrants skipped the recruitment station, travelled on tourist visa to the chosen country of destination, sought and found work and then applied for a work permit. In many labour-importing countries this was not an uncommon practice and the work permit was seldom refused (Engbersen 1997, Sinn et al. 2005). The immigration of guest workers was an important part of Europe's post war economic growth through their contribution of scarce (manual) labour, especially in industry. When the oil crisis and the restructuring of industry in Western Europe echoed in the economic recession, the guest worker programs were terminated throughout Europe. With the deterioration of the economic climate, immigration passed from being a 'solution' to becoming a 'problem' (Sciortino 2000). The problem was of course that many of the 'guests' chose to stay and that immigration continued through legal channels, such as asylum and family reunification and formation, and through illegal entry. Against this background, illegal immigrants gradually transformed from 'adventurers' into 'vagabonds' in the public and political eye (Bauman 1998).

Immigration policy since the 1970s in especially the Northern member states of the EU can be characterized by continuous attempts to stop, curtail and limit legal and illegal immigration[2]. At the same time the emerging scientific literature on immigration has pondered the question why it is so hard for liberal states to control migration processes, pointing to the real and perceived inability of governments to gain control over immigration (Cornelius et al. 2004, Castles 2004, Joppke 1998, Sassen 1996). Despite strong rhetorics, hard political choices and a plethora of new policy initiatives, immigration to Western Europe increased steadily over those same years. This lack of policy-results can't be wholly ascribed to laxness or to politicians that failed to put their money where their mouths are. Immigration policy has received much political attention, has seen vast increases in funding and staffing and has been at the centre of the cooperation in Justice and Home Affairs[3], one of the most dynamic policy fields in the European Union (Monar 2001, Mitsilegas et al. 2003, WRR 2003). The image of a Fortress Europe was introduced, by those who oppose it, to describe a policy development aimed at keeping out (bogus) asylum seekers, illegal immigrants and 'unwanted' immigrants in general. The external borders of the EU (including sea- and airports) have been transformed into formidable boundaries. A sad testimony to this development is the increase in migrant deaths along certain parts of the Mediterranean borders (Carter & Merrill 2007, Carling 2007). Borders have been strengthened with guards, watchtowers, concrete and fences. They have also been equipped with expensive state-of-the-art technology, such as infrared scanning devices, motion detectors and video surveillance. Moreover, visa requirements have been stepped up, and the visa themselves have been modernized and are increasingly difficult to forge. And yet, despite funding and political backing for the fight against illegal immigration and the strengthening of borders and border control, the presence of irregular migrants remains a fact of life for most EU countries.

1.2 Turning inwards: internal migration control

The gradual realization that borders alone cannot halt illegal migration has led to a widening of the scope of immigration policy. Policy moved away from the border to the international level, but it also turned inwards to the local level and the level of institutions (Guiraudon 2001; Zolberg 2002; Lahav & Guiraudon 2006). States are now trying to shut the doors to the welfare state, work, housing, education and other institutions of society. Access to public services has become an instrument of migration policy (Van der Leun 2003, Pluymen and

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1 See Jandl (2004) for a brief overview of research on estimates of illegal immigration.

2 Invited immigration at the top end of the labour market has been common practice throughout the years and recently many European countries have even reinstated recruitment policies for certain segments of the labour markets, most notably the ICT sector (see for example De Lange et al 2003).

3 Justice and Home Affairs is known as the Area of Freedom, Security and Justice since the entry into Force of the Treaty of Amsterdam.

Minderhoud 2002). The central notion in the development of these policies on irregular resident migrants is *exclusion*. Engbersen (2001: 242) suggests that the Fortress Europe may be turning into a Panopticon Europe "in which not the guarding of physical borders is central, but far more the guarding of public institutions and labour markets by means of advanced identification and control systems. Panopticon Europe guards the 'system border' of rich welfare states". These policies of exclusion from work and welfare presuppose a government with a profound bureaucratic 'grip' on and knowledge of the institutions of the welfare state and the (illegitimate) use thereof by irregular migrants. Information is a keyword in these internal exclusion policies. In more recent years internal migration control in general has become increasingly closely linked with digital and technical surveillance. Within the blooming field of surveillance studies there is an emergent group of researchers that combine the insights from the 'surveillance literature' with that from the literature of 'migration studies' (for example Lyon 2007, Haggerty & Ericson 2006, Zureik & Salter 2005, Caplan & Torpey 2001, Koslowski 2002, Torpey 2000). These studies focus on different aspects of the relationship between migration and surveillance (borders, identity documents, security) and have different disciplinary backgrounds (history, law and social sciences). However, most of these studies do not focus on the internal migration control of irregular migrants (some exceptions are Vogel 2001, Samers 2003) or only marginally deal with the issue. This book will try to build on this new field of 'migration surveillance' both theoretically and empirically.

Effective internal migration control implies that irregular migrants have to be detected. The mist, in which the presence of irregular migrants is usually shrouded, has to be lifted in order to exert control. Surveillance is thus linked with information and knowledge production. Control systems depend on information to make society, in the words of James Scott (1990), 'legible' so that the state can act and implement policy. In Engbersen's Panopticon Europe it is enough for the gatekeepers of the welfare state to know who does *not* belong. Controls of documents and (government) registers are routinely done to keep out those who lack the proper documents and registrations. In this book it is argued that this logic of societal exclusion does not suffice anymore in the eyes of some European governments. These governments wish to take their internal exclusion policies a crucial step further and are looking for ways to make expulsion policies – the ultimate exclusion - more effective. Again governments turn to modern systems of surveillance, but this time not just to determine that someone 'does not belong', but to determine who someone *is* as expulsion is impossible to execute without a correct and documented legal identity. This development in which the 'older' policies of societal and institutional exclusion of irregular migrants are increasingly supplemented with policies aiming to identify and expel irregular migrants is the core focus

of this book. To what extent do governments make this 'turn' in internal migration policy and what does it look like in day to day policy practice? These two strands of internal migration control on irregular migrants, though both focused on exclusion, make very different demands on the ways governments organize their paper and digital surveillance systems. Denying access requires no other identification than a label of 'not belonging', expulsion requires full fledged identification of the individual and his background. For expulsion policies to be effective, the organization of the state's knowledge production will have to be thoroughly reorganized. The story of the development of internal control on illegal aliens should therefore be a story of organizing and reorganizing digital and human surveillance and the underlying 'knowledge production' that fuels the system of surveillance. In the current information age where filing cabinets are rapidly replaced with searchable databases and where technology simplifies interconnectivity and (remote) accessibility, technological innovations will play a lead role.

1.3 Research questions: internal migration control at crossroads?

The move towards internal migration control and the ongoing technological sophistication and use of surveillance systems in modern society, raise questions on how internal migration control will develop in the future. How will West-European states organize the internal, domestic counterpart of the 'fight against illegal immigration'? External migration control, both at the border and at the paper borders of visa and passports, has seen the use of the latest technology to stay ahead of immigrants and smuggling organizations that are trying to circumvent the states' best efforts. Internal control will require increased surveillance and surveillance powers and - if border policy is any indication – it is likely that especially the rich welfare states of the Northwest of the European Union will fund and use the latest technologies that are at their disposal. While internal migration control is likely to display the latest development in its instruments and methodology, its goal is likely to remain the same. David Lyon (2004: 142) claims that surveillance, irrespective of new methods and technology, is always used for 'social sorting', for the classification of populations as a precursor to differential treatment. In the case of illegal aliens differential treatment will usually amount to exclusion, which is the general underlying rationale of internal migration control. Internal surveillance of irregular migrants can however take two forms: (1) an 'established' form of societal exclusion and (2) a 'new' form focused on identification that ultimately leads to expulsion, which is hypothesized to be upcoming in certain EU member states. Both require a different use of (new) surveillance technologies. Another likely factor of importance in the development of internal migration policy is the European Union. In the case of external migration control the European Union and related cooperation schemes such as the intergovernmental Schengen agreements, were instrumental in the development of

new policy initiatives. Europeanization was not only important in the development of common EU-policies, but also and perhaps especially as a 'policy laboratory' where new concepts and innovations were developed that were implemented nationally (Monar 2001). As internal migration control develops at the national level in various member states it is most likely that some sort of 'counterpart' develops at the level of the EU, either as a full EU-policy or as a supplementary and supporting framework and infrastructure. These considerations lead to the formulation of the central research questions for this study, which read as follows: *How do national and EU-policies of internal migration control aimed at the exclusion of irregular migrants develop? Do states increasingly supplement more 'established' policies of societal exclusion with policies of exclusion focused on identification and expulsion? And what is the role of (modern) systems of information and surveillance in the construction of these policies of exclusion and control?*

1.4 Case selection: Germany and the Netherlands as most likely cases

This study will focus on two countries that can be regarded as 'most-likely cases' in view of the research questions. If we expect that internal migration control on illegal aliens will grow and develop around (advanced) systems of information and control (surveillance) these countries should fit the profile best and first. To put it more bluntly: if internal surveillance on illegal immigrants doesn't develop and evolve in these countries it is unlikely that it will surface in other EU member states. The countries in this study are The Netherlands and Germany. These two countries constitute a most likely scenario because they share a number of relevant characteristics, which are outlined below.

Firstly, they share a basic common political approach towards immigration. Both countries do not wish to be seen as countries of immigration, have developed immigration policies geared to limiting or even stopping immigration since the 1970s and face a popular opinion that is by and large negative towards (illegal) immigration. In recent years illegal immigration has become an important and politically sensitive topic. In their global comparison of immigration and immigration policies Cornelius et al. (2004) group these countries together under the heading of 'reluctant countries of immigration'. There is in other words a fertile political soil for the development of internal migration control. Over the years, especially since the mid 1990s, their immigration policies have become much stricter. Germany adopted very strict asylum legislation after the 'asylum compromise' of 1993 and the Netherlands adopted stricter legislation in 1994 and especially through the enactment of the Aliens Act 2000. Furthermore, during the 1990s and 2000s the legislation for family reunification and formation has been tuned up with new barriers and restrictions. Along the way, the irregular migrant came to feature more and more in policy documents and white

papers. Irregular migration was an important issue in the well-known German Süssmuth report and internal control on irregular migrants became a spearhead in Dutch immigration policy in the early 2000s. Notwithstanding more recent political overtures to attract highly skilled labour migrants, the general development of immigration policy in these two countries is one of curtailing unwanted migration, both those who come through legal channels (asylum, visa and family reunification and formation) as well as those who come illegally.

A second common political feature is their founding membership of both the European Union and the Schengen group that negotiated the Schengen Agreement and Convention. In other words, these countries share a long history of European political cooperation. In general, through their membership of the EU, but also more specific on matters of border control and immigration policy through the multilateral negotiation of 'Schengen', related instruments such as the Dublin Convention and more recently the Prüm treaty that has already been nicknamed "Schengen III". 'The fight against illegal migration' has been an important part of the Schengen cooperation and has featured at the top of the European Union's agenda for Justice and Home Affairs for years now. Not only does this breed a common understanding of certain cross-border and supranational policy problems, it also provides a platform for politicians and bureaucrats to learn, discuss and copy each others policy innovations for domestic use (Guiraudon 2000, Monar 2001, Broeders 2008).

In the third place they share a number of economic features that are relevant in relation to irregular migration. They can both be characterized as advanced and affluent welfare states that are in more or less permanent need of recalibrating and restructuring (Ferrera and Hemerijck 2003, WRR 2006). In the debate on irregular migration the welfare state often plays a key role. Popular belief often holds that irregular migrants will 'abuse' the welfare state and its entitlements and that this will undermine the sustainability of the system as a whole in the long run. It is however doubtful that the availability of entitlements is a powerful magnet for would-be unauthorized entrants themselves as compared to other demand pull factors (Cornelius et al. 2004, WRR 2001). To irregular immigrants 'the welfare state' is probably more an indication of general affluence and a certain level of social stability, than a possible source of income. An economic characteristic that is of greater importance to them is the size and structure of the informal economy. For most irregular migrants it is this part of the economy where they hope to find employment. In Schneider & Ernste's overview of informal economies worldwide, the Netherlands and Germany are grouped together. They estimate that the shadow economy in these countries adds up to somewhere between 13 and 16 per cent of GNP (Schneider & Ernste 2000: 81). According to Sciortino (2004: 37) the

degree to which states allow – or cannot avoid – the development of a robust informal economy, is the main factor that makes irregular migration and residence possible and feasible. The size of the irregular migrant population in both countries is for obvious reasons difficult to ascertain. In the Netherlands counting the uncountable has some degree of scientific sophistication. Various estimates based on different models and approaches put the number of irregular migrants in the Netherlands somewhere between 46.000 and 116.000 according to the Central Bureau of Statistics (Hoogteijling 2002: 49). Engbersen et al. (2002: 62) put their number anywhere between 47.000 and 72.000 when counting the irregular migrant population excluding irregular Europeans, and between 112.000 and 163.000 including European irregular migrants. For Germany there are no scientific estimates of the irregular migrant population available. Various 'guestimates' put the irregular migrant population anywhere between an absolute bottom of 100.000 (based on the police statistics for suspects with irregular residence) up to one million migrants with irregular residence (Kreienbrink & Sinn 2006: 27).

A fourth common feature is the size and level of professionalism of their respective bureaucracies. Both have a sizable, professional bureaucracy in which corruption does not play a major role. The government has a certain grip on the major institutions of society (such as the labour market, education, welfare state provision etc.) through a dense system of regulations, controls and oversight. Public provisions are as a rule only accessible through bureaucratic procedures that require individuals to identify themselves with legal documents, detailed registrations and involve routine cross-checking between various public and semi-public authorities, making policies of societal and institutional exclusion a realistic option (Vogel 2001, Van der Leun 2003). They are also modern bureaucracies, in the sense that computerization and the use of other new technologies are considered important parts of the working process. That goes for the use of data systems and ICT in public services to facilitate the interaction between governments and citizens, but also for the use of modern technology and data systems for the 'coercive' parts of the state apparatus, such as the police, intelligence agencies and increasingly the authorities dealing with immigration issues.

These four characteristics make Germany and the Netherlands a most likely case for the expected developments outlined above. To state the obvious: these are of course selected similarities and common features at a high level of abstraction. If one were to look below this level of comparison, or emphasized other, more divergent, characteristics it would be possible to draw another picture. One could, for example, draw on the literature on bureaucratic styles and traditions that awards a different label to the countries in this study. In this typology Germany is considered legalistic and the Netherlands pragmatic (cf. Van

Waarden 1999: 339). Also the polities vary considerably. The German Federal structure in which the *Länder* have much legislative autonomy contrasts with the Dutch decentralized unitary state that combines centralism with some autonomy and quite some discretionary power for lower levels of government, most notably the municipal level. These differences are real and may produce different outcomes, even when the intent of policy is the same (Scharpf 2000). Throughout the study differences such as these play a (sometimes significant) role. Where this is the case it is discussed, but the emphasis remains on the broader question of (changes within) policy development and its implementation. Though differences like these may provide interesting explanations for some of the findings, it is the general direction of the policy development that is the subject of this study. At this general level, the shared characteristics described above constitute a most likely setting for the expected developments.

The choice for a selection of 'most likely cases' means a choice for the homogenization of the sample of countries on key aspects that are considered important for the development of surveillance and internal control on irregular migrants. It would also have been possible to choose contrasting cases - i.e. a most different system design - instead of selecting the countries on the basis of their shared characteristics. A more varied spread of cases might have included a Nordic or a Mediterranean country. A country such as Italy, with a large population of illegal immigrants, a tradition of periodic regularizations and a bureaucracy with a looser grip on a more 'informal' society and economy would be a contrasting, but hardly an interesting case. It would be a 'least likely' case, a country that would not provide much insight in the build up of internal surveillance. The primary reason for not choosing a 'most different' approach is that the developments under scrutiny are relatively new. Both the political sense of urgency on the issue of illegally resident immigrants and the technical possibilities to implement internal surveillance on a grand scale with modern means are fairly recent. The history of control of immigration and asylum in Europe has shown that the two countries included in this study have usually been in the forefront of policy development, while countries such as Italy (or Spain, Portugal and Greece for that matter) trail at a distance and/or often have a different outlook and interests. For one thing these countries have only recently shifted from being countries of emigration to countries of immigration (Cornelius et al. 2004). The aim of the study is to see whether a structure of surveillance on irregular migrants is emerging and developing. Research on Italy is likely to reveal that this is not or only very recently the case. Even though the new Berlusconi government enacts strict anti-irregular immigration policies, these policies are unlikely to display much use of sophisticated surveillance technology in the internal migration control on irregular migrants. A Mediterranean case would not add much to the knowledge on the structure and

potentialities of the (digital) surveillance of irregular migrants, nor would it mean that it is not being developed in other member states of the European Union. Obviously, Germany and the Netherlands are not the only countries that are likely to display the signs of this development. Other, equally interesting cases could have been selected, such as Denmark, France or Sweden. Pragmatic reasons such as the state of research on the issue of irregular migration in other countries have led a restriction to a Dutch and German case. Germany and the Netherlands are seen as 'representatives' of a number of countries that are most likely to provide insight in the development, use, potential and imperfections of internal surveillance on irregular migrants.

1.5 Outline of the study

The political and legal developments in the internal migration control on irregular migrants will be analyzed in the Netherlands and Germany in two broadly defined 'policy sectors': that of 'guarding the access to the labour market' and that of 'police surveillance, detention and expulsion'. The developments in the EU's 'fight on illegal migration' will also be analyzed, focusing on those developments that are of value to Dutch and German domestic policies of internal migration control. The analysis will deal with both policy making and the implementation of policy by executive bodies of the state. The selection of the 'policy domains' is based on highlighting the importance of knowledge production and identification in the development of policy aimed at controlling irregular immigrants. They are what might be called 'panopticon-sectors' *par excellence*. The build-up of a system of information and control on irregular migrants aiming at their exclusion will most likely manifest itself first in these domains. They are also policies that highlight the state as a coercive actor. The central questions of this book are about the development of control. Though control may take many forms, the prime interest here is in the policies the state develops in taking an active and forcible control of migration processes. Considering that irregular migrants usually have taken great pains to reach the countries of the EU and are therefore not easily persuaded to leave, this usually means forcible exclusion and forcible removal. This emphasis on the coercive side of the state is also in line with a growing literature that maintains that the nation state seeks to reassert itself through control policies in a time when globalization challenges its dominant position (see for example Schinkel 2008, Wacquant 2009, Bauman 2004, Lyon 2003). The 'penal state', the 'security state', the 'surveillance state' all point in the direction of states trying to gain control over processes and populations that are volatile and unpredictable. In the migration literature 'control' is a general theme. And as will be analyzed in the following chapters the 'migration control state' owes a lot of its policy ideas and instruments to developments in security, the penal system and in the 'surveillance state', and vice versa.

1.5.1 Chapters

Chapter **two** outlines the general theoretical framework of this study. It combines insights from the migration control literature with those of surveillance studies, especially the 'branches' that deal with state surveillance and the surveillance of mobility. In this chapter a vital distinction is made between two essentially contradictory logics of exclusion that emphasize a different use of registration and identification systems. The first logic of exclusion relates to societal and institutional exclusion, meaning that documentation and registration are only used to determine 'belonging' and thus access, or in the case of irregular migrants: denial of access. The second logic of exclusion relates to the ultimate aim of expulsion and requires documentation and registration systems that are able to identify individual irregular migrants in order to make expulsion possible. The term logic refers not only to a political policy choice, but also to an organizational and operational logic that derives from it. The radically different demands these logics ask of bureaucratic organization and (digital) surveillance weave a central thread through the empirical chapters. The general question whether Germany and the Netherlands are shifting towards an internal migration policy in which societal exclusion policies are increasingly supplemented with policies of identification and expulsion is inextricably entwined with the question whether their bureaucracies and their digital infrastructure are able to instrumentalize the second logic of exclusion. In the empirical chapters that follow the general theoretical framework of chapter two will be supplemented and combined with theoretical insights that are more directly related to the specific subject that is dealt with in the empirical chapters. Additional insights from the fields of political economy, criminology and EU studies, will be used in the chapters on the labour market, 'police surveillance, detention and expulsion' and on EU developments respectively.

Chapter **three** deals with the issue of guarding the access to the labour market. Generally, irregular migrants are trying to better their lives and the main method to do this is to work. Exclusion from the labour market, both formal and informal, is therefore a prime target in any policy trying to discourage irregular settlement. Erecting paper walls around the labour market, through all sorts of work permits and identification requirements, has been going on for quite some years. Elaborate networks of (often interconnected) registers and databases have been set up in Germany to close off the labour market to irregular migrants (see for example Vogel 2001). The fact that the labour market is traditionally densely regulated and documented combined with the growing emphasis western governments have placed on shielding it off to irregular migrants, leads to the expectation that it becomes a workshop for new systems of information gathering and knowledge production. Question remains whether

this traditional site of the societal and institutional exclusion of irregular migrants is also turning towards the second logic of exclusion aimed at identification and expulsion?

Chapter **four** focuses on a chain of government agencies that constitutes the core of the coercive state when it comes to internal migration control: the police, the detention system and the immigration authorities responsible for expulsion. Police surveillance is the day-to-day control on irregular residence. The apprehension of irregular migrants is perhaps the most elementary form of organizing internal migration control. Residing illegally is not permitted – and in some countries a criminal offence - and control seems to be intensifying. Compulsory identification (carrying of identity cards), though not always introduced within the framework of the fight against illegal immigration, is spreading through Europe and is making internal control easier. All police work is based on accumulating, accessing and exchanging information, and internal migration control is no different. However, popular and political demand on the police is high across the board. For surveillance on irregular migrants to be effective, the issue has be politically prioritized and backed by resources. The detention system is dependent on the police for the 'supply' of irregular migrants and depends on police and immigration authorities to provide the necessary identification and documentation to release irregular detainees into expulsion. Without identification expulsion is impossible which makes new methods, systems and procedures to obtain this information vital for this ultimate mechanism of internal migration control. The second logic of exclusion then requires the detention system to function as a 'factory of identification'. The question is if and to what extent Dutch and German detention systems can fulfill this role?

In chapter **five** the focus is placed on the contribution of European schemes, policies and instruments to the domestic policies of internal migration control in the Netherlands and Germany. In a unified Europe, internal migration control means that national states also have to turn to the European level to construct the tools necessary for their policies of exclusion. Joint 'policies' on return and the use of the political weight of the EU to put pressure on countries of origin reluctant to take back their own citizens are part of this strategy, but the main European contribution is through the provision of new instruments of digital surveillance. The member states of the EU are currently developing a network of databases in the field of (irregular) immigration. The Schengen Information System (II), the Eurodac database and the Visa Information System are vast databases, often including biometric data, aimed at controlling migration flows and identifying and sorting legal and irregular migrants. These systems are able to 're-identify' parts of the population of irregular migrants on the basis of digital traces of their migration history and are therefore a major, and growing, contribution to the efforts of those member states developing surveillance

systems operating (especially) under the second logic of exclusion. The new digital borders of the EU are in a very real sense legal external borders that are patrolled at the (sub) national level.

Chapter **six** is the concluding chapter of this dissertation that will conclude and reflect on the findings of the research and will answer the research questions.

1.5.2 A note on the (statistical) data

Like most dissertations this study builds on the work of numerous scholars that have researched various aspects of (irregular) migration, government policy and surveillance. However, and again like most dissertations, this study could not be pieced together on the basis of existing scientific studies, so sources also include 'grey' literature, studies conducted by NGO's and studies commissioned by government agencies and ministries. In the empirical chapters the various 'types' of sources are clearly indicated in the text and references. Considering that policy development is the prime interest of this study the information and data provided by the Dutch and German government themselves often comes into play where the scientific literature cannot offer a "peer-reviewed" source. Therefore, in terms of (statistical) data this study relies for a large part on the data that government agencies make available to the public. That means that the statistics used should be handled with care and a good degree of 'healthy suspicion'. Care and suspicion are warranted because government statistics always (also) serve political priorities and are meant to justify political programs and the policy alternatives that were chosen. However, considering the general accountability of the Dutch and German bureaucracies there is also no need to view government statistics in the light of Winston Churchill's dictum that he "only believes the statistics that he forged himself". In addition to a healthy suspicion to the official statistics, it has to be realized that this study tries to ascertain policy developments in internal migration control, which has a target population of 'uncountable' irregular migrants. Given the government supplied data and the elusive target population of the policies analyzed, allowance has to be made for some degree of shadow dancing. Conclusions in this study will therefore not reach the level of certainties (an odd scientific claim to begin with) or claim to have settled matters once and for all. The material allows for the analysis of trends, shifts in policy thinking and the implementation thereof. It can comment on the direction the ship of state is moving in, but not ultimately on the 'effectiveness' of policies. The data simply come with (too many) restrictions. So, it is not just governments that have to make ends meet. When it comes to sources and data researchers also have to make choices under the restriction of the availability of information. However, in light of the central theme of this book, we should perhaps also be glad with some limitations of the research material. A brave new world that

has government data on all aspects of social life is not necessarily a society in which free research thrives.

2 THE STATE, SURVEILLANCE AND IRREGULAR MIGRANTS: THEORETICAL PERSPECTIVES

2.1 Introduction

"The border is everywhere", wrote David Lyon in 2005. We are accustomed to think of the border in terms of territorial lines dividing the world into countries. But these traditional territorial lines originate in politico-legal international agreements (often codifying the outcomes of war and civil strife), they have also been translated into legal documentary requirements, which, in turn have been translated into prerequisites for rights, obligations and entitlements for those 'belonging' to a specific side of those 'territorial' lines. In other words, the border has been translated into a myriad of smaller belongings and memberships that in everyday life determine rights and limitations. And if the border is everywhere, than logic dictates that it can also crossed – legally and illegally - everywhere.

Over the years many authors have debated the changing nature of the border and its significance for migration control. In paragraph 2.2 these debates are analysed along the lines of a number of often used metaphors. The metaphor of the Fortress Europe, coined by those who oppose it, draws attention to the developments in border and migration policies of the EU and its member states to guard Europe against unwanted immigrants. The metaphor of the panopticon has been used to describe the shift to internal control on irregular migrants and to stress the importance of surveillance. The debate now seems to be in a post-panoptic phase, in which the 'surveillance state' is a central theme. Paragraph 2.3 analyses the development of the surveillance state and its growing link with the development of internal migration control on irregular migrants. Paragraph 2.4 describes the limits of the state surveillance. Some limitations are part of the realm of the state itself – such as legal restrictions – while others are the result of strategic behaviour of irregular migrants and illegitimate organizations that frustrate the state's efforts, sometimes with minimal resources. Paragraph 2.5 sums up the central expectations that result from this theoretical chapter for the analysis of the empirical material in the chapters that follow.

2.2 The changing nature of European borders: a story in metaphors

Many have observed that Western states in recent decades have not been able to stop unwanted immigration in spite of the outspoken political wish to do just that. The widespread declaration of 'zero-immigration' policies by West-European governments, after the termination of the guest worker programmes, went hand in hand with rising numbers of immigrants through the channels of asylum, family reunification and family formation. The

problems that these channels of legal entry posed for these 'reluctant countries of immigration' were supplemented with the rise of illegal immigration and other methods resulting in illegal residence, such as overstaying on legal tourist visa (Cornelius et al. 2004). The fact that the liberal states of the West have (seemingly) been largely unsuccessful in stopping unwanted immigration has spurred a public and academic debate on the question whether or not states have 'lost control' on immigration (see for example Sassen 1996; Soysal 1994; Jacobson 1996; Joppke 1998, 1999; Freeman 1998; Lahav & Guiraudon 2000; Guiraudon 2001; Cornelius et al. 2004). Some saw the era of the nation state and 'hard' national borders drawing to a close as a result of globalisation. This pressure on the nation state results either from economic globalisation (a free flow of goods and capital will be followed by at least some degree of free movement of people) or from an emerging global legal culture of human rights that awards rights to individuals irrespective of state-membership. Others questioned the notion of lost control, pointing to the increased capacity and resources being directed at the issue of immigration and immigration control. From a more historical perspective it was put forward that the absolute physical control of frontiers by states was always a myth and will remain so (Anderson & Bigo 2002; Andreas 2000).

Though the debate is by no means closed, there does seem to be wide agreement on the notion that immigration and immigration politics have shifted from the realms of 'low' politics to that of 'high' politics. Definitions of security and security threats in relation to borders have significantly shifted. Borders have become less about fighting wars, and more about fighting crime and new security threats such as terrorism and illegal immigration (Andreas 2000, Bigo 2000). Immigration control has reached the top of the political agenda and the public unease in Western Europe fuels the resolve of politicians to dedicate more manpower and resources to the agencies involved. Germany and the Netherlands, having been at the forefront of 'policy innovations' in both national and European migration control, are a case in point. Meanwhile the border itself is changing. The border as a concept and the practical organisation of the border are transforming in response to the many – and sometimes – conflicting challenges of economic globalization, international migration and Europeanization. In Europe, the development of the border has often been captured in metaphors, starting with the vivid image of a Fortress Europe that was coined by those who opposed the 'closing of Europe'. Needless to say, one metaphor for all of the European Union clouds relevant differences between its member states, such as the north-south divide that is especially relevant in matters of immigration. Nonetheless, metaphors can take us briefly through the development and the changing nature and location of the border and lead us to the central role that surveillance plays in managing (unwanted) migration nowadays. These metaphors are of course also 'programmatic'. They point to the essence of the 'policy

paradigm' that is in operation at a particular time and haunts the minds of politicians and policy makers. As such, they might be seen as a 'policy frame'. Rein and Schön (1993: 146) described framing as "(…) a way of selecting, organizing, interpreting, and making sense of a complex reality to provide guide posts for knowing, analyzing, persuading and acting". Specific frames and metaphors highlight specific parts of the policy problems at hand and thus produce fast tracks to certain policy solutions. Reversely, they undervalue and lead away from other options, as the following metaphoric 'history' of European migration control illustrates.

2.2.1 Fortress Europe

The metaphor of a Fortress Europe has often been used to describe the development of immigration and border policies at the level of member states and subsequently of the EU itself. This rather grim metaphor draws attention to the fact that borders and immigration policy have become a 'line of defence' against immigrants who are perceived to be 'laying siege' to the fortress. Since the late 1980s national policies for immigration and asylum have developed along the rationale of denying or at the very least limiting access for most immigrants. The invitation policies and guest worker programmes were over and immigration should have grinded to a halt. When it didn't, public and political opinion of immigration and immigrants began to change. Against a background of rising unemployment, restructuring of welfare states and a continuous high level of immigration, public opinion and mainstream politics began to perceive immigrants by and large as uninvited and unwanted. From the mid-1980s and all through the 1990s asylum migration dominated public sentiment and immigration policy in Europe. Especially Northern EU member states had enormous (administrative) difficulties coping with the large numbers of refugees. Germany even functioned as Europe's 'magnet' with the number of asylum applications peaking at the staggering number of 418.191 applications in 1992 (Broeders 2004). The image of asylum seekers gradually changed from politically persecuted and help deserving individuals to 'floods of bogus-asylum seekers', from which a few 'deserving genuine' refugees could be filtered – at great costs. In the late 1990s illegal immigrants became a new prime category of unwanted immigrants. As the number of illegal immigrants rose, the 'fight' against illegal immigration was also stepped up. In the process, immigrants coming to Western Europe for economic reasons, such as 'bogus asylum seekers' and irregular migrants, became categorized as 'enemies of the state' (Engbersen 1996; Schinkel 2005).

The development of immigration policy at the level of the EU followed suit. As the issue of borders is intimately tied up with national sovereignty, the member states were very reluctant

to yield control to the institutions of the EU in matters of immigration and border control. 'Common policies' were developed in the intergovernmental third pillar of the EU and some major initiatives, such as the Schengen agreements, were negotiated outside the framework of the EU altogether. The political sensitivity of immigration and asylum in Europe was one of the reasons that development of EU-policies in this area – Justice and Home Affairs – became firmly embedded in a discourse of safety and security (Kostakoupoulou 1998, Peers 2000, Mitsilegas, Monar & Rees 2003). National sensitivities about sovereignty and secrecy did not however add up to disagreement about finding new ways to close the borders, improve control and harmonize visa policy. The latter being essential for controlling access to an internally borderless Schengen zone. The construction of the fortress took off in earnest during the 1990s. Physically, the dropping of the internal borders between the Schengen member states led to the reinforcement of the new joint external borders. Gates, concrete, fences and watchtowers are the most visible icons of the fortress. Some parts of the border and certain notorious backdoor entry points to the EU, such as the Spanish enclaves *Ceuta* en *Melilla* on the coast of Morocco, have been turned into fortresses in a most literal sense (Broeders 2002) and now look like military strongholds. This is not just a European phenomenon. Parts of the border between the United States and Mexico have undergone a similar transformation under militaristic slogans such as *Operation Gatekeeper*, *Operation Hold-the-Line* and *Operation Hard Line* (Andreas 2000). However, both the European border and the US-Mexican border are simply too long to control. Let alone seal off. Germany for example shared an external Schengen border with Poland (454 km) and with the Czech Republic (810 km) that even the generously staffed *Bundesgrenzschutz* could not patrol effectively and/or continuously (Asbeek Brusse & Griffiths 2004). Since December 21st 2007, Germany's neighbours to the east are full members of Schengen, meaning that the burden of external control shifted to them with a new and even longer external Schengen borders in the east. Due to the long borders the Fortress Europe is not all steel and concrete. In the modern age immigration control has widened. Border control is 'moving away from the border and outside the state' (Lahav & Guireaudon 2000), or is becoming 'remote control' (Zolberg 2002) or is moving 'upwards, downwards and outwards' (Guireaudon 2001). Classical border control, characterised by gates and guards, is changing as Anderson & Bigo (2002: 19) sketch:

> The control of movement of persons is changing - the Member State borders are less and less important. The control of movement begins in the country of origin, at the consulate for people coming from most countries in the world, it continues at the point of departure with travel agents and airlines, subject to carrier liability, exercising controls on travellers' documentation and, for surface travellers at the land borders of the EU neighbouring countries who will not admit them if they suspect they intend to attempt to enter the EU without proper documents.

> People arrive at the EU borders in large numbers, but many have already been deterred or prevented from reaching them. At the external EU border, if undocumented or suspect persons arrive by air, they will be held in an international zone of airports and entry to the EU is very difficult. By contrast, the external land borders of the EU are relatively easy to cross. The requirements of the market economy and the necessity of rapid circulation of goods explain why the government does not go too far "sealing" off the borders in a way that would prevent undocumented immigration.

In other words, territorial borders are, in spite of huge investments, still permeable borders. One reason for that is that borders have a double function. The smooth functioning of the modern economy requires an easy passage for some people and goods. Businessmen and cargo should pass the border with a minimum of delay. On the flip side, the border is meant to filter out contraband, terrorists and irregular migrants. Border officials thus face the challenge to restrict illegal border crossings while facilitating and encouraging the rising volume of legal crossings. They have to filter out the 'undesirable' from the 'desirable' crossings (Andreas 2003) and they have to be quick about it. In his work on globalisation Bauman (1998) saw a new border developing between the first world and (a new) second world. This new border divides the global population into 'tourists and vagabonds' and into 'globals and locals'. In other words, international mobility may be part and parcel of what we call globalisation but it is the privilege of the few. Guiraudon & Joppke (2001) call this the paradoxical union of 'open' economies and 'closed' national states in the age of globalisation. Another reason for the permeability of the border is a matter of capacity. There is simply too much border in relation to the capacity the state can muster to guard it. The fact that a totally 'sealed' border is neither possible, nor (economically) desirable has led to a new shift in policy to counter irregular migration.

2.2.2 Panopticon Europe

In recent years policies to counter irregular migration have increasingly turned inwards. Border controls remain important but in light of their 'structural flaws' have to be supplemented with policies of discouragement of those unwanted aliens that pass the border. The goal of discouraging irregular migrants has led to a shift towards internal migration control, which comprises a wide array of policy measures such as employer sanctions, amnesties, exclusion from public services and surveillance by the police (Van der Leun 2003, Cornelius et al. 2004). Immigration policy is usually equated with the territorial dimension of the state, but internal migration control reminds us that states are at once *territorial* and *membership* associations. When it comes to internal migration control, these two interrelated dimensions pose different challenges for the state, as Torpey (2000: 33) describes:

> The first dimension, *territorial access*, chiefly raises questions about the *capacity* of states to identify citizens, distinguish them from non-citizens, and regulate their movement in keeping with policy objectives. The second dimension, *establishment*, concerns the extent to which states may be able to exclude noncitizens from opportunities for work, social services, or simply unperturbed existence once they have already entered the territory.

In the future, internal borders may become even more important than state borders, than is already the case. Engbersen (2001: 242) suggests that the Fortress Europe may be turning into a panopticon Europe "in which not the guarding of physical borders is central, but far more the guarding of public institutions and labour markets by means of advanced identification and control systems. Panopticon Europe guards the 'system border' of rich welfare states". The Dutch Linking Act that entered into force in 1998 is perhaps the quintessential example of panoptic shielding of the welfare state. This act makes the entitlement of immigrants to a whole range of public and semi-public provisions such as social benefits, health care, housing and education systematically conditional on having a regular residence status (Bernini & Engbersen 1996; Van der Leun 2003: 115).

The metaphor of the panopticon comes from the work of Foucault (1995, org. 1977), who in turn borrowed the term from Bentham's design for a prison. Bentham's panoptic prison design, in which individual prisoners could be seen at all times by a centrally located guard who was invisible to them, has become a dramatic symbol for the modern society in which surveillance plays such an important role. The panopticon has become a central metaphor in the literature on surveillance, which deals with all sorts of gathering of personal information for analysis and the exertion of control. When it comes to surveillance by the state the gathering of information on citizens and their behavior is seen as a constitutive element of the power of the state over its subjects. Foucault's emphasis on the intimate connection between power and knowledge, and on the crucial importance of individual surveillance in modern administrative systems has proven enormously suggestive (Torpey 1998: 248, see also Dandeker 1990). According to Foucault's theory the constant surveillance and visibility in the panoptic prison are meant to do more than just control the inmates. The ultimate aim is to discipline the individual under surveillance. The idea is that the prisoners under the perpetual eye will experience a process of disciplining in which they lose the opportunity, capacity and will to deviate:

> "Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is

> discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary…" (Foucault 1995, org. 1977: 201).

In other words, the operation of power should become cheaper, easier and more effective as the inmates 'internalize the gaze' of power (Gilliom 2001: 130). The exclusion of irregular migrants through panopticism will be less precise as it is bound to the much more 'fleeting' institutions of the welfare state, instead of spatially confined institutions such as the prison and the school. The aim is to sift out anyone who lacks the proper documentation. Being undocumented bars access to public institutions and services and the underlying policy assumption is that this exclusion will discourage irregular migrants from lengthening their stay.

Many researchers have taken the panopticon metaphor out of the realm of the prison and used it to describe other policies in which the state tries to control and influence (deviant) social behavior. The modern welfare state, and the control on its beneficiaries, has been compared to a panopticon (see for example Gilliom 2003), as has the introduction of cameras in public places for the purpose of public surveillance (see for example Yar 2003). In all cases information is gathered with the intention to improve control. Information serves as a power base for the state. In the modern state information and communication technology plays an important role in widening the possibilities to document, codify and store information on the activities of subjects and citizens.

2.2.3 Migration control in a 'state of surveillance'

In the recent academic literature on surveillance there is a debate on the loosening of bonds between the panoptic metaphor and the study of surveillance. Within the broader field of surveillance studies the panoptic metaphor has been questioned on many accounts (see for example Boyne 2000, Haggerty & Ericson 2000, Yar 2003, Lyon 2007). In relation to the question of internal migration control on irregular migrants the metaphor comes under strain on three specific counts: (1) the objects of surveillance are mobile and not bound to classical panoptic institutions, (2) surveillance is used for social sorting, rather than controlling the 'socially sorted' and (3) the aim of surveillance is exclusion rather than correction.

Firstly, as Bauman (1998) indicated, international mobility is one of the key defining characteristics of globalization. For the elite it is a privilege, bordering on an obligation. The 'vagabond' on the other hand, hopes to achieve his international mobility despite of the policies that the richer countries implement to prevent it. The element of mobility doesn't sit

well with the institutional emphasis in Foucault's panopticon. Instead of closed institutions such prisons, factories, schools and hospitals in which people are 'kept' under a watchful eye, surveillance is now aimed at moving populations. This requires a control on populations rather than on territories or populations in a fixed location. Territorial and institutional borders will have to be supplemented with a more 'liquid' border that is able to trace and survey the immigrant population. The power derived from panoptic surveillance has become increasingly extraterritorial and is no longer necessarily fixed to a place (Bauman 2000, Deleuze 2002, Bigo & Guild 2005). This does not mean that the institutional context has become irrelevant for the surveillance on unwanted immigrants. Far from it. Considering the fact that undocumented immigrants try to hide and submerge in west European societies, it is institutions such as the labour market, social security and health care institutions where they emerge and may (again) become visible to the state. Mostly, irregular migrants come into contact with these institutions on a temporary basis as contact with official institutions and public officials is preferably shunned. Their 'close encounters with the welfare state' (Van der Leun 2003: 115) differ from the fixed localities and fixed populations of the panopticon. So the locus of control has become less predictable and has to follow the movements of the population under surveillance.

Secondly, surveillance of populations is primarily aimed at social sorting, defined by Lyon (2004: 142) as the classification of populations as a precursor to differential treatment. The population is therefore not a priori known and classified, as is the case in a prison or school. A prison or a school, one might say, starts with a sorted population of prisoners and students. Didier Bigo introduced the alternative metaphor of the "Ban opticon" noting that " (…) the social practices of surveillance and control sort out, filter and serialize who needs to be controlled and who is free from that control, because he is 'normalized'. It is more a Ban than a Pan opiticon" (Bigo & Guild 2005: 3; Bigo 2004). In other words, surveillance aims to divide the mainstream of the mobile population into separate subpopulations, which are to be treated differently. The Dutch and German asylum procedures are a prime examples of the 'art of subdivision'. These procedures have made various subdivisions within the broad category of eligible refugees, meaning those applicants who cannot be sent away due to humanitarian reasons. Most of those who are not refused protection are channelled towards some form of (temporary) auxiliary status with less legal rights than the UN refugee status. This means that most off them lack the strong rights of the refugee status, leaving the option of return at a later point in time open. Scanning and selecting certain groups from within the masses is a different function than the panoptic control of a selected and classified group. Gary Marx (2005: 13) points out that "many forms of surveillance can be usefully viewed as techniques of boundary maintenance. Surveillance serves to sustain borders through defining

the grounds for exclusion and inclusion - whether to physical places, opportunities or moral categories".

Thirdly, Panoptic surveillance in Europe on undocumented (or more generally unwanted) migrants has made exclusion an explicit policy objective. The system under construction is meant to gain knowledge of the actions and movements of irregular migrants, but not with the ultimate aim of structuring and moulding their behavior in line with socially accepted standards - defined by the state - as the Panopticon does. The aim is not to get them in line, but to get them out. The element of correction, of the 'internalization of the gaze', is not a central element of the panopticon that the member states of the EU are constructing[4]. Engbersen (2001), borrowing from Bauman's analysis of modern American prisons, claims that the aim is not correction, but exclusion. "Panopticon Europe is not a 'factory of correction'. Its aim is not disciplining and correcting undesirable migrants. Panopticon Europe is designed as a '*factory of exclusion* and of people habituated to their status of the *excluded*' (Engbersen 2001: 242). In other words, the state gathers information on the doings and whereabouts of illegal immigrants with the explicit aim to exclude them from both its territorial and membership associations. 'Post-panopticism' then brings us to the realm of the surveillance state. The interaction between the advent of the surveillance state and the internal migration control on (irregular) migrants will be discussed in paragraph 2.3.

2.2.4 Metaphors on power and the power of metaphors

Even though metaphors are useful analytical concepts they are not without flaws or drawbacks. They structure our view of the world by highlighting certain elements of a phenomenon and omitting what can be 'left out' of the picture. The images they invoke are meant to convince but should also encourage reflection. They should be an invitation to reflect on the core characteristics of the phenomenon that is captured by the metaphor. However, they also run the risk of becoming clichés: weak metaphors that no longer invoke reflection but rather reflexes (Witteveen 2000: 43). Or phrased even stronger: "clichés can be easily consumed because they do not require cognitive reflection" (Zijderveld 1979: 12). However, the fact that they no longer invoke reflection does not mean that clichés do not have a social function. They are important in structuring social behavior but, as Zijderveld (1979) puts it, their meaning has been superseded by function. Powerful images such as the fortress and the panopticon have both advantages and drawbacks for the study of internal control on irregular migration. They should not be allowed to turn into clichés, that no longer

4 The 'pedagogic' element of the panopticon is not so much correction as it is prevention. The construction of the panopticon, just as that of the fortress is meant to discourage would-be immigrants and through discouragement prevent their arrival.

require reflection. These metaphors capture the nature and character of political and policy developments in a broad sense and stress those elements that help us to understand the essence of the type of surveillance under scrutiny. The Fortress Europe and the panoptic metaphor draw our attention to the power of the state and the enormous capacity it has built up in the 'fight against illegal immigration'. It highlights the actions, choices and developments within the power container of the state. The concept of the 'surveillance state' furthermore channels our attention to technology and technological innovations. It highlights innovation in surveillance techniques, such as the current debate on biometrics, and its use for the government's control on (mobile) populations. The choices and policies of the state are the central focus of this book and much of the 'metaphorically inspired' literature helps to highlight the relevant trends and leave side issues at the side. Paragraph 2.3 therefore focuses on 'the' state and the state perspective.

But metaphors are obviously ideal types. Therein lies a problem, as social scientists often have to note that the devil is in the detail. Bennet (2005: 133) having conducted a detailed inquiry into what actually happens – in terms of surveillance - when you buy an airline ticket, points to the risks of relying too much on metaphors:

> Surveillance is, therefore, highly contingent. If social scientists are to get beyond totalizing metaphors and broad abstractions, it is absolutely necessary to understand these contingencies. Social and individual risk is governed by a complicated set of organizational, cultural, technological, political and legal factors. The crucial questions are therefore distributional ones: why do some people get more 'surveillance' than others?

This points to realities both inside and outside of the power container of the state that are at odds with metaphoric clarity and lack of ambiguity. Power always meets resistance. Sometimes the state is openly challenged; sometimes opposition is covert and small scale. Sometimes resistance is a matter of the subjects of surveillance, while in other cases it is within the state itself that resistance or obstruction takes place. Too much emphasis on state power therefore entails the risk of blocking out counter movements that are relevant to the analysis of state surveillance on irregular migrants. Even though this study concerns itself with the developments of the state's capacities and the choices it makes in the internal control on irregular migrants, it is important to note and where possible evaluate these countermoves and strategies. Paragraph 2.4 therefore deals with the literature that maps the limitations of state power and its control on irregular migration.

2.3 The surveillance state and internal migration control

The history of surveillance is closely entwined with the history of the modern bureaucratic state. In fact, it is hard to imagine the first without the second. Bureaucracy depends on registration and classification to implement policies varying from collecting taxes, distributing benefits and allowances to controlling and policing the population. This paragraph will therefore start with a brief historical account of the connection between the rise of the modern bureaucracy and the rise of surveillance as an instrument of state power (2.3.1). Early on in the process of state formation, surveillance has been directed to the question of international mobility. Passports were an early form of subdividing populations into those who could legally pass the border and those who could not. The state drew territorial and legal borders by means of registration and documentation, thus classifying those who travelled without documents as 'illegals' or trespassers'. Paragraph 2.3.2 will deal with the link between surveillance and international mobility. The computer age has altered the face of the modern bureaucratic state on many fronts, but has been a revolution for the information intensity of modern surveillance. Surveillance is rapidly being computerised, networked and internationalised and is strengthening its focus on (irregular) international mobility (paragraph 2.3.3.). Though it is tempting to equate surveillance with technology this paragraph should make clear that surveillance can and often is both 'face to face and/or technologically mediated', even though in 'today's world the latter is growing fast' (Lyon 2007: 1).

2.3.1 The rise of bureaucratic power and surveillance

Accumulating information on citizens and inhabitants has been described as a central aspect of state formation. The historical rise of centralised nation states is closely entwined with the gathering of information on the population on a large scale. James Scott (1998) describes this process as one in which the state makes its people 'legible' by gathering information on its subjects in the various roles they play in society. This legibility served to increase the state's ability to govern and control its population. Caplan & Torpey (2001: 1) in similar vein stress the role of 'documenting individual identity' in the rise of modern government: "Establishing the identity of individual people – as workers, taxpayers, conscripts, travellers, criminal suspects – is increasingly recognized as fundamental to the many operations of the state". In order to enhance its grip on society, the state increased the accumulation of information on its inhabitants through registration and documentation. Information, legibility and documenting identities can of course be applied to various state tasks. It is vital for both the control of the population (with totalitarian control as its extreme form) but also for emancipatory goals and redistribution of scarce resources in light of the operations of the welfare state. Surveillance always moves somewhere on a continuum between *care* and

control (Lyon 2007: 3). Both the welfare state and the control state require elaborate bureaucracies to run their operations.

The rise of the bureaucratic state went hand in hand with increasing possibilities, and desires, to control the population through information. Information and bureaucracy can almost be seen as two sides of the same coin. Authors such as Weber, Foucault and Giddens analysed bureaucracy as a highly rationalized mode of information gathering and administrative control. They discussed the administrative logic of modernity in terms of the growth of 'surveillance', understood as an expansion of the supervisory and information gathering capacities of the organizations of modern society and especially of the modern state and business enterprise (Dandeker 1990: 2). Surveillance in these views is one of the prime instruments at the disposal of the state to monitor and control its population and society. Often this line of reasoning has focused on the nightmarish extremes of state power and totalitarianism. Both fiction- Orwell's all-seeing Big Brother - and history - the highly organised bureaucratic power of the German Third Reich - have provided vivid images of the power of surveillance when it is not morally or legally restrained. The intimate connection between bureaucracy and surveillance cannot be explained by just using images of a power-hungry government seeking means to control and subject its population. Bureaucratic surveillance is two-faced: it can be seen from both the perspective of social control or from that of social participation. Lyon (1994: 31) argues that "The administrative machinery constructed during the nineteenth century can be understood both as a negative phenomenon – Weber's 'iron cage' of bureaucratic rationality or Foucault's 'disciplinary society' - or, more positively, as a means of ensuring that equal treatment is meted out to all citizens". Both functions depend on the surveillance capacity of the state. It can be argued that the control function of surveillance came first in a historical sense. After all, registration and administration were originally designed to award duties and responsibilities to citizens, such as taxation and conscription (Scott 1998). As European states gradually developed into welfare states the duties of the citizens towards the state were supplemented with all sorts of rights and redistributions (see for an historical account De Swaan 1993). Gary Marx notes that the state's reasons for collecting and using identification have broadened significantly over time. "In the twentieth century its traditional claimed needs to identify for reasons of internal security, the draft, to protect borders, and for taxation, were supplemented by regulatory needs and the desire to do good (as defined by those with power) via the welfare state" (Marx 2001: 326). This is where the other face of surveillance, the face of social redistribution and equal treatment of citizens, comes to the fore.

The function of internal surveillance and control is increasingly to separate the 'ins' from the 'outs'. Solidarity and redistribution are by definition limited to a clearly demarcated group. Especially in rich welfare states there is a paradox of solidarity and exclusion: maintenance of national, institutionalised forms of solidarity for the benefit of native citizens and denizens (legally residing aliens) requires a rigorous exclusion of outsiders from the welfare state's social entitlements (Teulings 1995; Entzinger & Van der Meer 2004, Engbersen 2004). Identification and surveillance of the population is therefore also an instrument to determine eligibility. Both Germany and the Netherlands fit neatly into this representation of bureaucratic development. They are both elaborate welfare states with a high level of social protection, which requires a keen eye for matters of eligibility. Most sectors of public and semi-public life are highly regulated and subject to registration and documentary requirements by a professional and well staffed bureaucracy. However, the actual implementation of policy is executed in the offices and practices of the 'street level bureaucracy', where there usually is room for some (formal and informal[5]) discretion in decisions over benefits and sanctions (see Van der Leun 2003; Cyrus & Vogel 2003).

2.3.2 Surveillance and the control on 'legitimate movement'

In an age of globalization separating the 'ins' and the 'outs' has also become a matter of migration and immigration policy. Migration policy itself is a tool to divide the population of the 'globally mobile' into a part that is considered 'legal' and a part considered 'illegal'. John Torpey (1998, 2000) argued that modern states, and the formation of the international system of nation states in which they are embedded, have monopolized the 'legitimate means of movement'. He saw a development similar to Weber's notion of 'monopolization of the legitimate use of physical force', in which the state took the legitimate use of violence out of the private sphere. Likewise, the state has taken the right to move across land and borders out of the private sphere: "The result of this process has been to deprive people of the freedom to move across certain spaces and to render them dependent on the state and the state system for the authorization to do so – an authority widely held in private hands theretofore" (Torpey 1998: 239). This monopolization was to a large extent executed through the introduction of the passport. The passport connected an individual with a written identity that can only be issued by the state and this document became the prerequisite for moving across the border. Identification, and thus identity, became formalized and documented. The issue of enforcement was of even greater importance. Identifying and documenting new subdivisions in society meant very little, if the state could not enforce its policies and regulate

5 Cyrus and Vogel (2003: 226) define formal discretion as "the scope of choices foreseen by law and administrative regulations" and informal discretion as "the use of choices that are not explicitly allowed by law or are even forbidden".

the movement of its subjects. “The successful monopolization of the legitimate means of movement had to await the creation of elaborate bureaucracies and technologies that only gradually came into existence, a trend that intensified dramatically toward the end of nineteenth century” (Torpey 2000: 35). Surveillance and (international) mobility thus became closely entwined. As Boyne (2000: 287) puts it: “The prime function of surveillance in the contemporary era is border control. We do not care who is out there or what they are doing. We want to see only those who are entitled to enter”. Yet, this short quote outlines the problematic coherence between irregular migration, surveillance and exclusion in a nutshell. The fact that you only want to see those who are entitled to enter means that you *have* to care who is out there and what they are doing. Once irregular migrants have crossed the border it takes information and documentation on who they are and what they are doing to be able to effectively exclude them. That goes especially for the successful implementation of expulsion policies. The practical organization of exclusion is a labour- and information-intensive process. Torpey has argued that the modern state’s capacity to intervene in social processes depends on its ability to embrace society. As states grow larger and more administratively adept they can only penetrate society effectively if they embrace society first. “Individuals who remain beyond the embrace of the state necessarily represent a limit on its penetration” (Torpey 1998: 244). Irregular migrants are of course both likely – they are after all ‘irregular’ because they do not fit into any legal administrative category - and eager to stay beyond the embrace of the state. Internal migration control is aimed at embracing them and the institutions and circles in which they move in order to exclude them.

Information and identification are vital for the control of populations and because of a general lack of registration this goes double for the irregular population. The keywords for the internal control on irregular migrants are surveillance and identification. In a modern (welfare) state exclusion is dependent on documentation (or registration) of identity and legal status. Marx (2001) describes seven types of ‘identity knowledge’. Of these, three types are especially important for the goal of internal control on irregular migrants. The first is ‘legal name’, identification requires that a person can be linked to a unique legal name. In short: who are you? Authorities have to invest a lot of time in this basic question of identity. Linking an irregular migrant to a legal identity is a prerequisite for further action such as expulsion. The second type of identity knowledge is ‘locatability’. In short this refers to the question: where are you? This involves the “ability to locate and take various forms of action, such as blocking, granting access, delivering or picking up, charging, penalizing, rewarding or apprehending” (Marx 2001: 313). Locatability is one of the main links between capacity and enforcement. If the state does not know where to go, policy will remain a dead letter. In the case of ‘liquid’ populations (compare Bauman 2000) moving through society by stealth –

such as irregular migrants – borders will have to follow and seek out the places where they interact with the institutional world. Moreover, many irregular migrants will not wait for the immigration authorities to show up at the door when they have been given notice to leave the country, but go deeper underground. So from the state's perspective the use of detention as a preparation for expulsion is another aspect of locatability. The third type is described as 'symbols of eligibility/non-eligibility'. This concerns the manner in which an identity is coupled with a set of rights. This can be done in the form of documentation (passport, social security card) or in the form of registration (legal status, eligibility etc).

2.3.3 Surveillance and irregular migrants: two separate logics of exclusion

The link between the exclusion of illegal immigrants and policies of surveillance can follow two separate, and essentially contradictory, logics. The first may be captured under the notion of 'exclusion from documentation' and the second under the notion of 'exclusion through – or by means of – documentation and registration'. Policies operating under the first logic exclude irregular migrants from documentation and registration in order to exclude them, while policies operating the second logic aim to register and document the individual irregular migrant himself in order to exclude him in the ultimate sense of expulsion.

Exclusion from documentation and registration

First, surveillance may be deployed to exclude illegal immigrants from key institutions of society, such as the labour market and the housing market and even from informal networks of fellow countrymen and family. This is the panopticon Europe as described by Engbersen (2001) in which the state raises a protective wall of legal and documentary requirements around the key institutions of the welfare state and 'patrols' it with advanced identification and control systems. The first logic of exclusion reads as follows: Irregular migrants are (formally) excluded from legal documentation and registration, and are thus excluded from the institutions themselves while it is exactly these documents and registrations that allow access to the institutions. One might say that the state's embrace in this perspective is aimed at the institutions and networks illegal immigrants use and need for their daily lives. It is a strategy of exclusion through the delegitimization and criminalization of all those who may be employing, housing and aiding illegal immigrants. Seen from this perspective the panopticon does contain some elements of correction and discipline as it aims to discipline first of all public and semi-public institutions and secondly the social networks and institutional surroundings of irregular migrants. These strategies are prominent in both the Netherlands and Germany where registration is routinely used to exclude irregular migrants from (semi-) public institutions and the labour market. Targeting the ring of 'social' networks

and institutions, such as the crackdown on legal and not-so-legal temp agencies in the Netherlands, is a more recent phenomenon.

Exclusion through documentation and registration

In the second type of logic, the state aims to embrace illegal immigrants themselves. The state follows the strategy of developing detection and identification tools aimed at exclusion. Embrace of illegal aliens is necessary for detection, but especially for expulsion, as states have gradually found out that 'unidentifiable immigrants are constitutionally rather invulnerable to expulsion' (Van der Leun 2003: 108). The expulsion of illegal aliens can only function when identity, nationality and (preferably) migration history can be established. If not, extradition is likely to be resisted from within (lawyers and judges) and from abroad (countries of transit and origin) in addition to personal resistance from illegal aliens themselves. It is therefore vital for the state to be able to connect illegal aliens with their 'true' identities. The second logic of exclusion then reads as follows: Documentation and registration is aimed at the irregular migrant himself, in his capacity *as* an irregular migrant. Documentation and registration have to establish (a) the illegal status of the migrant and (b) establish and (re) connect the irregular migrant with his legal identity. In other words, registration is used to identify or even re-identify irregular migrants (see Broeders 2007). This is in turn needed in order to facilitate exclusion in the ultimate sense: expulsion from the state. This strategy is dominant in the advanced welfare states of Northern Europe (Engbersen 2003; Levinson 2005, Van Kalmthout et al. 2007). Since the 1990s Germany and the Netherlands have for example been increasing their detention capacity for irregular migrants and rejected asylum seekers with the aim of facilitating expulsion (Jesuit Refugee Service 2005, Welch and Schuster 2005). Both countries have also been investing heavily in database systems that are able to register, track and identify the resident migrant population and are leading advocates of organising and equipping data exchange at the European level in matters of migration management (see for example Aus 2003, 2006, Broeders 2007). In southern Europe, the Italian, Spanish and Greek governments have in recent years particularly pursued a strategy of selective inclusion, which also requires documenting and registering irregular migrants[6].This latter strategy, though important, is however outside of the focus of this study.

[6] These countries have followed a strategy of selective inclusion of specific categories of illegal migrants through regularization programmes. An increasing number of European countries have adopted such regularization programmes over the past decade. Such programmes bring undocumented persons out of the shadows and provide information to governments on their numbers and characteristics. It also transforms them into regular denizens with corresponding rights and duties (e.g. to become a taxpayer).

2.3.4 Surveillance in the digital age: tracking and identifying mobile populations

The introduction of the computer to the modern bureaucracy has no doubt been a quantitative and a qualitative leap for its capacity. Gilliom (2001: 129) simply states that "the turn to the computerization of surveillance and administration represents a revolutionary shift in administrative power of the state system". Filing cabinets and card indexes have been, or are being, transformed into searchable digital databases. Information and communication technology has made it possible to link various databases and to create networks between them. Communication technology has also detached registrations and administrations from fixed places and locations because they are often remotely searchable. This interconnectivity and accessibility of information makes cross-referencing potentially a matter of seconds. Computerisation, interconnectivity and remote accessibility are an enormous boost for the state's ability to execute the first logic of exclusion *from* documentation and registration. The verification of non-registration or the checking of suspect documents becomes easier and faster. From a purely technological perspective the limit may indeed be approaching the sky.

Whether or not the governments connect and combine different bodies of information will increasingly become a matter of legal constraints, as the technological constraints are losing their relevance quickly. Computers and modern surveillance techniques are spreading rapidly in modern society. Moreover, it is not just governments that are stepping up their surveillance activities. Big brother is joined by big business. Corporate actors are interested in all sorts of information on citizens (often in their role of consumers) and some forms of surveillance are in the hands of private parties, such as video surveillance in stores and other semi-public spaces. Haggerty & Ericson (2000: 609) see the development of a 'surveillant assemblage', in which surveillance becomes an inescapable feature of modern society. They paint a somewhat fatalistic and dramatic picture, in which there is no escape from the coming future:

> In the face of multiple connections across myriad technologies and practices, struggles against particular manifestations of surveillance, as important as they might be, are akin to efforts to keep the ocean's tide back with a broom – a frantic focus on a particular unpalatable technology or practice while the general tide of surveillance washes over us all.

This 'surveillant assemblage', spreads much wider than the systems of knowledge production of the state itself and should not just be viewed as a top-down system in which the few monitor the many. The availability of surveillance systems and the rapid spread of their use have 'democratised' the chances of becoming the object of surveillance. Haggerty & Ericson (2000: 614) use the metaphor of rhizomatic expansion for this development. Rhizomes are

plants, which grow in surface extensions through interconnected vertical root systems. Or put simpler: they grow like weeds. The rhizome metaphor accentuates two characteristics of the surveillant assemblage: its phenomenal growth through expanding uses, and its levelling effects on hierarchies. Though the phrase is usually reserved for paranoia, it can almost be said that surveillance is everywhere. For Haggerty & Ericson (2000: 619) this development marks "the progressive 'disappearance of disappearance' – a process whereby it is increasingly difficult for individuals to maintain their anonymity, or to escape the monitoring of social institutions". For irregular migrants the 'disappearance of disappearance' would be truly bad news.

Digital surveillance has thus become an integral part of everyday life. Whereas in earlier days there was a limited number of records on an individual –usually locally stored printed documents – the digital tracks of modern man are everywhere. Most of it is generated with citizens' consent or under conditions of their indifference. Lyon (2003: 152) rightfully reminds us that "Compliance with surveillance is commonplace. Most of the time, and for many reasons, people go along with surveillance". The result is a circulation of (various) representations of an individual in databases, that Gary Marx calls digital shadows. "(…) now, with so many new ways of collecting personal data and the growth of data banks, we see the rise of a shadow self based on images in distant, often networked computers" (Marx 2005: 23). Haggerty & Ericson (2000: 613) point to roughly the same phenomenon when they speak of 'data doubles' that "(…) circulate in a host of different centres of calculation and serve as markers for access to resources, services and power in ways which are often unknown to its referent". The growth of surveillance and the digital storage of data on individuals is paralleled by a growing interconnectedness between systems of surveillance. Here we enter the realm of the second logic of exclusion, the exclusion *through* documentation and registration. When applied to the case of irregular migrants this would entail all efforts to 'embrace' and register them – i.e. create data doubles – in order to re-identify them at a later stage when they come into contact with state officials. The fast developments in computer technology and the diminishing costs connected with computer registration make policies of 'encompassing registration' in order to control a relatively small population increasingly a viable option.

So in the case of irregular migration the state is increasingly turning to modern surveillance techniques to achieve the double goal of identification and exclusion. Digitalised databases and biometric identifiers, two relatively new innovations, are being combined and seem to become the 'technique of choice' for governments that want to restrict and control irregular migration. Databases are used for pre-emptive surveillance that aims to anticipate likely

unwanted behaviour by means off classification and profiling (Salter 2005: 43) and for the (re-)identification of terrorists, criminals and, increasingly, irregular migrants . In border policy there is a long-standing practice pre-emption in for example visa policy. The citizens of some countries need to apply for visa and some countries are even blacklisted. Databases facilitate this mechanism and may also make it easier to blacklist groups of people or even known individuals. As migration policies rely heavily on legal documentation and identification – not in the least when trying to expel irregular migrants – it is vital for the state to connect the dots between an irregular migrant and his or her legal identity. Or, as Salter eloquently puts it "Linking the mobile body to stable or reliable information is a crucial technique of risk management" (Salter 2005: 47).

The steadily growing reliance on databases and profiling also affects the development of bureaucracy itself. Aas (2004) has argued that the reliance on databases leads bureaucracies in the direction of more formalized decision making procedures in which the formats and electronic forms themselves increasingly determine how professionals should think and act. Individual cases are processed according to procedure and the ultimate decision is embedded in the algorithms and decision trees of the software. Once all the required boxes have been filled in the computer 'dictates' the appropriate action to be taken. The individual subject is increasingly standardized and de-contextualised, while the individual bureaucrat is losing elements of its discretionary space. Bovens & Zouridis (2002: 180) have described the introduction and use of ICT in some sectors of the bureaucracy as the onset of a development in which 'street level bureaucracy' (cf. Lipsky 1980) develops into 'system level bureaucracy'. In this transformation the role of ICT is no longer supportive but decisive and its function for the bureaucratic organisation moves from 'data registration' to 'execution, control and external communication'. Even though their analysis is based on and is only applicable to what they call 'decision making factories', such as the Dutch organisation that handles the Student Grants and Loans, the logic of this development - that it limits the human factor in both bureaucrat (by limiting his discretion) and the subject (by codifying him) - is more than relevant for the case at hand. The more dependent the migration policy process becomes on the digital decision making and databases, the more the interaction between the (irregular) migrant and immigration official will be characterized by this 'double depersonalization' (Broeders 2009b).

Given the fact that 'identities' are now centre stage in matters of migration and deportation, states are searching for the undisputable link between person and identity. In doing so, they have brought the body into the equation. The buzzword in matters of surveillance and migration is 'biometrics', i.e. the use of data extracted from the body, such as an iris scan,

digital facial image or a fingerprint. Biometrics primarily serve the purpose of the verification of identities, on the assumption that truly unique identifiers are found on the body (Lyon 2003: 68, Van der Ploeg 2005, Lodge 2007). With the widespread use of biometric technologies the body has become a password authenticating people and authorizing (or disqualifying) their behaviour accordingly. On some airports there are now fast-track procedures for frequent flyers on the basis of an iris scan. Gaining access to offices and government buildings is sometimes dependent on a fingerprint scan. In most other cases it is usually bad news if a fingerprint is matched against previously stored prints. A print that is matched against the records of the police or the immigration authorities will often result in an arrest, a refusal for entry or in an expulsion procedure. Muller (2004) calls this the transformation of citizenship into 'identity management'.

Identity management also highlights the link between biometrics and the expanding system of databases that supports it. The use of biometrics is an important part in the development of what Mark Salter calls 'hyper-documentation' by which he means that "each piece of data is linked to other data, and ultimately to a risk profile: body-biometrics-file-profile" (Salter 2005: 47). Biometrics are – at the very least in the eyes of the governments and government agencies that are promoting them – very useful for the tracking and sorting of (internationally) mobile populations. Especially in the post 9-11 era the political support for the use of biometrics in matters of security and migration has been virtually unwavering (see for example Lyon 2003; Muller 2005, Balzacq 2008). Politicians are introducing or contemplating the use of biometrics in passports, ID-cards, visa and all sorts of databases related to immigration policy and (national) security. Both immigration and national security issues such as terrorism are global phenomena and groups of states have strong incentives to work together where it is mutually advantageous (see also Broeders 2008). According to Lyon (2004: 139) the 'infrastructural basis of contemporary surveillance' makes it a (potentially) international phenomenon. Transnational crime, international terrorism and international migration have pushed the search for effective policies and remedies beyond national borders. The government regulation of the 'legitimate means of movement' has taken on a grander scale than just the national state. A relatively new phenomenon is that states are starting to cooperate, share information and in some cases are even setting up joint surveillance systems. In the field of immigration policy, the member states of the EU have been working on an interconnected surveillance system of their own for quite some time. It started with the Schengen Information System (SIS), that lists persons – primarily irregular migrants – and missing objects such as identity documents. It is now supplemented with Eurodac database, that registers asylum applicants including their fingerprints and will be expanded with the Visa Information System (VIS), that will register fingerprints and the

application details of anyone who requests a visa of the EU. These are vast databases that can be accessed throughout the European Union and even outside of it in consular offices in the case of the (not yet operational) Visa Information System. When these systems are used in the context of the 'fight against illegal migration' and the internal control on irregular migrants they are vital tools for the exclusion *through* registration, as their principal function is to re-identify irregular migrants (Broeders 2007). It has been especially member states such as Germany and the Netherlands that have been pushing for the rolling out of this network of databases in the context of the Schengen and wider EU fora.

2.4 The limits of state surveillance

Much research has been devoted to the question why immigration policy has not been able to control immigration. Why is the liberal state, despite political determination and vast resources, 'losing control' of immigration? Why is there a "significant and persistent gap between official immigration policies and actual policy outcomes" (Cornelius et al. 2004: 4)? This 'policy gap hypothesis' is in the view of Cornelius, Martin & Hollifield, who coined the phrase in the first edition of their book *Controlling immigration. A global perspective*, not even a real hypothesis. They stress that it is perhaps misleading to refer to the gap hypothesis as a true hypothesis since it is an empirical fact that few labour-importing countries have immigration control policies that are perfectly implemented or do not result in unintended consequences. In other words: policy gaps are a given. The new identification, information and control mechanisms that the state is setting up, will also have their flaws and will most likely produce new policy gaps.

The policy gap however, does have a specific anatomy. Research has shown there are various sources of this policy gap and that their relative importance varies from country to country. For example, client politics and the active and professional lobbying of politicians are an integral part of the American political system. Given the presence of large, and sometimes politically influential, groups of immigrants there is a substantive lobby and popular movements on behalf of (illegal) immigrants that influences policy even against popular sentiments of limiting immigration (Freeman 1998). As most European countries lack a tradition of political lobbying 'American style' there is much less organised pressure on governments in this style. Other 'sources' of the gap fit the profile of northern member states of the EU, such as the Netherlands and Germany, better. In this paragraph the sources of the policy gap are organised in two clusters.

One cluster centres on sources of the policy gap within the state (par. 2.4.1.). Different levels of government and different branches of the government produce restraints on the intentions

and actions of the executive branch of government. But even within the realm of the executive different (political) logics may be at work simultaneously, thus producing policy gaps. Gaps may be the result of conflicting political considerations at the national and the local level and may also result from legal constraints or from practical and technological limitations. The second cluster centres on the irregular migrant and his institutional and social surroundings. Irregular migrants produce restraints on policy either through the use of social networks and legal, semi-legal and informal institutions (par. 2.4.2) or through their own individual actions (par. 2.4.3). Individual actions sometimes carry more weight than might be expected given the relatively weak position of irregular migrants. The restraints found in the sphere of the irregular migrants and his (institutional) surroundings can be captured under the notion of 'foggy social structures': social structures that emerge from efforts by individuals and organizations to avoid the production of knowledge about their activities by making them either unobservable or indeterminable; or, put another way, the practical production of fog (Bommes & Kolb 2003: 5 of 133). Both the Dutch and German state and society offer many examples of internal restraints on the state (emanating from local government, state agencies and the judicial branch of government for example) as well as examples of institutional 'innovations' on behalf of irregular migrants – though by no means benevolent institutions per se - and possibilities for individual strategic behaviour.

2.4.1 The state and 'self restraint'

Policy gaps may be the result of political choices. Sometimes officially declared immigration policy is quite different from the 'real' intention of policymakers (Cornelius et al. 2004, Castles 2004, Cornelius 2005). Some policies remain unimplemented intentionally because 'turning a blind eye' is the politically and/or economically more sensible option. For the United States Cornelius (2005) has shown the huge gap between the rhetoric and funding of the patrolling of the US-Mexican border and the virtual non-existence of internal controls on the labour market (i.e. control on employers). But this also holds true for the Southern member states of the EU. Castles (2004: 223) even claims that the resulting paradox is in fact the real, yet undeclared, object of state policy. In his view irregularization can be seen as "(…) an attempt to create a transnational working class, stratified not only by skill and ethnicity, but also by legal status". It may also mean that certain policies are for a large part intended to give the impression that the government is handling the problem, while it is fully aware that it is not. In Germany and the Netherlands this may well take the form of a gap between political rhetoric and a lack of political priority for policy implementation. Another version may result from investing heavily in very visible 'solutions' in the full knowledge that the investment amounts to the proverbial drop in the ocean, and not much more. For the USA, Andreas (2000) described the enormous investments in the guarding of the US-Mexican

border in terms of an 'escalation of policy'. In his view this escalation of border control had to be seen as a response to the powerful narrative of the loss-of-control theme. The escalation did sort effect in actual border control, but its main purpose was symbolic and clearly aimed at the domestic public. "Yet policing methods that are suboptimal from the perspective of a means-ends calculus of deterrence can be optimal from the political perspective of constructing an image of state authority and communicating moral resolve" (Andreas 2000:9). Phrased slightly more provocative it simply means that stupid policies can sometimes make smart politics.

Sometimes, political rhetoric is harsher than the official policy practice for reasons of self-interest. Though it is certainly not something that governments often publicly admit to, but irregular migrants are as a rule not excluded from urgent medical care. In the Netherlands, the entry into force of the Linkage Act was accompanied with the installation of a 'Linkage fund'. Medical professionals can draw from this government fund when they treat uninsured irregular migrants. In part this fund is the result of obligations under international law, but a secondary reason is the protection of wider society against the spread of disease and epidemics. Historically, exclusion of the 'unwanted' has been limited by a mixture of humanitarian considerations and considerations of fear and safety. De Swaan (1989) has shown that the evolution of welfare and healthcare was to a large extent built on the self-interests of the elite who feared that the disease and poverty of the unfortunate might turn against them. A similar train of thought underlies some of the limits on the exclusion of irregular migrants nowadays.

In the USA, and other classical immigration-countries, policies have been watered down or hardly implemented under the influence of pressure groups such as employers and other pro-immigration lobbies (see for example Cornelius 2005). In Europe, domestic restraints usually take another form. Potentially effective but draconian control measures are likely to be challenged and even overturned by courts that brand such measures unconstitutional or in violation of rights that cannot be withheld from (irregular) migrants. High Courts such as the German *Bundesverfassungsgericht* and the Dutch *Hoge Raad* performed this role in earlier stages of the development of immigration policy. Courts intervened in the development of government policies and policy proposals on issues such as illegal expulsions and withholding certain rights and entitlements from long-term immigrants. For example, in two famous cases in 1973 and 1978 the German Bundesverfassungsgericht first curtailed the executive's nearly unlimited discretion to expel aliens and then codified the notion that the rights of legal immigrants should grow incrementally over time and should ultimately approach the rights of the citizen (Joppke 1999b; Broeders 2001: 62-63). Joppke (1998) calls

this the “self-limited sovereignty that explains why liberal states accept unwanted immigrants”. This national ‘channelling’ of international legal norms and human rights, has a more prominent effect on policy development than international pressure or international law itself.

Other gaps may be the result of a lack of capacity at the level of the implementation or may result from differences of opinion between different agencies or levels of government. “If local authorities do not share the same policy objectives and interests of the national government (or they are not given sufficient resources) they may become lax in enforcement or simply not comply” (Cornelius et al. 2004: 15). Sometimes gaps may occur at the local level because of political differences between national and local authorities. More often however, it is the local level of government that is confronted with the results of national policies and has to deal with issues of social order, public health and safety as they emerge in local practice (see for example Van der Leun 2003). Strict exclusion policies are then watered down at the local level by municipalities and private and semi-private organisations, though their means are limited and they can often only give temporary relief (see for some Dutch examples Rusinovic et al. 2002). The local level of government often faces the challenge of drawing a socially acceptable border between inclusion and exclusion, which sometimes results in defying national laws and policies or even taking legal action against the national state.

The prominence of information and information technology is usually an asset for the state, but it can also be a restraint on policy. The centrality of what Bommes & Kolb (2003: 5 of 133) call ‘knowledge production’ also leads to vulnerabilities. Knowledge production may be vital to exert control in a modern society. “Yet societies and their states operate on the basis of insecurity, concerns about gaps in knowledge, doubt about the reliability and validity of various forms of constructed knowledge and the incompatibilities of a range of forms of knowledge”. Scott (1998) turns this line of reasoning up a notch. He argues that modern states must produce knowledge and information in order to execute their various policies. The process of knowledge production, however, requires simplification of a complex social reality. Reality has to be rewritten in order to make social reality ‘fit’ into the categories and terms in which the policies are formulated. This is basically the flip side of the development from ‘street level bureaucracy’ to ‘system level bureaucracy’ as described in paragraph 2.3.3. Shifting control from the bureaucrat towards the bureaucratic database limits the human factor in bureaucratic operation. Sometimes this may be an advantage for bureaucratic procedures as it increases equal treatment. However, a greater dependence of (the logic) of databases may also increase blind spots in the panoptic gaze. Databases are after all never

'street smart' and do not posses the professional and tacit knowledge of an experienced professional.

2.4.2 Restraints on the state: public protest, social capital and 'bastard institutions'

Just as illegal aliens are 'illegal' because they do not fit into any legal category, they are also a group because they are labelled as such by policy. They are not a group by choice and are seldom truly organised, especially in Europe. Moreover, public protest is unlikely to sort much effect as the general public attitude towards immigration in Western Europe is hardly favourable. Especially illegal aliens, who lack all but the most basis set of rights, do not seem to have many or very vocal defenders. In the past groups such as the Witte Illegals Movement (*Witte Illegalen*) in the Netherlands, the still very active German Jesuit Refugee Service, and the churches did target public opinion to improve their legal and social situation. Nowadays it seems that resistance against policy has been 'replaced' with assistance to irregular migrants. Various groups and organisations play a role in helping irregular immigrants getting by on a day-to-day basis, thus weaving a sort of social safety net, albeit with limited capacity (Rusinovic et al. 2002). Public opinion and civil rights groups are even further in the background when it comes to the growing surveillance of irregular immigrants. The application of new information technology in the fight against illegal immigration is relatively unknown to the general public, and is unlikely to muster much popular resistance. Even when it concerns citizens and legal inhabitants themselves the use of modern surveillance systems hardly stirs up popular unrest. Gilliom's (2001: 124) observation for the USA that "Our nation is adopting widespread policies of surveillance and control with a barely stifled yawn or even muted applause", seems to apply to Western Europe as well.

In order to remain out of sight, irregular migrants steer clear of formal institutions that increasingly require registration and official documentation. Just as many irregular migrants depend on the shadow economy for work they increasingly rely on informal 'shadow' markets in the spheres of work, housing, relations and documents. These informal markets can be classified as *bastard institutions* (Hughes 1994) or *parallel institutions* (Mahler 1995). They are illegitimate institutions in which we can see the same social processes going on that are to be found in the legitimate institutions (Hughes 1994: 193-194). These bastard institutions are developed by irregular migrants, regular migrants and native citizens, in response to the demand that is created by restrictive legislation and the large demand for cheap labour force, illegal housing, (false) documents, partners, et cetera. Bastard institutions are essential for the travel and residence opportunities of irregular migrants and very hard for the central state to gain control over: state instruments of surveillance and identification have difficulty penetrating them. As such, they are typical examples of 'foggy structures'.

In addition to bastard institutions that enable them to escape from formal patterns of registration, irregular migrants make strategic use of informal migration networks. These also help them to avoid detection by the state. The transnational social capital of irregular migrants makes it possible for them to follow in the footsteps of compatriots legally residing in Europe and remain in the shadow of ethnic communities (Engbersen 2001). Whereas bastard institutions are difficult to control by the state because of their *illegitimate* character, this social capital is hard to control because of its *legitimate* character. After all, regular migrants are allowed to travel freely (and may secretly take someone along in their car) and may also have their compatriots come over on tourist visas and then help them to stay in the country illegally (Broeders & Engbersen 2007).

2.4.3 Restraints on the state: the importance of not being earnest

Just like other socially weak groups, the resistance of illegal aliens is unlikely to be open, organised and confrontational. A demonstration is hardly a wise strategy if you wish to remain unseen. Scott (1985) has shown that the resistance of socially weak groups is usually silent and individual. They are a "form of individual self-help; and they typically avoid any direct symbolic confrontation with authority or with elite norms" (Scott 1985: 29). Everyday forms of resistance are the *weapons of the weak* that may prove to be very effective in the frustration of policy. Simple strategies can sometimes seriously undermine all the might and computer power that the modern state has at its disposal. As Gary Marx noted "Humans are wonderfully inventive at finding ways to beat control systems and to avoid observation. Most surveillance systems have inherent contradictions, ambiguities, gaps, blind spots and limitations, whether structural or cultural, and if they do not, they are likely to be connected to systems that do" (Marx 2003: 372). Gilliom showed the limitations of surveillance on welfare systems of social security. "The surveillance system seeks to gauge truth and compliance by using officially reordered sources of income in a data set which is awesome in its capacity to measure recorded events anywhere in the nation, but laughable in its blindness to unrecorded income, barter and trade" (Gilliom 2001: 132).

Those who do not wish to be seen can either hide or try to obscure the vision of those watching by purposefully producing 'foggy social structures'. Illegal aliens are no fools and often anticipate the state's action or use their knowledge about policies, procedures and loopholes to stay out of sight or to frustrate implementation of policy (see for example Engbersen 2001, Van der Leun 2003, Sciortino 2004, Broeders & Engbersen 2007). Manipulation of their personal identity is one of the major strategies adopted by illegal aliens who want to prevent detection by the state. Irregular migrants often do not have the

possibility to live and work under their personal identity in the public sphere (and sometimes neither in the private sphere) given the risk of apprehension and deportation. Irregular migrants therefore develop various strategies to change and mask their personal identity and illegal status. There are three main variants (Engbersen 2001). First of all, there is the structural or situational adoption of a false identity. A widespread practice is the acquisition of false papers or legitimate documents - such as passports, social security numbers and medical insurance cards - from legitimate others. Irregular migrants also use a false identity as a major strategy to ensure that they can stay in the EU in case the police arrest them. The relatively high number of Algerians among apprehended Dutch irregular migrants, for example, may be explained by the fact that many Moroccans assume an Algerian identity. As the Algerian authorities are generally uncooperative when it comes to implementing deportations, it makes them more difficult to deport (Van der Leun 2003). Secondly, they obliterate their legal identity – more particular, their nationality – vis-à-vis the authorities. Thus, irregular migrants can prevent and obstruct deportation by destroying their identification papers (such as their passports). Unidentifiable irregular migrants are the 'unmanageable' cases that the immigration authorities have difficulty coping with and they are seldom deported. Thirdly, they conceal their irregular status from others, such as employers, public officials and members of their own ethnic community. They do so out of fear for repercussions but also because knowledge of their status may lead to an inferior position in their own community. These identity strategies highlight the importance of lying for irregular immigrants. When there is no documented proof of identity, the agents of the state are powerless without the information provided by the individual.

2.4.4 Restraints on the state in Germany and the Netherlands

There are, in short, many possible restraints on the politics and policies of the state. That being said, it should be pointed out here that the empirical core of this research project concerns itself with the intentions, politics, policies and instruments that the Dutch and German state bring into play for the internal migration control on irregular migrants. Though I am well aware of the restraints that result from the various sources described above, they are not a central part of the analysis made in the following chapters. Policy gaps coming from these sources will obviously appear and reappear throughout the analysis, but the focus is on the state and development of state policies and not on the irregular migrant and his social and institutional environment. For both the German and the Dutch case there have been research projects that do take the position of the irregular migrant as the starting point and

focus for empirical research[7]. Nonetheless, some of the restraints are more relevant than others in this study, especially if one differentiates between the policy sectors that will be analysed. Not every source of policy gaps will be of (major) importance in the policy domains of the following chapters. Each policy domain 'favours' a certain type – or types - of restraint on the state as a result of the institutional setting and relative power positions within that setting. For example, access to the labour market, which is a major lifeline for irregular migrants, is bound to produce policy gaps as a result of strategic and risk-calculating behaviour of individuals and of intermediary, often informal, institutions. Market forces do not necessarily stop at legal requirements and boundaries, especially when the balance between risk and profits tips in favour of the latter. Internal surveillance by the police will most likely find its policy gaps within the realm of the state itself. The line between (national) political priorities and the priorities of police officers on the beat is a long one, along which priorities may be watered down for various reasons. Detention and expulsion will most likely meet resistance from the individual migrant who has a lot to gain from non-cooperation and shielding off his legal identity.

However, the development of internal migration control and the drive towards applying more and more technical means to detect, identify and exclude irregular migrants, is at least partly driven by the fact that in time policy instruments are often evaded and even rendered useless by the counteractions and evasions that irregular migrants and (informal) institutions come up with. Policy innovations provoke counter innovations that aim to neutralize policy effects and this may ultimately result in a stalemate. In other words, there is an important element of action and reaction in the interaction between the state and the irregular migrant, though this would be hard to measure given the lack of hard facts and figures on the developments within the population of irregular migrants. The differences in power positions are also striking. Even though irregular migrants and 'their' institutions are far from powerless, they remain the 'little people' that have to rely on the weapons of the weak. Caplan & Torpey (2001: 7) see it thus: "In short, states and their subjects/citizens routinely play cat-and-mouse with individual identification requirements. Yet even if, as these examples suggest, the game is never entirely decided in advance, it still seems realistic to concede that so far the cat has held the better cards". On the other hand, some of the examples above suggest that modest means, such as a simple lie, are sometimes extremely effective.

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7 For the Netherlands the "hidden city' research project is especially noteworthy. This project on irregular migrants in the city of Rotterdam resulted in a number of (Dutch) publications, such as Burgers & Engbersen (1999); Engbersen, Van der Leun, Staring & Kehla (1999); Staring (2001) and Van der Leun (2003). In Germany a number of researchers, both University and NGO-based, have undertaken research projects focussing on the position and living conditions of irregular migrants in Germany or specific German cities. Examples are Anderson (2003) on Munich, Alt (2003) on Munich and Leipzig and Stobbe (2004).

2.5 A new regime of internal migration control?

This book is primarily about states, not about irregular migrants. More precisely, it is about the question whether there is a development in state policies towards irregular migrants in certain countries of the European Union in which policies of societal exclusion (the first logic) are supplemented with policies of exclusion focused on identification and expulsion (the second logic). In that sense, it's main focus is not even on the two case studies, Germany and the Netherlands. The development itself is the prime focus of research. Germany and the Netherlands are the empirical cases that are studied to seek an answer to the question whether this development is taking place and if so, to what extent and in what form. This hypothesized development of state behaviour vis-à-vis irregular migrants consists of a number of core elements.

- Internal migration policy on irregular migrants is intensifying in countries where their presence is considered a (political) problem
- Internal migration policy on irregular migrants is dominated by the policy goal of exclusion
- This exclusion follows two separate logics:

  (a) exclusion from (formal) institutions, in which the irregular migrant's access to registration and documentation is barred and is therefore excluded from the institutions. Recognizing irregular migrants as 'not belonging' is sufficient in this more traditional logic of internal migration control.

  (b) exclusion in the sense of expulsion, in which case exclusion requires an extensive documentation, registration and identification of the irregular migrant himself. In this logic identification is indispensible for effective exclusion (paradoxically this exclusion often initially requires a radical embrace of irregular migrants).
- Exclusion is increasingly executed through a system of digitalized bureaucratic registration and surveillance. A technical and computerized approach will become increasingly dominant. Internal migration control is a matter of the surveillance state
- The almost oppositional demands the two logics of exclusion make on the organization of bureaucratic documentation and registration, make a shift towards the (supplementary) use of the second logic also a shift in the organization of the instruments and procedures of migration control to enable the identification and tracking of irregular migrants instead of just shielding off institutions
- Identification and the breaking down of irregular migrant anonymity – and all the organization and systems needed for that –increasingly becomes a central notion in

the development of the internal migration control on irregular migrants at both the national and the EU level.

Empirically, Germany and the Netherlands are taken together on the explicit assumption that they are comparable cases when it comes to this expected development in internal migration control. The interest is in the development of state surveillance on irregular migrants, not in comparing the two cases per se. Obvious differences between the two countries – the unique federal structure of relatively independent *Länder* versus the more centralised but layered structure of Dutch government is a classic example – also influence state behaviour and will of course be taken into account where it is inevitable and appropriate. But the choice is for a focus on the *similarities* in relation to the issue of internal migration control. The three empirical chapters that follow are chosen with a view to detecting the expected changes in the internal migration control on irregular migrants. Guarding access to the labour market (chapter 3) is probably the most classic site for internal migration control following especially the first logic of societal and institutional exclusion. In the heavily regulated Dutch and German labour markets public and semi-public authorities routinely conduct checks of registrations and documents that shield off the labour market to those without papers. Question here is if labour market policies and the authorities implementing them are also turning towards the second logic of identification and exclusion, especially considering the demands that entails for a very different use and organization of registration and documentation systems. In chapter 4 on 'police surveillance, detention and expulsion' the second logic is much more dominant, even though competing claims on the police are to be expected. The question here is how this chain of government agencies that is charged with the organization of the expulsion process, fares with the implementation of the second logic of exclusion. Is there a significant intensification in policies, budgets and staffing to increase the number of identifications and expulsions and what obstacles does it encounter? The third empirical chapter takes the issue of the domestic control on irregular migrants to the level of the EU. In a 'borderless' Europe instruments have to be found to create and patrol new borders that will enable its member states to separate the ins from the outs. The EU member states will primarily look to the European level to find new solutions that will strengthen and instrumentalize the second logic of exclusion. After all, expulsion in an unified Europe is ideally expulsion from the EU, or at least from the Schengen area. The potential traces of migrant identities all over Europe in the files and databases of its member states, are a tempting and valuable source of information for those member states that seek to construct effective expulsion policies. Organizing those into a new European digital border may be the ultimate instrument to break down the anonymity of irregular migrants.

3 GUARDING THE ACCESS TO THE LABOUR MARKET

3.1 Setting the scene: political mindsets and policy frameworks

In august 1849 the first Dutch aliens act entered into force. This was a fairly liberal law that stipulated that all aliens were welcome in the Netherlands except political troublemakers and vagrants. The main worry of the authorities was political agitation and migrants becoming a burden on the (costly) poor relief system. According to Lucassen (2001: 246) the spirit of the law was that "Trustworthy and industrious immigrants were not to be hindered, even when they did not have a passport or if they had no means of identification at all. Only dangerous and (above all) poor aliens had to be kept out or expelled". Two things are interesting about this 1849 law from a contemporary point of view. In the first place, labour migration was perceived to be totally unproblematic. In the second place, documentation and identification were already playing an important part in the internal control on aliens, especially with a view to expulsion. Lucassen (2001) points out that the authorities stimulated various forms of identification. Migrants also welcomed them, because documentation served as an 'insurance policy' against official harassment by the authorities. The authorities in turn needed documentation to ascertain to which country a destitute migrant should be expelled and it "greatly increased the chances that the authorities of that state would accept such a person" (Lucassen 2001: 247-8). Germany drafted its first Aliens law in the same period, but made a turn towards restrictions for labour migrants much earlier. Especially after the 1870s the authorities began to worry about undocumented poor labour migrants. According to Lucassen this is probably explained by the fact that the German *state* assumed responsibility for the poor relief much earlier than the Dutch. But imperial Germany was also early to organize the recruitment of foreigners for employment in agriculture. "Eventually, bilateral accords were signed to regulate seasonal agricultural employment. Some foreign workers, however, violated the terms of their entry. Deportation was the punishment. Yet employers who hired the unauthorized foreigners were also culpable. By the interwar period, when international migration in Europe generally ebbed, German labour law included sanctions for unauthorized employment of aliens" (Miller 2001: 321).

In other words, the concepts of migrant labour, legal access to labour (thus making irregular labour participation a distinct possibility), documentation and identification of labour migrants and the penalization of employers have long roots in European history. At the same time, there is also a history of liberal laws, selective enforcement of labour laws and controls and a pragmatic approach to labour migrants that hinged primarily on the prevention of a migrants becoming a burden on the institutions of the poor relief. In the post-war period a number of these instruments and arguments, and especially the shifts between them, come to

the fore again. During the time of the recruitment policies of guest workers, from the late 1950s until the mid-1970s, irregular migration was not much of an issue in Germany and the Netherlands. In these post-war years of economic expansion immigration was first and foremost a matter of labour market needs and in some countries – such as France - of demographic considerations to replenish war losses (Money 1999). Migration was almost exclusively seen as a matter of economic policy (Boswell 2003: 10-11). On the fringes of the official recruitment channels there was also a flow of irregular migration. Some labour migrants simply skipped the formal channels and procedures of the labour recruitment agreements and migrated on their own accord. They looked for work, usually found it and then presented themselves to the authorities requesting formalisation of their status as a guest worker. The political and public perception of this phenomenon in the Netherlands was generally favourable; they were called 'spontaneous labour migrants' and were often regarded as adventurers in the positive sense (see Engbersen 1997). In Germany, this phenomenon was also widespread and was generally accepted, although not looked upon favourably per se (Sinn et al. 2005).

3.1.1 The political (re)birth of the illegal alien in Germany and the Netherlands

The economic recession that was echoed in by the oil crisis in the early 1970s turned the tables on both regular and irregular labour migration. Labour recruitment was terminated and in political eyes the image of the irregular labour migrants underwent a paradigmatic transformation from 'spontaneous labour migrant' into the 'irregular migrant'. The first measures to curb (irregular) labour migration were taken in the 1970's in the field of employer sanctions. The primary aim then was to 'demagnetize' the labour market (Martin 2004). In other words, sanctions and policy were directed first and foremost at domestic employers while the irregular migrant himself was less 'in the picture'.

According to Engbersen & Burgers (2000) this first phase in the development of a policy approach on irregular migrants is characterised by both a general lack of policy as well as public debate in the Netherlands and is followed by two phases. The second phase runs roughly to 1991 and is characterised by an increasingly strict regulation of entry through immigration law and policy and a simultaneous lax approach towards irregular residence and irregular work. These are the days when many government policies in the Netherlands were characterised by the principle of 'gedogen' or 'toleration', meaning that the implementation of policy, notwithstanding formal legal frameworks, is intentionally weak or reserved (Buruma 2007). Irregular migrants, once established, are able to find work even in the formal labour market. They can still obtain Social-Fiscal numbers (so called sofi-numbers), which allow them to hold tax paid jobs. The enforcement regime on irregular labour is lax

and in a number of sectors such as agri- and horticulture, where in spite of the high unemployment figures employers find it difficult to fill the vacancies, the authorities often turned a blind eye. In the early 1990s this policy approach changes. This third phase 'starts' with the publication of the report of the Commission Zeevalking in 1989. This report advised the government to construct a coherent policy of internal migration control and stressed the importance of cooperation between separate state departments and authorities and the need for an effective expulsion policy. The 1990s saw the development of a policy on irregular migrants, consisting of a number of legislative measures and administrative operations (Van der Leun 2003: 17-18; Pluymen & Minderhoud 2002). One of the most recent chords in Dutch policy on irregular migrant was the publication of the government's white paper on Irregular Migrants (*'Illegalennota'*) in 2004. In the 2004 white paper the labour market has been declared one of the major policy priorities. The minister for Aliens Affairs and Integration writes that this is needed because "…illegal employment makes it possible for an illegally residing alien to finance and perpetuate his existence in the Netherlands" and it must also be considered " …a serious threat to the economic and social order" (Minister voor Vreemdelingenzaken en Integratie 2004: 22). In contrast to earlier periods much emphasis is placed on the *implementation* of policy and the intensification of labour market controls.

During the days of guest labour recruitment, the German authorities had a 'loose' approach towards 'spontaneous' labour migrants that was similar to the Dutch approach. Schönwalder, Vogel & Sciortino (2006: 38) point to recent archive based studies that document that in the 1960s the formally illegal entry of non-national job seekers was widely accepted and their residence and employment were often retrospectively legalized. The oil crisis put a stop to this practice and led to the termination of legal labour migration programmes. In the years following the recruitment stop German politics focussed its attention on the restriction of access to other – increasingly crowded - legal pathways into Germany such as family reunification and asylum migration. In Germany, as in the Netherlands, political attention for the phenomenon of illegal migration and residence started in earnest in the early 1990s (Schönwalder, Vogel & Sciortino 2006, Cyrus & Vogel 2005). Prior to that, from the 1980s until the first years of the 1990s, the German Republic had bigger issues at hand. The end of the cold war and German reunification – which implied great migratory movements of ethnic *Aussiedler* towards the former West Germany – and the exceptionally large numbers of asylum seekers coming to Germany in the late 1980s and early 1990s took up the brunt of the political attention. This combination of migration flows constituted what could be called a veritable 'migration crisis' in German politics, that could only be resolved with a broad and intensely debated political 'asylum compromise' in 1993 that amended the German Basic Law (*Grundgesetz*) in order to curtail the number of asylum applicants (Joppke 1999; Broeders

2001; Boswell 2003). In the mid 1990s, when Germany and the Netherlands were both over the peak of the 'asylum crisis' attention began to shift towards irregular migration. After 1989 fighting irregular migration in Germany has initially and much more than in the Dutch case, been a matter of controlling its long and porous 'green' border in the east of Germany (a 'hard' external border of the Schengen group). At a later stage German politics increasingly turned its attention to internal migration control on irregular migrants. Especially the Kohl government began to draw linkages between unemployment and illegal labour in the run-up to the 1998 elections (Boswell 2003: 63-4). In Germany, the internal control on irregular migrants is mainly implemented through a system of residence and work permits and registrations that was already in place when the political attention shifted towards this issue. Hailbronner, Martin & Motamura (1998: 205) stress that Germany already has a highly developed system of registration and surveillance in which different agencies can access each other's databases and there is a central register for non-nationals that can be used to detect irregular status. Vogel (2001) points out that even in corporatist Germany, with many non- or semi-state organizations playing a role in the regulation of the labour market, and in federal Germany with its real political difference between the *Länder* active cooperation seems to be the norm (Vogel 2001:343). Cyrus and Vogel (2005: 14) maintain that the more recent legal reforms in the field of internal control on irregular migrants have placed more emphasis on law enforcement. Irregular migrants and irregular migrant workers are now listed prominently on the political agenda. The new coalition of CDU, CSU and SPD declared the shadow economy as one of its priorities in their coalition agreement of 2005: "Schwarzarbeit, illegale Beschäftigung und Schattenwirtschaft sind keine Kavaliersdelikte, sondern schaden unserem Land. (…) Unser Ziel ist es, den gesamten Bereich der Schattenwirtschaft zurückzudrängen" (in Vogel 2006: 1).

3.1.2 Aim and structure of the chapter

Engbersen & Burgers (2000) characterised the development of the political outlook on irregular migration in the Netherlands as a transformation from 'spontaneous guest worker' in the first phase, to a necessary and 'tolerated' source of labour in the second phase and ultimately into an 'unwanted illegal alien' who is to be excluded in the third phase. Germany may be said to have followed a similar trail, albeit with a less pronounced second phase of toleration. The result is that both countries now share roughly the same political outlook on irregular migrant labour: the phenomenon is considered harmful to economy and society and irregular migrants are considered unwanted. In short, irregular migrants must be barred from the labour market both legally and, more recently and importantly, in practice through the implementation of controls. In this chapter I will analyze in what way these countries (try to) translate and organize this changed political view of exclusion into practical policies. In

paragraph 3.2 I will first look into the political economy of the labour market and (irregular) migrant labour from a theoretical point of view. How is the role of the state in matters of labour market regulation and surveillance viewed in the relevant theoretical debates? How do the parameters of the welfare state on the one hand and the demands of the (capitalist) economy on the other affect the state's options in internal migration control on the labour market? Paragraph 3.3 then develops an analytical typology for labour market surveillance in the Netherlands and Germany based on the two logics of exclusion that were introduced in chapter two. The typology serves as a 'blueprint' for the empirical paragraphs 3.4 and 3.5 that document the developments in the Netherlands and Germany and illustrates the way these countries develop policies and instruments that operate under the two logics of exclusion. Paragraph 3.4 describes the logic of 'exclusion from documentation' – the more 'classical' approach to labour market fraud – and paragraph 3.5 describes the policies operating under the logic of 'exclusion through documentation' - a more novel approach in internal migration policy. Conclusions and discussion are presented in paragraph 3.6.

3.2 Political economies of irregular migrant workers

3.2.1 The double movement of the state

The relation between the economy and (irregular) immigration is often presented as a "simple" matter of supply and demand. In a world without borders, the supply of labour would be potentially unlimited. If employers in advanced capitalist economies would have unrestricted access to that labour it would radically alter the face and function of national labour markets, as we know them today. Economic supply and demand are however mitigated by the interventions of governments. Markets emerge and function within social and political contexts. The labour market is not just the domain and study object of the economic sciences, but also, and perhaps even more so, the domain of the political economy. After all, even Adam Smith who introduced the notion of the free market - as the outcome of 'individuals pursuing their own gain led by an invisible hand' - did not mean to suggest that there was no role for governments in market economies. Quite the contrary: the 'free' market needs the state, just as the state needs the market. Karl Polanyi also pointed out the fact that state and market need each other if 'catastrophe' is to be avoided. In his view the relation between state and market should be governed by the concept of 'embeddedness', because economic actions become destructive when they are 'disembedded' meaning that they are not governed by social or non-economic authorities (see Schwedberg 2003: 28). The fact that markets are embedded in a socio-political system does not necessarily mean that they are governed in an effective or 'just' way. Their mutual relations vary over time and in different contexts, and in the words of Block & Evans (2005: 507): "There can be both positive and negative consequences of any specific form of embeddedness". Historically, the state and

capitalist enterprises have often been 'running mates'. Political and economic goals and ambitions often overlap, making 'government' and 'business' natural allies[8]. At other times, governments and business found themselves in opposite corners, for example when the needs of the capitalist economy – cheap labour, long weeks and hours, no unions etc. - clashed with responsibilities of the state other than economic growth, such as the prevention of social unrest and safeguarding public health. Borrowing again from Polanyi (2001), the position of governments may be characterised as a 'double movement'. Market societies are shaped and reshaped by a movement for laissez-faire and expansion of markets on the one hand and movements for social protection and the limitation of market forces on the other. In real political life these ideal types do not just clash, but they also mix and sometimes even reinforce each other (cf. Block & Evans 2005). Governments have had to balance between the needs and demands of employers and increasingly those of employees, especially since the days that the latter became a political force to be reckoned with.

The history of the *welfare* state is a history of slowly improving the social and legal status of workers vis-à-vis employers. The construction of the welfare state entailed granting rights to workers (such as the right to form a Union) and implementing restrictions on the wishes of industry, such as introducing a minimum age for factory work, compulsory 6-day workweeks etc. The welfare state also entailed a process of decommodification of labour when it sheltered workers from market forces through social systems and unemployment benefits (Esping-Andersen 1990). Social protection, and thus decommodification, is reserved for full citizens and is to a large degree extended to legal aliens (denizens) in modern welfare states. Only a legal status gives access to social protection. Thus, irregular migrants still depend heavily – but not exclusively - on their ability to work and their possibilities to sell their labour as a commodity. The history of the *capitalist* state is a history of seeking new innovations and advantages that would improve the production process and increase profits, sometimes aided and sometimes hindered by government. In this history governments come to the aid of business in various ways: resisting the rise of trade unions, passing labour- and contract laws favourable for business, protecting the interest of national enterprises (by diplomatic support or protectionist policies) and by stimulating the 'supply' of cheap labour – for example through (legal) labour migration. These two histories have laid competing claims on the priorities and resources of the government. Nowadays, they still do.

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8 Using the terms 'government' and 'business', though useful to make the point clear, makes them both look much more monolithic and single-minded than they actually are. A Dutch multinational like Shell has different interests and viewpoints that of a small or medium sized firm. Government can also subdivided in different layers and institutions that have different and sometimes conflicting interests.

3.2.2 Immigrant labour: between market and welfare state

Immigration is subject of tension when seen through the 'oppositional' perspectives of the capitalist state and the welfare state. From a capitalist perspective immigration is either a source of innovation and competitive advantage ('importing' the best and the brightest) or it is a source of cheap labour, especially when compared to domestic labour. Either way, immigration is sought after because it increases profits. In recent years labour migration and recruitment has been reinstated in many European countries at the top end of the - now global – labour market. European governments have been competing amongst themselves and with the rest of the industrialized world for IT-specialists and other highly trained professionals (Boswell 2003). Germany launched a green card initiative for IT specialists in 2000 and developed a broader policy framework after the widely debated report of the Commission Süssmuth (2001). In the Netherlands the government presented its plans to attract more international professionals in its 2006 white paper 'towards a modern migration policy' (Minister voor Vreemdelingenzaken en Integratie 2006). In an ideal capitalist world the state would always facilitate employers' wishes for migration policies. Above all, that means flexibility: hiring immigrant workers in times of labour scarcity and firing immigrant workers when the economic tide turns. The guest worker period in Germany and the Netherlands is an illustration of the state facilitating both elements of labour migration flexibility.

Seen from a welfare state perspective, however, immigration is often considered a threat. Cheap immigrant labour will jostle domestic labour, wages will drop and the institutions of the welfare state will be overloaded. The welfare state perspective on immigration centres on crucial questions of inclusion and exclusion of immigrants. Paradoxically, the protection of those within the welfare state requires a radical exclusion of those who are outside the welfare state (Teulings 1995; Entzinger & Van der Meer 2004). A certain level of welfare can only be sustained if there are limits to the number of people that are eligible for benefits and if those who are taxed to provide the funds are not overtaxed. Overtaxation can be both understood in a literal, financial sense, and in a symbolic sense, meaning that in order for welfare systems to be sustained and seen as legitimate it should not become a matter of 'us versus them' (Van Oorschot 2006, WRR 2006). Or, as Christian Joppke (1999: 6) put it, "because rights are costly they cannot be for everyone". Cheap immigrant labour raises difficult issues about wage differentials and unfair competition with domestic labour. In the long run, when guest labour turns into settlement, it raises questions of equal treatment, as the aftermath of the guest labour programmes in Europe has shown (Joppke 1999). Settlement also raises the complicated issue of immigrant integration, poverty and welfare dependence, which has become an increasingly thorny issue in Western Europe. These

experiences are the foundation of the Dutch and German defensive stance towards immigration in general and their reputation of being 'reluctant countries of immigration' (cf. Cornelius et al. 2004). Considerations of protecting domestic workers and the welfare state are felt even sharper in the case of *irregular* migrant labour: workers that lack even the status of denizens. This defensive stance of the Dutch and German governments is also attributed to some of the shared characteristics of the welfare state itself. Within the different worlds of 'welfare capitalism' in Europe the German and Dutch welfare states are usually grouped together under the heading of the so-called continental model (Esping-Andersen 1990; Ferrera et al. 2000, Ferrera & Hemerijck 2003). They are both rich economies, have elaborate en redistributive welfare states and a tightly regulated formal labour market. To put it bluntly: both countries are rich and redistributive welfare states and the fact that there is much to be redistributed makes the paradox of inclusion and exclusion more substantial, both in reality and perhaps especially in terms of (political) perception.

So the state has a double agenda. Obviously, the state encourages economic growth, which would imply support for the labour migration agenda of the business community. But there are also considerations emanating from the welfare state that favour the exclusion of (irregular) migrant workers to keep the system functioning and legitimized. A number of theoretical perspectives on the political economy of irregular migration seek to explain the presence of irregular migrant workers and the role that the state plays in managing its double movement.

3.2.3 Theoretical notes on (irregular) migrant labour in modern welfare states

When the economies of Western Europe recovered from the devastations of the Second World War France entered its *trente glorieuses* and Germany became a *wirtschaftswunder*. In those days immigration was considered a logical answer to labour market shortages in certain sectors of the economy (Joppke 1999; Broeders 2001). Migrants were considered a (temporary) means of greasing the wheels of trade and industry. Especially Marxist theorists made the case that the labour migrants of the post war era were in fact an industrial 'reserve army' in the service and at the disposal of a booming capitalist economy (see for an overview Samers 2003: 556-558). Because of their temporary stay they had limited rights and a weak legal status in the countries where they were working. As such they were an abundant, cheap and flexible source of labour. The role of the state in this Marxist perspective is that of an ally of industry or, in explicit reference to the Communist Manifesto (Marx & Engels 1990/1888), as the 'executive committee of the bourgeoisie'[9]. In other words, labour migrants were

[9] Literally: "The executive of the modern state is but a committee for managing the common affairs of the

portrayed as a new and imported, rather than domestic, proletarian workforce to be exploited for capitalist gains and the state played its part by supporting and executing the capitalist agenda. As many of Europe's temporary labour migrants chose to stay after the termination of the guest worker period and gradually improved their socio-economic position and their legal and political status, the comparison with a proletarian workforce loses strength. Irregular migrants, lacking any legal status, are now often considered the successors to their weak position on the labour market. From this point of view they might be considered the new reserve army of workers for the capitalist economy (Calavita 2003; Castles, 2004; Cornelius 2005). In this perspective the state is still the facilitator of the employers aiming to grease the wheels of industry by openly or secretly allowing irregular migrant labour.

Segmented labour market theory, starts from the structure of the modern western economy itself. In this perspective there is a structural imbalance in the economies of western states that fuels the need for (irregular) migrant labour. This theory stresses the imbalance between the structural demand for entry-level workers and the limited domestic supply of such workers – partially the result of the social protection to citizens and denizens provide by the welfare state - which has generated a structural demand for immigrants in developed countries (Massey et al. 2005: 33). In an age of globalization this mismatch is often corrected by means of relocating certain industries to low wage countries. Capital is in most cases far more mobile than labour. However, many of the sectors in which irregular migrants are typically concentrated – such as agriculture, horticulture, tourism, food processing, some segments of the textile industry, low level services (hotel, catering, caring and domestic work) and prostitution - " must be considered as industries which cannot be outsourced to low wage countries. Instead low wage labour is taken in" (Düvell 2006: 32). Analysts of globalization and migration, such as Saskia Sassen (2001: 293), have stressed the 'need' of big business for cheap and docile labour. Firms profit from migrant workers because they are cheap and above all flexible workers that can be hired and fired according to their needs. Or, in Calavita's (2003: 400) words: "It is not particularly original to point out that undocumented workers provide capitalist economies with a source of labour that lacks the power of domestic labour to exact concessions from employers". The demand for immigrant labour seems to become a structural feature of globalized economies, especially in the large 'global' cities, where the labour market polarizes (Stalker 2000: 133; Sassen 1991). Marcuse (1989) calls this the hourglass economy in which the lower and top end of the economy are growing at the expense of the middle. Burgers & Engbersen (1996: 624) maintain that 'opportunities' for (irregular) migrants in the global city tend to concentrate in two economic spheres. In the

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whole bourgeoisie" (Marx and Engels 1990/1888: 15).

first place they find employment in the traditional sectors of industry that 'survived' the various waves of deindustrialisation. These industries often rely on minimising their labour costs to make ends meet by making use of cheap immigrant labour, or even cheaper, irregular immigrant labour. The second economic sphere is found in the expanding services sector. The growth of high-end services has been accompanied by a growth in the lower strata of the services economy: low status jobs that are poorly paid and physically demanding also tend to be filled by migrant labour. In more elaborate welfare states these job are often taken by irregular migrant labourers. The lower strata of the Dutch and German economies - the 'shadow', 'underground' or 'informal' economy – are roughly in the same league in terms of size. Schneider & Ernste (2000, 2002: 35-6) estimate that between the years 1989 and 1993, the informal economy ranged from 11.8 per cent to 13.5 per cent of official GNP for the Netherlands and from 10.5 per cent to 15.2 per cent of official GNP for Germany. However, there are also other methodologies and estimates that show larger variation, or indeed very divergent figures for the same country (see Samers 2004: 203-7, see also Portes & Haller 2005: 413-418 for various methods of measurements). Still, by most accounts both countries have a sizeable informal economy that is likely to provide jobs for irregular migrants. Obviously, the informal economy and irregular migration should not be seen as fully overlapping phenomena. Even though the informal economy is of vital importance to irregular migrants, it is first and foremost a 'domestic' affair. Many legal inhabitants, citizens and denizens alike, engage in social security fraud, unreported labour, unreported self-employment and barter. The labour market participation of irregular migrants is but one component of the shadow economy (Van der Leun 2003: 36, Van der Leun & Kloosterman 2006: 62).

A third cluster of theoretical explanations does not start from the state's intentions (as do the Marxists) or from the pressures from the structural features and changes of the economy (as segmented labour market theory does), but from political pragmatism and structural flaws of state control itself. These perspectives all start from the so-called policy gap between official immigration policy aims and actual policy outcomes that, according to Cornelius & Tsuda (2004), is inevitable. In other words, states may produce laws and rhetoric about curtailing immigration all they want, the policy result will none the less not live up to the stated aims of immigration policy. A number of reasons are often put forward. Some have to do with the benefits that businesses reap from employing illegal migrant workers as described above. Others have to do with matters of political convenience as some battles are easier fought in politics than others. Many authors have pointed out that states may issue harsh statements on irregular migration and implement tough border policies, but turn a blind when it comes to the irregular migrant work force. In the United States the employment of irregular

migrants is pretty much a public secret. According to Cornelius (2005: 777) US policies on irregular migrants address only the supply side. Large sums of money are invested in border management in an effort to reduce the flow of irregular migrants, but the US does nothing serious to reduce employer demand for irregular migrant labour. This explanation seems at odds with the cases of the Netherlands and Germany that have developed substantial internal migration policies. The general notion of turning a blind eye may of course have specific Dutch and German transplantations. For example, given a tradition of protection of the private sphere in both countries (domestic) work in private households is likely to be a blind spot. Both public resentment of governments controlling behind the front door and a small expected 'return' makes private households a relatively expensive and unattractive site for labour market controls. Freeman (1998) has pointed out he clientelist nature of immigration politics in America. When benefits are concentrated and costs are diffuse – as is often the case with immigration policies- clientelist politics are more likely to develop (see also Hollifield 2000: 145). Obviously clientelism finds a more fertile ground in political systems that have a tradition of professional lobbying in mainstream politics, as is the case in the United States. In Germany and the Netherlands – lacking such a tradition - this line of reasoning may follow the track of electoral politics, rather than clientelist politics pur sang. Still, lobbies on behalf of big industries or their unionized counterparts (for example the union of the construction industry) may influence policy. Even though political and business elites may look favourable on globalization and labour migration, a large part of the workforce and the electorate regard it as threatening. So there are important electoral reasons for governments to block immigration and protect the domestic workforce and population. Or more pragmatically, the government should not be seen to harm the workers' interests in favour of the agenda of business and industry. This pragmatism also applies to the employers. Boswell & Straubhaar (2003) point out that hiring irregular workers saves them the trouble of making public pleas for immigrant labour, which are often politically sensitive in the eyes of the domestic labour force and electorate. Irregular migrants give employers access to low-cost, flexible labour without the problem of having to 'fight the issue out in a highly politicized public arena' (Boswell & Straubhaar 2003: 1).

Most of the theoretical notions discussed above assume and suggest that irregular migrant labour is a structural feature of rich and advanced welfare states. Interestingly, it is also often suggested that the state does not seem very troubled by this feature of its economy. Rich global countries tolerate (irregular) migrants because of their vital role in the smooth running of the economy (especially at the fringes) or out of political pragmatism, either pacifying the demands of employers or pacifying the state's own disability to implement effective (internal) migration controls. However, in recent years advanced welfare states such as Germany and

the Netherlands have become increasingly adamant in their political resolve to banish irregular migration and irregular migrant labour from their societies. Although most EU-countries are equal in their public rejection of irregular migrants, there is ample evidence suggesting that some countries are more equal than others in this respect. Boswell & Straubhaar (2004: 5) suggest that a number of governments are increasingly taking the 'combat of illegal foreign labour' seriously: "Germany, the Netherlands and France all have tough legislation, and have stepped up efforts at enforcement since the early 1990s". In his analyses of (irregular) immigration and the underground economy Michael Samers (2004: 242) notes "… there is also considerable evidence that at least northern European governments are doing everything but ignoring it". In other words, these countries go against the theoretical grain by developing an approach of the problem of irregular migration that is characterized by tough legislation and increasingly tough implementation and perhaps even challenge the inevitability of the policy gap. This raises two lines of questions. The first results mainly from the theoretical framework presented in chapter two and concerns the question whether and to what extent Germany and the Netherlands are developing internal surveillance policies on the labour market that follow the two logics of exclusion and the different demands they have on surveillance technologies of documentation and registration. The second line of questions results from the theoretical notions set out in this chapter and concerns the role of the state in balancing between the double movement of 'capitalism' and 'welfare' on the one hand and on capacity and control on the other. This will be analysed with a typology for labour market surveillance in the Netherlands and Germany based on the two logics of exclusion that were introduced in chapter two.

3.3 Labour market surveillance in Germany and the Netherlands: a typology

Advanced welfare states, such as the Netherlands and Germany, that are serious about countering and discouraging the residence of irregular migrants, will focus their attention first and foremost on the vital institution of the labour market. To a large extent, labour market surveillance is meant to discourage the various actors in the field: discourage employers to make use of irregular migrant labour, discourage criminal elements to facilitate the supply and demand for irregular labour, discourage civil servants and other authorities to bend or 'loosely interpret' the rules and ultimately, to discourage irregular migrants to try their luck on the Dutch or German labour market.

As set out in chapter 2, both countries are expected to develop a policy program of exclusion of irregular migrants that is increasingly operated through the management of information, registration and identification. Controlling access to the labour market and excluding irregular migrants from it is likely to require the operation of both 'logics of exclusion' that

were set out in the previous chapter. The two logics combined aim to make the presence of irregular migrants in the formal and informal labour market as limited as possible. Policies operating under the first logic of exclusion – exclusion from documentation - are primarily aimed at institutions (especially employers, but also other institutional 'providers'). Policies operating under the second logic of exclusion (exclusion through documentation) are aimed at the irregular migrant himself.

The two logics of exclusion are combined with two basic policy methods that are used in labour market surveillance. The first of these is the concept of 'deputation'. The idea of the 'sheriff's deputy' was used by both Torpey (2000: 36) and Lahav & Guireaudon (2000: 57) to indicate that governments are 'enlisting' third parties in order to make migration policy more effective (see also Garland's (2001: 124) similar notion of responsabilization strategy). When governments shift responsibilities to private parties (especially employers, subcontractors, temp agencies) they turn them into 'deputy sheriffs' by making them responsible for a part of the regulation of access to the formal labour market. Governments are then 'outsourcing' some, or maybe even many, of its registration and verification responsibilities to private parties or lower levels of government. The second is the more traditional policy approach of 'control and punishment'. Deputation only works with those willing to be deputised – no matter how grudgingly - or those who have been given enough incentives to comply with rules and regulations. Employers that do not intend to 'play by the rules' and illegal or even criminal organizations functioning in the informal economy cannot be (effectively) deputized. Controls and punishments (fines, imprisonment) are needed to exert direct control on the labour market. More importantly, the existence of a credible threat (a risk of getting caught) may be the most important lever that turns 'undeputable' employers into 'deputable' ones. This framework for the exclusion of irregular migrants from the labour market is summarized in table 3.1 below.

Table 3. 1 The exclusion of irregular migrants from the labour market: discouragement by deputation and control

	Exclusion from documentation	**Exclusion through documentation**	
Deputation	1. Deputizing employers - Administrative requirements - Authentification of ID documents 2. Instrumentalizing discontent - Industrial self-restraint - Private snitching 3. Limiting discretionary powers	1. Organizing inter-agency cooperation 2. Linking database systems (labour, residence, social security and migration etc.) 3. Mandatory cross-checking of data	Targeting the 'deputable' → targeting the 'undeputable'
Control and punishment	1. Controls and fines (increasing the perceived risk of getting caught)	1. Controls (not fines!) 2. Identification is integral part of control system 3. Chain approach in control system (control, detection, identification, incarceration, deportation)	
Targeting institutions → targeting irregular migrants			

The first logic of exclusion – exclusion from documentation and registration – is aimed at blocking the access to the formal entry tickets to the labour market. These policies target the gatekeepers to the *formal* labour market. The policy subject, one might say, is not the individual irregular migrant himself, but all the institutions – in a very broad sense – he needs to gain entry to the formal labour market. These institutions are government institutions (such as the work permits office) but primarily private parties such as employers, subcontractors and temp agencies. Deputation is possible in a number of cases. The central government can limit the discretionary room to manoeuvre for lower level or decentralised state authorities – those issuing permits for example – that deal with the labour market. In these cases central governments limit the discretionary movement of street level bureaucrats even though these are already formally deputized. Employers are obviously the prime targets for deputization as they are the 'de facto' gatekeepers of the labour market. Their role can

take various forms. Administrative requirements may scare off irregular migrants lacking the proper papers and an obligation to report information on workers to the authorities helps detection and may also scare off migrants. Making employers responsible for the checking of documents and the verification of their authenticity turns them almost into deputy immigration officials. A third possibility is that the state organizes the discontent of employers and employees, or even the general public, into an advantage and a source of information for state policies. Employers jealous of the competition or feeling cheated by colleagues bending the rules (and increasing their margin of profit) can be turned into a source of information on irregular practices. However, there are limits to deputation as it relies on self-restraint and law abiding behaviour on the part of the employer and a willingness to fulfil certain obligations. It is therefore primarily suitable for formal institutions and organizations that will 'play by the rules'. Whether or not employers and street level bureaucrats 'play by the rules' is, among other factors, a matter of balancing profits against the chance of getting caught for employers and intermediary organisations. In the case of street level bureaucrats it may also be a matter of balancing the discretionary room to manoeuvre against the chance of being reprimanded or worse.

He, who cannot be deputized, has to be controlled. By controlling and fining employers the state raises the stakes, but only if it manages to increase the chance of getting caught and – more importantly – the perceived risk of getting caught. So it is not just a matter of increasing control, more important is the increase in a credible threat of control. Often, it is not the 'balance of power' that regulates the actors' choices and behaviour but the 'balance of threat', an argument made in International Relations theory by Stephen Walt (1985). In this way bona fide employers and institutions may be coerced into compliance and may become deputable. However, when the government is dealing with irregular migrants working in the shadow economy it is likely to be confronted with shady or even criminal institutions, organizations and individuals that cannot be 'deputized' at all. Furthermore, some employers, that are usually not so shady, have hardly any fear of control. In many countries employing domestic workers for cleaning, childcare and care of the elderly is commonplace and the often middle class employers feel relatively certain that they will not be controlled by the authorities. For these (diverse) groups controls are the only means to influence behaviour. Increasing the (perceived) chance of getting caught and being heavily fined is vital here as well: it is the only way of ending their business, making them go out of business or choosing another business.

Policies targeting the individual irregular migrant himself, operating under the second logic of exclusion, have an even greater need for identification. It is no longer sufficient to establish

that an individual worker does not belong (and fine the employer) but it becomes necessary to identify the irregular migrant himself. Under the first logic the aim is to block access to the (formal) labour market by using a system of (digital) gatekeepers, the second logic requires a database system that can identify or re-identify irregular migrants. This makes deputation much more an affair of organizing procedures *within* the government. In essence, it requires new policies that change procedures and routines within certain government institutions, shifting tasks from 'mere' exclusion of irregular migrants to (aiding in) the detection and identification of irregular migrants. Sometimes it will mean new tasks and procedures and sometimes it will entail a limitation of discretionary room to manoeuvre. It requires the organization of interagency cooperation and especially the interconnection of the databases they have at their disposal. It also requires an active policy of connecting and crosschecking data between the various systems of information. This time not to refuse access to certain institutions but to investigate and verify status and identity. For government authorities it is the difference between (passive) administration and (active) investigation. Governments that seriously intend to limit the presence of irregular migrants in the labour market, and even within the borders of the country, will have to adopt policy measures that penetrate, rather than shield off, certain institutions. Registration and documentation should be aimed at identification and actual removal rather than at refusing entry and discouragement. Needless to say, the second logic requires a much more 'hands on' approach, making surveillance and control even more important. Policies aimed at immigrants, instead of employers, require a different mode of operation for the authorities involved. Controls are vital, but are only effective if apprehension and identification become an integral part of the control procedures: first to detect illegal status and then turning irregular migrants over to the authorities that will establish their identity. Different authorities will have to cooperate as they all have different sources and data systems that can be used for investigation and identification. And finally, a chain approach is necessary to make this an 'effective strategy' resulting in the return of the irregular migrant to his country of origin. Investing in control systems like this is only meaningful if the whole chain of control, detection, identification, incarceration, deportation (see also chapter 4 on this issue) is staffed and funded and followed through by the authorities responsible for each part of the chain. And of course, as the cliché will have it, a chain is only as strong as its weakest link. Operating a control system like this is labour intensive, which also implies that the state has to be more selective, and has to choose its interventions well. The following paragraphs will analyze how the policy approach and instruments to deal with irregular migrants on the labour market that have been developed in Germany and the Netherlands relate to these two logics of exclusion.

3.4 Exclusion from documentation

Entering the labour market in Germany and the Netherlands is a matter of paperwork, registration and cross-referencing. Anyone - natives and legal aliens alike - has to fill out forms, hand over documents and has to be 'recognised' by the proper systems and authorities. Anyone who lacks the proper papers or is not registered where he or she should be registered, is a suspect employee in the eyes of the Dutch and German labour law. Over the years a dense web of restrictions has developed: regulations and registrations that together have formed a paper and increasingly a digital wall around the labour market. This network can be used to shield the labour market and to identify irregular immigrants. Closing off the labour market through documents and registrations is the 'classic' way of discouraging irregular migrants in both the Netherlands and in Germany. The exclusion also serves to prevent irregular migrants from holding tax paid jobs on which they can build a claim for regularisation at a later stage. As can be seen in the typology in the previous paragraph, 'exclusion from documentation' is made up of two sections. The first is 'databases and deputation', i.e. the digital wall around the labour market mentioned above. The second is 'control and punishment' indicating that this form of exclusion is also in need of a more hands on approach of exclusion. Those who cannot be deputised or those who were able to circumvent the digital wall can only be reached and excluded through a credible system of controls.

3.4.1 Deputation and databases

Both in Germany and the Netherlands the exclusion of irregular migrants from documents and registration, and hence from the formal labour market itself, is an interplay between government authorities and employers. Authorities (do not) issue documents and employers are to some extent responsible for checking certain documents and legal requirements. Employers are increasingly responsible for the 'legality' of their employees as a result of deputation by the government.

In Germany there is a maze of bureaucratic institutions and registrations that make up a wall around the labour market. Dita Vogel (2001: 329-335) describes this bureaucratic obstacle through the example of two fictional 'irregular migrants' (with a different migration history) looking for work. Both Carol – a Pole that entered on a tourist via – and Maria – a Zairian woman who entered illegally and is now an asylum claimant – are shown to have virtually no chance of getting a job in the formal economy as a result of the "dense jungle of German documentation, registration and data management practices" (Vogel 2001: 329). In Germany employers are obliged by law to ask for the social security card and the income tax card before hiring a person (Sinn et al. 2005: 46). So in order to take up a job in the regular

economy they would have to be in possession of social security cards and tax cards, which are impossible to get as they are not registered in the local registration office (*Einwohnermeldebehorde*) in the case of Carol, or registered with restrictions for work in the case of Maria. In any case, they would both need a work permit, an impossibility in the case of Carol (because of his illegal residence) and extremely difficult in the case of Maria, as employers would first have to look into prioritised unemployed candidates suitable for the job. If they had found an employer, they would be able to get hold of a legal social security card, as the employer would apply for the card and the authorities would send it without cross-referencing. However, they would still not be in possession of a tax card or a work permit, without which not many employers would hire them, so the chances of getting one are slim. If they would use falsified papers, they will probably be detected in a later stage as their employer would send in the documents to the statutory health insurance, where the documents would be cross-referenced by a computer programme. Vogel (2001: 333) explains that "This verification procedure is made possible by the fact that the last two numbers of any social security number are calculated from the other numbers". A slightly more effective strategy would be to borrow papers from another person, but the cross-referencing of the health insurance provider is likely to result in a notification of the local branch of the Federal Labour Office, which would investigate on the basis of local files and other (missing) registrations and would contact the employer for clarification on missing data and documents. Data crosschecking will filter out many attempts by irregular migrants to secure a legitimate job. Vogel (2001: 334) points out that these procedures will not normally lead to much more than a warning letter to employers, but 'as a general rule will prevent the inadvertent hiring of undocumented immigrants in the regular economy'. In other words, the system in operation at the time of writing was both well equipped as a means of blocking access to the formal labour for irregular migrants as well as a means to discourage employers from hiring them. Vogel (2001) suggests that employers may even suspect that there is a much more efficient system of data crosschecking that the one that actually exists. There is in other words an elaborate system of verification in place that will alert authorities when 'mismatches' occur, and has a 'discouraging' effect on employers.

In the Netherlands an irregular migrant bounces off a similar wall of registrations, documents and crosschecks. Most importantly an irregular migrant will not be able to obtain a (legal) social-fiscal number (sofi-number), which is the main pre-condition and entry ticket when applying for a legal tax-paid job. A sofi-number, which is issued by the tax authorities, can only be obtained on the basis of a valid residence permit that is issued by the immigration authorities (IND) and a registration in the population register, or the Municipal Basic Administration (*Gemeentelijke Basisadministratie* – GBA). For obvious reasons this is

not a possibility for irregular migrants. Irregular migrants can always try to work on the sofi-number of a legal compatriot or on a sofi-number otherwise obtained. There have been examples of groups of people that were all working on one and the same sofi-number. By now the tax authorities have inserted an 'alert' into their database that is triggered if more than one contract is registered on a single sofi-number. In principle it is now impossible for a group of people to work on one number (Barents & Eijkelenboom 2006: 69). In November 2007 a 'new' identification number, the so-called Citizen's Service Number (*Burger Service Nummer*), replaced the sofi-number. The idea behind this change is that all citizens and denizens will now only have to have one number in their dealings with various government agencies and administrations instead of the many that were in use before. It is, in other words, a centralisation of 'identity management' and an opportunity to streamline the connection and interoperability of various databases, if they may be legally linked. Exchange of information on one person is made easier for government authorities. The municipalities will issue the new Citizen's Service Number when people register themselves in the Municipal Basis Administration. Ironically, that means a decentralisation compared to the limited number of tax offices that could issue a sofi-number and may increase the possibilities for gaining fraudulent access to a Citizen's Service Number[10]. Prins (2006) has argued that a single number may be more attractive for swindlers and criminals (one number, multiple access to various systems) and may thus increase the chance of identity fraud.

In addition to the sofi-number there is the general requirement that employees have to be able to identify themselves as a result of the 1994 Compulsory Identification Act. This is an important linchpin for the deputation of employers. Employers have always been responsible for the 'administrative legality' of their employees, but in 2000 a new article 15 was inserted into the Aliens Employment Act (WAV) that obliges employers to check the identity of employers and to keep a copy of their identification on file. This was a reaction to the growing use of subcontractors. At the same time a new article 16 enabled the Labour Inspectorate to exchange information with other authorities. So currently, employers are legally obliged to check the identity papers of their employees, to keep copies in their administration and to make sure that employees will be able to produce identity papers if called upon by the authorities during an inspection. In its Year Plan for 2006 the Labour Inspectorate added extra weight to employer's responsibilities when it announced that employers that do not cooperate in establishing the identity of employees will no longer be guilty of a misdemeanour but of a criminal offence and fined accordingly. This is a strong form of deputation that raises questions on the limits and the extent of the employers' responsibility

[10] Starting January 2004 the tax authorities limited the number of offices that could issue sofi-numbers to sixteen. This decision was taken to counter the possibilities for identity fraud (Minster van Justitie 2004: 6).

for the 'legality' of their workforce, especially in an age in which 'identity fraud' is taking on a widespread character (Barensen & Eijkelenboom 2006: 62). Against a backdrop of intensified controls and much higher fines in recent years (see paragraph 3.4.2), the incentive for employers to increase their efforts on the matter of the control of documents has become bigger. The government also tries to facilitate this process. In 2003 the Labour Inspectorate sent a brochure out to 700.000 employers, detailing how to verify the identity of their employees. A number of CWI offices (employment agency/social security services) have started with a pilot with so-called verification- and information points. At these points employers can have the identification documents of their employees checked (Barentsen & Eijkelenboom 2006). This is a government service, but this will not necessarily remain so. Furthermore, if this system will be spread out it will put extra pressure on employers to make use of it (…you could have known…). The tax authorities were looking into something similar for the link between identity (documents) and the social-fiscal number (Minister voor Vreemdelingenzaken en Integratie 2004: 26). Another recent innovation that draws employers deeper into the labour market control system is the introduction of the First Day Notification (*Eerstedagmeldding*). The government introduced a compulsory notification prior to the actual first workday of new employees to the tax authorities. This way when an employer is being investigated and irregular workers are found, employers cannot use the classic pretence that an irregular worker only started working the day prior to the inspection (Minister voor Vreemdelingenzaken en Integratie 2004: 23, Barentsen & Eijkelenboom 2006: 69).

In both countries employers – in a broad sense - are encouraged to function as gatekeepers to the institution of the labour market. Not only by the direct deputation of employers but also by stimulating self-regulation at the level of industries and employers' federations. This holds true especially for those sectors in which irregular migrant labour is a common phenomenon, that are well organised at industry level and which have also been highlighted by the government as prime sectors for labour market controls (see also paragraph 3.4.2). So it is especially 'notorious' sectors such as construction (in both countries, but especially Germany), commercial temp agencies and agriculture and horticulture (especially in the Netherlands) that start up projects to counter undeclared labour and irregular migrant labour. Unsurprisingly, governments are more than willing to lend a hand. In Germany, the Finance Ministry is setting up joint campaigns with the construction sector and the transport sector under rallying cries such as '*Schwarzarbeit. Nicht mit mir!*' and '*Illegal ist unsozial*' (see also Sinn et al. 2005: 50). In the Dutch construction sector employers federations and unions jointly introduced an "agency for compliance in the construction sector" (*Bureau Naleving Bouwnijverheid*) that gathers information and tips from workers and employers in

the sector and exchanges this information with the controlling authorities (Podium 2006: 1). The employers' federation for agri- and horticulture (*LTO Nederland*) runs a special programme to certify (specialised) temp agencies for the sector to ensure that they won't send irregular migrant workers to the employers that use these agencies for flex workers[11]. This form of deputation at the meso-level of industries has its own logic. Employer federations want to be responsible partners of the government and also have to look out for their members, whose interests may be shifting from non-compliance to labour laws to compliance when controls and fines are increasing. Unions also have important incentives to be against irregular migrant labour as they 'threaten' the legal workers by undercutting prices and offering greater flexibility than their legal co-workers. However, in sectors where irregular (migrant) labour is rife, these initiatives are unlikely to turn the tables on the phenomenon of irregular migrant labour. On the other hand, deputation doesn't stop at the level of industries and unions. In fact, control authorities such as the Labour Inspectorate or the German custom authorities get much of the information that direct their controls from the general public in the form of tips and information about 'suspicious' workplaces or workers. Citizens, employers (jealous or wary of unfair competition) and (legal) co-workers often point the authorities in the direction of irregular migrant workers, their employers and the places they work. In the Netherlands a significant number of controls and investigations by the authorities are based on tips (Arbeidsinspectie 2007). For Germany Sinn et al. (2005: 47) and Stobbe (2004: 101) maintain that external controls are triggered by two sources of information. First, they are conducted on the basis of information and analyses by the authorities themselves (both those directly responsible for labour market control, and other authorities such as the police, social insurance agencies etc.). Secondly, controls are initiated because of information and tips received from the general public (business competitors, neighbours, trade unions and regular employees).

Lastly, deputation can also apply to those who already are formally deputies, i.e. the public and semi-public authorities that control the registrations and issue the documents that irregular migrants need to get access to the labour market. To make exclusion work these agencies will have to improve their information exchange to increase the control on ineligibilities. Secondly, the central government will want to limit discretionary powers that may result in cracks in the paper and digital walls. Especially in the Netherlands the existing maze of bureaucratic requirements was not originally set up to function as a paper or digital wall to exclude irregular migrants. Over time it has been made to function as such, as laws to that effect were introduced during the 1990s. Van der Leun (2003: 170) showed that the

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[11] See: http://www.lto.nl, under 'projecten': 'certificering van uitzendbureaus'.
Or see: http://www.kiesria.nl (both accessed 10.1.2008)

exclusion of irregular migrants by various authorities has become stricter over the years. Especially in those sectors where workers have a lower level of professionalisation there is tendency to comply with the new laws more legalistically resulting in harder digital or paper walls that effectively shut out irregular migrants. This legalistic approach is also found in Germany. Perhaps even more so, as a more lenient approach, grounded in a tradition of 'gedogen'(toleration), is hardly a part of German 'bureaucratic history'. In 2001 Cyrus & Vogel (2003) conducted in-depth research on the German Federal Labour Office (*Bundesanstalt für Arbeit)* which, among many other tasks, is responsible for decisions on work permits and the combat of illegal employment. The latter task has been centralized at the Customs authorities in 2004. Their research focused on the decision-making procedures in granting or refusing work permits and on the level of discretion of these 'street level bureaucrats'. They conclude that these important gatekeepers of the labour market have a legalistic and professional attitude in which regulations from higher levels within the hierarchy are closely followed. Employment relations are hierarchical, and employees are aware that their decisions will be subject to scrutiny by higher levels of the organization. As a result they try to solve cases face-to-face within their level of hierarchy and in accordance with written norms, such as regulations, decrees and operating instructions issued at the level of the Federation and the refinements at the level of the *Länder* (Cyrus & Vogel 2003: 253). The fact that Germany does not have a linking act may be explained by the fact that it does not seem to need it. According to Vogel (2001) a tradition and practice of cross-referencing and data-exchange between the various agencies that are responsible for labour market access has developed. "Identification procedures in the German labour market are characterized by organizational decentralization and fragmentation, on the one hand, and cooperation and central databases on the other" (Vogel 2001: 340).

Obviously, crosschecking databases, curtailing street levels bureaucrat's room to manoeuvre and deputising employers can only attribute to the exclusion of irregular migrants from the labour market in as far as employers and irregular migrants have some connection with the formal labour market. Not all employers are 'deputable' and not all irregular migrants seek access to legal documentation. Employers determined to make use of irregular (migrant) labour and irregular migrant workers can only be approached through more active policies of control and punishment.

3.4.2 Control and punishment

The proof of the pudding is always in the eating. When governments reach the limits of what they can achieve through regulations (what is and isn't allowed according to the law) and through deputation (outsourcing control to employers and other actors) they have to turn to

more active policies if they want to intensify internal migration control further. In both countries successive governments have tried to increase their grip on labour market fraud, tried to curtail irregular migrant access to the labour market and consequently have stepped up direct controls on the labour market. Vogel (2006) summed up the recent developments in labour market control in Germany under the heading: '*höher – schneller- weiter!*'. Higher fines, speedier controls as a result of computerisation and innovations such as chip cards, and more means and personnel for the control authorities. As the following pages will show 'higher, faster and more' is also an apt slogan for the recent Dutch policy developments. The aim of labour market controls is primarily a matter of raising the stakes for employers, irregular migrants and intermediaries. Entering the labour market will become more difficult if the chance of being controlled increases. Recruiting irregular migrant workers is much less attractive if the chance of getting caught or even the perceived chance of getting caught increases. In other words, the primary aim of controls is still *discouragement*, also in recognition of the fact that it is simply impossible to subject all employers to controls. A number of trends stand out in both countries: increases in manpower and controls, a more restrictive policy framework and higher fines and a more targeted approach, often organised in special control teams, consisting of various enforcement authorities.

Organization and manpower

In 1999 the Netherlands Court of Audit established that the Labour Inspectorate (*Arbeidsinspectie*) employed circa 80 inspectors responsible for inspections under the Aliens Employment Act (WAV) (Algemene Rekenkamer 1999: 9). The report notes that this constitutes a significant increase compared to 1993, but no specific numbers are mentioned. Institutional and organisational changes in labour market control system also influenced the numbers of inspectors. In 2000 the Dutch government decided to create a new agency, the SIOD (Social Intelligence and Research Unit), a new investigative unit with the broad task of investigating cases on all matters concerning the Ministry of Social Affairs and Employment. The launch of the SIOD in 2002 entailed a new division of labour and responsibilities between the Labour Inspectorate and the SIOD. The Labour Inspectorate is responsible for the less complicated investigative tasks under the Aliens Employment Act, while the SIOD takes care of the heavy cases involving criminal organizations and requiring an inter-sectoral approach (Arbeidsinspectie 2002: 48). The creation of the SIOD entailed the transfer of a significant part of the Labour Inspectorate's capacity to the SIOD. A large number of inspectors (35 fte) were transferred to the SIOD and the Labour Inspectorate aimed to be back at normal strength (100 fte) in 2004 (Arbeidsinspectie 2002: 50). However, since then the political priority for labour market surveillance and the fight against the employment of irregular migrants has been intensified almost every year, resulting in a significant rise in the

number of inspectors after the Labour Inspectorate's 'losses' to the SIOD had been replenished. In 2003 the number of inspectors stood at 91, rising to 131 in 2004, 170 in 2006 and coming to a provisional halt at 180 inspectors in 2006. In short, the number of inspectors dealing with irregular migrant labour was more than doubled and in addition to that large scale fraud with irregular migrants is now being investigated by the new investigative branch of labour market control, the SIOD.

The German numbers dwarf those in the Netherlands, even when compensated for the obvious differences between the two countries. The 1981 law on the control of illegal employment (*Gesetz zur Bekämpfung der illegalen Beschäftigung*) introduced new measures on information exchange among agencies, heightened the fines and deputized transport companies by obliging them to cooperate with migration controls. In addition to the development of the legal instruments and intensification of sanctions, the number of staff involved in workplace controls at the Federal German Labour office (*Bundesanstalt für Arbeit)* was continually increased (Schönwalder et al. 2006: 72). External controls used to be a task of the German labour offices and the Custom Administration (*Hauptzollämter*). Since the last major reform of the legal framework in 2004 the responsibility for labour market controls has been centralized. Since the entry into force of the new law (*Schwarzarbeitsbekämfungsgesetz*) it is the federal customs organization, and more specifically the Department for Financial control of irregular employment (*Finanzkontrolle Schwarzarbeit – FKS*) in Cologne that holds the exclusive mandate. According to Cyrus, Düvell & Vogel (2004: 55) the number of inspectors at the Labour Offices increased from 50 to 2.450 in the years between 1982 and 1998. Since then numbers have risen both autonomously and as a result of the centralisation of responsibilities at the Customs office that entailed a transfer of staff from the labour offices to the Customs office. In the early 2000s there were 5,200 customs officials fighting against undeclared work and illegal employment and according to the Federal Ministry of Finance, this figure will rise to 7,000 officials in the course of the year 2005, the ensuing personnel costs amounting to about € 250 million (Sinn et al. 2005: 75-76).

Increasing controls and rising fines

With the rising numbers of inspectors the Dutch Labour inspectorate has significantly stepped up its controls. In the years 2001-2003 the number of inspections dropped, but this was largely due to the 'transfer' of inspection capacity to the newly founded SIOD. Obviously the loss of capacity to the SIOD is not a full loss as these inspectors are for a large part also working on cases that involve the employment of irregular migrants. After that the increase

in labour market inspectors translates into a rapidly increasing number of labour market inspections (see table 3.2).

Table 3.2 Labour market controls and reports of offence/administrative fines, 1999-2006 in the Netherlands

	Controls	Reports of offence/administrative fines
1999	6.034	783
2000	5.040	718
2001	3.840	739
2002	3.737	688
2003	3.700	731
2004	5.950	1.063
2005	8.633	2.201*
2006	11.026	3.013

Sources: Arbeidsinspectie 2000-2007

* From 2005 onwards it is not the number of PV (reports of offence) but the number of administrative fines that is counted. In reality the number of administrative fines in 2005 is well over 2500 as in many cases both the employer and the facilitator are fined (Arbeidsinspectie 2005: 67).

With the increase of the inspections the number of fined employers has also risen substantially (from 783 fined employers in 1999 to 3.197 in 2006). However, the main reason for the recent steep increase in the number of reports of offence and fines has been the introduction of the administrative fine in January 2005. In fact, the administrative fine has been a proverbial 'giant leap' for the Labour Inspectorate. Prior to 2005 the procedure for fining employers that violated the Aliens Employment Act was a lengthy and somewhat cumbersome procedure. The Labour Inspectorate drew up a report after an inspection revealed that an employer illegally employed (irregular) migrants and sent its report of offence to the Public prosecution Department (OM). The public prosecutor then determined the height of the fine. In 1999 the Public prosecution Department set a fine of 2000-5000 Dutch Guilders per illegally employed person in the case of a first offence as a general guideline. However, in practice the Court of Audit found in 1999 that the fines were usually equal to or below the minimum fine of 2000 Guilders (Algemene Rekenkamer 1999). The Public prosecution Department argued that it was a lack of information in the reports of the Labour Inspectorate that was the bottleneck of the whole procedure and hence, the root of the relatively low fines. In 2004 the Court of Audit looked into the matter again and concluded that the fines that the Public Prosecutor imposed were still too low to have a deterring effect on employers. This lack of deterrence had much to do with the fact that fines had only risen 10 per cent over the years coming to an average amount of €980 per illegally

employed person (Algemene Rekenkamer 2004). The introduction of the administrative fine made life a lot easier for the Labour Inspectorate, as it can now fine employers directly, instead of through the channel of the Public Prosecutor. The procedure is faster and administratively less complex, but most of all, the fines have been raised substantially. Since 2005 an employer is fined €8.000 per illegally employed worker; if the employer is a repeat offender the fine goes up to €12.000. In the case of a private person as an employer the fine is set at €4.000 and at €6.000 for repeat offenders. If the labour inspectors find administrative deficiencies concerning the hiring and (sub-) contracting of alien workers, employers are fined €1.500 per deficiency. The Department for Social Affairs and Employment considers the administrative fine a very successful tool in the fight against the illegal employment of irregular migrants (Staatssecretaris van Sociale Zaken en Werkgelegenheid 2006).

In Germany the large number of inspectors also translates into high numbers of controls. Sinn et al. (2005: 48) state: "Due to the relatively large number of checks and the intensive cooperation and data-technological interconnection, the frequency and intensity of checks can be regarded as high, in comparison to other industrial countries". However, keeping track of statistics concerning controls and fines is even harder than in the Dutch case. The recent transfer of responsibilities from the Labour offices to the Federal customs authorities complicate matters further. Statistics until 2003 by the Labour Offices give some insight into the development in the control system (see table 3.3). Between 1992 and 2003 the number of warnings and fines has generally decreased while the number of reports of offence (the start of legal proceedings) has increased over time. For the period 2000-2003 the numbers of the employees that are warned, fined or prosecuted are available separately. However, the statistics do not distinguish between legal foreigners workers irregularly and irregular migrants working irregularly (Kreienbrink & Sinn 2006: 24).

Table 3.3 Warnings, fines and reports of offence resulting from labour market controls, employers and employees, Germany, 1992-2003

Year	Warnings and fines		Reports of offence	
	Employers and employees	Of which foreigners working irregularly	Employers and employees	Of which foreigners working irregularly
1992	18.928		4.131	
1993	30.736		5.884	
1994	36.876		5.281	
1995	42.402		6.486	
1996	46.160		9.147	
1997	43.157		11.484	
1998	37.740		10.597	
1999	42.881		9.919	
2000	41.255	17.445	11.374	5.165
2001	30.486	12.591	10.409	5.411
2002	31.342	12.881	13.728	6.611
2003	27.670	11.052	13.931	6.355

Source: Kreienbrink & Sinn 2006: 23-24

In Germany, at least until 2003, legal procedures were gaining in importance when compared to fines. Even so, the height of the fines has been increased in 2000 and in 2002. Since 2002, employers who employ illegal aliens (or, who irregularly employ aliens) are no longer subject to a fine of maximum €250.000, but are liable for double that amount (€500.000). Since 2004 social security fraud by employers can be punished with prison sentences up to 5 years (Vogel 2006, see also Sinn et al. 2005: 49). The actual height of the fines and the length of the terms of imprisonment depend on the seriousness of the violations of the labour law, the number of illegal aliens employed and the conditions of their employment. Employees can also be fined for up to €5000 for working without a permit. The German authorities seem to have a similar problem as the Dutch authorities with enforcing the system of fines and imprisonment that hinges on the role of the prosecutors and the courts. Sinn et al. (2005: 49) point out that courts are inclined to lower the fines because of lack of evidence, often resulting from the reluctance of employees to testify against employers. They observe that there is ample room for the employer and the employee to make a deal and 'stick to a story'. Also, the reports of offence sometimes reach the public prosecutors office after the irregular migrant already entered the repatriation procedures, which complicates the collection of evidence. Nonetheless, more recent figures from the Federal customs Authorities do indicate that the new 2004 law and the steep increase in

personnel have resulted in a very substantial increase in the numbers of controls in recent years (see table 3.4). This would suggest that the pressure on employers is rising in Germany.

Table 3.4 Labour market controls in Germany, employers and employees, 2003-2006

	2003	2004	2005	2006
Persons controlled at the worksite	79.269	264.500	355.876	423.175
Controls of employers	32.572	104.965	78.316	83.258

Sources: Bundeskriminalamt 2004: 50 & Finanzkontrolle Schwarzarbeit 2008[12]

Between 2003 and 2006 the number of controls has increased significantly. The number of employers that were visited has more than doubled, while the number of employees that were checked increased more than fivefold.

Risk analyses and specialised control units

During the 1990s the Dutch approach to the problem of illegal employment of irregular migrants lacked an information-based strategy. In 1999 the Dutch Court of Audit concluded that the inspections lacked a systematic approach based on a risk analysis. The control system was thus open to so-called 'white spots', sectors that may be heavily populated with illegal labour, but are nonetheless left in peace (Algemene Rekenkamer 1999: 5, 18). Since then the Labour Inspectorate has invested in a risk analysis based approach to labour market fraud, leading to the selection of certain sectors as 'risk sectors' and to the introduction of a number of special intervention teams. If we go by the facts and figures of the most recent year report of the labour inspectorate (Arbeidsinspectie 2007) we get the following 'top 5' of sectors in which the employment of irregular workers is the highest: (1) retail trade (2) agri- and horticulture (3) hotel and catering industry (4) construction and (5) temp agencies. A number of these sectors of the Dutch economy have been 'classics' over the years (agri- and horticulture/hotel and catering/construction) and some, such as the temp agencies, have become problematic sectors in recent years. In the latter case it has been an official government policy of deregulation of the sector of employment intermediation that was the origin of a fast rising number of legal, shady and criminal temp agencies that mediate in the demand for (irregular) migrant labour (Van der Leun & Kloosterman 2006). The year report over 2006 also gives an interesting breakdown of the controls, in terms of the information source on which the control was started, revealing the Labour Inspectorate's underlying risk calculation. The largest number of controls were on the Labour Inspectorate's own initiative

[12] http://www.zoll.de/do_zoll_im_einsatz/bo_finanzkontrolle/lo_statistik/index.html (accessed 15.1.2008)

(based on their own information analysis), second were the controls that were conducted in cooperation with other partners in the so-called intervention teams and third were the controls that were started up on the basis of tips and other notifications from outside of the inspectorate (Arbeidsinspectie 2007: 10). The 'returns' on the controls (in terms of number of fined illegally employed persons) are highest when the controls are based on tips of the general public, underscoring the effectiveness of using the general public's discontent to the state's advantage.

Since the late 1990s the Dutch government has introduced an increasing number of so-called intervention teams for those sectors of the economy that have a high risk profile for employing workers illegally and employing irregular migrant workers. There were some early predecessors such as the Clothing Intervention Team that was active during the years 1994-1997 and targeted the (predominantly Turkish) sewing shops in Amsterdam (Raes et al. 2002). The intervention teams are made up of inspectors and officials of various government agencies such as the Labour Inspectorate, Tax authorities, Social Insurance Bank, Public Prosecutors Office, municipalities and the Aliens Police. Within these teams the patchwork of government control agencies is pulled together. In the 2004 White paper on irregular migrants the Dutch government announced its intention to create a 'nation wide network of intervention teams' (Minister van Vreemdelingenzaken en Integratie 2004: 24). In addition to existing (or previously operational) intervention teams, such as the Westland, Construction and Confection intervention teams there will be new teams for sectors such as Warehouses and Distribution. Despite the fact that a number of these teams have been in operation for some years, there are no systematic evaluations of their effectiveness. There was a recent more procedural evaluation of the 'internal' cooperation that gave an overall picture of satisfaction with the interagency cooperation in the intervention teams. Tellingly however, it points to the participation of the (aliens) police and to problems with information exchange and access to the (systems) of the various participations as priorities for improvement (Castenmiller et al. 2007). The police have to deal with multiple demands on their services and the information systems of the various organizations are not always able to 'communicate'. The Ministry of Social Affairs is setting up a system for the intervention teams to overcome the difficulties, but none of the members of intervention teams were aware of this at the time of the evaluation (ibid: 17). Moreover, different sectors have different problems in terms of labour law violations and the structural characteristics of certain sectors also influence employers' behaviour and the impact of the control system. Not all sectors are equal and therefore not all intervention teams achieve, or are able to achieve, the same results. See for an illustration box 3.1.

Box 3.1 Why some sectors are more equal than others

One of the earliest Intervention Teams was the **Clothing Intervention Team**. In the early 1990s it was a public secret that illegal practices, especially irregular migrant labour, were widespread in the Amsterdam garment industry (Raes et al 2002). Until 1993 it was estimated that 10.000 illegal (migrant) workers worked in this sector. State responses were twofold. First, there were legal initiatives such as the extension of the Dutch Act on Chain Liability to the garment sector in 1994, which made retailers formally responsible for the illegal practices of their contractors. Secondly, the authorities organized crackdowns through the introduction of a Clothing Intervention Team, which organized raids on Turkish sewing shops and especially targeted violations of the Aliens Employment Act (WAV). The activities of this intervention team were one of the main reasons for the nearly complete disappearance of the garment industry in the Dutch capital (Raes et al 2002). However, the demise of the (Turkish) garment industry from the Dutch capital also had a lot to do with changing strategies from retailers (relying more on imports from low(er) wage countries).

A traditional Dutch sector in which irregular (migrant) labour is common is agri- and horticulture. For years the Labour Inspectorate noted an average of 20% violations of the Aliens Employment Act during their controls. Only recently has this figure has been dropping to 17.5% in 2005 and 13% in 2006 (Arbeidsinspectie 2007b). The percentage of irregular resident migrants involved in labour market fraud is however relatively stable (18%). The sector as a whole has some specific characteristics: the vast majority of irregularly employed aliens are Poles and other middle- and eastern Europeans. At the same time the number of work permits issued for the sector has been on the rise for years: from 9.675 in 2002 to 39.645 in 2006. 92% of these permits are granted to Poles and other middle- and eastern Europeans. The Labour Inspectorate attributes the drop in the violations of the labour law to the wider availability of permits, measures taken by the sector itself and to the increase of controls. However, this general picture contrasts sharply with a more specific (geographical) part of the sector. If agri- and horticulture are 'traditional' sectors of (aliens) labour law violations, then the greenhouses of the Westland district are 'notorious'. The **Westland Intervention Team** (WIT) specifically targets this 'district' of greenhouses that is roughly wedged in between the large cities of The Hague and Rotterdam. The team became operational in 1999 and conducts controls in cooperation with a number of different control authorities. Despite these controls and the general tightening of the legal framework (including the administrative fine), the Westland still lives up to its 'reputation'. While the Labour Inspectorate finds 13% violations of the Aliens Employment Act for the sector as a whole (not including the Westland) the WIT scores a percentage of 35% for the same year (2006). The Labour Inspectorate points especially to the supply side to explain the differences: the proximity of large cities and specialised intermediaries and temp agencies (Arbeidsinspectie 2007b). However, other explanations may also be feasible. The demand may be high because of availability, but also simply because of profitability, because the chance of getting caught is a calculated risk, or even because irregular (migrant) labour is a necessary lever to make a profit and to keep business afloat. Furthermore, outsourcing this industry is possible in theory but – in contrast to the garment industry - is hardly an economic or political possibility.

In Germany controls are based on both the analysis of the authorities themselves and on the basis of tips and information received from the general public (Stobbe 2004: 101). The prime sector for labour market controls, especially since the Berlin 'building boom' started in the early 1990s, is the construction sector. Another reason for its central place in the control regime is the fact that this is a sector in which the numbers of irregular migrant workers are often considered not to be dropping, in spite of the many controls (Liedtke 2005: 212). Over the years a number of other sectors have been put forward as prime sectors for irregular migrant employment, such as hotel/catering, transportation, cleaning services, food industry and agriculture (Liedtke 2005, Bundesregierung 2005: 107). However, Schönwalder et al.

(2006: 48) are very critical of the information the German government has on the distribution of irregular migrants workers over the various sectors of the economy: “The basis of individual estimations is often not transparent or it is derived from individual examples. Workplace controls by the authorities are not systematically evaluated. In the absence of such systematic evaluation, the reports of the authorities on the raids carried out and cases of illegal employment discovered can only be dealt with as individual cases”. The fact that the construction sector has been a hotbed of irregular migrant labour in Germany is however relatively uncontested. Especially during the 1990s construction boom in Berlin, special teams were formed to counter illegal employment in construction. According to Martin and Miller (2000) these were very large teams composed of policemen and labour inspectors that organized at least one major inspection of a construction site per month. “A major work site inspection involves up to 100 police with dogs to surround the construction site to prevent anyone from leaving during the inspection, and 200 to 300 labour inspectors to check the legal status of each worker on the site” (Martin & Miller 2000: 23). However, there are also some indications that illegal employment during this period of rapid expansion of the building industry in the German capital has also been tacitly approved (Sinn et al. 2005: 48).

The Bundesregierung (2005: 107) also states that there is a ‘sectoral shift’ in progress. Private employment of irregular migrants is supposed to become relatively more important. Van der Leun & Kloosterman (2006) hypothesize about a similar shift from more ‘public’ to more ‘private’ spheres in the Netherlands. A sectoral shift towards private households – in building activities such as house renovations for example – and the well known but hardly touched upon ‘private sector’ of the domestic aid for cleaning, childcare and care for the elderly causes problems for the control agencies. Especially female migrants tend to be employed in domestic work which is only very seldom a tax paid job, regardless of the legal status of the domestic worker. In this sector, as in many others, migrant workers are not necessarily illegal residents, sometimes they just lack a legal right to work or ‘only’ engage in labour market fraud through tax evasion. The literature on female (irregular) migration and domestic work shows a clear divide between the north and the south of Europe. In many Southern European countries the 24 hour live-in domestic worker is a normal phenomenon, whereas in countries such as Germany, the UK and the Netherlands they tend to be employed on live-out conditions (Anderson 2000, Jordan 2006). In her characterization of migrant domestic workers in various European cities Anderson (2000: 85) places Berlin in the quadrant typified by “live-out” working conditions and a “documented” status. That does not mean that there are no irregular migrants in domestic work in Northern Europe, as both Anderson herself documents and can be seen from other studies such as those by Philip Anderson (2004) and Lutz (2007). As the demand for migrant domestic work is not met through

special recruitment policies as it is in on a certain scale in the Southern Europe, Lutz (2007b: 189) maintains that countries such as Germany and the Netherlands "(…) ignore the existence of this phenomenon by transforming it into a 'twilight zone' that exists only as an irregular market". This twilight zone gives (female) irregular migrants a certain shelter against government control, although not against dangers of exploitation and violence that employment in private households can entail. Cyrus & Vogel (2006: 104) indicate that most of the women they interviewed that worked in a domestic setting were unafraid of the 'virtual possibility' of labour market controls. Work in the private sphere is an obvious 'white spot' for labour market controls. If governments would like to change this, it would probably cause more problems for the German authorities than it would for the Dutch authorities. There are a number of reasons why the German authorities do not and cannot control private households, ranging from the constitutional protection of the private household to considerations of effectiveness and a low public 'visibility' (Stobbe 2004: 103; Sinn et al. 2005: 48). When in 2001 they did look behind the front door - the authorities in Frankfurt raided 200 private households for the first time - it created such a public outcry about the intrusion on the private sphere that they were also the last. Nonetheless, the German government tried to include the private sphere when it introduced its new legislation for labour market control in 2004. This proposed intrusion into the private homes of German citizens was heavily criticized in the ensuing parliamentary and public debate and was ultimately withdrawn from the bill (Cyrus, Düvell & Vogel 2004: 55). In contrast, the Dutch Construction Intervention Team is increasingly directing its attention to construction work at private households, primarily on the basis of tips (Bosse & Houwerzijl 2006). In 2005 for example, half of the controls that the Labour Inspectorate conducted in the construction sector were at private households, which has caused no public unrest to speak of. However, controls in private homes on domestic work are also unheard of in the Netherlands. Despite the common knowledge that domestic work can almost be equated with labour market fraud (at the very least tax evasion) this traditional 'white spot' is left unbothered and has never been prioritised by the labour control authorities.

In the day-to-day practice of labour market controls the exclusive mandate for the Customs authorities since 2004 does not mean that there is no cooperation with other authorities. Cooperation at the level of information exchange, coordination and joint investigations are commonplace. The Bundesregierung (2005: 108) lists 11 organisations that work together on controls and information exchange, including the police, the border police, immigration authorities and social insurance authorities at the federal level and the level of the *Länder*. The competences of the inspectors of the Customs authorities are however remarkable. Since 1998, the officers of the custom authorities have the same rights and duties as police officers.

That means that the inspectors no longer have to call on the police if in the course of their investigation certain suspicious facts – indicating an offence or misdemeanour – emerge (Sinn et al. 2005: 47). Dita Vogel's qualification of faster (*schneller*) had to do with the increased possibilities for checking documents and cross-referencing as a result of new technologies. Faster applies to the databases and registrations and crosschecking that is done at the 'back office' of the control authorities, but also at the increased possibilities to do so on the spot. Sinn et al. (2005: 47) point out that the checking of identities and legal status through the verification of documentation is an integral part of external controls. The introduction of new documentary requirements intended to prove 'legality' went hand in hand with new data systems that allow for fast track 'checking procedures': "So wurde zum Beispiel zunächst ein Sozialversicherungsausweis eingeführt, dann wurde es in einigen Branchen verpflichtend, den Ausweis am Arbeitsplatz mitzuführen, und heute soll in einem Pilotprojekt in Berlin-Brandenburg mit offen getragenen Chipkarten experimentiert werden" (Vogel 2006: 112). The Bundesregierung (2005: 111) stresses the contribution that on line access during the controls to the databases of the social services, labour offices and the central aliens register could make to the effectiveness of the controls. However, controls aren't the only measures taken in Germany against the illegal employment of irregular migrants. The heavy intensifications of the control regime aimed at the exclusion of irregular migrants are implemented alongside measures to widen the possibilities for legal labour migration, especially in some sectors where irregular migrant workers were/are commonplace. In the case of Germany, these 'new guest worker schemes' already started in the early 1990s, for example for seasonal labour in agriculture and subcontracting to foreign construction companies for the construction industry. Most of the schemes were meant to accommodate and legalise (irregular) labour migrants from Eastern Europe, especially Poland. Though the intention was to regularize irregular labour migration this goal has only been met partially, as the new schemes could not compensate for all the demand and also opened up new possibilities for fraud and irregular labour migration (Menz 2001, see also Broeders 2001: 145-146). In fact, the new government schemes also required new control efforts on behalf of the state, as is often the case. All in all, a clear example of what Portes & Haller (2005: 409) call a 'paradox of state control' meaning that "(…) official efforts to obliterate unregulated activities through the proliferation of rules and controls often expand the very conditions that give rise to these activities".

Higher, faster, more!……more effective?

The question remains whether all these investments in technology, interoperability, manpower and control capabilities amount to a more effective labour market control regime and to a decrease in irregular migrant labour and labour market fraud. As can be seen from

the statistical material gathered and presented above, 'effectiveness' is hard to measure on the basis of the available data. Furthermore, the fact that there are no data at all available on the target population – in this case the 'stock' of irregular migrant workers – makes it even more difficult to comment on effectiveness. There is a general lack of reliable evaluations of controls and the working of the various (intervention) teams, as many researchers have observed before. For the Dutch case, there is an evaluation study on the internal procedures of the intervention teams and there are two studies on the employers' compliance to the Aliens labour law based on surveys and interviews with employers (Mosselman & Van Rij 2005; Groenewoud & Van Rij 2007). All three studies have been commissioned by the authorities themselves. The two surveys among employers have methodological 'flaws' that seriously influence the reliability of the answers that employers give. The responsible minister for Social Affairs and employment aims to seek alternative venues of research to gain insight into compliance among employers (Minister van Sociale Zaken en Werkgelegenheid 2007). That being said, the studies do give some insight into the relative weight that employers ascribe to the various factors that influence their choice on whether or not to employ irregular migrants. The material may not give much insight into the actual developments in irregular employment and the control thereof, but it does say something about the employers' perception of the field. As such, it comments on the 'balance of threat' rather than the 'balance of power' so to speak. On the basis of the survey studies two, somewhat contradictory or at least parallel, conclusions can be drawn. The first is that financial gain – and not the lack of an available legal workforce - is the predominant motive for employers to use irregular migrant labour. More supply of labour, or the now 'legalised' EU-workforce from Central and Eastern Europe is therefore unlikely to alleviate an important part of the demand for irregular migrant labour. A second conclusion is that the perceived risk of being caught by controls and being fined (by higher fines) does seem to have a preventive effect. The perceived chance of getting caught and fined is substantially higher than the actual chance of being subjected to labour market controls, underlining the discouraging effect of controls and fines. This is also substantiated by the fact that the percentage of repeat offenders has been dropping, especially since the introduction of the administrative fine. So there are both indications that some employers remain incorrigible (and undeputable), as well as indications that other employers can be discouraged into compliance with labour laws.

3.5 Exclusion through documentation

Exclusion *through* documentation requires roughly the same 'infrastructure' as is used for policies operating under the logic of exclusion *from* documentation that was described in the previous paragraph. It is a shift of goals, methods and procedures rather than means. The

focus of interagency cooperation and control authorities should tilt towards the irregular migrant himself, instead of a dominant focus on the employer. Obviously, since the two logics of exclusion use the same 'infrastructure' they are not mutually exclusive. More than that, in an 'ideal world of policy efficiency' they are mutually reinforcing: employers are sanctioned and irregular migrants are apprehended and returned to their country of origin. Both goals can be achieved in a single worksite control, but they do require a different approach towards detection, documentation and identification as well as a different deployment of manpower and resources. The intensifications in the labour market control regime and the increasing political attention for the phenomenon of irregular migrants and irregular migrant labour that is apparent in both countries, would suggest that this second 'layer' of the control regime aimed at the irregular migrants also comes to the fore. Two interrelated phenomena take up centre stage in this second logic. In the first place, *identification* becomes even more important than in the first logic. Irregular migrants have to be recognised first as irregular migrants, and then later on have to be (re)identified and connected to their legal identity and their country of origin. Secondly, the need for identification almost automatically increases the role and importance of the deployment of modern identification techniques such as database technology.

The paragraph on 'exclusion through documentation' is divided into two sections, corresponding to the analytical framework in table 3.1. Paragraph 3.5.1 deals with deputation and databases and paragraph 3.5.2 with control and punishment.

3.5.1 Deputation and databases

Under the second logic, identification becomes the goal for the databases and database technology. It is no longer sufficient to establish that a certain worker is an irregular migrant worker who should be excluded from the labour market. Instead, identification should be geared towards revealing the identity of an irregular migrant with a view to later expulsion and return policies (see chapter 4). In other words; the authorities at work in the field of labour market regulation would be required to look further than the labour market itself and place their control efforts in the service of direct control on irregular residence and even expulsion policies. Obviously, that would not only mean a shift in working procedures (and legal requirements) but also in the mental map of the professionals working in the field of labour market fraud. Previous experiences in the Netherlands with a similar shift - when the introduction of the Linking Act in 1998 required various authorities in education and housing to act as gatekeepers and executors of exclusionary policies towards irregular migrants - showed mixed results (Van der Leun 2003). Some authorities readily took up their new gate keeping functions, while other professions dealt with it in a more 'flexible' manner and

moulded the requirements to fit in with their own professional standards. Deputation in the case of exclusion through documentation is primarily aimed at the authorities of the state itself. Unlike the previous paragraph, this paragraph therefore mainly deals with internal reorganization, within and between various agencies. One reason for this is that all policies to do with apprehension, incarceration and expulsion are at their very core only within the jurisdiction of the state itself. Deputizing private individuals, private organisations or even semi-public organisation on these issues is politically and legally impractical or even impossible[13]. A second reason is the fact that not all government authorities are necessarily responsive to the needs and demands of the central government. They have institutional practices and interests, standard operating procedures and they mostly regard their tasks from the perspective of their core business, which, in this case, is the fight against labour market fraud.

In the Netherlands 'identification' has become a central notion in many government policies. Labour market (fraud) policies are no different. After all, one of the main routes to work for irregular migrants is to appear legal which is often achieved by using false papers or by illegitimately using legal papers that do not belong to the migrant in question (Broeders & Engbersen 2007). Against the backdrop of an increasingly strict control regime, the importance of obtaining false papers or buying or borrowing of legitimate documentation – sometimes known as look-alike fraud - have become (even more) important strategies to keep the door to the labour market open. The Dutch government has responded in kind: identity management and identity fraud have become household policy concepts. According to Prins & De Vries (2003) policies relating to 'immigration' and 'security' are two of the main accelerators for the development of system of digital identification, i.e. controlling and verifying identities by means of database systems and/or other technical means. Indeed, the proliferation of identity related databases that have been created in the field of labour market fraud, or other databases that can be useful to labour market inspectors, has steadily grown. The state department is developing a Document Information System Civil Status, a database containing the document characteristics and markers needed for the authentification of foreign passports and ID's that will be accessible for various authorities. The SIOD has created an 'identity expertise centre' (De Vries et al. 2007: 64-66). Furthermore, the police use a Verification and Information System that stores the numbers of all lost and stolen passports (Barensen & Eijkelenboom 2006), which may help in the matter of fraudulent use of non-falsified documents. Look-alike fraud, that uses legal documents, is one of the reasons

[13] There are of course exceptions, especially private carriers, such as airlines and shipping companies, have been deputized on at least two counts: checking documents and refusing passengers if they are found lacking (an immigration task) and transporting irregular migrants back to their countries of origin (expulsion policies).

that the Dutch authorities are increasingly looking into the possibilities to include biometric features into identification documents. If a person is linked to his identity document by means of a fingerprint, look-alike fraud will be detected and proven more easily in the case of direct controls. The police also maintain a register of all aliens in the Netherlands, which used to be called the Aliens Administrative System (*Vreemdelingen Adminstratie systeem*-VAS) and is now part of a more comprehensive police database, the *Politie Suite Handhaving* (PSH – V). More in general, politicians are eagerly looking into database technology as a new instrument in the fight against identity fraud and irregular migrant labour. In 2004 both the Dutch Minister for Justice and the Dutch Minster for Aliens affairs and Integration stressed the need to connect databases and to facilitate the exchange of information between several authorities in order to fight identity fraud en counter irregular migrant employment.

As was already indicated in the previous paragraph, the German authorities responsible for counteracting illegal employment are perhaps even more geared to information exchange than the Dutch (Sinn et al. 2005). In addition to the 'filtering out' of irregular migrants on the basis of information exchange, the German authorities are also increasingly investing in systems that can establish identities. For a long time, all foreigners are registered in the Central Aliens Register (*Ausländer Zentral Register* – AZR). This database contains personal information on all foreigners in Germany, who are officially registered or whom the police investigated, who have been apprehended or who have been repatriated. The catalogue of data registered in this database has gradually expanded. For example in 2002, information on issued and rejected visa has been added (Sinn et al. 2005: 43). The foreign-resident authorities, the Federal Border Police (*Bundesgrenzschutz* - BGS), the Federal Office of Criminal Investigation (*Bundeskriminalamt* – BKA) and the police departments of the *Länder* have access to this database. If an irregular migrant is an asylum seeker, or has applied for asylum in the past, he might be traced through his fingerprint, which would be registered in the AFIS system of the BKA. In 2005 a 'lost papers' database was set up within the Federal Administration Office, registering lost and found identification documents that belonged to nationals of third countries requiring a visa and that were issued by foreign authorities (Sinn et al. 2005). These data might be used to counter (look-alike) identity fraud and determine the identity or citizenship of a foreigner and thus facilitating the implementation of repatriation later.

However, the actual use of these systems in many cases still seems to confirm the (first) logic of exclusion from documentation, rather than the second. As far as can be deduced from the available literature the data systems are used to detect fraud and block access to the labour market, rather than using them in a more investigative way to detect irregular migrants with

the aim of transferring data to the immigration and police authorities, potentially and ultimately leading to arrest and expulsion. If anything, the flow of data seems to be more in the direction of the labour market authorities than in the direction of the immigration and police authorities. This suggests that the controls mainly target employers and exclude irregular migrant workers, rather than result in the apprehension of irregular migrants with a view to expulsion. Furthermore, in a number of cases, access is restricted to immigration and police authorities because of the nature of the data. This makes deputation of labour market officials at the level of data-exchange more difficult and the exchange of information more 'one-sided'. There is of course data-exchange at a more general level, in the form of inter-agency workgroups that gather and discuss information to make controls more specific and effective. The Dutch white paper on Irregular Migrants (2004) did include a proposal for the direct deputation of labour market inspectors in matters of identification. However, this proposal to give labour market inspectors the authority to conduct identification investigations was dropped in favour of making it a punishable offence for employers not to cooperate in establishing the identity of an employee (Minster voor Vreemdelingenzaken en Integratie 2005: 9). The government apparently saw a greater advantage in deputizing employers, who can be severely fined, than in widening the investigative duties of the Labour Inspectorate. In sum, deputation in data-exchange is limited in the sense that Labour inspectors can only be deputised to a certain extent. However, the policing competences of the German Customs inspectors are an example of the mixing the two functions of policing and labour market controls to an extent much further than what was even proposed in the Netherlands. In connection to illegal employment the German inspectors have the authority to establish identities, conduct interrogations, confiscate evidence and to search and arrest suspects. An entirely different level of deputation altogether.

When targeting irregular migrants themselves, deputation and databases are very much entwined with controls. The (electronic) resources for identification are of more interest when an irregular migrant has been apprehended and identification is needed to detain and/or expel him. Under the logic of 'exclusion through documentation' controls are important, but only if they (also) lead to the arrest of irregular migrants, rather than the fining of employers. If the authority to apprehend irregular migrants cannot be transferred, then the police authorities must cooperate closely with the labour inspection.

3.5.2 Control and punishment

When the authorities fix their eyes on the irregular migrant the height of the fines becomes of lesser importance. Fines can be of importance for migrants who do not have a work permit but do have a legal status of residence. It might deter them from working irregularly again.

But if an irregular migrant worker does not have a valid residence permit the 'logical' thing to do from a state perspective is to detain, identify and expel them. That is, for a government that seriously places 'irregular resident migrants' as a policy problem at the same levels as labour market fraud. Legally speaking this was always the logical thing to do, but there are many indications that the police did not see irregular residence as an important priority for a long time (Engbersen et al. 1999; Van der Leun 2003). This was the case for both the 'normal' police surveillance, in which irregular migrants were not considered a priority, as well as for the assistance that the police gave to labour market inspections. In Germany, irregular residence is a criminal offence and is therefore officially a priority. How this translates in day to day practice is however unclear (see also chapter 4). However, since successive Dutch and German governments have tagged irregular residence and irregular migrant labour as a significant problem the pressure from the central government on agencies such as the Labour Inspectorate, local authorities and the police has been mounting. In part this can be seen in the changes that have been implemented in Dutch and German policing in general and the developments within the aliens police more specifically. This will be dealt with in chapter 4. It can also be seen from the involvement of the police in labour market controls. Since labour market inspectors lack the authority to deal with irregular residence, irregular migrants can only be dealt with if they are transferred to the police or immigration authorities, or if the police are participating in the controls. In other words, labour market controls would have to become part of a chain of control, starting at detection at the workplace and leading ultimately to expulsion.

In the Netherlands the political pressure on the police, and especially the Aliens Police, or Aliens Department as they were previously known, to actively deal with the irregular migrant population has increased since the early 1990s (Engbersen et al. 1999; Engbersen et al. 2002). The 2004 White paper on Irregular Migrants explicitly announces the intensification of joint controls by the (aliens) police and the labour inspectorate. The underlying goal is to increase the number of expulsions as a result of the joint controls (Minister voor Vreemdelingenzaken en Integratie 2004: 23). This would imply that police involvement in labour market controls has been rising since then. Again the available data make it difficult to get a good impression of the development in police controls on the labour market. Engbersen et al. (2002: 30) pointed out that the registrations in the Aliens Administrative Register (VAS) do not systematically differentiate between irregular resident migrants that were apprehended during a labour market control or as the result of any other form of police control. Many of those found working illegally, have been entered into the system as irregular resident migrants, i.e. in breach of the Aliens law, rather than in breach of the Aliens Employment Act (WAV). Their analysis of the VAS-data for the years 1997-2000 even show a

decline of the number of apprehensions under the Aliens Employment Act, dropping from 2,1 per cent to 1,0 per cent of all apprehensions (ibid: 32). A later analysis of VAS-data stretching to 2003 confirms this trend, with labour market related apprehensions hovering around 1 per cent (Leerkes et al. 2004: 224-5). The 'real' number of labour market apprehensions is anywhere between the 1 per cent that is registered and the unknown percentage that may be hidden in the figures registered under breaches of the Aliens Act. It is however noteworthy that the authorities apparently do not feel the need or the political pressure to register these figures more accurately. If we assume that at least a number of irregular migrants apprehended during a labour market control are not accurately registered, we should turn to other data that may give some insight into the matter. One could for example look at the activities of the Westland Intervention Team. Their year report on 2003 – the most recent that has been published! – suggests an intensification of joint controls by the Labour Inspectorate and the police. The number of so-called 'A-controls' in which the police participated rose to 15 per cent of all WIT controls in 2003, which is still a very modest percentage, especially given the reputation of the Westland. The report notes that these A-controls are far more effective in terms of detecting and prosecuting cases of violating the Aliens Employment Act. They calculate that the chance of getting caught is 6.5 times higher for employers and employees than in the case of B-controls, in which the police does not participate[14]. The main reason for this is that the participation of the aliens police makes it possible to identify nearly all of the migrant workers. During the A-controls 760 employees were checked, of which 161 were found to be irregular resident migrants. The Aliens police reports that 82 per cent of these irregular migrants have been effectively expelled, 16 per cent has been 'discharged' (*heengezonden*) and 4 per cent was still in detention by the time the year report was published (Westland Interventie Team 2003: 11). Interestingly, the report notes a decline in the number of apprehended irregular migrants when compared to 2002, but attributes this to the fact that in 2003 they controlled smaller firms. All in all, there seems to be only scattered information that does not add up to a clear picture of whether joint checks are increasing and to what effect. For example, an evaluation report on labour market controls in agri- and horticulture (excluding the WIT controls) reports an increase in joint controls from 2002 to 2005, but a drop in 2006 that takes the percentage below that of 2002 (41 per cent in 2006, 46 per cent in 2002). Also, between 2002 and 2006 the number of apprehended illegally resident aliens drops from 315 in 2002 to 76 in 2006. This report does point to the fact that the results of the WIT in the same period (which have not been published), show an entirely opposite picture (Arbeidsinspectie 2007b).

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[14] The increased effectiveness is of course also likely to be the result of a selection effect: the police will be asked to participate in those controls where the labour market authorities expect the largest groups of irregular migrant workers.

In Germany the situation is similar to that of the Netherlands. The political pressure to do something about irregular migrant employment and irregular residence is evident, but there is little evidence available to pinpoint the exact developments in practice. As in the Dutch case, the police statistics of the Bundeskriminalamt (BKA) do not differentiate between irregular migrants who have been apprehended on the basis of violating the labour laws and those apprehended for violating the residence laws. Police statistics for 2006 list 92.633 suspects for offences against the residence law, asylum law and EU rules for free movement. When this is combined with the statistics for the number of irregular migrants among all non-German suspects, of which there were 64.605 in 2006, the number of irregular migrants apprehended for violations of the labour laws drop well below this last figure (as irregular migrants can obviously be suspects in various crimes and misdemeanours other than the violation of residence laws). To be more precise, the number of irregular migrants apprehended for violating the residence laws in terms of illegal residence (*illegaler aufenthalt*) stood at 40.424 and there were an additional 12.642 'other' breaches of the residence laws[15]. There is also an indication of 'offences connected to irregular migrant labour' but the numbers are so low (369) that they most likely relate to the bigger cases of labour market fraud. Moreover, the suspects are more likely to be employers than employees (Bundeskriminalamt 2007: 108, 110, 116). Both in Germany and the Netherlands, the registration of irregular migrants apprehended during work site controls seems flawed. There are indications that they are not separately listed and are thus 'hidden' within the larger statistical category of those apprehended for being 'irregular residents'. However, that leaves the size of their relative share in the total of apprehensions wide open to debate: it could mask small numbers or it could mask larger numbers. Some of the scattered indications found, suggest that the numbers may be – 'disappointingly' - low, especially against the background of an unmistakable political pressure to increase the number of apprehensions. A more sophisticated registration in order to gain insight in the increase or decrease of apprehended irregular migrant workers over the years has however not been implemented by the authorities, nor demanded by politicians. Apparently it is not considered a priority.

The proxy of police involvement in labour market controls, as an indication of turning towards the second logic of exclusion, is not a very easy one in Germany either. A distinction has to made between the legal framework and practice before and after the new law on irregular migrant labour. Stobbe (2004: 100-102) maintains that until the early 1990s the legal framework in Germany was primarily aimed at the regulation of the labour market. Its

[15] There may be overlap in these figures as the statistics count offences rather than individual persons.

contribution to migration control came second. The labour market inspectors did not prosecute irregular migrants themselves; they left this to the police and immigration authorities with whom they cooperated. Especially when the labour agencies suspected the presence of irregular migrants at a certain worksite, the police were called in to 'surround' the worksite and to arrest irregular migrants if necessary and immigration officials were called in to do the document checks. In short, labour markets inspectors required police assistance to deal with irregular migrants themselves in terms of identifying and apprehending them. However, no figures are available. Since 1998 customs officers have the competences of police officers when it comes to irregular migrant labour and since 2004 the customs officers are solely responsible for labour market controls and have seen their ranks swelling. These competences include establishing identities and taking irregular migrants into preliminary custody. In short, the customs authorities have no need for police assistance anymore.

There is no central record of the number of apprehensions resulting from these labour market controls. Given the steep increase in the number of inspectors and inspections and the police-like competences of the inspectors, one would expect an increase in the number of irregular migrant labourers that were caught and arrested. A report on the 'fight against undeclared labour in 2004-2005' by the Senate[16] of the *Land* Berlin however, gives different indications. Despite the fact that Berlin was and is a traditional hotbed of irregular migrant labour – especially in construction – the numbers of apprehended irregular migrants have been dropping from 1.340 persons in 2000 to 404 in 2004. There is a number of reasons for this drop in the figures. The first is the fact that the apprehensions and procedures that result from the controls of the Customs officers are not entered into the statistics of the police and are hence missing from these data. Another reason is that the EU free movement of workers now covers Polish workers, who accounted for much of the irregular migrants in previous years (Senatsverwaltung für Wirtschaft, Arbeit und Frauen 2005: 20-21). The relation between the statistics of the Customs offices and the police data is somewhat unclear and is further hampered by the fact that there are no reports of the Berlin Customs offices that contain statistics. A year report of the Bavarian Customs authorities, containing facts and figures on the activities of the Bavarian branch of the *Finanzkontrolle schwarzarbeit*, also lacks figures on what happens to irregular migrants detected during their controls (Oberfinanzdirektion Nürnberg 2007).

16 In Berlin, one of three German city state *Bundesländer*, the Senate is the executive body, or government, of the state.

3.6 Conclusions

Evaluating these policy developments in Germany and the Netherlands is not a straightforward affair. Conclusions may be drawn on three different levels: the political level, the policy level and the level of the execution of policy. Descending further to the level of daily practice information becomes scarcer and it is less easy to determine its value and validity for the processes this chapter aims to describe. The best that can be obtained from the facts and figures gathered in this chapter are indications for a number of developments, some indications more firm than others. The general trend for labour market controls with a view to irregular migrants workers for both countries is neatly summed up in Dita Vogel's characterization 'higher, faster, more'. An added characterization of my own in reference to the quality of the data could be 'Dancing in the dark to faster music'. The speed of the music definitely has effects on both the controllers and the controlled, but the darkness makes it difficult to be very specific.

That being said, a number of observations and indications do stand out. The first being the fact that the two countries are strikingly similar in the policy choices they make at a general level. At the political level there is a marked trend to intensify policies that are aimed at blocking irregular migrants' access to the labour market (policies following the first logic of exclusion) and a more reserved trend towards incorporating the second logic of exclusion, aimed at the irregular migrant himself, into the labour market control system. In the Netherlands the government seems more explicit in its stated aim to target the irregular migrant himself. Both trends are characterized by an increasing use of database technology and the creation and refinements of digital boundaries: more registration is combined with networked registration. For policies aimed at the irregular migrant himself this trend is especially apparent in the heavy investment in new databases aimed at identification, identity fraud and the establishing the authenticity of documents and identities. Blocking access has also increasingly shifted 'out of the state' in more recent years; deputation of employers and enlisting the help of the general public to get information and tips have become popular choices in policy development.

At the level of policy itself, one might say that both governments have put their money where their mouth is. Measured in terms of funding and staffing, the Dutch and German labour market control agencies have definitely been on the receiving end of government spending. These intensifications have resulted in more controls and more fines. Furthermore, both countries have invested in making the control regime more precise in terms of directing attention to those sectors in which irregular migrant labour is commonplace. Again, the biggest steps have been taken in strengthening the control regime aimed at blocking access to

the labour market. The main emphasis is on the demand side of irregular (migrant) labour and hence on employers. When it comes to the second logic of exclusion it becomes more difficult to see if, where and how the political priorities are translated into policy. Identification has become a more central feature of the control system. In the Netherlands the police are (supposed to be) more involved in the labour market control regime and in Germany the Customs authorities – solely responsible for labour market controls since 2004 - have been 'fully deputized' and now have police-like duties and competences. How this translates into a control regime that functions along the lines of the second logic of exclusion, and thus aimed at the irregular migrant, his apprehension and ultimately expulsion, is hard to tell as the data are either missing or 'misty' at best.

As usual, the level of the daily practice of labour market controls is the most difficult level to get a clear view of. Here, an interesting paradox evolves. The first logic is primarily aimed at discouragement and blocking access, both phenomena that are difficult to measure as the 'discouraged' can't be listed or counted. Yet most of the statistical information available is only able to provide indications for the first logic. The second logic is aimed at apprehension and detention, i.e. of entering a subject *into* the state apparatus (instead of shutting him out), yet the data on this category are by and large missing, or not adequately registered. It is therefore impossible to distinguish between irregular migrants apprehended during worksite controls and those apprehended during the course of some other form of control. Neither the size of the group of apprehended irregular migrants workers, nor the development of the size over time can be accurately determined, thus making any comment on 'effectiveness' impossible. It seems reasonable to assume that the control regime targets the individual irregular migrant now more than it did in the past as a result of the steadily mounting political pressure in recent years and the investments in identification procedures and databases. But to what extent is impossible to say as the numbers are simply not gathered and calculated. The following chapter on detention and expulsion may provide more insight into this matter. This lack of reliable data means that governments themselves are 'dancing in the dark' even though they are bound to have more information than is out in the open. The fact that these data are not gathered and/or made public may indicate any of a number of things ranging from disappointing results to priorities at the level of implementation differing sharply from national political priorities to rising apprehensions hidden within a larger category of apprehended irregular migrants. However, it also means that scientists, journalist and parliament for that matter, have no way of evaluating the control system and the recent changes in its operation in any real, empirical sense.

What do these developments in policymaking – with all the restrictions on the interpretation thereof mentioned above – amount to in terms of the Dutch and German political economies? How can we theoretically typify the Dutch and German welfare states in terms of the relation between state, market and irregular migrant labour? The neo-Marxist theorem that irregular migrants are a 'new reserve army of workers' can be rejected. The investment in legislation, manpower and resources are simply too substantial. If anything, these policy programmes of restriction point away from the idea of governments providing the market with cheap and docile labour. 'Government' is not the footman of 'business' in this respect.

Segmented labour market theory however, holds more than a little sway. Irregular migrant workers are found in specific sectors of the economy and there are some indications that governments have turned a blind eye in some cases (Berlin construction during the 'boom') and also the new guest worker schemes indicate a willingness to cater to needs of the (segmented) labour market. Furthermore, there are notorious 'white spots' where the authorities cannot and/or will not intervene with controls. Governments are restricted as well as reluctant to control private households, thereby de facto consenting to widespread fraudulent domestic work, including domestic work by irregular migrant workers. Needless to say this lack of control also places domestic workers in a vulnerable position in a potentially exploitative environment. In short, there is segmentation in the Dutch and German labour market of which governments are fully aware, but which is nonetheless left alone as a result of political choices and/or restrictions in capacity. But where the authorities do target known 'hotbeds' of irregular migrant the Dutch and German governments cannot be said to be helpful or even conveniently 'uninvolved' towards these sectors. Controls are most intense, and increasingly so, in those parts of the economy that are well known for labour market fraud and irregular migrant labour. The stated aim of these control policies is the reduction of irregular migrant labour as far as possible. An interesting witness of this phenomenon is the category of the 'undocumented unemployed' that emerged from fieldwork among undocumented migrants in the Netherlands in the 1990s (Burgers & Engbersen 1999). Roughly a third of the interviewed undocumented aliens were unemployed, and since that time the intensity of the control regime has been pushed up further. The fact that the greenhouses of the Westland region are still, and incorrigibly, in need of irregular migrant labour indicates segmentation, but the control regime does not indicate sympathy or benevolence towards its employers. There is not much pressure on government from these sectors of the economy, if anything there is political pressure on employers. Neither the Dutch nor the German government is likely to get itself into trouble by actively addressing these parts of the labour market. GNP simply does not depend on it and firm policies are more likely to create political capital with the electorate, than they cost in terms of 'economic'

loss. Policy gaps are hardly the result of active lobbies on the state. Nonetheless, in spite of intensifications in funding and manpower, policy gaps and a degree of segmentation cannot be avoided. Governments and agencies select the sectors they prioritize for control, and by default they de-prioritize other sectors. Sometimes they even skip whole sectors of the economy, such as domestic work, that are notorious hotbeds for labour market fraud and irregular (migrant) labour due to political and legal restraints. But the most dominant constraint remains a matter of capacity: there are simply too many companies to control. When the EU proposed a framework policy against employers of irregular migrants in 2007, it aimed for the control of 10 per cent of all registered companies in each member state, even though the Commission's own assessment indicated that only 2 per cent were being controlled at the time (Carrera & Guild 2007: 5). According to a covering note on this proposal by the Foreign Ministry to the Dutch parliament, reaching the target of 10 per cent would require an increase in staff from the current 180 to 930 inspectors (Ministerie van Buitenlandse Zaken 2007). Perhaps unsurprisingly the Dutch government opposed the 10 per cent target. White spots are therefore inevitable and we may conclude that while segmentation is not the intention of policy, some foreseeable segmentation may well result from it, or in some cases simply cannot be avoided.

4 POLICE SURVEILLANCE, DETENTION AND EXPULSION

4.1 Introduction

On entering the domain of police surveillance, detention and expulsion we increasingly enter the domain of the coercive state. At least in theory, exclusion here means exclusion from the state altogether: first removal from society (through arrest and detention) and ultimately removal from the national territory (through detention and expulsion). States that genuinely invest in expulsion policies will have to organize a chain approach of police surveillance, detention and expulsion. Or at least, that is what logic would dictate. The closer organizations are to the actual expulsion, the more dominant the organizational logic of exclusion becomes. In the 'chain' of government agencies that is central to this chapter, competing interests and demands gradually lessen and make place for what might be called 'organizational single-mindedness'. The police have ample room to maneuver between the various political demands and societal claims on their organization. In the past the Dutch police have always adhered to their own interpretation of the political demands for the control on irregular migrants (Engbersen et al. 1999, Van der Leun 2003), often favoring community relations over migration control. The next link in the chain, the detention of irregular migrants, is much more singular in its task of exclusion. Immigrant detention centers have and need less room than the police to deviate from their task of 'detaining immigrants'. The fact that immigrant detention is usually separate from the normal prison regime, where return to society plays a role in the day to day regime, makes it even more singularly oriented on societal exclusion. The same can be said for the last part of this chain of exclusion: those parts of the immigration authorities that are charged with the expulsion of illegal aliens have a clear agenda that does not leave much room for weighing off different options against each other. Exclusion, in the most definite sense, defines their organizational rationale.

Obviously, the surveillance, detention and removal of illegal aliens are not phenomena without historical precedent. States, and before the advent of the nation state, cities, have always differentiated between various groups within their territory and have controlled, detained and removed those elements that were considered criminal, dangerous or simply 'alien' to the socio-political body (Morris & Rothman 1998, Matthews 2005). Illegal aliens now figure as a present day incarnation of the vagrant and the vagabond. However, some other things have changed over time. Expulsion in modern constitutional states is not simply within the full discretion of the state executive. Expulsion policies are embedded in a legal and societal framework and an international legal environment that restrict the possibilities for expulsion policies. National legal frameworks bind the executive's discretion in a direct way, while societal resistance against expulsion policies, invoking vivid images of

deportations, mass expulsion and population transfers in the past, may shame governments into inaction (Walters 2002). Other practical and important restraints are the costs and the heavy drain on other government resources such as detention capacity and personnel. Or as Noll (1999: 269) puts it, forced returns come with 'high economic, political and psychological costs'. Despite the contested nature of police surveillance, detention and expulsion and the heavy practical and financial costs, these policies do seem to be on the rise in many EU member states, not in the least in Germany and the Netherlands. 'Unwanted', irregular migrants are increasingly subjected to detention regimes and the efforts to expel them have become a political priority. Even though expulsion remains in essence a 'solution of last resort' it has in recent years come to be regarded and treated as the indispensable closing section of any serious immigration policy. In the Dutch white paper on return it is even stated that 'return policy should not be the closing section but rather an integral part of immigration policy itself' (Minister van Vreemdelingenzaken en Integratie 2003: 5). And even though voluntary return is the preferred option in both the Netherlands and Germany, the 'use of forced returns cannot be missed' as it is phrased by the German Ministry of the Interior (Bundesminsterium des Innern 2008: 154). This raises the question why and to what extent Germany and the Netherlands are intensifying the implementation of their expulsion policies. How serious are these political wishes and how are they translated into policies of practical implementation? If both the domestic and foreign obstacles are high, what underlies the determination to see these policies through?

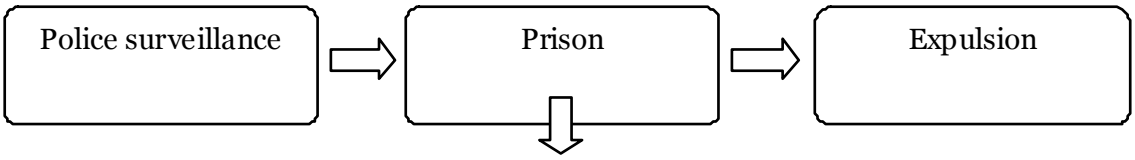
There are two interesting theoretical takes on the issue of police surveillance and detention and to a lesser extent on expulsion. Migration control literature, as also discussed in chapter two, offers explanations for the intensification of these policies, while the criminological theory on the 'new penology' offers some alternative lines of thought explaining especially the intensifications in immigrant policing and detention. The theoretical framework for this chapter will be elaborated on in paragraph 4.2. The paragraphs 4.3, 4.4 and 4.5 will deal with the policy developments and implementation in Germany and the Netherlands for respectively police surveillance on irregular migrants, immigrant detention and expulsion policy. Paragraph 4.6 will draw some conclusions.

4.2 Internal surveillance: the state in control and/or the penal state in action?

Theoretically, police surveillance and detention take us into the world of 'crime and punishment' and raises criminological perspectives. To a certain extent this is strange. In the Netherlands irregular residence is not a criminal offence, and therefore not punishable by criminal law. In Germany it is a criminal offence though it is seldom punished under criminal law. Detention of irregular migrants is usually administrative detention and the goal is not to

punish migrants with a prison sentence or fine for their irregular stay, but to prepare (them) for expulsion. Yet, in terms of explanations for the increase of the internal migration control by the police and the increase in the use of immigrant detention, it is especially criminological theory that seeks to explain these phenomena. The theories on the 'new penology' and the 'new punitiveness' put forward explanations and expectations on the increase of control and surveillance and on the spread and evolvement of detention regimes. In this chapter these theories are applied to the specific case of internal migration control on irregular migrants which sometimes requires some adaptation of the original insights that were not always concerned with irregular migrants. Moreover, this criminological theory is less concerned with the issue of the intensification of expulsion policies. The issue of expulsion, together with policing and detention, is also a matter of migration control theory, which – in a nutshell – expects governments to try to close the policy gaps in immigration policy even at high costs in order to increase their grip on immigration flows. Expulsion is also an issue for political theory on interstate relations. A number of authors have placed the issue of expulsion at the transnational level, invoking questions of citizenship, statelessness and international relations between states.

Prison plays a central role in this chapter, both 'theoretically' and 'empirically'. It is the central link in the chain that starts with the apprehension of irregular migrants and ends in either their expulsion or their return to the streets and their life in irregularity.



Police surveillance can only lead to expulsion if there is enough capacity in detention facilities for the irregular migrants that are apprehended by the police. Detention can only lead to expulsion if all the necessary preparations for expulsion are facilitated and made during the time in detention. The detention regime regulates the inflow of irregular migrants through capacity and to some extent also regulates the outflow by arranging the conditions for expulsion. If not, detention will interrupt an irregular migrant's residence but not end it.

4.2.1 Police surveillance

The ongoing criminological debates about the 'new penology' and the 'new punitiveness' provide a theoretical background for the developments in the policing and imprisonment of irregular migrants. Feely & Simon have coined the concept of the 'new penology' in 1992.

According to them "(…) the new penology is markedly less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather, it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness. The task is managerial, not transformative" (Feely & Simon 1992: 452). In the new penology the emphasis is on actuarial policies that are instrumentalized by 'aggregate classification systems for purposes of surveillance, confinement and control'. In short, the penal system becomes a system of control that manages 'dangerous' populations, while ideas of rehabilitation and correction are left behind. "In particular, the emergence of what is seen as a permanently marginal and, thus, irredeemably dangerous segment of the population – the so-called 'underclass' – calls for their control and containment, while rendering any prospect of treatment and integration futile" (Cheliotis 2006: 315). The goal of policy programs characterized by a 'new penology logic' is not so much to eliminate crime, but rather to make it tolerable through systemic coordination (Feely & Simon 1992: 455).

One of the main *indicators* of the existence of this 'new penology' are the rising incarceration figures in western countries; first and foremost in the USA but increasingly in Western Europe as well. Moreover, this 'dangerous underclass' that is managed through detention is increasingly a 'colored underclass', consisting of African Americans in the USA and of immigrants and irregular migrants in the EU (see the next paragraph). However, the new penology also influences the police, who are obviously one of the prime actors in the control and management of 'the underclass', and are responsible for the 'supply' of detainees. The main tasks of the police are to secure and maintain the legal and social order. A general feeling of insecurity and fear of an underclass will increase popular and political demands on the police to provide security and to keep the streets safe. This culture of fear and insecurity, that underlies the 'new penology', is said by a number of authors to thrive on the political dominance of neo-liberalism, which is obsessed with insecurity and the search for policies to address the (presumed) sources of this societal fear (Ericson 2007, Reiner 2007, Wacquant 2001b). Ericson (2007) claims that this broad current of societal and political insecurity fuels the production of new measures and laws that criminalize all kinds of potential sources of harm and insecurity. It does so through two mechanisms. The first is the introduction of "counter law". These are laws that are invented to "(…) erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of preempting imagined sources of harm (Ericsson 2007: 24). This counter law also involves efforts to blur the traditional distinctions between the legal forms of criminal, civil and administrative law. Ericson's second principle is that of the "surveillant assemblage", in which new surveillance infrastructures are developed and new uses of existing surveillance networks are extended that also erode or eliminate traditional standards and procedures of criminal law.

The police are adapting to these changing circumstances. Sheptycki (2007: 490) states that the police have undergone a number of transformations. Policing institutions have been changing in response to new transnational policies, the effects of the information technology revolution, and by the spread of neoliberalism. In other words, international events and transnational crime - such as terrorism, international drugs trafficking and irregular migration – lie at the roots of contemporary insecurity and fear (see also Bauman 2009). International policy responses to these phenomena influence the tasks and possibilities of police organizations. Neoliberal obsessions with insecurity have increased the demand on the police to deal with insecurity, while the spread of information technology has pushed technology to the fore as the new prime instrument of control and the management of 'dangerous populations'. A surveillance assemblage is being developed that is also aimed at irregular migrants, as this group is part and parcel of the new underclass (Engbersen 1999). Moreover, irregular migrants constitute a group that is both local in its presence and global in its origin. The internal control on this 'glocal' underclass of irregular migrants will depend heavily on the capacity of modern database technology to link (inter)national data sources, especially when the police are pursuing policies that are ultimately meant to lead to expulsion. Linking anonymous irregular migrants in Germany and the Netherlands back to legal identities in countries of origin worldwide requires a new scale and scope of data gathering. However, the widespread use of ICT in police organizations also carries the risk of what Sheptycki calls '*compulsive data demand*', meaning that these organizations have an insatiable thirst for information, resulting in a 'volume of data so great that trying to analyze it has been likened to 'drinking from a fire hose' (Sheptycki 2007: 495).

A 'new penal' perspective on the police surveillance on irregular migrants differs from a perspective of migration control. A new penal approach to irregular migrants is likely to favor control on criminal and troublemaking irregular migrants combined with a detention regime that is primarily aimed at keeping them off the streets. Policies for either their return to society or their country of origin would not be considered a priority, similar to the devaluation of rehabilitative programs for the normal prison regime. Expulsion is likely to be limited, perhaps confined to the return of criminal (legal and illegal) migrants. Furthermore, the arrests themselves would probably suffice for the statistical indicators that have to be met. Migration control theory, on the other hand, would consider expulsion a logical aim for government to strive for as it is the ultimate indication of government's control of migration flows. The police would then be the first shackle of a chain approach of both control and information between various agencies. Identification of irregular migrants, without which expulsion is impossible, is a task that requires various sources of information, the gathering

and processing of which usually lies between the police, detention and immigration authorities. Identification with a view to 'detecting' and arresting irregular migrants is primarily within the domain of police surveillance, identification with a view to (re-) documenting an irregular migrant in order to expel him often takes place within the walls of a police station, detention centre or prison.

4.2.2 Prison

One of the crucial questions – in view of the two logics of exclusion used in this book - is about the nature of immigrant detention in Germany and the Netherlands. The answer to that question depends (1) on the policy goals that underlie immigrant detention and (2) the seriousness with which these goals are pursued in day to day practice. A new penal approach to immigrant detention is more likely to limit itself to a policy goal of exclusion of irregular immigrants from society and its institutions (getting them out of sight and off the streets). Deporting the easy cases would however not be shunned. A migration control perspective would see the prison in a different light and expect a policy approach and practice in which detention is seen as a necessary space of transit in preparation for expulsion. Even though 'giving the impression of control' is not alien to this approach either, one would expect a more serious preoccupation with efforts to close the 'policy gap' in detention and expulsion in order to gain and claim control over migration processes. In the first case, adhering to the first logic of exclusion that merely blocks access to society and societal institutions, detention centers would function as Bauman's (1998) 'factories of exclusion', in which people are 'habituated to their status of the *excluded*'. Detention would only be a deterrent, a harsh and symbolic way of sending the message that 'our' immigration systems are not soft (cf. Walters 2002: 286). On the other hand, if countries like Germany and the Netherlands are implementing policies that adhere to the 'second logic of exclusion', which is under investigation in this book, this would not be enough. The second logic of exclusion requires more of the immigrant detention regime. Prisons and immigrant detention facilities will have to be geared to gathering documentation and information with a view to the identification of irregular migrants, as this is the only way to make expulsion possible. Detention is then truly part of a chain approach running from arrest to the ultimate form of exclusion: expulsion. In short, if the Dutch and German prisons are part of the second logic of exclusion they will have to be operated as *factories of identification*.

The overall rise of the prison population in many western countries has been taken as one of the prime 'icons' of and indicators for the new penology (Feely & Simon 1992). Against a background of popular uncertainty and fear criminologists see governments seeking 'neoliberal' solutions in matters of crime and security. This new approach to control is

predominantly coercive and sees the prison system as a means to control populations, but has lost faith in the notion that prisons can contribute to 'solving' social problems through correction and rehabilitation. Increasingly prisons are governed with an actuarial logic by a new generation of professionals "who are more inclined to talk the language of performance indicators and are perhaps less interested in 'classical' goals of rehabilitation" (Cheliotis 2006: 319). Of course, for irregular migrants, whether they are expelled or simply put back on the street when detention can no longer be (legally) justified, correction and rehabilitation are not relevant options. Governments see no need to rehabilitate those who were not supposed to be there in the first place. Only a doorway to a legal status would be an incentive for such rehabilitative programs, but such opportunities are rare and exceptional in countries such as the Netherlands and Germany.

Turning the focus towards immigrants and detention, various authors stress that the increase in incarceration rates has a distinct colour. Wacquant (1999, 2001a) notes that African-Americans are increasingly overrepresented in the American prison population. According to him this is a deliberate move on the part of the government to control the black underclass in a time when 'traditional' control mechanisms, such as the black ghetto, are no longer able to fulfill that function. Or perhaps more accurately (and dramatically), he sees a 'deadly symbiosis' of the ghetto and the prison: we live in a time when "ghetto and prison meet and mesh" (2001a). In essence Wacquant sees mass- incarceration of African–Americans as the new penal management of poverty, which replaced welfarism as the dominant strategy to deal with the underclass (Matthews 2005: 177). In a comparison of the American and the European prison regimes and the rise in mass–imprisonment on both sides of the Atlantic, Wacquant (1999: 216) notes that "foreigners and quasi-foreigners would be the 'blacks' of Europe". In other words, European prison populations are increasingly made up of non-native inmates with a legal status varying from full citizenship to that of an illegal alien. Those with a legal status tend to be overrepresented within the normal prison system; those without a legal residence are usually incarcerated within their own special 'branch' of the detention regime. There is a specific trend to use the so called administrative detention regime as an instrument of the 'management of unwanted migrants'. Wacquant (1999: 218) notes that in France, and by implication also in wider Europe, there has been a "deliberate choice to repress illegal immigration by means of imprisonment". Weber & Bowling (2004: 206) note a sharp increase in immigration related detention capacity in the UK (see also Gibney & Hansen 2003). And even in the United States, where illegal migration is usually not subject to much *internal* migration control, Inda (2006: 116) notes a 'surge in the numbers of undocumented immigrants incarcerated in county jails, federal prisons and immigration detention centers' (see also Ellermann 2005).

A new penology approach to immigrant detention would imply that irregular migrants are not being held with a view to expulsion per se, but mainly to keep them off the streets. Basically detention would be used to address the visible symptoms of the societal problems that irregular migrants 'cause', but would be less interested in addressing the root causes of the irregular residence itself. The prison system would be used to manage 'irregular migrants' as representatives of a 'dangerous underclass' that society fears and/or does not wish to see. A number of authors seem to detect the logic of the new penology in the practices of (irregular) immigrant detention. For example Boswoth (quoted in Lee 2007: 850) holds that "The point is that prisons and detention centres … are singularly useful in the management of non-citizens because they provide both a physical and a symbolic exclusion zone". Morris and Rothman (1998, again quoted in Lee 2007: 857) maintain that "As such, imprisonment arguably serves the purpose of merely warehousing the unwanted and undeserving poor". If however the state has it aims set on making expulsion policies effective, simply 'warehousing' irregular migrants would be pointless. If migration control is the dominant consideration underlying policy, detention would have to serve different goals. Firstly detention is meant to prevent abscondment and secondly, and most importantly, detention should serve to prepare for expulsion through the identification of irregular migrants and by organizing documentation. Turning irregular migrants back on to the street would have to be considered defeat from the perspective of control; another chapter in the story of states losing control on migration.

When it comes to the imprisonment of (irregular) migrants Wacquant's Prison-Ghetto metaphor is not the only popular metaphor. Agamben's metaphor of the camp, ultimatly referring to the horror of the German death camps, is also often used (Walters 2002, Rajaram & Grundy-Warr 2004, Schinkel forthcoming). To Agamben the camp is the most extreme materialization of the 'state of exception', a place where there is no longer any distinction between law and violence (cf. Walters 2002: 285) and there are no longer any restrictions on the behaviour of the 'sovereign'. The state of exception, of which the camp is the most extreme manifestation, is a situation in which the law is suspended in order to defend the law, or even a situation in which the law is suspended in the name of the law (Andrew 2005: 12). Although there are certainly modern examples of the camp as a manifestation of this extreme state of exception - the American detention regime in Guantanamo Bay[17] is a good fit – it seems a top heavy metaphor for the administrative

[17] Besides the fact that the prisoners in Guantanamo Bay were not held on American soil (and could hence not claim access to the American legal system) it was the legal definition of the prisoners themselves that placed them outside the law. They were neither 'prisoners of war' nor 'criminal suspects', which would have given

detention of irregular migrants. Irregular migrants, though very vulnerable in a legal sense, are certainly not stripped of every right. Human rights, often with a national constitutional translation, and certain procedural rights such as appeal and judicial review may be limited, but are nonetheless real. That does not mean that it should be considered impossible that modern western states might bend the law, choose 'particular' interpretations of the law or even suspend parts of the legal framework in their dealings with irregular migrants. As such, the state of exception is a more interesting notion than that of the camp itself. Especially in its interpretation by Ericson as 'counter law': "Normal legal principles, standards and procedures must be suspended because of a state of emergency, extreme uncertainty, or the threat of catastrophic potential. *The legal order must be broken to save the social order*" (Ericson 2007: 26; emphasis added). Another important reason to entertain the possibility of the use of 'counter law' in the detention of irregular migrants is the fact that the state is dealing with non-citizens that lack a legal immigrant status and are only protected by human rights, international treaties and a limited set of constitutional and procedural rights. Modern liberal states have - also in recent history - tried to limit the legal rights of legal immigrants, changed their legal frameworks to limit access to procedures, rights and institutions for asylum seekers and have in a sense suspended national asylum laws by means of European policy innovations such as the doctrines of 'safe countries of origin' and 'safe third countries', and more recently even 'supersafe third countries'. It should be mentioned here that modern states have also been responsible for extending legal rights and strengthening the position of migrants vis-à-vis the state, in spite of declared political intentions to curtail immigration (see for example Joppke 1998, 1999 and Cornelius et al. 2004). Legal inclusion and legal exclusion of (irregular) migrants are sometimes simultaneous processes and there is pressure on both directions. Either way, it points to the importance of (the lack of) citizenship and legal status, which plays an important role in matters of immigrant expulsion. A lack of proven citizenship, often the result of an irregular migrant destroying, hiding or lying about his or her legal identity, provides protection against expulsion by the state. So naturally, the state tries to limit the possibilities of irregular migrants to obscure their identity (Broeders & Engbersen 2007). Question is how far the state wants to try to bend the law when it comes to detention and expulsion? More specifically, how much 'counter law' or how much of a 'state of exception' will it allow (itself) in dealing with irregular migrants, who are by law the ultimate 'non-citizens'?

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them access to a certain degree of due process and legal protection, but they were named 'enemy combatants', a status beyond the law (Loader & Walker 2007: 89).

4.2.3 Expulsion

If we exclude the odd diplomat that gets sent home every now and then, expulsion in Western Europe is nowadays primarily a matter of immigration policy. Expulsion and return policies target two semi-separate groups: irregular migrants and rejected asylum seekers. These two groups are semi-separate because in the eyes of the law they are both ultimately considered illegal aliens. Expulsion policies have two dimensions. The first is the internal organization of expulsion policies; the second is the external, international dimension, as liberal western states have found there is no such thing as unilateral expulsion in the modern state system. The new penology perspective is largely 'empty-handed' when it comes to expulsion policies. It may account for the deportation of the easy cases, as this is good for the image of control and the production figures – but it would be hard-pressed to find a justification for the insistence on a policy that requires as much effort and resources as expulsion policies do. Migration control theory, on the other hand, focuses on the preoccupation of politicians to (try to) keep migration processes under control and to 'close the gaps' in policy outcomes. High investments to increase the actual expulsion rates are more easily explained from this perspective.

Internally, there is a distinct trend in which governments are increasingly "obsessed with the need to 'tighten up' their deportation and repatriation policies" (Walters 2002: 280). Immigration policies are considered to be 'unfinished' without a serious return policy that sends the message that policies have come full circle. This message of an immigration policy without soft spots is intended for the (would be) migrants and the domestic population alike. In the context of the UK, Gibney & Hansen (2003: 7) speak of a 'removal gap' that according to the British Home secretary undermines public support for asylum policies, and therefore needs to be 'closed'. Policy gaps, according to Cornelius & Tsuda (2004: 5), are usually caused by either unintended policy consequences or result from an inadequate policy implementation. Either way, trying to resolve the problem of a 'removal gap' implies that governments have to look at their own procedures and bureaucratic organizations. The answer[18] to the removal gap lies primarily within the governmental organization itself. In Walter's (2002: 278) view this leads to a process in which states embark on 'governing the governmental system, rather than governing the population in a direct manner'. The government becomes preoccupied with scrutinizing and reforming its own procedures. Reforming the procedures with an eye to expulsion would imply a turn towards 'identification' as a main bureaucratic task. Internally, the detention system will effectively

[18] In Cornelius' & Tsuda's view there can be no real answer to a policy gap. Even though they discuss the policy gap under the heading of "The gap hypothesis", they immediately pose that policy gaps are in reality an

have to function as a factory of identification which can be very difficult as many irregular migrants refuse to cooperate with identification in order to avoid expulsion. Despite the known difficulties and restrictions, governments will embark on this course to prevent being seen as 'soft on migration' or worse, out of control in matters of migration control. Whether or not irregular migrants can be identified, documented and expelled also heavily depends on the external dimension: expulsion requires at least the (minimal) cooperation of another sovereign state.

Deportation then, is a bilateral affair. Or as Walters (2002: 275) puts it: "Modern deportation is both a product of the state system, and [...] one of a number of techniques for the ongoing management of a world population that is divided into states". That makes citizenship a vital marker in the international system "advising state and nonstate agencies of the particular state to which an individual belongs" (Hindess 2000: 1487). However, different states have different interests when it comes to the migration of their own citizens or the citizens of other nations. Sometimes states have good reasons to read the marker right and sometimes there is ample reason to misread it. Effective expulsion policies imply a need to know which country to return a migrant to *and* that this country recognizes the migrant as its own citizen and 'accepts' him back. If irregular migrants who hide their identity are the main obstruction to expulsion policies, then uncooperative or unwilling countries of origin are a very good second. Even though the right to return is a human right enshrined in international law, a right of entry is still something which has to be codified and documented by sovereign states. Returning to China for example, is notoriously difficult because of the highly impractical requirements of passport re-issue, replacement and extension (Liu 2008). Putting political pressure on China to take back its own citizens is even harder. Many countries of origin are reluctant to take back their citizens, often because it is far more interesting for them to have young men and women working elsewhere and sending home remittances than having them (back) home where they have a good chance of being unemployed (Ellermann 2008). That makes expulsion policies also a matter of foreign policy, diplomatic relations and, in the case of Germany and the Netherlands, a matter of multilateral EU foreign policy. At the level of the EU, member states have started some cooperation in matters of expulsion policy and the negotiation of readmission agreements (Cholewinski, 2004; Mitsilegas et al., 2003; Samers, 2004a). It also means that the scale and the dimensions for the surveillance and data gathering needed for the identification of irregular migrants, takes on a multilateral scale. That issue is partly dealt with in this chapter and partly in chapter 5 on the development of EU migration databases.

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empirical fact, as there are no immigration policies that are perfectly implemented or do not have unintended consequences (Cornelius & Tsuda 2004: 4-5).

4.2.4 Factories of identification?

If we combine the insights from the 'new penology' perspective and the migration control thesis with the general framework of the two logics of exclusion of this book, the question basically boils down to this: is the state apparatus of policing, detention and expulsion (beginning to) function as a factory of identification?

The first logic of exclusion concerns itself with shutting off access to societal institutions. Within the new penology this is taken to the extreme and access to society as a whole is cut off by means of imprisonment. Irregular migrants are part and parcel of the feared (new) underclass and this societal fear has to be mitigated by the state. But as the state is hardly interested at addressing the root causes (either of criminal behavior or of illegal residence) it only addresses the visible manifestation of irregular migrants: their presence itself. Irregular migrants are arrested (taken off the street) and detained (taken out of sight). In short, the new penal approach expects policies preoccupied with the visible signs of social unsafety, which would explain increased police surveillance and full prisons. Expulsion is an added bonus but will be much less of a priority, as the prison 'does the trick'. The actuarial logic that dominates the perspective of the new penology will rather aim for measurable results (arrests and detentions) that require less troublesome procedures and efforts than those needed for expulsion policies. In short, the system functions as a *factory of exclusion*, that ends at the level of detention.

The question under investigation in this book, however, is whether and to what extent states such as Germany and the Netherlands are making a turn towards the second logic of exclusion in their internal migration control policies. In order to take exclusion to its ultimate form and have an effective expulsion policy, the need for documenting and identifying irregular migrants becomes paramount. Under the second logic the system of policing, detention and expulsion should function as a *factory of identification*. This is not easy because it requires a lot of the internal organization of state bureaucracies, as well as the external relations with other sovereign states. However, the anxiousness of modern governments to be able to control the phenomenon of migration and the increasing availability of (technological) means to help them do that, may explain why states embark on the difficult road to expulsion. Migration control theory and surveillance theory would expect states to construct new internal migration policies that may close the policy gaps that undermine migration control. That means policies that not only just detain and *exclude*, but also detain and *identify*, in order to make expulsion policies feasible. To work as a factory of identification the German and Dutch state have to effectively organize police, detention and

expulsion into a chain that can 'secure the pre-conditions of removal', meaning all measures that serve the identification, localization and documentation of irregular migrants (Noll 1999: 268).

4.3 Police surveillance

The police in Germany and the Netherlands are organized in different ways. Like many government organizations in Germany the police has both a federal 'branch' and a police force at the level of the *Länder*. Until 2005 the German *Bundesgrenzschutz* was responsible for the border patrols, the patrols directly behind the border and at sea- and airports. In 2005 this *Bundesgrenzschutz* was rebaptized as the *Bundespolizei*. The responsibility for the internal controls on irregular migrants lies with the police forces of the *Länder*, and in the case of labour market controls with *Finanzkontrolle Scharzwarbeit* (FKS) of the Customs Department. In the Netherlands there is a similar division of labour between the (military) Royal Constabulary (*Koninklijke Marechaussee*, Kmar) that is responsible for the checks at and directly behind the borders and the regular police force that is responsible for the internal surveillance on (irregular) migrants. In the Netherlands the regular police is organized into 25 districts. Moreover, within these district police forces, there are special units who have been delegated the task of internal surveillance on (irregular) migrants within the police force. Until 2003 these units were called Aliens Services (*Vreemdelingendienst*) and after the re-organization in that year they were renamed the Aliens Police (*Vreemdelingenpolitie*). Especially in the Netherland there are clear indications that the internal control on irregular migrants has been stepped up due to political pressure in recent years, even though this intensification is also a source of strain between the police organization and the national government on the issue of who determines policing priorities.

4.3.1 Trends in police surveillance: priorities and organization

For a long time the internal control on irregular migrants could hardly be considered a priority for the Dutch police. Studies conducted in the 1980s and 1990s indicate that the discretion in the day to day practice of policing was very big (Aalbers 1989, Clermonts 1994, Engbersen et al. 1999) making the internal surveillance on irregular migrants to a large extent a matter of local decisions. For a long time discretion was used as a rule to *not* apprehend irregular migrants if they were not engaged in criminal behavior (Engbersen et al. 2002: 21). The Aliens Police use a five point list of priorities that is predominantly focused on criminal irregular migrants and those that cause public order disturbances. Only the last of the five points is on the surveillance of irregular migrants in a more general sense (Boekhoorn et al. 2004: 137-8). There have also been practical constraints on the surveillance of irregular migrants. In 2002 the Dutch Advisory Council on Aliens Affairs (ACVZ)

conducted interviews with members of the Aliens Police in the four largest Dutch cities (the 'Randstad') who indicated that the shortage of detention capacity was larger than recorded in the official figures. The interviewed police officers indicated that they often got instructions to limit the number of apprehended irregular migrants due to a shortage of detention capacity (ACVZ 2002: 22, see also Den Hollander 2004: 162). Nonetheless, during the 1990s the pressure on the police to become more active in the police surveillance of irregular migrants has been rising.

In 1994 the Law on Compulsory Identification was introduced which significantly widened the possibilities and competences of the police to increase controls and identity checks. It also called upon the police to cooperate with other control organizations, such as the Labour Inspectorate, the Tax Authorities and the FIOD. In terms of staff and budgets the introduction of this Act was also important for the Aliens Service. In the years following 1994 various intensifications almost doubled the number of staff (from 700 to 1360 fte). According to Boekhoorn et al. (2004: 126) this had an unforeseen side-effect. In the Netherlands, police surveillance on irregular migrants is both a general task for all police officers (the so called basic police) as well a specific task that is delegated to the Aliens Service. The vast increase in staffing at the Aliens Service was taken up by the basic police as a sign that internal surveillance on irregular migrants could now be considered a specific responsibility of the 'specialists', and not so much one of theirs anymore. In 2001 the new Aliens Act 2000 entered into force. One of the measures in this act was to broaden the competence of the police to conduct (identity) checks and controls on irregular migrants. The new Act made it easier to stop, interview and investigate aliens suspected of irregular residence (the criterion was changed from 'having concrete indications' into having 'an objective reasonable suspicion' about irregular residence). It also became easier for the Aliens Service to enter private houses without the permission of the owner. The aim of these reforms was to increase the number of controls, detentions and expulsion of irregular migrants (Boekhoorn et al. 2004: 115). In 2003 the Aliens Service was thoroughly reorganized and 'renamed' Aliens Police. This reorganization served both a long standing desire of the Aliens Service organization to focus more on their operational tasks and the political wish to increase operational surveillance. Until 2003 the Aliens Police had two basic tasks. The "administrative surveillance" of the Aliens Law (also known as the 'paper surveillance') and the "operational surveillance". The administrative tasks consisted mainly of the paperwork concerning the entry and stay of legal aliens, such as the issuing of documents. Until 2003 the circa 1500 staff were divided over the two tasks of the Aliens police. The majority was assigned to the 'paper surveillance (900) while the remaining 600 worked in the 'operational surveillance". The reorganization meant transferring all paper surveillance out of the police

organization and into the hands of the Immigration and Naturalization Service (IND) and the municipalities on the one hand, and an intensification of the means for the operational surveillance on irregular migrants on the other (Boekhoorn et al. 2004: 106). While the transfer of the 'paper surveillance' to the IND and the municipalities meant the loss of 900 jobs, the organization at the same time received extra staffing to be able to increase the controls that the government insisted on. An extra 450 fte's were added to the ranks of the Aliens Police, which totaled 1050 fte after the completion of the reorganization, this time all for the operational surveillance on irregular migrants.

In Germany, the internal control on irregular migrants is much less characterized by organizational expansion and new policies and laws. Two things account for at least part of that: the first is that irregular residence is considered a criminal offence; the second is that there is no specialized subdivision within the police of the *Länder* dealing with the issue of aliens and irregular migrants. As a general principle the German police are obliged to investigate all crimes that come to their knowledge. Because irregular residence is a criminal offence, punishable by a fine or imprisonment, the principle of legality prohibits that the police dismisses a case; only the public prosecutor has that authority (Vogel et al. 2009). This is of course a very formal restriction that will still allow policemen on the street to make use of their discretionary space, but the formal incentive is to deal with irregularity when it is encountered. In Germany there is no special branch of the police force that is directly responsible for 'immigration policing'. There is however a division of labour between different agencies that can be translated into the Dutch terminology of the 'paper surveillance' and the 'operational surveillance'. The *Auslanderbehörde* (the Foreign-Resident Authority) take care of the 'paper surveillance' as they are responsible for all administrative dealings with both legal (administration and documents) and illegal (removal orders) aliens in Germany. The 'operational surveillance', the enforcement of the Foreigners law, is in the hands of the police, the Federal police and the FKS.

The Federal police are responsible for the borders and further only come into play for the internal surveillance of irregular migrants at very end of the procedure as the actual deportations of irregular migrants are the responsibility of the Federal police. Internal operational surveillance is divided between the FKS and the police of the *Länder*. The FKS, though formally not police officers, deal with the labour market controls including the tasks that in the Netherlands are fulfilled by the police. As explained in the previous chapter they have police like powers including the authority to arrest and interview suspects. General internal surveillance is within the competence of the regular police. Irregular migrants are sometimes encountered during the investigation of other crimes and misdemeanors, or may

be stopped on the basis of a (well-founded) suspicion. As all foreigners are legally required to carry identification documents, and most native Germans usually carry and are willing to show them (cf. Vogel et al. 2009), identity checks are not a very controversial topic in Germany. There are differences between the competences of the various *Bundesländer* and the various 'police organizations' with regard to the authority to conduct identity checks. All police can ask *suspects* to identify themselves, but there are differences in the discretion to stop and ask people for identification when there is no direct suspicion. The FKS has the widest scope of discretion albeit only within the confines of labour market controls. They can check identities without the need for an informed suspicion. In 2006 they checked 423.1745 identity documents during the course of labour market controls (Bundesrechnungshof 2008: 29). In all *Bundesländer* the police need to have a special search warrant to enter a private house and in 6 of the 16 *Bundesländer* the police need a special permission to conduct identity checks in public. In the other ten states the police may stop and check any individual if they can justify it by the characteristics of the situation (Vogel et al. 2009).

4.3.2 Measuring police surveillance

Just about the only data that are available to get some impression of police surveillance on irregular migrants and the intensification thereof, are police data. For the Dutch case there are figures available for the time period between 1999-2004 (Boekhoorn et al. 2004). These figures indicate a clear increase in the number of apprehensions of irregular migrants[19] during this timeframe, rising from roughly 12.000 apprehensions in 1998/1999 to roughly 23.000 apprehensions in 2003/2004 (see table 4.1).

[19] The number of apprehensions does not equal the number of irregular migrants as one irregular migrant may be apprehended more than once or for different violations. Engbersen et al (2002: 23) corrected their dataset of police statistics for the time period of 1997-2000 for this fact. In the timeframe 1997-2000 they counted 53.733 apprehensions, but only 47.764 individual irregular migrants (roughly 89%). This may be used as a rule of thumb when looking at the figures presented in table 4.1 .

Table 4.1 Apprehended irregular migrants specified by reason of apprehension in the Netherlands, april 1998-april 2004)

Reason for apprehension	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004
Aliens Law	6.604	6.428	6.978	7.742	10.564	9.629
	(55%)	(52%)	(46%)	(44%)	(46%)	(42%)
Criminal Law	2.859	3.439	5.125	6.667	8.664	9.076
	(23%)	(28%)	(34%)	(38%)	(38%)	(40%)
Other laws*	2.538	2.516	3.069	3.133	3.697	4.253
	(22%)	(20%)	(20%)	(18%)	(16%)	(18%)
Total						
(100%)	12.001	12.383	15.172	17.542	22.925	22.958

Source: Boekhoorn et al. (2004: 157)
* Other laws include (non limitative): the Opium Law (narcotics), local decree (APV) and Car traffic laws

Though the police are not always very accurate with 'booking' an irregular migrant under the 'proper' legal article (see the previous chapter on the apprehensions under the Aliens Employment Act), it is interesting to note that the relative share of irregular migrants booked purely for the breach of the Aliens Law is actually decreasing, where an increase would have been expected as a result of the intensification on 'normal', i.e. non-criminal, irregular migrants. The relative share of irregular migrants booked under criminal law on the other hand is rising fast, climbing from 23 per cent in 1998/1999 to 40 per cent of all apprehensions in 2003/2004. This may mean two things. One explanation may be that the Aliens Police conducted the intensification of irregular migrant surveillance strictly according to their own set of priorities which favors the control on criminal and public disorderly irregular migrants over 'normal' irregular migrants. An alternative explanation posits that the general build up of the exclusionary Dutch illegal aliens policy in the last decade marginalizes irregular migrants through the exclusion from the labour market and public provisions. The success of these policies contributes to forms of 'subsistence crime'. The exclusion of illegal immigrants seems to result in groups of irregular immigrants resorting to poverty-related crimes in order to finance their stay in the Netherlands. This 'marginalization thesis' is supported by the fact that the increase in apprehensions under criminal law are to a large extent explained by apprehensions for minor offences such as theft, shoplifting and burglary (see Engbersen & Van der Leun 2001; Leerkes 2009). Obviously, the one explanation does not foreclose the other.

Unfortunately, it is hard to determine on the basis of the available data whether the intensifications and reorganization of the Dutch Aliens Police in 2003 has translated into a

general increase in the active surveillance of irregular migrants, other than the criminal irregular migrants that are prioritized by the police themselves. The available data (computed on the basis of police datasets) run only to 2004. As the reorganization and the recruiting of new operational personnel took quite some time and severely burdened the organization (Boekhoorn & Speller 2006), even an extra two years wouldn't have told us much more. The data from 2006 onwards could tell us more if and when they become available. In order to monitor the effects of the reorganization and the political desire to intensify police surveillance, the Ministry of Justice introduced new performance-indicators. The most important of these are the number of primary and secondary identification investigations that Aliens Police department are to conduct annually. A primary investigation means that a person whose identity cannot be established on the spot is taken in for further investigation to find out his identity and legal status. A secondary investigation is the identification and documentation of an irregular migrant with a view to expulsion. For the Aliens Police as a whole (all 25 districts) the target for the primary identity investigations was set at 40.000 and the target for the secondary investigations was set at 11.883 for the year 2006 (Boekhoorn & Speller 2006: 67). For a city police district like Amsterdam-Amstelland this translates into an average of 400 primary and a 150 secondary identity investigations per month. In some districts this has already led to a professionalization of the identification process and the introduction of an 'identification street' in the police station, where all the practical and technical means available for identification are lined up. The police regard this professionalization of the process of identifying and documenting irregular migrants as one of the main goals for the future development of expertise (Boekhoorn & Speller 2006: 69).

Surprisingly, the police data for Germany show a decline in the number of apprehended suspects without legal residence between 1996 and 2005 (see table 4.2). To a certain extent this can be explained by the specifics of the German immigration history that shows an enormous peak in asylum migration during the early 1990s that has gradually subsided since then. If the apprehensions at the border are subtracted – as they are not considered a result of internal migration control – there were 46.196 apprehensions of irregular migrants as a result of the internal police surveillance in 2005. This roughly doubles the numbers for the Netherlands, but given the differences in population size of the two countries it cannot be considered much.

Table4.2 Irregular migrants in police statistics in Germany, 1996-2005

	Suspects without legal residence[1]	Suspects without legal residence minus illegal migrants apprehended at the border[2]	illegal residence as offence[3]
1996	137.232	110.208	-
1997	128.146	102.941	-
1998	140.779	100.578	-
1999	128.320	90.531	-
2000	124.262	92.777	-
2001	122.583	94.023	-
2002	112.573	89.935	-
2003	96.197	76.223	60.615
2004	81.040	62.825	48.296
2005	64.747	46.196	41.883

1. 'Tatverdächtige mit illegalem aufhalt', source: Kreienbrink & Sinn (2006: 16)
2. 'Tatverdächtige abzüglich der an den Grenzen aufgeriffenen unerlaubt eingereisten Ausländer', source: Kreienbrink & Sinn (2006: 16)
3. Straftat: 'Illegaler aufenthalt nach Auslandergesetz', source: Bundeskriminalamt (2007: 42), (2005: 44)

There is another aspect of the apprehension figures in table 4.2 that seems to mark a difference between the Netherlands and Germany. Though the data are only available from 2003 onwards they indicate that the vast majority of the irregular migrants are apprehended (or at least booked) for their irregular residence and not for committing another crime. The proportion is even increasing over the documented years (2003-2005). This is confirmed by the police in Frankfurt, who estimate that only a small number (about 8 per cent) of the detected irregular migrants have also committed other crimes (in Vogel et al. 2009). This suggests that the irregular migrants in Germany are 'less criminal' than those apprehended in the Netherlands. In light of the marginalization thesis, this might be explained by a relatively better position, room to maneuver and possibilities to 'make a living' for irregular migrant in Germany, compared to the position of irregular migrants in the Netherlands. This would suggest that there is less reason for irregular migrants in Germany to engage in 'subsistence crime'. Even though the difference is noteworthy, the available data are not sufficient to support more than a suggestion.

4.4 Detention as an instrument of migration control

Immigrants are a steadily growing part of the prison population in most European countries, and Germany and the Netherlands are no exception. When compared to the other European

countries, both states are in the 'upper part' of the 'middle section' when it comes to the number of foreigners in prison. In 2005, 28 per cent of the German prison population was foreign and 32.9 per cent of the prison population in the Netherlands was of foreign descent (Van Kalmthout et al. 2007: 11). The annual statistics for 2006 gathered by the Council of Europe confirm these relative positions, setting the proportion in the Netherlands at 32.7 per cent and in Germany at 26.9 per cent (Aebi & Delgrande 2008). The overrepresentation of foreigners in German and Dutch prisons seems to confirm the general new penology thesis on detention and its specific interpretation on immigrant detention by Waquant. Oddly enough, in Germany the overrepresentation of foreigners is highest in the former East German *Länder*, where the foreign population is much smaller (proportionally) than in the former West (Dünkel et al. 2007: 351). On the whole, Dünkel et al. (2007: 358) attribute the differences to discrimination, a much more restricted access to non-custodial measures for foreigners and to a more violent behavior among certain groups of foreigners. However, the normal disclaimer applies and Dünkel et al. assert that more research is needed on these issues. In addition to these reasons, one has to consider that some violations of the law can only be made by immigrants, such as breaches of the immigration and residence laws. The significance of this category within the general 'foreign' prison population, the majority of them irregular migrants, will be elaborated on below.

4.4.1 Trends in administrative detention in Germany and the Netherlands

The detention of irregular migrants is an increasingly substantial part of policies of internal migration control in which detention is seen as an instrument to achieve certain policy goals that are otherwise (considered) impossible to achieve. The UNHCR, who is primarily concerned with refugees, lists a varied number of grounds on the basis of which member states of the EU detain asylum seekers. The list includes: "pre-admission detention, pre-deportation detention, detention for the purposes of transfer to a safe third country, detention for the purposes of transfer to the responsible state under the Dublin Convention and criminal detention linked to illegal entry/exit or fraudulent documentation" (UNHCR 2000, quoted in Hailbronner 2007: 163). This list can be widened to other groups than asylum seekers to discern a number of semi-separate groups of (irregular) migrants that populate the Dutch and German prisons. In the first place there are foreign born criminals who will lose their residence as a result of the crime they committed. They are declared *persona non grata* and will be deported after they served (part of) their sentence which they typically serve in a regular prison. In the second place there are asylum claimants that are detained during the procedure of their asylum application in so-called "pre-admission detention". Not all countries use this practice in which detention is used as a preventive measure (see Hailbronner 2007). Pre-admission detention almost turns an asylum

application into a “crime of arrival” (Weber & Bowling 2004: 198). These first two categories are however, not the primary focus of this study. The third category consists of migrants who do not have a legal right of residence (anymore) and who are the subjects of internal migration control. This category comprises irregular migrants apprehended at the border, arrested by the police while residing in the territory of the state (see preceding paragraph) or asylum seekers whose asylum request was turned down. This last group becomes irregular after the time that they are granted to prepare for their own independent return has expired. The reasons that states give for the use of detention are usually centered on two main issues. The first is the prevention of abscondment. Detention is obviously the ultimate form of ‘localization’, one of Noll’s (1999) ‘preconditions of removal’. The second reason is that of identification: determining nationality in the absence of travel or identity documents and arranging travel documents. Van Kalmthout (2005: 325) mentions that one of the main justifications for immigrant detention in the Netherlands is insufficient cooperation of an irregular migrant with the authorities to establish his identity, the shedding or destroying of identity papers, and the use of false papers (see also Grimm 2004 for the German case). These are also the reasons that the UNHCR lists as the grounds on which detention may be resorted to if necessary (see Hailbronner 2007: 167).

There are huge differences between EU member states in the legal framework that regulates the detention regime for irregular migrants. Two indicators are often mentioned to determine the ‘severity’ of the regime, which are also indicators for the degree of ‘exception’ that states allow themselves in the incarceration of irregular migrants. First of all states differ in the legal definition of whether ‘irregular residence’ or ‘irregularity’ is considered a criminal offence. The majority of the EU countries, including the Netherlands do not consider irregular stay to be a criminal offence, meaning that there is no ground under criminal law for detention. In a smaller group of EU countries[20] that includes Germany, irregular stay is a criminal offence that is usually punishable with fines and detention (Van Kalmthout et al. 2007: 64). However, the legal differences are usually not translated into practical differences between the various detention regimes. Even though irregular residence is a criminal offence in Germany, irregular migrants are usually not detained under criminal law. As in most countries immigrant detention is administrative detention and is not considered a punitive measure, but rather a measure to safeguard other purposes, mainly expulsion (Dünkel et al. 2007: 377). And reversely, the fact that irregular residence is not a criminal offence in the Netherlands does not mean that some actions related to irregular stay are not punishable by

[20] Besides Germany these countries are Finland, Ireland, France and Cyprus.

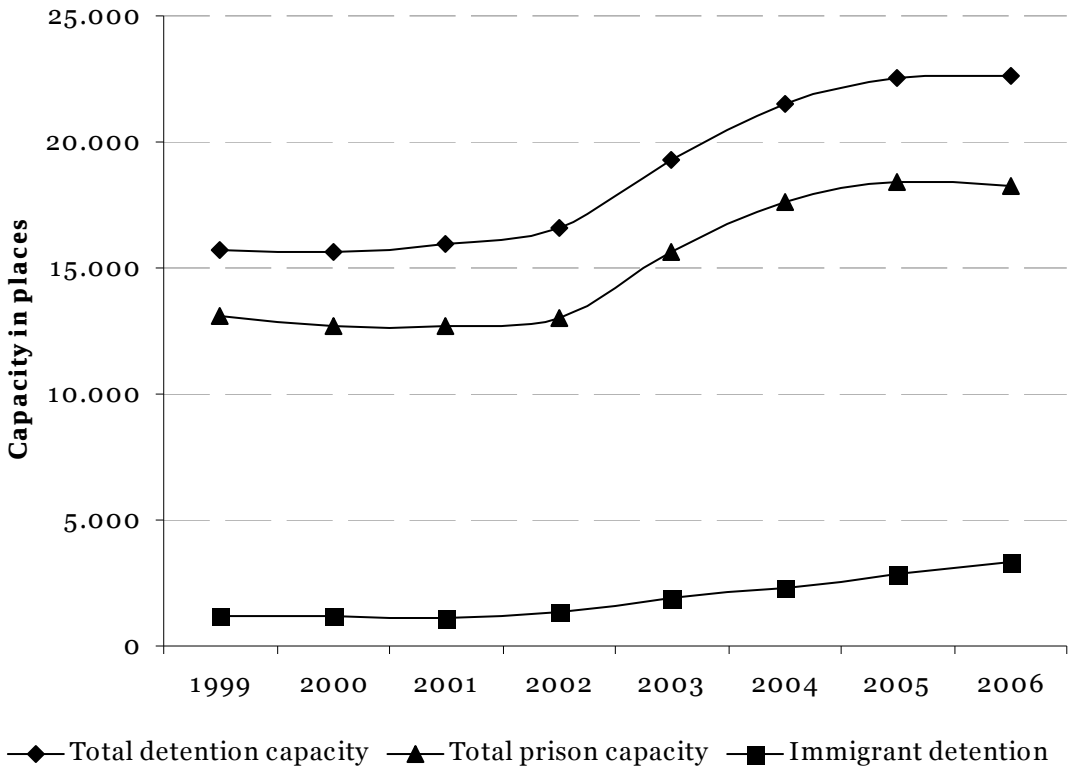
law. For example illegal entry, producing false documents, and not leaving the country while being a 'persona non grata' are all punishable offences (Van Kalmthout et al. 2007: 64). Secondly, the EU member states vary considerably in terms of the time an (irregular) migrant can be held in detention: some countries measure the length of stay in hours, others in days and others in months. Some even lack any maximum prescribed by law. The length of administrative detention in Germany and the Netherlands is long when compared to most other European countries. The German authorities can detain irregular migrants up to 18 months. The administrative detention for irregular migrants is initially 6 months, which can be extended by a further 12 months. This maximum length of 18 months is however an exception. On average the administrative detention lasts six weeks. Obviously, this 'average length' is made up of both detainees that stay shorter and much longer than this six week period. Research published in 1990 showed that that the proportion of detained irregular migrants awaiting expulsion who spend more than six months in custody lies at roughly 10-20 per cent (Dünkel et al. 2007: 383). The decision to detain an irregular migrant is made by a judge on the basis of recommendation of the local Foreign Nationals Agency. In Germany the constitution prescribes that all decisions concerning the deprivation of liberty have to be made by a judge. In the Netherlands there is no fixed duration of imprisonment (Van Kalmthout et al. 2007: 59). In principle it can last until expulsion is realized or still remains a possibility. "When expulsion has not been realized within 6 months, the courts generally rule that the interest of the detained foreigner weighs heavier than the interest of expulsion of the government. However, this does not apply when the expulsion is to be expected shortly or when the foreigner himself can be blamed for not being able to realize the expulsion" (Van Kalmthout & Hofstee-Van der Meulen 2007: 650). Figures for 2000-2001 show that the average length of immigrant detention in the Netherlands was 36 days (ACVZ 2002: 23). However practice also shows that long-term detention of 15 up to 18 months is no exception (Van Kalmthout & Hofstee-Van der Meulen 2007: 650).

4.4.2 Detention capacity and organization

An increasing role of detention in the organization of internal migration control on irregular migrants should be visible from the growth of the detention capacity and changes in the organization of the administrative detention regime. The build-up of the detention regime in the Netherlands provides insight in the importance the Dutch government attaches to detention (and ultimately expulsion) and also in the separate groups of (irregular) migrants that are targeted. Van Kalmthout (2005: 322) gives a brief overview of the increase in detention capacity since the early 1980s. In 1980 the capacity for administrative immigrant detention was 45 places and the measure to detain irregular migrants was executed 450 times. The increase in capacity started in earnest during the 1990s. Moreover the new

detention capacity was specifically designated (and sometimes built) for (irregular) migrant detention, in stead of cells in normal prisons 'earmarked' for immigrant detention. In 1994 the Willem II penitentiary in Tilburg was taken into use with 560 places for immigrant detention. In 1998 the so-called 'departure centre' Ter Apel opened its doors adding another 394 places for immigrant detention with a view to expulsion. Since 1998 a large number of new places including the so-called '*grens hospitia*' ('border shelters'), the Expulsion centers at Schiphol airport and Rotterdam airport, new detention centers in Zeist and Rotterdam and also two detention boats in Rotterdam were taken into use. It is noteworthy that the Dutch Expulsion Centers were introduced as part of a government program that was called "Towards a safer society". In other words the intensification of expulsion policies through these centers was introduced as a measure of public safety, and not primarily as a measure of immigration policy (Den Hollander 2004: 160). In 2006 the capacity for immigrant detention stood at 3.310 places (DJI 2007). The increase in capacity serves two goals: firstly, short term detention directly at the border (to turn back illegal immigrants apprehended at the border and asylum seekers whose claims are regarded 'manifestly unfounded' in fast track procedures) and secondly, detention to prepare for the expulsion of irregular resident migrants. If we set the increase in immigrant detention capacity against the background of the overall increase of the Dutch detention capacity in the same time period the following picture emerges. Total detention capacity has been steadily increasing since the 2000s, but seems to be stabilizing (and even sloping downwards a little) in recent years, whereas the capacity for immigrant detention keeps on rising steadily (see graph 4.1).

Graph 4.1: Detention capacity in the Netherlands, 1999-2006



Total detention capacity includes: prison capacity, capacity institutions for youth offenders and the capacity for the enforced mental healthcare (TBS). Source: Data 1999-2002 from DJI (2004: 9), data 2003-2006 from DJI (2007: 47). Data from DJI 2007 include detention capacity in police cells.

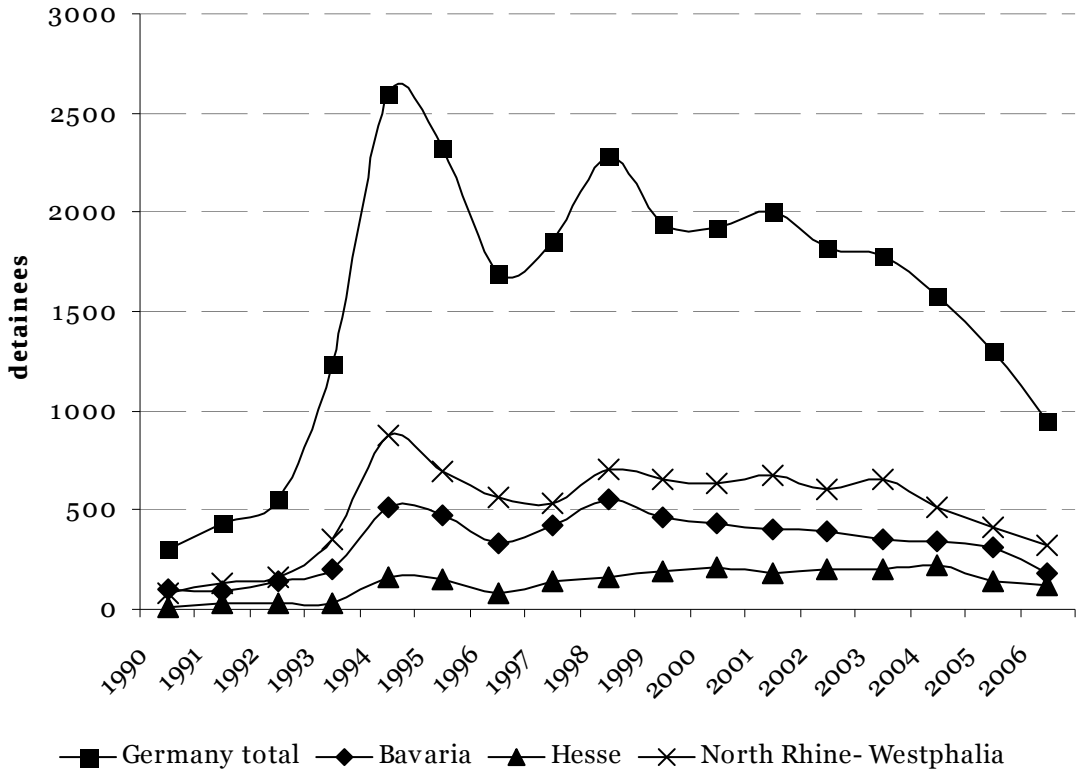
In relative numbers administrative detention capacity has also risen sharply. If we look at immigrant detention as a percentage of the total prison capacity (i.e excluding youth facilities and enforced mental healthcare) the share of immigrant detention has risen from 9.1 per cent in 1999 to 18.1 per cent in 2006. In short, the relative share of immigrant detention capacity doubled in the last eight years. Van Kalmthout (2005: 323) further adds that the annual number of migrants detained with a view to expulsion is roughly 12.000 which translates into 25 per cent of the total annual inflow in Dutch prisons.

The German regime for the detention of irregular migrants differs from the Dutch case in a number of aspects. First of all the prison system is decentralized. The *Länder* are responsible for the buildings and the personnel, which attributed to large differences between facilities and regimes. Furthermore, in 2006 the Federal government, despite heavy criticism from both academics and practitioners, decided to transfer the legislation for prisons to the level of the *Länder* as well (Dünkel et al. 2007: 345). Secondly, these differences are also visible in the more specific case of immigrant detention for the purpose of expulsion. Whereas in the

Netherlands, especially since the 1990s, the detention facilities are specifically designated for immigrant detention and immigrants are thus kept separate from the normal prison population, the regime in Germany is more 'mixed'. The facilities for administrative detention vary considerably among the *Länder*, ranging from special facilities for the administrative detention of irregular migrants to normal prisons where they are held alongside criminal convicts. There are three different models of detention: (1) special establishments for the administrative detention of irregular migrants, (2) detention in regular prisons (*Justizvolzugsanstalt*, JVA) or (3) in special departments of such a JVA (Van Kalmthout et al. 2007: 54). A more detailed overview of the detention facilities in the various *Bundesländer* in 2004 gives the impression that a large part of the German capacity for administrative detention is realized within JVA's, some of it in separate sections, but much of it as an 'earmarked' part of regular capacity (Dünkel et al. 2007: 381-382). A number of the German detention facilities have a rather bad reputation and have been visited and reported on by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on numerous occasions throughout the 1990s and the 2000s (Dünkel et al. 2007: 377-8).

Due to the decentralized organization the development of the detention capacity over time is difficult to measure. Dünkel et al. (2007: 379-380) give some indication of development over time, but these data must be treated with the utmost care because they do not measure capacity, but the actual *stock* of detained foreigners who are pending removal at one specific day (January 1st) per year (see graph 4.2). The only information that can be taken from this graph is that capacity has increased since the early 1990s and that a small number of *Bündeslander* seem to take up the lion share of the detained foreigners pending removal (again: on January 1st of each year). The 'top three' of the sixteen *Bündeslander* are also depicted in the graph.

Graph 4.2: Foreign detainees pending removal in penitentiary establishments in Germany (total) and selected Bundesländer, 1990-2006 (all measurements: the count of detainees on January 1st of the year)



Source: Dunkel et al. (2007: 379-380), adapted.

The current capacity for the administrative detention of irregular migrants awaiting removal is roughly 2250 places (Dünkel et al. 2007: 380). That is not much, especially when set against a background of 222 German prisons with a total capacity of 80.000 places: a 'mere' 2.8 per cent of the total prison capacity. Moreover the graph, with all its limitations, shows that in 1994 there were 2.600 foreigners imprisoned with a view to expulsion, meaning either that the total capacity has gone down since the middle of the 1990s or, more likely, that the German regime is more flexible in terms of placement of irregular migrants. The latter is an obvious option, as many irregular migrants are detained in normal prison facilities. This gives the German immigration authorities more flexibility in the placement of irregular migrants. The figures can be put in a better perspective by zooming in on Berlin, one of the *Länder*. Berlin lists very low figures in terms of the data underlying graph 4.2 (highest score is 18 in 1994) and therefore didn't make it into the top 3 in the graph. This is 'odd' because it has a specialized immigrant detention center with 340 places in Köpenick, making it the Land with the second largest detention capacity (Dünkel et al. 2007: 381). A recent dissertation by Pieper (2008) on the topic of detention and migration gives exact figures for

this Berlin facility in the year 2002. According to official figures 5.676 people were taken into immigrant detention (*abschiebungshaft*) during that year (Pieper 2008: 187), which means that on average every place in Köpenick was used almost 17 times during 2002. Though it is of course impossible to extrapolate this figure to the other *Länder*, it does give some indication of intensive use of the available detention capacity. How effective this use is, can only be approximated by looking at the data for the actual expulsions in the next paragraph.

4.5 Expulsion

The crucial question is whether the investments in immigrant detention actually result in an increase of effective expulsions of irregular migrants. In 2005 the European Commission concluded on the basis of the then available information (for the period 2002-2004) that in the EU 25 roughly 1 in 3 of the formal 'return decisions' on irregular migrants are effectively implemented and result in removal (CEC 2005). Two thirds of the return decisions are not in any way implemented. In a number of countries governments are trying to close, or at least diminish this 'deportation gap', i.e. "(…) the gap between the number of people eligible for removal by the state at any time and the number of people a state actually removes (deports)" (Gibney 2008: 149). In short, states are investing in detention and expulsion policies, despite the knowledge that expulsion is difficult and costly. Germany and the Netherlands are also trying to improve their expulsion policies.

4.5.1 Leaving detention, leaving the country?

Immigrant detention can end in one of two possible outcomes: either the irregular migrant is expelled or he is released back onto the streets. In the latter case it is likely that he will go back to his prior life with the same irregular status for which he was brought into detention in the first place. On the basis of statistics from the Dutch Immigration Services (IND) for the years 2000 and 2001, the Dutch Advisory Committee for Aliens Affairs concluded that immigrant detention resulted in expulsion for 60,7 per cent of all detainees in 2000 and for 56.9 per cent in 2001 (ACVZ 2002: 23). The remaining detainees were released either because of administrative errors (*vormfouten*) or because there was no realistic expectation that expulsion would be possible. Finally, a large percentage was released due to 'unknown' factors (26,6 per cent in 2000 and 35,1 per cent in 2001). Release from detention does not mean these irregular migrants won't be detained again. Those who stay irregularly after their release have the same risk of being apprehended as they did before their first detention. Van Kalmthout et al. (2005: 145) find that of a subset of detained irregular migrants (N= 262) that have a dossier of the immigration authorities, 18 per cent have been in immigrant detention before. To some 'undeportable' irregular migrants the detention system risks becoming a revolving door.

In 2005 the IND reported that it had been possible to proceed with deportation for 60 per cent of all irregular migrants detained in that year (Immigratie- en Naturalisatiedienst 2006: 65). On the basis of his research among 400 immigrant detainees in 2003-2004 Van Kalmthout (2007b: 101) claims the percentage of irregular migrants that are actually expelled is much lower and even lies below 40 per cent. A rather low percentage, especially when set against a background of rising length of detention and rising costs: an estimated €35.000 detention costs per successful expulsion. The absolute number of expulsions from the Netherlands has also been dropping since 2003 (see table 4.3). The Dutch government distinguished between two sorts of 'actual departures', the category opposed to the so-called 'administrative removal' where an alien is considered to have left the country when he is not found during a control of his last known house address. In the case of a *deportation* an alien is escorted past the border and/or back to his country of origin. The majority of the deportations are conducted by airplane (Immigratie- en Naturalisatiedienst 2006). A *supervised departure* entails that the immigrants' travel documents are kept by the authorities until he has effectively passed the border. The absolute numbers for both categories have been dropping since 2003, signaling a trend of a decreasing effectiveness of expulsion policies.

Table 4.3 Expulsions and supervised departures from the Netherlands, 2000-2006

	Deportations (uitzetting)	Supervised departure (vertrek onder toezicht)	Total actual departure
2000	9.947	15.262	25.209
2001	9.498	7.049	16.547
2002	12.015	9.055	21.070
2003	11.374	11.006	22.380
2004	9.215	9.800	19.015
2005	8.912	n.a.	
2006	7.765	n.a.	

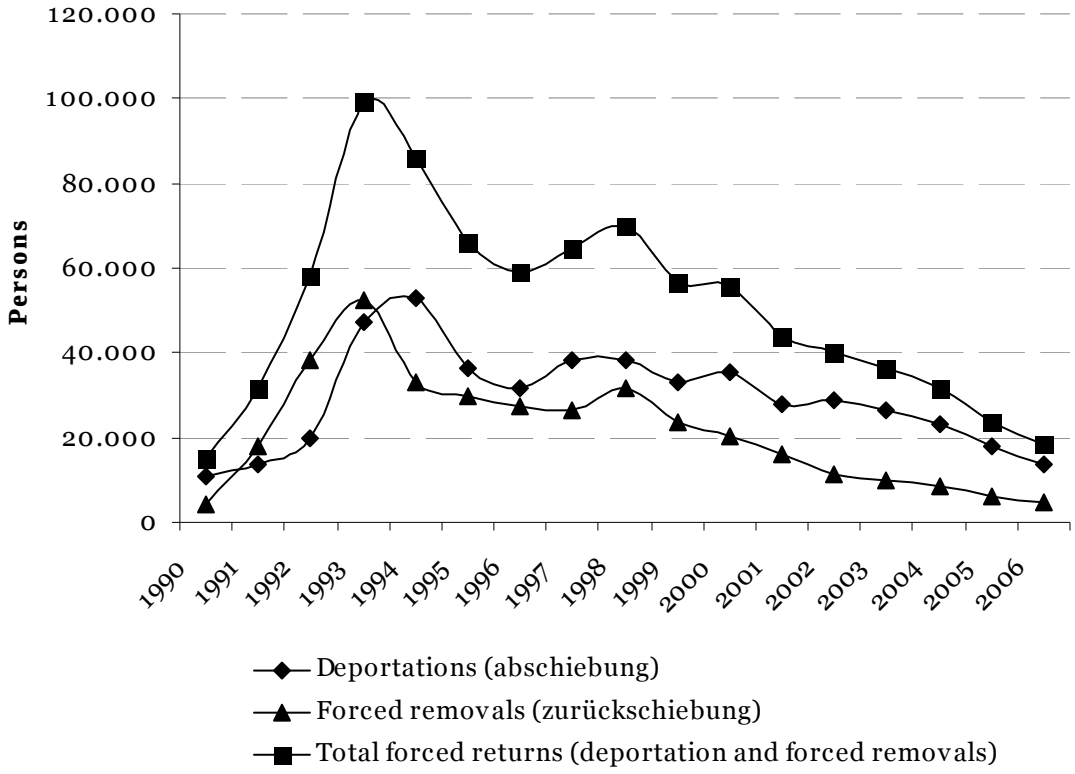
Source: Minister voor Vreemdelingenzaken en Integratie (2003: 8) and Ministerie van Justitie (2004: 48-49), (2005: 37-38), (2006: 48), (2007:42)

There is also an important connection between the length of the detention of irregular migrants and the chances of them being actually expelled. In an earlier research project using a sample of 400 detained irregular migrants Van Kalmthout et al. (2004: 95-98, see also Van Kalmthout 2005: 332) found that 56 per cent was detained for less that three months, 22 per cent between three and six months and 22 per cent for longer than six months. Tellingly, the

number of irregular migrants that was effectively expelled was highest among those that were detained under three months (67 per cent). This percentage dropped significantly as time went on; only 19 per cent of those that were detained longer than three months were effectively expelled. This is confirmed by the data used by the ACVZ (2002: 23-24). Roughly 80 per cent of the detained irregular migrants that were expelled were in detention for less than 28 days. Reversely, the average length of detention of irregular migrants that were released because expulsion could not be implemented was 121 days. So far it seems that the intensification of the detention regime has not translated into an increase of actual expulsions. It also seems that the detention regime is harshest, because of its length, for those irregular migrants that (eventually) prove to be 'undeportable'.

The history of German expulsion policy is closely entwined with the (sizable) migration flows into this country, especially in the years after the fall of the Berlin wall. According to Ellerman (2008: 173), the immigration authorities conducted fewer than 8,000 deportations in 1985, a number that climbed to 15,000 in 1990, peaked at 47,000 in 1993 and stabilized at around 35,000 by 2000. More recently, the German figures have a taken a more significant tumble (see graph 4.3). There was a steady decrease in the number of expulsions during the 2000s that intensified after 2005 (Kreienbrink 2007). The category 'forced removals' is comprised of three different subcategories, two of which are taken into account in the figures underlying graph 4.3. *Zurückweisung* or 'rejection at the border' is not taken into account because it is a matter of border policy and not of internal migration control. *Zurückschiebung*, or removal, is meant to bring an apprehended irregular migrant back to the country from which he entered Germany. Force and detention can be used for this category of irregular migrants. If an irregular migrant has been in the country for more than 6 months he has to be deported (*Abschiebung*), in which case an irregular migrants is usually physically transported (and sometimes escorted) out of the country. In 2006 the number of deportations stood at 13.894 and the total number of forced removals at 18.623.

Graph 4.3 Deportation and forced removals from Germany, 1996-2006

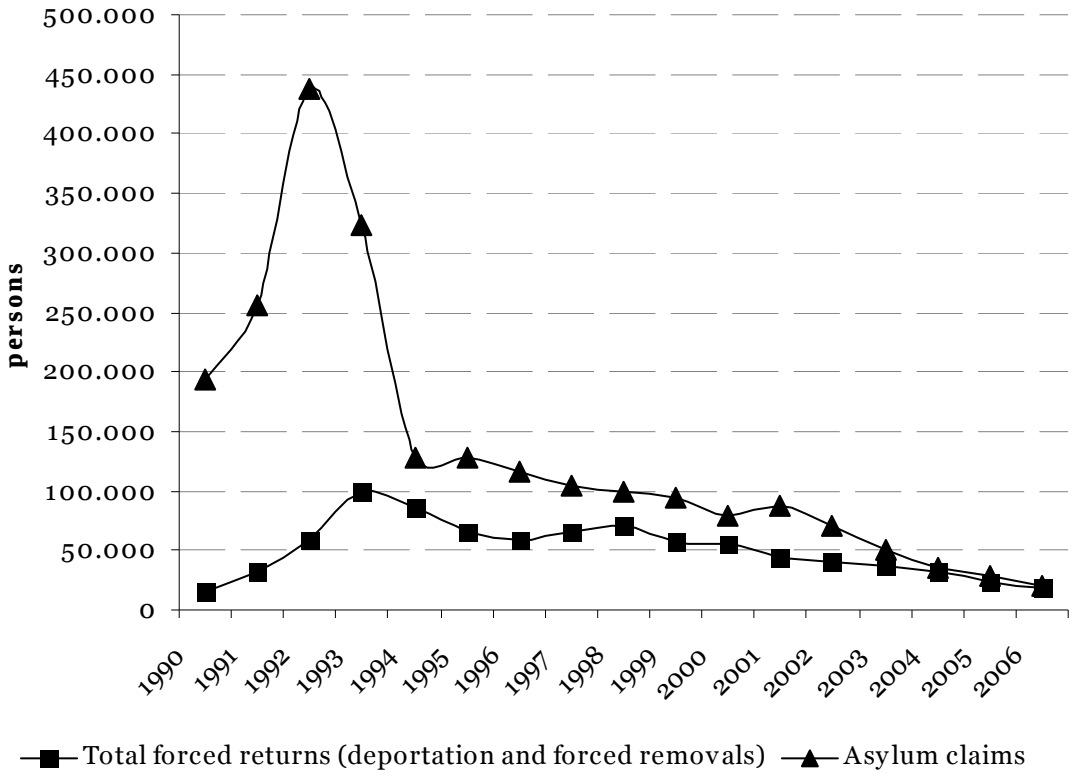


Source: Bundesminsterium des Innern (2007: 151 & 289)

The relation between (the length of) immigrant detention and actual expulsions cannot be accurately determined for the German case as the necessary statistics are lacking. However, estimates range from 60 per cent to 80 per cent of administrative detainees that are actually expelled (Dünkel et al. 2007: 386, Kreienbrink 2007: 152). That is significantly higher than in the Netherlands. For the length of immigrant detention there are also only estimates and 'averages'. Dünkel et al. (2007: 383) say that the average stay in immigrant detention is six weeks, but immediately add that this average obscures the fact that many detainees are only briefly in custody while roughly 10 to 20 per cent of them spend more than six months in detention. It is also interesting to note that during the 1990s the composition of deported aliens displayed a marked shift away from illegal immigrants and criminal immigrants in favor of rejected asylum seekers. While in the late 1980s asylum seekers accounted for only 25 to 30 per cent of forced removals, in 1993 this had risen to 76 per cent and, by the end of the decade, continued to range between 47 to 58 per cent (Ellermann 2008: 173). Kreinenbrink (2007: 61) who uses data from 2000-2004, estimates that roughly one third of the current population in immigrant detention does *not* have an asylum background. Considering the dominant focus on failed asylum seekers in German expulsion policy – a

much more prominent emphasis than in the Netherlands – the drop in the expulsion figures becomes less dramatic than it seems at face value. Graph 4.4 shows the numbers for the total of all forced removals and the figures for the number of asylum applications in Germany for the time period 1990-2006.

Graph 4.4 **Forced removals from Germany, asylum applications in Germany, 1990-2006**



Source: Bundesminsterium des Innern (2007: 151 & 289); Bundesamt für Migration und Flüchtlinge (2006)

As can be seen from the graph the gap between the number of expulsions and the number of asylum claims is closing fast and almost overlap in 2006. The drop in the number of asylum claims explains the decrease of the number of removals to some extent, but does not tell the whole story. Ellermann (2008) points to another explanation: the increasingly difficult process of identification due to the fact that migrants and asylum seekers do not carry identification documents. The impact of this 'problem of the papers' increased enormously since the mid 1990s. Officials of the Interior Ministry stated in 2002 that in the mid 1980s the immigration authorities had to obtain travel documents for only 30 to 40 per cent of all asylum seekers. Less than two decades later it is estimated that 85 per cent of all asylum seekers arrive without documentation (in Ellermann 2008). The situation in the Netherlands is similar. Of the 400 detainees in Van Kalmthout's study 61 per cent had no documents at all, after taking out the remaining false and invalid documents a total of 88 per cent did not

have any useful documentation (Van Kalmthout 2005: 59). The bottleneck of identification seems an important contender to explain the decreasing deportation figures when budgets and staffing for detention and deportation process are rising.

4.5.2 Searching for identities

As said before, the bottleneck of identification is the result of a lack of cooperation – or even the active obstruction - of the irregular immigrant himself, his (supposed) country of origin or both. The problems with irregular migrants primarily involve the destroying of identity papers, being silent or lying about identity and country of origin and refusing to cooperate with the immigration authorities and the embassies of their (supposed) countries of origin. The fast increase in the number of undocumented cases in immigrant detention during the last decade is an important indication that irregular migrants are well aware of 'the importance of not being earnest' (Engbersen & Broeders 2009). Countries of origin – in this case represented by their embassies and consulates in Germany and the Netherlands – are often also unwilling to cooperate or use an array of tricks to frustrate the process of identification and repatriation (see for example Kreienbrink 2007: 116). Some countries, like Ethiopia, simply refuse to cooperate, while other countries, such as China, formalize their procedures to such an extent that repatriation often becomes de facto impossible (Liu 2008). Even though most countries cannot and will not blatantly refuse to accept their own citizens back, they can influence the timing and possibilities for return by informally stretching procedures. Noll (1999: 274) maintains that some countries of origin handle the issuing of travel documents for irregular migrants as a sort of an "informal filter for remigration". Confronted with these obstructions that lead to dropping expulsion rates, the Dutch and German authorities have been looking for 'counter measures' to professionalize the identification process and to increase pressure on, or the incentives for, both the individual migrant and the authorities of the countries of origin. Ultimately the authorities try to develop instruments that make the process of identification less dependent on the cooperation of migrants themselves.

Organizing identification: centralization and professionalization

Both Germany and the Netherlands have been implementing organizational changes in recent years to increase the effectiveness of the expulsion process. Often these organizational changes were meant to increase the professionalization of the authorities involved in expulsion policies. Identification has proven to be a very specialized task that benefits from centralization, especially in Germany where expulsion is within the competence of the *Länder*. As early as 1993 the conference of the Interior Ministers of the *Länder* decided to install a special Working Group on the issue of return policies (*AG Rück*) to debate and

devise common strategies for expulsion (Kreienbrink 2007: 117). At the federal level the Bundespolizei direction in Koblenz established a Coordination Center for 'return issues' that specifically deals with the most 'difficult' countries of origin in terms of the identification, recognition and documenting of irregular migrants that are 'suspected' to be their nationals. Right now it deals with 14 countries, thirteen of them Sub Saharan African. This central direction relieves the *Länder* of the task of trying to obtain documents from these countries (Kreienbrink 2007: 134). At the level of the *Länder* there is a trend of centralization as well. Normally all *Ausländerbehörde* have the jurisdiction to issue expulsion orders, but in Baden Württemberg only four central *Ausländerbehörde*, out of a 120, can issue them in this *Bundesland*. According to Ellerman (2005: 1230-1231) this centralization also makes the process of expulsion less 'vulnerable' for public resistance and the "particularistic demands of constituency-serving elected officials". In the Netherlands there has also been a process of organizational change. Following the priority given to 'tackling' the problem of irregular migration in the white paper on return ('*terugkeernota*') of 2003 and the white paper on irregular migrants ('*illegalennota*) of 2004 the government decided in 2005 to create a new return migration organization. This new organization called the 'Return and Departure Service (*Dienst Terugkeer en Vertrek*- DT&V) became operational in 2007 and deals with both 'voluntary' and forced returns. This DT&V will take over a number of tasks related to return from the Immigration and Naturalization Service, the Aliens Police and the Royal Constabulary (KMar).

Pressuring migrants

Getting uncooperative irregular migrants to cooperate with the authorities in establishing their identity seems like a direct route towards identification and expulsion. The most important 'instrument' that the authorities use to this end has already been dealt with in the previous paragraph. The detention regime for irregular migrants is in itself a severe source of pressure on irregular migrants. Besides the mere fact of being incarcerated the regime is usually harsher than that of normal prisons as the facilities and circumstances are sober. There is often overcrowding, a lack of medical and legal aid and poorly or even unqualified staff (Dünkel et al. 2007; Van Kalmthout & Hofstee-Van der Meulen 2007). As irregular migrants are by legal definition not supposed to return to society, all activities and education that prepare regular prisoners for their return to society, are lacking. Furthermore, irregular migrants that refuse to cooperate have no way of knowing how long they are likely to stay in detention. The detention regime is meant to increase the pressure on irregular migrants to cooperate, just as it is meant to deter other migrants from a life in illegality (Van Kalmthout et al. 2007: 53).

The authorities use immigrant detention to find out the identity of irregular migrants by means of repeated interviews, language tests (though they are often considered expensive and inaccurate, see Kreienbrink 2007: 137) and research in files, documents, registrations and databanks. During the evaluation of the German immigration law in 2006 the question was also raised if the authorities should have the possibility to search the immigrants' homes to look for clues of their nationality and identity (Kreienbrink 2007: 135). When the authorities suspect – as opposed to prove - they have determined an immigrant's nationality they often have to 'present' this immigrant at an embassy or a consulate of the 'suspected' country of origin. The embassies must recognize the immigrant as a citizen before they (might be) willing to provide a new passport or a *laissez passer*. Depending on the available proof of the identity and nationality this is either done 'in paper' or in person (Van Kalmthout 2005: 140-142). A 'paper presentation' entails that the irregular migrant has to fill out a form with questions regarding his identity, place of origin, family etc, that will then be examined by embassy personnel. A presentation in person means that the irregular migrant will be interviewed face to face by embassy personnel in order to establish his nationality. If the embassy accepts the migrant as its national, a document will be issued for his return. Presenting migrants is hardly an 'exact science' and in both Germany and the Netherlands the authorities sometimes present the same migrant to a number of embassies. Germany sometimes brings the representatives of various embassies together to prevent what the German authorities call 'embassy tourism', i.e. to limit the risk that various successive embassies reject the migrant as their own (Kreienbrink 2007: 137). In the Netherlands the authorities take some migrants past a number of different embassies without substantial indication for a specific country of origin, but in the hope of 'passing' the right one. However, this so called 'embassy shopping' does not yield very much result and does yield a lot of protest from the legal profession (Van Kalmthout 2005:194).

Pressuring countries of origin

Presenting immigrants to embassies is obviously not just meant to put pressure on the irregular migrant, it is also meant to influence the behavior of the countries of origin. Many countries of origin prove to be very uncooperative. As western states get keener on expulsion the number of uncooperative countries is rising. In 1990 the German authorities dealt with the representatives of 10 countries on a regular basis and that number rose to 80 in 2000 (Ellermann 2008: 174). The documented cases are usually unproblematic, but "many governments drag their feet when it comes to issuing travel and identity papers to individuals who no longer possess these documents, thereby effectively rendering repatriation impossible" (Ellermann 2008: 171). One of the main efforts to increase the diplomatic pressure on countries of origin has been the negotiation of so called readmission agreements.

Germany has been negotiating these agreements unilaterally, while the Netherlands usually negotiates its readmission agreements as a part of the Benelux group (IOM 2004). Readmission agreements usually specify the procedures that will be followed in the case of immigrants whose identity and nationality are contested. As readmission agreements primarily serve the interests of the countries that wish to expel irregular migrants, they have to contain either effective threats or incentives for the countries of origin, in order for them to sign the agreement. One of the main bargaining chips used in the negotiation of these readmission agreements is making development aid dependent on cooperation in the matter accepting returning citizens (Kreienbrink 2007, Ellermann 2008). The negotiation of such treaties is usually a lengthy and difficult process that is sometimes subject to an endless array of 'stalling tactics'. Furthermore, many states have found out that there can also be a huge difference between the paper reality of a bi-lateral agreement and the practical implementation of that agreement. Ellermann (2008) describes two readmission agreements that Germany negotiated during the early 1990s of which much was expected after signing the paperwork. The one with Romania was a big success and resulted in the repatriation of 60.000 Romanians in 1993 and 1994 alone. The agreement with Vietnam did not even come close to the agreed targets and was considered a failure. The very different incentives for the countries of origin are usually considered the main explanation for the differences in compliance and effectiveness: the strong incentive of the lure of EU-membership made Rumania very cooperative, while the absence of such a tempting prospective explains the Vietnamese obstructionist tactics. The negotiation of readmission agreements at the level of the EU, a next step in the efforts to increase the effectiveness of expulsion policies, often suffers from a similar lack of quid pro quo in the (proposed) agreements (see chapter 5). For the German case, Ellermann (2008: 180-183) describes how interior officials in Bielefeld (Nordrhein Westphalen) circumvent the diplomatic and political levels and try to establish liaison structures with officials of the interior ministries in some countries of origin in order to (successfully) increase the number of readmissions. With the same agenda in mind, they also try to better the relations with lower level embassy personnel. This 'small diplomacy' seems to work as the cooperation of some of these countries has improved, but some of the 'side payments' that are involved in the process come awfully close to bribing.

Identification without the help of the immigrant himself

The easiest way to identify uncooperative irregular migrants is by means of instruments that do not require their cooperation at all. The first thing both the Dutch and German authorities do, is to check the available national and international database systems that may provide information on the irregular migrant in custody. The German authorities especially check the Central Aliens Register (AZR), the central database of the immigration authorities that is also

fed by various public and semi-public authorities that are obliged by law to exchange, check and pass on information relating to foreign nationals (Vogel & Cyrus 2008: 3). In the Netherlands an irregular migrant is checked against the data in a large number of databases including the Aliens Administrative System (VAS), National Schengen Information System (NSIS), the Municipal Basic Administration (GBA) and a number of (inter)national police databases such as Netherlands National Investigative System and the Europol and Interpol databases (Van Kalmthout et al. 2005: 129). However, many of these databases still require a minimal degree of cooperation from the irregular migrant in question as they only store so called 'alphanumerical information' – names, dates, places, characteristics etc – meaning that the authorities still need at least a name to make a match between a detainee and the information in the database. In light of this 'structural flaw' of the available data the German and Dutch authorities are increasingly embarking on a strategy of including biometric identifiers into these (immigration) databases. The use of biometric identifiers, such as digitalized fingerprints, photographs suitable for facial recognition or retina scans, would mean that the authorities do not need the cooperation of the immigrant anymore as they can use biometric information to make 'sweeping searches' in the available data. At both the national and the international level (especially the EU) there has been a biometric turn in (internal) migration control. As such a turn is both technologically and legally challenging as well as costly, progress is only made slowly.

In Germany there were early pleas for a more structural approach to the use of biometrics in matters of immigration and identification. The Sussmüth commission proposed in 2001 to store all the data of visa applicants in a central register and make it available for the authorities that need to identify irregular migrants with a view to expulsion. As many irregular migrants enter the country on a legal visa it would be a logical step to store copies of documents, fingerprints, photos etc. (Unabhängige Kommission Zuwanderung 2001: 154-156). The inclusion of biometrics would enable and speed up the identification of irregular migrants that travelled in on a visa. In the recent evaluation of the immigration law (2006) this plea was repeated. However, the photographic data that are currently available in the AZR are not 'sophisticated enough' to use them for identification purposes: the quality needs to be upgraded (Kreienbrink 2007: 136). In 2005 Germany also introduced a special section in the so-called *fundpapierdatenbank*, a database for 'lost and found' identity documents. Part of it is now reserved for the storage of all documents underlying a visa application for Germany. Copies of the passport, application forms and photographs are stored and available for searches by the immigration authorities and the police to identify irregular migrants. The biometric identifier in this database is also 'facial recognition' on the basis of photographs. The technology of this system is more sophisticated than the AZR, but due to its relatively

short existence it does not generate many hits yet (Kreienbrink 2007: 136). In the Netherlands the turn towards biometrics has taken a similar route. A number of the databases contain fingerprint data. That goes for some police databases, but especially for the so called HAVANK database, which is the central storage system of (government collected) fingerprints administered by the National Criminal Investigation Department (Nationale Recherche). One section of HAVANK is made up of the fingerprints of all asylum seekers in the Netherlands and can be used to trace identities. The fingerprints of irregular migrants who were taken into immigrant detention are also registered. The Dutch 'White Paper on Return' called for the increased use of biometrics to increase the effectiveness of identification. The ultimate aim was to gather biometric data on all people who enter into a procedure that may lead to entry to the Netherlands (Minster voor Vreemdelingenzaken en Integratie 2003: 4). In the eyes of the government this required a number of new national databases and the unwavering support for the EU initiatives in immigrant database technology that are underway (see chapter 5). One of the issues under investigation was to compel all airlines to (digitally) register a biometric identifier of all the passengers they transport (a scheme of which not much has been heard of since, but which is certainly not technologically impossible). For the registration of biometric identifiers of visa applicants the Netherlands prepares for the introduction of the national pendant of the European Visa Information System (VIS) that will store the fingerprints of all those who apply for a visa in Europe (see chapter 5). Once the gathering of biometric data on the various groups that enter Germany and the Netherlands takes on a greater scale and more data are stored, the identification process will become less dependent on the cooperation of individual migrants to reveal their true identities. Assuming that the body does not lie – and governments do assume this when they talk about biometrics – identification may become a 'simple' matter of cross-referencing for certain parts of the irregular migrant population (rejected asylum seekers, 'visa-overstayers').

4.6 Conclusion: factories of identification?

The general question of this chapter can be answered in the affirmative: the ship of state is turning towards identification in both Germany and the Netherlands. There is a noticeable turn towards policies that aim to identify irregular migrants with a view to expulsion. Both countries are investing in the identification process in all parts of the bureaucratic chain leading to expulsion. The police and immigration authorities introduce procedures and instruments that make identification possible and foreign policy is aimed at diplomatic relations with important countries of origin and the negotiation of readmission agreements. Furthermore, both countries are exploring the possibilities that can be provided by the 'brave new world' of modern surveillance techniques. Increasingly the immigration authorities turn

to database systems for the identification of irregular migrants. Where possible the database systems (will) work with biometric identifiers that can link immigrants to their legal identity and other personal data without needing their active cooperation. Given the enormous problem of uncooperative irregular migrants hiding their identity or lying about it to the immigration authorities, biometrics make it almost possible to 'skip' the immigrant himself in terms of identification. A 'surveillant assemblage' aimed at (irregular) migrants is clearly emerging. This issue will be taken up further in chapter 5 in the discussion on the new EU immigration databases (SIS II, Eurodac and VIS). In sum, we can say that Germany and the Netherlands are increasingly operating their policies of internal migration control as 'factories of identification'.

However, we do have to note that the proclaimed aim of these policies – an increase in the number of expulsions – is not met. If anything, the numbers seem to be declining rather than rising. The intensification in policing and especially the rising incarceration rates are not translated into more expulsions. This important contra-indication has a number of reasons. For one thing, expulsions vary with the general volume of migration that can lead to irregular residence, such as asylum migration. This is however only part of the story. Dropping expulsion rates are an important counter indication for the desired return on the government's investment in detention and identification policies , but at the same time can be seen as the prime motivation for investing even more resources in solutions for the problem of the identification of irregular migrants. The main reason for the dropping expulsion figures is the fact that irregular migrants are well aware of 'the importance of not being earnest'. The fact that irregular migrants have realized the value of frustrating the identification process has lifted identification to an even more central place in policy making. Theoretically the migration control perspective explains best why the Dutch and German governments are embarking on the difficult road of expulsion. The efforts to close the deportation gap are based on the political incentive to be in control of migration. The heavy investments suggest that it is actual migration control they are after and not just the image of control as is often presumed. For example Gibney & Hansen (2003: 15) characterize deportation policies as a 'noble lie', necessary because "no state is willing to collapse the distinction between legal and illegal migrants". However, irrespective of where the line between migration control and 'image control' may lie exactly, investment in the 'factory of identification' is likely to continue.

The fact that 'anonymous' irregular migrants – often aided by countries of origin – are able to frustrate expulsion so effectively also has a profound effect on the way the detention system functions in practice. Given the difficulties with identification, immigrant detention cannot

optimally function as a clearing house for irregular migrants, i.e. being a (short) stop over preparing them for expulsion. This is especially noteworthy in light of the fact that the data strongly suggest that the overall majority of successful expulsions in both countries are effectuated in the first weeks and months of detention. The longer detention lasts, the less likely that the outcome will be expulsion. Still, both governments keep significant numbers of irregular migrants in detention for much longer than that and keep up a legal framework that allows for detention up to 18 months in Germany and theoretically even longer in the Netherlands. But the lengthy and very costly detention of an irregular migrant that will eventually end up on the streets again does not seem a very rational migration control approach. Making detention capacity available for newly apprehended irregular migrants with a higher chance of being deported – and thus releasing 'undeportable' cases much earlier – would seem a more effective and rational approach. What can account for this apparent irrationality? Here the new penology perspective comes to the fore. For those who have to stay in detention for a longer period of time, the detention regime has a 'new penological' character. The 'undeportable' irregular migrants are held in a detention system that is essentially not meant for long stays. The regime is usually harsher than that of normal prisons as the facilities and circumstances are sober. Overcrowding, a lack of medical and legal aid, poorly or even unqualified staff and a lack of all activities and education that prepare regular prisoners for their return to society add up to a harsh regime, especially considering the long period irregular migrants can be legally detained in Germany and the Netherlands. From the perspective of new penology their societal exclusion for a longer period of time can already be measured as a policy effect. Prison then simply functions as a 'factory of exclusion' that keeps irregular migrants off the streets and out of sight for a longer period of time. That alone is considered a valuable proceed of policy. An added value, and a slightly more 'rational' line of reasoning from the perspective of migration control, is the idea that the long and harsh detention regime may serve as a deterrent for current and future irregular migrants. One might speculate that the authorities hope that the harsh detention regime 'stimulates' these irregular migrants to try their luck elsewhere after they have been turned back on the streets. The fact that there were 'returning' prisoners in Van Kalmthout's sample of irregular migrants means that at least a number of them are not deterred. For them the detention system risks becoming a revolving door, for others it may indeed be an experience that brings them to leave the country. However, both in terms of human and economic costs these long detentions seem a high price to pay for an unknown and immeasurable contribution to the effectiveness of expulsion policies.

The de facto functioning of the detention system as a deterrent brings the notion of the state of exception into mind. There is evidence that both countries are stretching their policies to

adapt to the circumstances and problems they face in order to increase effectiveness. In doing so they also undermine 'traditional principles, standards and procedures of criminal law' amounting to the use of counter law (Ericson 2007). The length and conditions of immigrant detention (especially in the Netherlands where illegal residence is not even a criminal offence) and some of the efforts of immigration authorities to expel irregular migrants (such as presenting aliens to various countries and 'informalizing' diplomatic relations to increase expulsion rates (Germany) all brush against the limits of the legal system and allow degrees of exception. Writing on the use of surveillance in immigration matters Lyon (2007: 134) even maintains that Agamben's notion of the 'state of exception' has actually become 'business as usual'. That may be a bit too all encompassing for the Dutch and German situation, but there is no doubt that legal constraints are increasingly bent or bypassed.

The concept and legal status of citizenship emerges from this state of exception as a central but ultimately Janus-faced status. In essence the lack of a known citizenship of irregular migrants both facilitates the 'exceptional' handling of immigrants by the state, as well as restricts the state in achieving its aims. Firstly, the fact that irregular migrants willingly hide their legal identity and citizenship makes them all the more vulnerable vis-à-vis the state. To some extent it puts them in a legal no-man's land. Lack of citizenship is often also a lack of legal/diplomatic representation, which gives the detaining state authorities more 'leverage' in their dealings with irregular migrants. The immigrant's valuable lie comes at a high cost. With the growing importance of immigrant detention the individual irregular migrant finds himself increasingly cornered between the rock of prison and the hard place of expulsion. On the other hand, the lack of citizenship puts the state authorities in an impossible position at the international level, as the lack of citizenship blocks the state's possibilities to deport irregular migrants. Both the irregular migrant and the (supposed) country of origin are well aware of this and use this politico-legal restriction on the deporting state to their advantage. In turn, this strengthens deporting countries in their resolve to find new means of identification. For founding EU and Schengen members such as Germany and the Netherlands the obvious place to develop new initiatives lies at the European level.

5 EUROPEAN TOOLS FOR DOMESTIC PROBLEMS.

5.1 Introduction[21]

In a Europe without internal borders migration control cannot be determined and executed at 'just' the national level. In practice this means that the EU and especially the Schengen states have a joint agenda when it comes to border control, visa policy and immigration and asylum policy. These are issues on which a significant policy agenda – that is primarily aimed at the exclusion of 'unwanted' immigrants – has developed in the last two decades since the Schengen cooperation began in 1985. Measures that were taken on irregular migration were usually related to border control issues, the countering of human smuggling and the closing of certain migration 'routes' into the territory of the Schengen states. *Internal* migration control on irregular migrants has long been considered a national matter. Not in the least because of an – informal - recognition of the large differences between the member states in their political perception and handling of the issue of irregular migration. The differences between the Northern member states, where irregular migrants are considered a problematic presence and the Southern member states, where irregular migrants are a much more tolerated part of the informal economy (and society), seem to stand in the way of a common stance on internal migration control on irregular migrants. Yet, as has been made clear in the previous chapters, countries such as the Netherlands and Germany are quite serious about the development and implementation of internal surveillance on irregular migrants. At the same time they are confronted with the obvious limitations of a purely national approach. As a result of frustrations with readmission and expulsion policies at the national level, member states have increasingly been looking at the EU level of policy making, hoping that the Union's political weight will increase the leverage on unwilling and uncooperative countries of origin. The biggest frustration of expulsion policies, the impossibility of identifying irregular migrants, could also potentially benefit from a European approach. Considering that an irregular migrant could have entered the European Union at any external border means that he may have left traces of his identity and itinerary in any other EU member state, information that may be made accessible through a European approach. It may be national politics and laws that declare an irregular migrant to be 'undesirable' or even 'criminal', but if the national instruments can only do part of the job, these member states are likely to look at the European Union to provide additional tools.

This chapter analyses the 'policies' and instruments that have been developed at the level of the EU that can (also) 'aid' member states in their domestic 'fight against illegal migration',

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[21] Parts of this chapter are based on two earlier studies: Broeders (2007) and Broeders (forthcoming)

as it is phrased in the official documents of the European Union. The EU initiatives will be analysed in terms of two theoretical questions set out in paragraph 5.2. The first is derived from the general theoretical framework and basically asks what the contribution of these EU policies and instruments is to the working of the first and second logic of exclusion. The second is linked to debates in political science and political sociology about the nature of EU cooperation. To what extent can EU policies and instruments on irregular migration be characterised as a common solution to a common problem? Or should it be viewed as the instrumental use of EU resources for domestic agenda's and policy problems? Paragraph 5.3 sketches a brief historical outline of the European cooperation in matters of (irregular) migration, originating outside of the legal framework of the EU and slowly edging towards (partial) integration into the EU's structures. Paragraph 5.4 deals with two policy initiatives that try to alleviate some of the difficulties in domestic expulsion policies. The first is the negotiation of joint readmission agreements and the second is the negotiation of a return directive. Paragraph 5.5 focuses on the development of European 'instruments'. Here the emphasis is on the development, and the politico-technical changes within the development, of an emerging network of EU migration databases consisting of the Schengen Information System (SIS) and its aptly named successor the SIS II, the Eurodac system and the Visa Information System (VIS). These systems have an important function in the exclusion of irregular migrants, both at the external borders of the EU and, as will be argued and shown below, in the internal migration control in individual member states such as Germany and the Netherlands. This paragraph will analyse the character, development and potential of these data systems and where possible the practical use of the system, highlighting the cases of Germany and the Netherlands. Conclusions will be drawn in paragraph 5.6.

5.2 EU policy making: transfer of competence or a European tool shed?

European unification has been a long history of nation states overcoming their national interests to achieve common goals and ultimately to prevent the repetition of the disaster of (world) war originating in Western Europe. The original rationale of the post war European cooperation was to restrict national states in their possibilities to develop the capacity for new wars. Coal and steel being the raw materials for the weapons of mass destruction of the immediate postwar days, the European nations decided to bring production thereof under the supervision of the European Coal and Steel Community, Europe's first truly supranational organization. Even today, and in contrast to most international organizations, the core of the European Union still is an in essence very supranational treaty: the EEC treaty which is now referred to as the first pillar of the European Union. In the first pillar the European institutions are fully involved in the development of common policies, through the so called community method, and the implementation of these policies is subject to judicial

review by the European Court of Justice. Even though European cooperation has known periods of serious stagnation and revived nationalism it is usually seen as a process that limits and diminishes the national sovereignty of its member states. The general direction of Europeanization has been that of 'an ever closer union' as it is phrased in the Treaty of Rome and in the preamble of the rejected "constitutional" treaty. European integration is therefore also often associated with restrictions on national policies and discretionary space. From a national perspective 'Brussels' is often a restrictive power: fishermen can't fish because of quota, firms get fined because of breaches of EU regulations for competition and national decisions have to be revoked because the European Court of Justice determines they are in violation of the EU-treaties. In other words, the EU molds the behavior of national governments so that it complies with the joint decisions taken at the European level. In this reading the commonality takes precedence over the national. However, in the literature on European migration policy the emphasis on the national perspective is still very much dominant. To a certain extent this is logical because the sensitive EU policy terrain of what we now call "Justice and Home Affairs', which includes immigration, asylum and visa, was originally the result of international negotiations within the Schengen group (and hence outside of the EU legal order). And even when it was taken into the framework of the European Union, it was still kept firmly intergovernmental and outside of the normal EU decision making process (Monar 2001, WRR 2003). Cooperation in matters of Justice and Home Affairs has been a project of reluctant and hesitant nation states, although one has to add that Europeanization usually is (Broeders 2009).

However, in addition to the traditional scheme of 'resorting', albeit reluctantly, to the EU to deal with problems that manifest itself at a European scale, there is another theoretical perspective that argues that national actors, or more precisely (parts) of the executive, seek out the European level not so much to devise common solutions for common problems, but to escape domestic constraints on policy making (Wolf 1999, Guiraudon 2000, 2003, Lahav & Guiraudon 2006, Lavenex 2006, Boswell 2007). Branches of the executive, such as immigration authorities, 'go European' to avoid parliamentary scrutiny or judicial accountability that would impede their activities at the national level (Boswell 2007). Guiraudon (2000) refers to this behavior as 'venue shopping': agencies making a vertical 'escape' from the various domestic constraints on policy making resulting from democratic, judicial and public scrutiny (see also Lahav & Guiraudon 2006, Lavenex 2006). The European scene makes it possible to escape domestic constraints and open up new spaces for action (Guiraudon 2003: 265).This logic especially applies to the organizations that are responsible for control and security, such as police and intelligence organizations operating at the international level, but also increasingly for the immigration authorities responsible for

the EU's 'fight against illegal migration'. The policy frames and (usually) soft law resulting from international cooperation do not constrain nation states but rather sanction national or protectionist initiatives: "International organisations and supranational participation legitimize the role of certain actors in policy-making that defend a logic of control" (Lahav & Guiraudon 2006: 207). Instead of being restrained in their autonomy, the EU level of policy making makes it possible to avoid national constraints and to strike alliances with their (ministerial) counterparts from the other EU member states. According to Wolf (1999: 336) the opening up of an additional political arena dominated by government representatives strengthens the executive as they alone can operate at both the national and the international level. According to him the strategic use of this new arena can be seen as an new version of the 'ancien' *raison d'état*, as this old notion of state interest highlights the "(…) fact that governments' strive for autonomy has always been of a double-edged character, i.e. it has been directed to the international and the domestic context simultaneously" (Wolf 1999: 337, see also Lavenex 2006: 331). This instrumental use of the EU's capacity would account for both a selective Justice and Home Affairs policy agenda – focusing on control and not so much on rights – and an intergovernmental organization of decision making. Even so, allowance has to be made for the fact that most EU cooperation started from a very national and narrowly framed perspective, while developing along the way into a common policy framework, including the community method of decision making. Trading in Francs, Guldens and Deutschmarks for Euro's wasn't achieved overnight either. It remains to be seen whether national governments can maintain the EU as an 'escape' route and withstand the communutarisation of (parts of) the Justice and Home Affairs agenda, especially considering the fact that "(…) the EU has hitherto proved to be particularly resistant to long-term instrumentalisation by national actors" (in Lavenex 2006: 346, see also Broeders 2009).

Most of the policies adopted at the EU level under the caption 'migration management' are primarily focused on the prevention of unwanted migration (Guiraudon 2003: 266, Lavenex 2006: 335). So far migration control is the de facto undisputed aim of policy development explaining the advances made in the development of (soft law) instruments and restrictive policies and the limited and sometimes even lack of progress on the more substantive dossiers concerning for example the rights of third country nationals and common norms for the handling of asylum claims (see par. 5.3). Migration control, especially when it is aimed at irregular migrants, is control through exclusion: barring access to legal procedures and geographical borders. Increasingly, it is also a matter of expulsion policies, which may be regarded the ultimate exclusion. That also means that migration control is increasingly part of the foreign policy agenda of the EU, especially where readmission agreements are concerned (Lavenex 2006). Furthermore, as shown in the preceding chapters on national

Dutch and German policies, the exclusion of irregular migrants is increasingly a matter of digital surveillance. The rapid technological advances in database technology and biometrics also influence the possible contributions that the EU can make to the 'fight against illegal migration'. This raises the question how policies and instruments such as these migration databases developed at the EU level contribute to the two logics of exclusion: at the level of the (Schengen) community as a whole but, in light of the focus on policies of *internal* migration control, especially at the level of the national state.

From a perspective of internal migration control the defining characteristic of an irregular migrant is his irregular residence. Irregular residence however does not presuppose irregular entry. There are three basic categories of irregular migrants: those who enter and stay illegally (the irregular migrant 'proper'), those who apply for asylum and become irregular after their application is rejected and those who travel to the EU on a legal (tourist) visa and become irregular after the validity of the visa expires. It is these migration histories that lay at the base of the development of the EU migration databases and their use for the exclusion of irregular migrants. The EU migration databases dealt with in this chapter have either been developed for, or adapted for, the storage of data on irregular migrants, visa applicants and asylum seekers and combinations thereof. As these systems are not devised to shield the access to societal institutions such as the labour market or the welfare state, they are less likely to make a contribution to the first logic of exclusion. However, the systems may contain functions that delegitimize and criminalize institutions or networks that irregular migrants need and use for their irregular stay. The main function of these systems in migration control is primarily linked to the external borders of the EU – the geographical borders and the access to legal procedures for asylum and visa– and therefore to external migration control. For the *internal* migration control the main contribution of these systems can be expected in the support and instrumentalization of the second logic of exclusion: that of exclusion through documentation and registration. The EU wide scale of these systems that will document and register important legal migration flows into all of the EU member states, brings the level of 'identity management' (Muller 2004) by means of database technology to a whole new level. Documenting identities and itineraries can be used for internal migration control as it may provide links to the missing information that frustrates national level expulsion policies. When these systems become operational in the context of the 'fight against illegal migration' and especially in the internal control on irregular migrants they should become vital tools for the exclusion through registration, as their principal function is to re-identify irregular migrants (Broeders 2007).

Information and communication technology has made it possible to link various databases, create networks between them and it has 'liberated' registrations and administrations from fixed places and locations through remote accessibility. This interconnectivity and accessibility of information makes cross-referencing potentially a matter of seconds. Considering the 'state of the art' technology applied in the setting up of these new EU databases the limit may indeed be approaching the sky from a purely technological perspective. Whether or not governments connect and combine different bodies of information will increasingly become a matter of political choices and legal constraints, as the technological constraints are losing their relevance quickly. Technological advances and possibilities often underlie 'function' or 'surveillance creep', meaning that systems originally intended to perform narrowly specified functions are expanded as a reaction to new (political) circumstances (Lyon 2007), often sidestepping or pushing back the limits of the original legal framework and safeguards. European integration offers new challenges and possibilities for member states in the field of (irregular) migration control. Whether or not they will be used for the domestic internal surveillance on irregular migrants depends on (1) if and to what extent national governments (can) use the EU in an instrumental manner, pushing for common policies and instruments that suit national needs and (2) if and to what extent the systems actually make a practical contribution to solving the problems national states experience in the internal control of irregular migrants, either through the first or the second logic of exclusion.

5.3 Schengen, Amsterdam & Prüm: a bird's eye view of European cooperation in Justice and Home Affairs

EU 'policies' on illegal migration weren't always embedded in a discourse of security and the irregular migrant wasn't always seen as a threat to the Fortress Europe. The changes in policy kept pace with the gradual change in perception of the irregular migrant. Cholewinski (2004) distinguishes three periods in the development of a 'comprehensive common EU policy' on illegal immigration that, according to him, lost its human rights component along the way. The first period runs from 1974 to 1989 and is characterized by member states displaying many reservations and a lack of political will to develop substantial common initiatives. However, the proposals and analyses in this period took a balanced approach to the problem: the vulnerable position of illegal immigrants was recognized and taken into account. A Commission proposal to counter illegal employment stipulated that member states should ensure the fulfillment of employer obligations and safeguard the rights of migrant workers so that the cost of an irregular migrant worker would be equal to or even exceed that of a legal worker (Cholewinski 2004). Even though this proposal was never translated into a common policy, the discourse on and analysis of the problems posed by irregular migration was

distinctly different from that in later years. The second period, running from 1990 to 1999, is characterized by intergovernmental cooperation outside the institutions of the EU proper and the so called 'post-Maastricht Treaty' measures. This period includes cooperation in semi-formalized intergovernmental groups such as the Ad Hoc Immigration Group, EU working groups and especially the Schengen Group. All of these functioned outside of the Community legal framework and were therefore free of judicial or democratic control by the European Court of Justice or the European Parliament (WRR 2003, Samers 2004a). The best-known is the Schengen Group that negotiated the Schengen agreement (1985) and Convention (1990). The original Schengen agreement outlined the ambition of the original five signatory states[22], including Germany and the Netherlands, to abolish their internal borders and give real meaning to the long standing European goal of free movement. However, it was the later Schengen Convention (1990) – that was basically an inventory of 'flanking measures' – that associated or even equated 'Schengen' with securitization and the image of the Fortress Europe. The Convention and the ever more voluminous rules and manuals that came along with it (known as the Schengen Acquis) were considered a necessary condition for the implementation of free movement within the Schengen area. It regulates a long series of crucial issues concerning national and common external border controls, cross-national police cooperation, practical issues such as 'hot pursuits' across borders by the national police and data cooperation, including registration of persons and objects. The convention is the starting point for a wide range of instruments for the registration and surveillance of large population groups in the countries concerned (Mathiessen 2001). First and foremost among those instruments is the Schengen Information System (SIS), the Convention's 'database-flagship'. With the entry into force of the Treaty of the European Union (Maastricht) in 1993 much of the ad hoc commissions and working groups on various issues of migration, asylum and security were taken up into the new structure of the European Union. "Combating unauthorized immigration, residence and work by nationals of third countries on the territory of the Member States" was identified as a common interest for cooperation in the intergovernmental third pillar of the new European Union (Cholewinski 2004). Though the cooperation on Justice and Home Affairs, as it was now called, became a formal part of the new EU treaty, decision making basically sidelined the European Commission and remained outside normal EU procedures for democratic and judicial review. Intergovernmental cooperation between nation states weary of losing sovereignty remained the norm. Most of the 'measures' aimed at illegal immigration that were adopted in this period focused on the detection of illegal employment, facilitation of expulsion and readmission and the problem of trafficking and smuggling of human beings (Cholewinski 2004).

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[22] France, Germany, the Netherlands, Belgium and Luxemburg.

The entry into force of the Treaty of Amsterdam in 1999 set off the third period. Amsterdam brought two major changes into the policy domain of Justice and Home affairs. The first was the incorporation of the Schengen-acquis into the European Union. The second was the transfer of some parts of the Justice and Home Affairs cooperation from the intergovernmental third pillar to the community first pillar of the EU[23]. Under the lofty new heading of the 'Area of Freedom, Security and Justice' (as Justice and Home Affairs is now also known) the policies on immigration, asylum, external borders and cooperation in civil law were transferred to the first pillar, while police cooperation and cooperation in criminal law remained in the intergovernmental third pillar. The Schengen acquis, containing provisions and regulations on all these matters, was divided over the two pillars accordingly (WRR 2003). EU policy on illegal immigration has developed rapidly in the period following Amsterdam. Though the treaty makes it much easier to adopt legally binding measures (in both the first and the third pillar) the member states retain a preference for soft law and operational measures. The political discourse on illegal immigration in the post-Amsterdam era gradually took on a grim tone: policy on illegal immigration became the 'fight against illegal immigration'. Measures taken in the post-Amsterdam period include strengthening of borders and carrier sanctions, the adoption of a regulation for determining the member state that is responsible for an asylum application (known as Dublin II, as it replaced the original Dublin Convention). Dublin II is linked with the Eurodac central database that contains the fingerprints of all asylum claimants over the age of fourteen. A database that has gradually taken on the secondary aim of preventing illegal immigration (Aus 2003, Cholewinski 2004). Visa policy was also stepped up for those countries considered to be the major sources of illegal immigration. In order to create an effective common visa policy the member states are working on a Visa Information System (VIS), a database aimed at registration of issued and refused visa, copies of travel documents and biometric identifiers. Furthermore, initiatives were taken to promote cooperation among member states in matters of expulsion policy and 'illegal immigration' became part and parcel of EU foreign policy and development aid through the recording of readmission agreements in for example the Contonou Agreement between the EU and the ACP-countries (African, Caribbean and Pacific countries). The fight against illegal immigration also targeted the traffickers and smugglers who facilitate illegal migration to the EU (Cholewinski 2003, Mitsilegas, Monar & Rees 2003, Samers 2004a).

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[23] Justice and Home Affairs matters in the first pillar were not fully brought under the community framework with the entry into force of the Treaty of Amsterdam. They became subject to a special transitional regime of five years in which the European Council continued to take decisions unanimously and in which the Community institutions (European Commission, European Parliament and the European Court of Justice) do not have their usual role and rights. The ending of this transition period requires a unanimous decision thereto by the European Council (see WRR 2003).

At the top of the political agenda is the comprehensive plan to combat illegal immigration, formalized in the Commission's 'Communication on a common policy on all aspects of illegal immigration' of June 2003. The comprehensive plan centers around eight points for action: visa policy, information exchange and analysis, pre-frontier measures, financial support of actions in third countries, border management, improvement of co-operation and co-ordination at the operational level, the advanced role of Europol, aliens law and criminal law (including illegal employment) and readmission and return policy (Samers 2004a: 31, see also Mitsilegas, Monar & Rees 2003: 93). The ambition to develop a comprehensive plan for all aspects of illegal immigration indicates that EU member states are slowly recognizing the importance of internal migration control. Indeed, border management, though vital and politically visible, is just one of the main issues on the list. The notion that erecting gates alone lacks effectiveness if migrants who pass the hurdle of border controls – legally or illegally - are able to live an unimpeded life in illegal residence has sunk in at the EU. This is most clearly expressed in the European Commission's Return Action Plan of 2002 which would have to ensure that 'the message gets across that immigration must take place within a clear legal procedural framework and that illegal entry and residence will not lead to the desired stable form of residence' (European Commission quoted in Samers 2004a: 41).

Some member states were eager to speed up the Justice and Home Affairs agenda even further. In May 2005, seven member states of the EU, again including both Germany and the Netherlands, signed a new treaty in the German city of Prüm. The Prüm treaty is also – unofficially – known as 'Schengen III' as there are some striking similarities: it was negotiated outside the EU legal order, among a limited number of member states and deals with 'Justice and Home affairs issues'. Furthermore, information exchange is the dominant theme of the treaty. The preamble states that the treaty seeks to establish "…the highest possible standard of cooperation especially by means of exchange of information, particularly in combating terrorism, cross-border crime and illegal migration…" (in Balzacq et al. 2006: 1). The treaty outlines the role of (additional) 'document advisors' that are to assist and advise consulates, carriers and host country border control authorities in their task of separating real from false documents and also introduces new procedures for mutual assistance and cooperation among signatory states in matters of repatriation. The treaty seems to rest on the view that 'data exchange will bring greater security to all' and aims to facilitate the exchange of the following types of data: DNA profiles, finger prints, vehicle registration, non personal and personal data' (Balzacq et al. 2006: 13). This adds to, and in many cases doubles with, all kinds of data exchange that are already in effect at the European level, especially the data collection and surveillance equipped by EU migration data systems, such as the SIS, Eurodac and VIS.

From Schengen to Prüm, via Maastricht and Amsterdam, Germany and the Netherlands have always been at the forefront of the European cooperation in matters of borders, asylum and 'the fight against illegal migration'. Especially Germany, using its political weight within the Union, has often initiated new schemes or pressured existing ones into a 'match' with the German policy agenda (see Aus 2006: 8; Aus 2008). On the issue of internal migration control on irregular migrants the EU provides a possible solution to the big bottlenecks in expulsion policy: the lack of cooperation of countries of origin and the identification problem. As this study focuses at the development of *internal* migration control, the development of a common European border strategy, including 'Schengen', and the setting up of a border control agency such as FRONTEX are by and large left out. The remainder of this chapter will focus first on the European efforts to come to a common 'Return Policy' and the efforts to use the political clout of the EU to negotiate readmission agreements with both countries of origin and countries of transit. In addition to these rudimentary forms of policy, the European cooperation on Justice and Home Affairs resulted in the construction of a number of 'instruments' or tools of migration policy. In terms of instruments this chapter will analyze the development of a European network of immigration databases that can be used to control migratory movement and help with the (re-) identification of irregular migrants that try to hide their identity (see also Broeders 2007, Broeders forthcoming).

5.4 Matters of scale and weight: EU return and readmission policies

The trouble that individual member states have with sending back irregular migrants as a result of a lack of cooperation from countries of origin and transit (see chapter 4) have made member states look for answers at a higher level. The negotiation of readmission agreements is now placed firmly on the EU's external relations policy agenda and the Commission has been given the mandate to negotiate them (Roig & Huddleston 2007: 366). The idea is that the political weight of the EU is an effective tool to negotiate readmission agreements with uncooperative countries (Mitsilegas, Monar & Rees 2003, Lavenex 2006). However, there is fierce resistance from countries of origin against these policies, as they consider them to be an instrument for 'externalizing' European problems. Nonetheless some progress has been made: a number of readmission agreements have been negotiated successfully. But even a celebrated 'success' such the insertion of readmission clauses in a large scale multilateral aid program as the Cotonou Agreement, which covers 69 African, Caribbean and Pacific countries, proved problematic as soon as the ink was dry. Ever since the entry into force of the agreement in 2003, the status of article 13 (which covers the readmission issue) remains unclear and disputed between the parties (Roig & Huddleston 2007: 371). Negotiating readmission clauses has proven to be difficult, but the EU consequently makes it even more

difficult by trying to negotiate the double deal of getting countries to take back not only their own citizens, but also those migrants that are believed to have transited through their country *en route* to the EU. That means taking 'back' transit migrants who are not nationals and for which there is no obligation to do so under international law. However, the European Commission views "(…) readmission agreements with transit countries as an alternative to repatriation to countries of origin of irregular migrants, whose itinerary, but not their identity, can be established" (Roig & Huddleston 2007: 365). In the negotiations with neighboring countries in Eastern Europe and in the southern Mediterranean which are the most important sending and transit countries it is especially the transit clause that frustrates negotiations. As countries like Turkey and Morocco have similar difficulties to negotiate readmission clauses with their own sending countries, they fear to get stuck with European problems (Roig & Huddleston 2007, Cassarino 2007). Or as a Turkish official phrased it: they fear that Turkey will become a 'dumping ground for unwanted immigrants by the EU' (Apap et al. 2004: 22). Moreover, if these countries of transit lack the political will, the political leverage and the capacity to send these transit migrants back to their own countries of origin they are likely to stay in that country, where their only option is to look for a new opportunity to gain access to the EU. These transit countries would then function as 'the doormen to the EU's revolving door' instead of the *Cordon Sanitaire* that the EU is looking for' (Roig & Huddleston 2007: 382).

Though there has been a significant increase in the number of EU readmission agreements that are negotiated or are under negotiation – testimony to the political importance attached to them – the negotiations are usually only successful in specific cases and under specific circumstances. The successful negotiations are those with the countries that are in line for EU membership, such as the CEE countries during the 1990s, or with Balkan countries that were simultaneously negotiating the Stabilization and Association Agreement with the EU (Cassarino 2007: 187). That meant negotiations carried both a stick and a carrot. Where there is no prospect of big spoils such as EU membership, the EU refuses to bargain with its (next) best chips. The Commission, charged with negotiation of the EU readmission agreements, was painfully aware of this in 2002 on the basis of the experience of negotiating the first set of six readmission agreements: 'As readmission agreements are solely in the interest of the Community, their successful conclusion depends very much of the "leverage" at the Commission's disposal" (Ellermann 2008: 185-186). This leverage has so far been sought in the strategic use of development aid and other funds, such as the Aeneas programme. In practice this has not gotten the EU very far (Lavenex 2006, Monar 2007). In some cases the deal on a readmission agreement was struck but practical cooperation remained lax to non-existent, in other cases negotiations were simply stalled (indefinitely).

For some countries neighboring the EU the most important carrot the EU can offer are so-called visa facilitation agreements, that can make the Schengen border less hard for (some of) their citizens. However, many of the EU member states do no find this a very attractive option, as they fear that they will 'close a door on irregular migration only to open a window on new potential irregular flows of visa overstayers, already the largest category of irregular migrants in the EU' (Roig & Huddleston 2007: 377). Frustrated with the negotiations on the formal level, some EU member states - France, Germany, Italy, Spain and Greece - have entered in more informal arrangements with especially the Mediterranean countries of Northern Africa. The pressing problem of 're-documentation, the delivery of travel documents or *laissez passers* by the consular authorities of these countries' has led these member states to form new cooperative patterns with North African countries such as Morocco, Algeria and Libya (Cassarino 2007: 187). The low public visibility and the adaptability of these arguments make them more attractive for the countries of origin and thus more effective for the member states concerned. Even though this practice seems to work for individual member states, it might turn out to be harmful for further EU attempts to negotiate formal readmission agreements with these countries.

The troublesome practice of expulsion policies has also led to other EU initiatives. Over the years a number of binding and non-binding 'policies' have been negotiated, such a Council directive on the mutual recognition of expulsion decisions on third country nationals and the Council decision on the organization of joint flights for the removal of third country nationals (Canetta 2007: 437). Taking the cooperation on return one step further is the current negotiation of a new Directive for a Common European Return Policy, also known as the Return directive. This directive is slowly taking form, but it is also highly controversial to the member states themselves, as well as an important source of strain in the relation between the European Council and the European Parliament. As this proposed directive contains a number of chapters that may require Member states to make some serious adjustments to their national policies negotiations are tough. Some member states are weary of any clause that will lessen their (national) control on irregular migration. For example, they do not want the Directive to apply to the so-called international zones at airports as they fear it will limit their ability to stop and send back immigrants at the border (Canetta 2007: 439). The directive also stresses 'the principle of voluntary return' meaning that a migrant should be given the time to organize his trip back to his country of origin autonomously after being issued with a return decision and a removal order by the state. According to Canetta (2007: 442) member states fear to lose control over the management of migration because of the risk that immigrants disappear into illegality during the phase reserved for the (self)organization of their voluntary return. Moreover, they worry about the loss of the general deterrent effect

of forced removals on potential future irregular migrants. From the perspective of migration control, the member states *are* enthusiastic about another element in the proposed directive: that of the re-entry ban. According to the proposal a removal decision shall include a re-entry ban for a period of up to five years that applies to the whole of the EU (a horizontal provision that applies to all member states). Controlling such a re-entry ban would imply the organization of an EU-wide data system able to conduct checks at the border to detect migrants under a re-entry ban when they apply for a visa for the EU, apply for asylum or are apprehended when they cross the border illegally. The EU is currently developing data systems for all of these 'categories' (see paragraph 5.5) but the data storage limits for these systems are much shorter than the five years that would be necessary to control for the proposed 5-year re-entry ban. For example, the current 're-entry-ban in the Schengen Information System is only two years (IOM 2004: 259). It remains to be seen how the EU chooses to deal with this issue. The logical choice is between shortening the re-entry ban period and lengthening the data storage limits in the EU immigration databases. The most sensitive proposal in the directive is a fixed maximum length of the 'temporary custody' (administrative detention with a view to expulsion) of six months for all member states. Concerning the very wide variation in practices among the members states of the EU (Van Kalmthout et al. 2007) this is a very difficult point. Especially for Germany and the Netherlands, which both exceed this limit by a wide margin (Canetta 2007: 445). The 'solution' for this problem, as can be read from the latest version of the directive of May 16th , 2008, has been to keep the limit of 6 months, yet allow a further extension 0f maximum twelve months if removal is delayed as a result of a lack of cooperation from the irregular immigrant himself or difficulty obtaining documents from third countries (CEU 2008: 24). Considering that these are the main causes for most delays of expulsion, the room to maneuver for member states such as Germany and the Netherlands has hardly been 'restrained' by the current version of the directive. It also suggests that 'deterrence' of irregular migrants by the possibility of a lengthy stay in administrative detention is valued highly by the member states, even in the knowledge that *effective* expulsion is usually achieved within the first months of detention (see chapter 4). The fate of the new directive has not been decided yet as it is now basically stuck between the Council and the European Parliament[24].

[24] This is the first test case of the recently introduced co-decision procedure in matters on illegal immigration. The European Parliament, which has been pretty much structurally ignored in the past when it only had the right of advice, is not going to making the negotiations on this directive easy. The proposed European Return Fund (that will contain €676 million for the timeframe 2008-2013) is basically being held hostage by the EP that has coupled the decision on the fund to that on the directive (Canetta 2007: 447-449).

5.5 Creating digital borders: a network of EU migration databases

The EU migration databases developed over a long period of time starting with the Schengen Information System (SIS) as part of the Schengen Convention in 1995 and extending into the near future with the expected launch of the SIS II and the Visa Information System in 2009. Along the way of their development the set up and functions of most of these databases have been adapted to changing circumstances. Two developments stand out in this respect. Firstly, the fact that irregular migration, and irregular residence, grew into a political problem during these years accounts for number of changes in the development, scope and functions of these systems. Secondly, the political prominence of 'the fight against terrorism', gaining in strength after the terrorist attacks in New York, Madrid and London has led to what Boswell (2007: 606) calls "(…) the appropriation of migration control instruments for the purposes of enhancing surveillance by security agencies". The successive development of the SIS, Eurodac and VIS and the increasing ambitions for and demands on these systems will be analysed below.

5.5.1 Schengen Information System (SIS), SIRENE and SIS II

'Schengen' operates two comprehensive registration and surveillance systems. The first is the Schengen Information System (SIS), a data based registration and surveillance system. The SIS is in operation, but is also under renegotiation and redevelopment in light of its operability in an enlarged EU of 25 member states. The need to design a SIS II also prompted member states to place new 'wish lists' on the table. The other system, SIRENE which stands for *Supplément d'Information Requis a l'Entrée Nationale*, is twinned with the SIS as an auxiliary or supplementary system.

The SIS is made up of a central database (called C-SIS) that is physically housed in a heavily guarded bunker in Strasbourg and of national SIS-databases (called N-SIS) in all of the Schengen states. Its purpose is to maintain 'public order and security, including state security, and to apply the provisions of this convention relating to the movement of persons, in the territories of the contracting parties, using information transmitted by the system' (article 93 of the Schengen Convention, quoted in Mathiesen 2001: 7). This broadly defined purpose provides the legal base for a large data system that stores information on both persons and objects. There are five categories of persons on whom information may be entered into the SIS. In light of the internal surveillance on irregular migrants the entries under article 96, 'persons to be refused entry to the Schengen area as unwanted aliens', are the most important. Of the objects than can be entered into the SIS the most important category is that of lost and stolen 'identity papers', which already in 1998 constituted the largest number of entries. The information on persons that may be stored in the SIS is a

rather basic and limited list: first and last name, known aliases, first letter of the second name, date and place of birth, distinctive physical features, sex and nationality, whether persons are considered to be armed and/or dangerous, reason for the report and action to be taken. Data are entered according to national standards and the national authorities are responsible for their accuracy. Not all authorities have overall access to the system; immigration authorities for example only have access to the data on irregular migrants. The system is a so-called hit/no hit system: a person is fed into the computer and produces a 'hit' if he or she is listed in the database. Even in case of a hit, not all information is readily accessible. Rather, the computer 'replies' with a command, such as 'apprehend this person' or 'stop this vehicle' (De Hert 2004: 40). According to the German Interior ministry there were more than 30.000 terminals in the Schengen area on which the SIS can be accessed in 2005.

All in all, the SIS is a rather basic system, with a limited range of options for the user, which is exactly why SIRENE was added. The SIS was not designed for detailed data exchange and in practice it serves as an index to the associated SIRENE system that facilitates the exchange of complementary information, including fingerprints and photographs. Although SIRENE is often described as the operational core of Schengen, there is no reference to the system in the Schengen Convention (Justice 2000: 19). The factual data are stored in the SIS but the SIRENE system makes it possible to exchange 'softer' data such as criminal intelligence information. In order to make this a 'convenient' arrangement the national SIS and the SIRENE bureaus are in most countries entrusted to the same organization, usually a central police department responsible for international cooperation. It is mandatory to notify the state that made an entry when the SIS produces a hit. After all, this state is responsible for its accuracy and is able to double-check. When it comes to irregular migrants however, the rules are less strict. Hits are only reported in exceptional cases and the standard procedure is to refuse entry (at the border) or to arrest, interrogate and turn over to the authorities responsible for expulsion when detected inside the country (Justice 2000: 22). Though the SIS is an instrument intended to maintain 'order and security', its main preoccupation seems to be with illegal immigration (Guild 2001). In 1999, the overwhelming majority of the entries on persons were on 'unwanted aliens to be refused entry to the Schengen countries (Justice 2000: 8). The figures on the SIS since 1999 suggest that this still holds true. The total number of entries is increasing at a firm pace: in 2007 the SIS held about 17.6 million entries. Entries on persons in the SIS are not the main contributors to this increase as its yearly averages vary between the 800.000 and 900.000 entries. But, as can be seen from table 5.1, the entries on irregular migrants (art. 96) in turn do take up the lion share of the entries on persons. Moreover, some countries, most notably Germany and Italy, interpret the criteria

for listing unwanted third country nationals rather widely, and are therefore responsible for the majority of the data stored in this category (Baldaccini 2008: 39).

Table 5.1: Selected entries and hits in the SIS, 1999-2007

Year	Entries	Entries on wanted persons	Entries on art. 96	Hits on art. 96
1999	8.687.950	795.044	703.688	21.711
2000	9.697.252	855.765	764.747	21.170
2001	9.856.732	788.927	701.414	26.363
2002	10.541.120	832.312	732.764	35.856
2003	12.274.875	874.032	775.868	32.856
2004	11.746.847	883.511	785.631	21.957
2005	13.185.566	818.673	714.078	21.090
2006	15.003.283	882.627	751.954	21.836
2007	17.615.495	894.776	752.338	n.a.

Sources: Bundesministerium des Innern 2002-2005, House of Lords (2007: 22), CEU 2005b and 2007b

The hits on irregular migrants are relatively low and recently even dropping. Over the years the hits represent about 3 to 5 per cent of the entries on irregular migrants. The last couple of years about 21.000 irregular migrants annually produce a 'hit' in the SIS, which means that they will be refused entry or a visa or, when they are inside a member state, there may be an information exchange through SIRENE to make expulsion possible. Van Kalmthout's (2005: 158) research among 400 detained irregular migrants in the Netherlands indicates that of the total of 400 detainees, 144 were checked in the SIS database, 17 per cent of which turned out to be registered in the SIS. However, on the basis of this study it is not possible to ascertain if the detection in the SIS led to an information exchange through SIRENE. More in general there are no data available that document whether or not expulsion is effectuated on the basis of an information exchange through SIS/SIRENE.

One needs to realise that the current version of the SIS was developed in a time when political minds were predominantly attuned to the problem of border controls and the compensation for the 'loss' of national borders. Internal migration control was not much of an issue in the early Schengen years. When looking at the national figures on the hits for art. 96 for Germany and the Netherlands (see table 5.2) we can make a distinction between internal and external hits. An internal hit for Germany occurs when the German authorities check an individual who has been registered (entered) by another country into the SIS under

art. 96. An external hit is the result of a check on an individual in another member state who produces a hit because of a German entry into the SIS under art. 96. The German statistics indicate that the external hits have consistently been higher than the internal hits (though the differences are getting smaller in recent years). Roughly translated that means that there are more (illegal) migrants being refused at the EU border and at European consulates in third countries, or expelled from other member states because of information entered into the SIS by Germany, than the other way around. In short, immigrants declared 'unwanted' by Germany are stopped at other member states' borders and consulates. That means that for Germany the SIS contributes more to border control than to internal migration control, in the sense of creating a 'remote control' (Zolberg 2002) or 'moving the border outside of the state' (Lahav & Guiraudon 2000). It's a preventive mechanism that extends the German border outwards.

Table 5.2: 'Internal' and 'External' hits on art. 96 in Germany and the Netherlands, 1999-2006

	Germany		The Netherlands	
	Internal hits[1]	External hits[2]	Internal hits[1]	External hits[2]
1999	1.650	4.275	421	126
2000	1.646	3.823	385	156
2001	1.879	4.911	334	146
2002	2.033	4.123	155	369
2003	2.224	3.718	218	330
2004	1.895	2.978	298	228
2005	1.589	2.702	388	368
2006	1.919	2.711	498	418

Source: CEU 2007b

1. Hits recorded internally in response to an alert entered abroad
2. Hits recorded abroad in response to a national alert

The distribution of internal and external hits for the Netherlands suggests that the internal migration 'use' of the system is slightly more important (in relative terms) to the Dutch authorities. On the whole the numbers for both countries are relatively low and do not suggest a vital contribution to the internal migration control irregular migrants. The SIS has distinct limits when judged from this perspective. These limitations and a number of others, as well as new ambitions for the use of the system have led to a redevelopment of the Schengen Information System.

The SIS has also proved to be a popular instrument. The rapid growth of the Schengen-group, even outside of the EU through association agreements with Norway, Iceland and Switzerland, and the prospect of further enlargement of the EU led to the decision to develop a second generation of the system as early as December 1996. This so-called SIS II should accommodate the new members and facilitate new, additional functions (De Hert 2004). The system should have been up and running by now, but various delays have pushed the date back a number of times. At the time of writing SIS II is still not in operation and recently the Commission announced that its latest scheduled 'end of the test phase' - which was set for September 2009 – will not be met (CEC 2009). In terms of options and functions of the new system the Justice and Home Affairs Council in 2003 made it very clear that SIS II would have to be a 'flexible tool that will be able to adapt to changed circumstances' (CEU 2003: 18). The prospect of a new generation of the system prompted member states to put forward all kinds of suggestions to increase the possibilities and the use of the system. The Joint Supervisory Authority of Schengen (2004: 14) signalled two major trends. It noted repeated moves to add new categories of information, especially biometric data, and a second trend to allow other (new) organizations, such as Europol, access to the data held in the SIS. Many of these proposals amount to a departure from the hit/no hit character of the SIS, making it more of an 'investigative' system. Suggestions to link the SIS II with other European systems are an even bigger step further in the architecture of the European network of databases and some documents even opted to integrate all systems into one European Information System (Brouwer 2004: 5). Uncertainties about the functionalities of the SIS II were dealt with in a 'flexible manner'. In 2003 the Commission wrote in a communication that, pending the decision by the Council 'SIS II must be designed and prepared for biometric identification to be implemented easily at a later stage, once the legal basis, allowing for the activation of such potential functionalities, has been defined' (CEC 2003: 16). In other words, politics would only have to follow the path laid out by the technology. SIS II will not be a cheap system. Between 2001 and 2006 the European Commission spent about €26 million on the development of the central database and infrastructure of SIS II. Between 2007 and 2012 the EU budget will be charged a further €114 million to get the system up and running (House of Lords 2007: 15).

Now that the definitive regulation on the establishment, operation and use of the SIS II (EP and CEU 2006) entered into force in January 2007 the additions to and expansions of its functions are clear. Most importantly, the new legislation provides for the inclusion of biometric information into SIS II, more specifically the storage of fingerprints and photographic data. In the future it might even be possible for the system to hold DNA profiles and retina scans, but this would require amendments to the legislation (House of Lords

2007: 20, 43). The addition of biometrics makes new searches possible. The data can be searched in two ways. Firstly, in a 'one-to-one' search, using the data to confirm a 'known' person's identity, i.e. comparing Jim Jones' fingerprints with the fingerprints in the SIS II that are registered to Jim Jones. Secondly, a 'one-to-many' search, in which the fingerprints of a person are fed into the SIS II to compare them to all stored fingerprints. The possibility of making broad searches, or 'fishing expeditions' on the basis of biometric data changes the SIS into an investigative tool for law enforcers and immigration authorities (Baldaccini 2008: 37-38). Especially the 'one-to-many' searches cause concern among many observers as these ideally require a very high levels of accuracy of the biometric data (in order to prevent faulty hits). The European Data Protection Supervisor warned in 2006 against a tendency to overestimate the reliability of biometrics and their use as a unique means of identification (see in House of Lords 2007: 21). The circle of organisations that will have access to new generation of the SIS database has also been significantly widened. Europol and Eurojust have been granted access and the list of national authorities that have access to (parts of) the database also grew longer (Balzacq 2008). Some authorities are described in such general terms that there seems to be ample room for expanding the list of organisations that have access, and for a (wide) variation between member states. As Boswell (2007) has argued these developments add up to security agencies utilizing migration policy tools for counter terrorism and other security aims, rather than a securitization of migration policies as such. The vast collection of personal data on migrants is a tempting source of information for security agencies in a time of global crime and terrorism. In sum, moving from the first to the second generation of the system has been much more than a technological affair. The scope, functions and possibilities of the system have changed and with it, its character.

5.5.2 Eurodac

A second important European database is the Eurodac system, which is linked to the Dublin II regulation, and its predecessor, the Dublin Convention. The objective of the Dublin Convention was to curtail the possibilities for 'asylum shopping' - i.e. individuals entering into the asylum procedure in more than one country successively - and to determine which state is responsible for an asylum claim. In order to do this the member states devised a system that could determine whether or not an asylum claimant had already lodged an application in another member state. To this end they decided to create a community-wide system for the comparison of fingerprints of asylum claimants named Eurodac (an acronym that stands for *Euro*pean *Dac*tylographic system). The development of the system was a long and politically rocky ride (See Aus 2006 for a detailed analysis). The decision to set up the system may have been taken in 1991, but it would take until January 2003 for the system to become operational. By then, the scope of Eurodac had been significantly widened. Originally

it was meant to contain just the fingerprints of asylum seekers, but in 1998 Germany pushed for the inclusion of irregular migrants, even threatening to veto Eurodac if the inclusion was not accepted (Aus 2006: 8). Irregular migrants were already following in the footsteps of asylum seekers as the 'most problematic' group of immigrants. In 1997 the Schengen Executive Committee had concluded, 'that it could be necessary to take the fingerprints of every irregular migrant whose identity could not be established without doubt, and to store this information for the exchange with other member states' (quoted in Brouwer 2002: 235). As the SIS could not accommodate the registration of fingerprints the member states had to look elsewhere. Mathiesen (2001: 18) asserts that the 'history of the issue of fingerprinting "illegal immigrants" shows how Schengen and Eurodac concerns are intertwined'.

Eurodac became operational in January 2003 and started with an empty database. Since this date the database has been 'filled' with three categories of fingerprints. Category 1 comprises the prints of all individuals of 14 years and older who apply for asylum in one of the member states. These are the prints that are necessary to detect cases of 'asylum shopping' in light of the original goal of the Dublin Convention. Category 2 contains the fingerprints of irregular migrants apprehended in connection with the irregular crossing of an external border and who could not be turned back. Category 3 contains the fingerprints of aliens found illegally present in one of the member states. These last prints are checked against category 1 and 2 but are not stored. Furthermore, the transmission of this category of data is optional, member states can decide for themselves if they want to use this option (CEC 2004). It is especially this category that is an indication for the use of EU surveillance systems such as Eurodac for the development of internal migration control on irregular migrants in the individual member states of the EU. Like the SIS, Eurodac is a hit/no hit system and the database contains only limited information: the member state of origin, place and date of application for asylum, finger print data, sex, reference number used by the member state of origin, date on which the finger prints are taken, and date on which the data were transmitted to the central unit (Brouwer 2002: 237). The use of the system in terms of entries and hits can be read from table 5.3.

Table 5.3: Entries and 'hits' in Eurodac (2003 -2006)

	2003		2004		2005		2006	
Category	Entries	'Hits'	Entries	'Hits'	Entries	'Hits'	Entries	'Hits'
Asylum claimants (cat. 1)	246.902	19.247a	232.205	40.759a	187.223	31.636 a	165.958	27.014a
Aliens crossings the external border irregularly (cat. 2)	7.857	673b	16.183	2.846b	25.163	4.001 b	41.312	6.658b
Aliens found illegally present in a member state (cat. 3)	16.814	1.181c	39.550	7.674c	46.229	11.311 c	63.413	15.612c

Source: CEC 2004, 2005a, 2006, 2007

a: fingerprints of an asylum seeker sent in by a member state were matched against the stored fingerprints of an existing asylum applicant (cat. 1 against cat. 1)

b: fingerprints of an asylum seeker sent in by a member state were matched against the stored fingerprints of an alien who illegally crossed the external border (cat. 1 against cat. 2)

c: fingerprints sent in of an alien found illegally present within a member state are matched against the stored fingerprints of an existing asylum applicant (cat. 3 against cat. 1)

The Eurodac database filled up rather quickly in its first years of operation. Most of the entries are related to asylum claimants and most of the hits are 'detections' of double (or even multiple) asylum claims filed by one individual (its main function for the Dublin system). More significantly, the number of entries and 'hits' on irregular migrants apprehended inside a member state (cat. 3) are steadily rising as well. The Commission considers the entries in category 2 to be too low when compared to the expectations and calls upon the member states to 'carry out their legal obligations'. Aus (2006: 12), in a less diplomatic phrasing, calls this category 'a near complete failure'. Some authors (Brouwer 2002, Aus 2003) point to the fact that fingerprinting individuals who were apprehended while crossing the border illegally, is hardly the logical 'thing to do' from the perspective of border states. As this fingerprinting can only have as result that the person concerned, who is later found in another member state, will be sent back to the former member state; one can reasonably doubt if the authorities of the first state will be very willing to execute this part of the Eurodac Regulation (Brouwer 2002: 244)[25].

[25] Aus (2006: 12) points out that even though the overwhelming majority of the entries in category 2 are from the southern border states Greece, Italy and Spain, the interesting thing is not their high share but the overall low volume of data transmitted to Eurodac. Furthermore, the problem of late transmission of data to Eurodac is also primarily caused by the Greek and Italian authorities, a logical and convenient delay from

Through the use of category 3 data, the Eurodac system is steadily becoming more important for the European 'fight against illegal immigration'. The number of hits for irregular migrants found inside member states went from 1.181 in 2003 to 15.612 in 2006. These are fast rising numbers considering that Eurodac contains only asylum data from 2003 onwards which means that only irregular migrants who have a recent asylum history will produce a hit in the system. Many of the irregular migrants currently present in the member states will have an older asylum history – if they have an asylum history at all – and will not show up in a Eurodac search. As the database fills up and holds information from a longer period of time, the number of hits is therefore likely to increase. The main value of the system for the member states lies in its contribution to solve the problem of the lack of information on the identity and country of origin of irregular migrants, without which expulsion is practically impossible. A 'hit' in the Eurodac system can provide a link to a dossier on an asylum application made in another member state that will contain information and perhaps documentation on the identity and the country of origin of an irregular migrants that is silent about his identity. In other words, it could 're-identify' him or her (Broeders 2007). Just as the SIS and SIRENE system can be used to exchange supplementary information to help make expulsion possible, Eurodac can function in a similar way. It is primarily Northern members states (Germany, the Netherlands, the UK and the Czech Republic) that use this optional category for the identification of irregular migrants. Table 5.4 zooms in on the German and Dutch use of the category three data, indicating that these two countries are the most enthusiastic users of the Eurodac system for identifying irregular migrants.

Table 5.4: Dutch and German entries and hits on domestically apprehended irregular migrants (category 3 data) in Eurodac, 2003-2006

	'Entries'			'Hits'		
	Germany	The Netherlands	All Eurodac states	Germany	The Netherlands	All Eurodac states
2003	9.833	223	16.814	985	42	1.181
2004	16.82	1.805	39.550	3.884	1.102	7.674
2005	16.757	8.492	46.229	4.628	2.868	11.311
2006	16.295	15.166	63.341	4.648	4.092	15.621

Source: CEC 2004, 2005a, 2006, 2007 (statistical annexes)

If we look at the data for 2006 we see that Germany and the Netherlands account for about half of the entries in category 3 (roughly 31.000 of a total of 63.000) and more than half of

their national perspective because queries on transit migrants found in other member states do not yield results as long as they are not registered in Eurodac.

the hits on category 3 data (almost 9.000 of a total of 15.621). Moreover, the hits are on a steady increase, especially for the Netherlands, over the years that the system has been in operation. Again, there are no figures available that can directly link category 3 hits to actual expulsions that were made possible by identification data obtained through Eurodac. However, the increasing use of Eurodac data by Germany and the Netherlands suggests that the category 3 data are considered useful in helping to solve the domestic 'identification problems'. The 'popularity' of the category 3 data among certain member states did not go unnoticed. In June 2007 the Commission published an evaluation of the first three years that the Eurodac system was in operation (CEC 2007) which emphasized the future possibilities of this specific category of data. The high use of this category led the Commission to propose that the data on irregular migrants found in member states should in the future also be *stored* in the database, instead of just checked against the data stored under the categories 1 and 2. This takes Eurodac another step into the direction of being a database on irregular migrants in addition to an asylum related database. Furthermore, the Commission intends to explore the possibilities "to extend the scope of Eurodac with a view to use its data for law enforcement purposes and as a means to contribute to the fight against illegal immigration" (CEC 2007: 11). In short, Eurodac's future –like its past- is likely to be a textbook example of 'function creep'.

5.5.3 Visa Information System

From the perspective of 'the fight against illegal immigration', the Visa Information System (VIS) is the next logical step in the emergent network of databases. In general irregular migrants have three possible 'migration histories'. They either crossed the border illegally (with or without help), they were asylum seekers and stayed after the claim was rejected or they came on a legal visa and stayed after its validity expired. The network of databases developed accordingly. Irregular immigration itself defies registration, but irregular migrants found in member states can be registered in the SIS (II), and in the future perhaps also in Eurodac. Those who enter through asylum procedures will be registered in Eurodac and those who enter on a legal visa will, in the future, be registered by the VIS. Control over identity has taken a central place in much EU discussion on (illegal) immigration, terrorism and the (perceived) 'links' between them. According to Guild (2003) this emphasis on identity control has elevated visa to the prime, and in the eyes of the member states, most trustworthy method of identification of third country nationals: 'Documents issued by non-Member States are no longer definitive for determining identity. (…) The Union takes over the task of identifying all persons who seek to come to the Union and determines where they belong' (Guild 2003: 344). Under the heading of 'measures to combat illegal immigration' the European Council conclusions of Seville (June 2002) called for 'the introduction, as soon as

possible, of a common identification system for visa data' (CEU 2002: 8). This new system became the Visa Information System that is currently being developed. Unsurprisingly, the initial proposal to develop a Visa Information System came from Germany (Aus 2006b: 17).

In December 2004 the Commission presented a proposal for a regulation on the VIS to the Council and the European Parliament (CEC 2004b) which was amended and finally adopted by the Council and the European Parliament in June 2007 (CEU 2007). With regard to the use of this latest database in 'the fight against illegal immigration' the phrasing has become more diplomatic, but the substance remains the same. In 2004 the VIS was "to assist in the identification and return of illegal immigrants", while in 2007 it is to "assist in the identification of any person who may not, or may no longer fulfil the conditions for entry, stay or residence of the territory of the Member States". The central importance of the system is for visa and immigration policy, but for the purpose of internal surveillance on irregular migrants the VIS can serve as an instrument to detect and identify them when found and apprehended on the territory of member states. It will make it possible to identify those irregular migrants that travelled into the EU legally at any border, and then 'overstayed'. Once identified, the system can facilitate the provision of travel documents for undocumented illegal residents, on the basis of the exchange of information through the VIS (Samers 2004a). In this way the VIS will also function as a system of re-identification for illegal aliens that travelled legally into the EU, but try to hide their identity when apprehended.

The VIS is a very ambitious project and requires a technically powerful system. On the basis of its feasibility study on the VIS the Commission aimed for a system with a capacity to connect at least 27 member states, 12.000 VIS users and 3.500 consular posts worldwide. This was based on the estimation that the Member States would handle 20 million visa requests annually (CEC 2003: 26). In 2007, the press release accompanying the political agreement on the adoption of the VIS regulation stated that the VIS will store 'data on up to 70 million people'. The technical set-up of the system is an exact mirror of the SIS (II). Just like the SIS, the new Visa system will have a central database (C-VIS), an interface at the national level (N-VIS) and local access points (terminals) for the police, immigration authorities and consular posts. The magic words in the development of SIS II and the VIS are 'interoperability' and 'synergy'. The systems are 'sharing' in the development costs and more importantly they will 'share a common technological platform' so that the systems are compatible, interoperable and able to cross-reference, connect and maybe even exchange information. The database themselves will remain separate (containers) but at the functional level SIS users can (will? must?) have their entries and queries checked against the VIS

database and vice versa. The central systems of the VIS and the SIS will even be direct neighbors in a physical and geographical sense, as they are to be 'hosted in the same location', which means they will both be housed in the SIS bunker in Strasbourg. The political wish of an increased interoperability also includes the Eurodac system, as was clearly set out in the so-called 'The Hague Programme', which is the agenda for the next five years for EU-policies on Justice and Home Affairs the council agreed upon in 2005. Article 1.7.2 of this new agenda calls for maximization of the 'effectiveness and interoperability of EU information systems in tackling illegal immigration' and specifically names Eurodac alongside the SIS II and the VIS (CEU 2005, see also CEC 2005b). As with the SIS (II) the European Council already proposed to grant 'internal security authorities' access to the system. This new example of function creep caused the European Data Protection Supervisor (2006: 2) to remind the member states that the VIS was developed in 'view of the European visa policy, not as a law enforcement tool'. As with Eurodac the member states agreed that the VIS should start with an empty database. The data to be stored in the VIS have a broad scope. In the first place there are the so-called alphanumeric data on the applicant (a digital version of the application form) and data on visas requested, issued, refused, annulled, revoked or extended. The alphanumeric information also includes the details of the person or company that issued an invitation or is liable for the cost of living during the stay. This means that the family members and companies that 'vouch for' the visa-recipient – and who may be held accountable should he or she overstay the visa - are also registered. For these groups the registration by the 'panopticon Europe' may well have a direct disciplining effect. By making it more difficult for irregular migrants to use their networks to gain access, the system contributes to the first logic of exclusion. Secondly, the system will include biometric data: each applicant will be fingerprinted for all 10 fingers and will have his photo entered into the VIS. This will make the VIS the largest ten fingerprint system in the world. The use of biometrics on such an unprecedented scale will bring the system, according to a 2003 feasibility study by the Commission, into a new and largely unknown dimension, both technically and financially (CEC 2003: 26). In the best scenario (optimal synergy with the SIS II) and including biometrics and supporting documents the development investment will amount to almost €157 million and the annual operating costs will be around €35 million CEC 2003: 29-30). The commission intends to make the VIS operational in 2009 (CEU 2007: 3).

5.6 Conclusions

In recent years the EU's 'fight against irregular migration' has been taken to a new level. The real progress is found at the level of EU instruments, rather than common EU policies. In terms of policies there have been only some minor breakthroughs in the negotiations of

readmission agreements and the development of a rudimentary return policy. However, EU readmission agreements suffer from the same structural flaw as those negotiated at the national level (see chapter 4). The inherently uneven distribution of benefits in these agreements between the contracting parties turns 'readmission' in practice often into a paper reality rather than improved cooperation. Furthermore, the advantage of negotiating with the full weight of the EU seems to be undone by the insistence of the member states to not just negotiate readmission agreements with their neighbours in their role as countries of origin but also in their role as countries of transit. Having to take 'back' transit migrants in addition to their own citizens gives some of these countries the (well founded) impression that the EU tries to externalize its migration problems. The fact that the EU refuses to bring valuable stakes such as visa facilitation agreements to the negotiation table further reduces the chances of effective readmission agreements. Frustrated with formal negotiations at both the national and the EU level some member states have now turned to 'informalizing' the issue of readmission. The negotiation of a Common Return Policy also shows every sign of national states hanging on to sovereignty and at the same time looking for new instruments to curtail and manage migration. Common elements, such as agreeing to limit the administrative detention of irregular migrants, are stretched up to the point where even the strictest member states, such as Germany and the Netherlands, hardly have to adjust their legislation. Restrictive elements such as the 5 year re-entry ban are enthusiastically embraced. In short, progress is slow and does not stray much from the domestic agenda's of those states where irregular residence is politically considered a problem.

In terms of instruments the EU's 'fight against illegal immigration' is being equipped with state of the art database technology. The analysis of the SIS (II), Eurodac and the VIS shows that these systems (will) operate on an unprecedented scale that is likely to grow even further as a result of technological advancements and the political desire to increase the 'interoperability' of the systems. Steps towards linking the various databases have been taken and have not met with substantial resistance. For example, Eurodac's goals have been significantly 'broadened' along the way. Though originally devised for the prevention of 'asylum shopping', the German intervention in 1998 made the system just as important for the internal control on irregular migrants. The active use of Eurodac for internal migration control by a small number of member states, first and foremost Germany and the Netherlands, underlines the value of this EU database for domestic use. The fact that all of the EU migration databases (will) include biometric identifiers signifies a crucial new step in the internal surveillance on irregular migrants. The biometric database turns 'internal migration control' into 'internal migration control 2.0', so to speak. The second generation of the SIS will include biometric identifiers and the VIS will even become the largest 'ten finger

print' database in the world. The amount of data stored on potential irregular migrants is enormous and is set to grow at great speed as the Eurodac database fills up and the VIS and the SIS II will go online. These European databases seek to register as many immigrants from 'suspect' legal categories (asylum) and 'suspect' countries of origin (visa) as possible, in order to get at the much smaller group of immigrants that crosses the line into irregularity at a later stage. These systems can be used to re-identify irregular migrants that try to conceal their identity in order to avoid expulsion and thus contribute to solving the main problem of domestic expulsion policies. However, the more effective these systems will turn out to be, the more likely irregular migrants are to adapt to changing circumstances. If the 'identity routes' of asylum and visa will be cut off due to a high risk of identification by the new network of migration databases, this might provoke a counter reaction. A possible side effect may be an increasing dependence of irregular migrants on smuggling and trafficking organizations (Broeders & Engbersen 2007).

In theoretical terms the European efforts in readmission and return and the development of a European network of migration databases primarily point in the direction of national governments 'going European' to serve national, rather than common agenda's. So far the European level has primarily served the interests of the member states and truly common policies have by and large been avoided. It can be argued that national authorities, especially those of the interior and immigration, have 'gone European' to achieve what they could not achieve at the national level. In part they could not achieve their goals because the scale of the problem had become truly European (common external borders, common visa policy) and so the solution had to be found there as well. For another part the EU level provided a convenient venue to negotiate new initiatives and instruments that suit national agendas but lack national constrains: a policy laboratory for new migration control measures far away from national democratic and public scrutiny. The 'pick and choose' use of EU instruments according to national agenda's can also be seen from the selective use of the Eurodac database in its first years of operation: member states that consider irregular migrants a serious domestic policy problem use the system heavily for detection and identification, while member states that that are relatively unconcerned about the presence of irregular migrants on their territory do not actively use the system. So far, instrumentalization of the EU by national actors seems to be the norm when it comes to internal migration control.

In terms of the two logics of control the development of the three databases follows and confirms the paradigm shift that identification, i.e. the second logic, is a vital issue for internal migration policy that has to supplement the first logic. Whereas the SIS was an instrument of *external* border control, primarily meant to exclude at the border, the Eurodac

system, on German insistence, already caters to domestic needs: exclusion at the border and identification to facilitate expulsion for the internal part of migration control. The SIS II and the VIS are set up from the outset as instruments that (also) serve the second logic of exclusion, in addition to their functions for external border control. For those member states that are serious about the internal migration control on irregular migrants, SIS, VIS and Eurodac are valuable instruments to execute both 'logics of exclusion' domestically. For example, the VIS will also register companies and family members that vouch for the applicant which may have a disciplining effect on their willingness to act as guarantor. Here registration is aimed at the networks irregular migrants need for travel and residence and follows the logic of exclusion *from* documentation. But the introduction of biometric identifiers in all systems is a 'killer application' for internal migration control, especially for the second logic of exclusion, that of exclusion *through* documentation and registration. The migration databases are massive efforts to identify irregular migrants themselves in their capacity as an irregular migrant, i.e. confirming at the same time their irregular status and (re-)affirming the legal identity they often successfully try to hide. The swift increase in the use of the Eurodac system for internal migration control - the only biometric system operational at the time of writing – in Germany and the Netherlands is an important indication that the immigration authorities in these countries are more than likely to become 'heavy users' of the new systems when they come online. The inclusion of more information in the system that can link an irregular migrant with formal documentation (visa application, request for asylum) and the overall application of biometric identifiers to make the link as 'watertight' as possible, illustrates the European preoccupation with identification of irregular migrants, especially in some of the northern member states.

6 CONCLUSION: BREAKING DOWN ANONIMITY

If nothing else, the preceding chapters have proven that the border is a social fact in this so-called borderless Europe. Though this dissertation is not about the border in the sense of territorial lines demarcating countries, the various translations of that border in terms of eligibilities and rights, and the translations of border patrol into registrations, internal control and surveillance are its core objects of study. The border is indeed everywhere (Lyon 2005) and can therefore be crossed anywhere. Irregular migrants often do not even cross the territorial border illegally, a useful reminder of the often missing link between 'illegal immigration' and 'illegal' or 'irregular' resident migrants. Some only cross the border of 'legality' when their visa expires or when they choose to remain in the country after their asylum application has been rejected. Once over the border of 'illegality', they (have to) cross various other borders and boundaries illegally because of the direct link between legal residence and all but the barest rights in contemporary Dutch and German society. He or she who is without legal residence also has no legal right to work, to be housed, to pay taxes, to receive benefits or more than just the basic healthcare. Legally, the state expects nothing more of irregular migrants than to fulfill their only legal obligation to their country of residence: the imperative to leave the country.

Of course, most irregular migrants are not willing to fulfill that legal obligation. They usually came for a reason. Most of them came in search of a better life and in the belief that they could find that in Europe. Though their exact numbers are unknown most European states that consider the residence of irregular migrants a problem are now convinced that bringing *down* their numbers requires active state policies. In order to get irregular migrants to leave the country the state developed policies aimed at exclusion and discouragement. These are meant to cut off access to the institutions, resources and networks that irregular migrants need to sustain and prolong their irregular residence. Being cut off from work, the housing market and institutional and social networks should force them to give up their irregular stay in Germany or the Netherlands. Both countries have been implementing policies of internal migration control on irregular migrants for a long time and they have stepped up their efforts since the mid 1990s. Elaborate schemes of registrations and documentary requirements have been devised to guard the access to the most important (formal) societal institutions. Blocking an irregular migrant's access to the legal documents and registrations that would give him access to these institutions has been labeled 'the first logic of exclusion' in this study. It is the 'traditional' policy of internal migration control on irregular migrants. Over the years the effectiveness of this strategy has proven to be limited. Even under the condition of being unable to count irregular migrants, it is clear that their presence is still a fact of life

in most European countries. If exclusion and discouragement do not get irregular migrants to leave the country and try their luck elsewhere, another strategy is needed, one that involves 'taking' irregular migrants physically across the border. This time it *is* the territorial border that is on the mind of state officials. This means that the state will have to invest in a 'second logic of exclusion', one that leads to the actual expulsion of irregular migrants from the country. Given the impossibility to expel anonymous irregular migrants the central notion in the second logic is identification. This study has documented a paradigm shift in the internal migration control on irregular migrants in countries such as Germany and the Netherlands. In this shift, the more traditional policies following the first logic of exclusion are increasingly supplemented with policies meant to put the second logic of exclusion into effect.

A crucial factor in this shift is the role that modern systems of surveillance and especially database technology play in this development. Internal migration control on irregular migrants is expected to be a prime site for the use and development of new technological surveillance instruments focused on documenting and registering access and eligibility on the one hand and on the identification of irregular migrants on the other. Information and communication technology can serve both logics of exclusion. For the first logic it is an indispensible tool to guard and shield off the institutions of the welfare state to anyone who is labeled as 'not belonging'. For the second logic, database technology, increasingly equipped with biometric identifiers, is used to identify irregular migrants. Connecting them with their correct legal identity is a vital link in the process of expulsion. Without a proper identification, expulsion is impossible and the expulsion order is likely to remain a dead letter. However, the two logics make very different and almost oppositional demands of the database systems that the state uses. The first logic merely requires the systems to recognize irregular migrants as 'not belonging', while the second logic requires them to be able to identify and document the individual irregular migrant. These considerations about the intensification and the direction in which internal migration control in the Netherlands and Germany will develop and about the role that modern technologies of surveillance are expected to play, led to the formulation of the following research questions in chapter one, which will be answered in this chapter.

How do national and EU-policies of internal migration control aimed at the exclusion of irregular migrants develop? Do states increasingly supplement more 'established' policies of societal exclusion with policies of exclusion focused on identification and expulsion? And what is the role of (modern) systems of information and surveillance in the construction of these policies of exclusion and control?

As explained in chapter one Germany and the Netherlands were selected on the assumption that they are comparable cases when it comes to internal migration control. However, the focus is on the development of state surveillance on irregular migrants itself, not in comparing the two cases per se. In three empirical chapters central issues of policy intensifications, a shift towards policies operating under the second logic of exclusion and the use of modern techniques of surveillance and database technology were analyzed. Chapter three dealt with "Guarding access to the labour market", which is the most classic site for internal migration control following especially the first logic of societal and institutional exclusion. Chapter four on 'police surveillance, detention and expulsion', focused on the chain of government agencies charged with the organization of the expulsion process. There the emphasis shifts to the organization and implementation of the second logic of exclusion. Chapter five took the issue of the internal migration control on irregular migrants to the level of the EU. In a 'borderless' Europe instruments have to be invented to create and patrol new borders that will enable its member states to separate the 'ins' from the 'outs'. EU solutions are especially expected to help with the issue of immigrant identification, contributing to the second logic of exclusion.

6.1 A new regime of internal migration control

In the field of labour market controls the dominant trend is one of intensifying policies of internal migration control, summarized by Vogel's (2006) characterization "higher, faster, more". The main emphasis in this intensification is on fine-tuning the first logic of exclusion. The turn towards the second logic in this policy sector can be seen at the level of political priorities, but hardly shows in the available data on the implementation of policy. At the level of implementation the facts and figures gathered in this chapter can only give indications for certain developments, some more clear than others. Both countries are rather similar in their political determination to fight the problem of irregular migrant labour and have intensified policies aimed at blocking irregular migrants' access to the labour market (policies following the first logic of exclusion). There is also a minor trend towards incorporating the second logic of exclusion, aimed at the irregular migrant himself, into the labour market control system. In the Netherlands the government seems more explicit in its stated aim to target the irregular migrant himself. Both trends are characterized by an increasing use of database technology and the creation and refinements of digital boundaries: more registration is combined with networked registration. Blocking access to documents and institutions has also increased the role of employers (for controls and information) and the general public (for information and tips) for labour market controls. This trend is illustrative for the shift 'out of the state'. Political priorities have also been translated into increased funding and staffing: the labour market control agencies have definitely been on the receiving end of

Dutch and German government spending. These intensifications have resulted in more controls, more (and higher) fines and more arrests. The main emphasis is on the demand side of irregular (migrant) labour and hence on employers. For policies aimed at the irregular migrant himself the trend is to invest in new databases aimed at identification, fighting identity fraud and establishing the authenticity of documents and identities.

When it comes to the second logic of exclusion it becomes more difficult to see how political priorities are translated into day-to-day surveillance. Identification has become a more central feature of the control system. In the Netherlands the police are (supposed to be) more involved in the labour market control regime and in Germany the Customs authorities – solely responsible for labour market controls since 2004 – even have been given police-like duties and competences. How this translates into a control regime that functions along the lines of the second logic of exclusion, and thus aimed at the irregular migrant, his apprehension and ultimately expulsion, is however not so clear. The data on the apprehension of irregular migrants as a result of labour market controls – which would indicate a turn towards the second logic in the labour market control regime – display very low percentages and/or may not be adequately registered. It is therefore impossible to distinguish between irregular migrants apprehended during worksite controls and those apprehended during the course of some other form of control. The 'real' number of labour market apprehensions is anywhere between the very low percentage that is officially registered and the unknown percentage that may be hidden in the figures registered under general breaches of the Aliens or the Residence Act. In either case the authorities apparently do not feel the need or the political pressure to register these figures more accurately. On the other hand, the steadily mounting political pressure in recent years and the investments in identification procedures and databases suggest that the control regime targets – or will target - the individual irregular migrant now more than it did in the past. But to what extent is impossible to say as the numbers are simply not gathered and calculated.

The policy developments within the chain of government agencies responsible for the expulsion of irregular migrants (police, detention and immigration authorities), show both a marked intensification of their tasks and budgets, as well as a distinct turn towards the second logic of exclusion. In this realm of internal migration control the ship of state is clearly turning towards identification. There is an intensification and professionalization of policies for the identification of irregular migrants with the aim of expulsion. Both countries are investing in the identification process in all parts of the bureaucratic chain leading to expulsion. The police and immigration authorities introduce procedures and instruments that make identification possible and foreign policy is aimed at diplomatic relations with

important countries of origin and the negotiation of readmission agreements. The detention capacity for the 'administrative detention' of irregular migrants has been increased, resulting in a fast growth of this part of the prison population. Furthermore, both countries are exploring the possibilities provided by the 'brave new world' of modern surveillance techniques. Increasingly the immigration authorities turn to EU database systems for the identification of irregular migrants. Especially the newer database systems (will) work with biometric identifiers that can link immigrants to their legal identity and other personal data without needing the active cooperation of migrants themselves. Given the enormous problem of uncooperative irregular migrants hiding their identity or lying about it to the immigration authorities, biometrics may make it possible to 'skip' the immigrant himself in terms of identification. A tempting prospect for the immigration authorities. A 'surveillant assemblage' aimed at (irregular) migrants is clearly emerging at both the domestic level, as well as at the European level. Germany and the Netherlands are increasingly operating their policies of internal migration control as 'factories of identification' for irregular migrants. The desired 'end products' of these 'factories' being a rise in the number of identified and successfully expelled irregular migrants.

However, notwithstanding the investments in policies of identification and exclusion, an increase in the number of expulsions is not achieved. If anything, the numbers are declining rather than rising. The intensification in policing and especially the rising incarceration rates are not translated into more expulsions. This important contra-indication for a policy development in the direction 'identification and exclusion' has a number of possible explanations. For example, expulsions may vary with the general volume of migration that can lead to irregular residence. This is however only part of the story. The fact that irregular migrants are well aware of 'the importance of not being earnest' is one of the main reasons for the dropping expulsion rates. Another reason is the tough stance of many countries of origin that are considered sources of 'irregular migration' on taking back migrants which cannot be identified beyond a doubt as their own citizens. Taking back these immigrants is often not in their political and economic interests and, especially in the case of transit migrants, they refuse to get stuck with what they consider to be 'European problems'. Both the irregular migrant and the (supposed) country of origin are well aware of the Achilles' heel of identification in the expulsion procedure and use this politico-legal restriction on the deporting state to their advantage. In turn, this frustration of expulsion policies strengthens deporting countries in their resolve to find new means of identification. So dropping expulsion rates are also the prime motivation for further investment in solving the problem of identification of irregular migrants. In the case of Germany and the Netherlands the state

does not just look for domestic solutions: many new initiatives and investments in the 'factory of identification' take place at the European level.

As the internal borders between the Schengen member states have been dropped, the entry of irregular migrants into the EU, be it legal or illegal, can be at any border in any member state. The fact that an irregular migrant is apprehended in Germany or the Netherlands does not say anything about his entry into the EU or the bureaucratic 'places' where he or she may have left (documented) traces of his entry, identity, origin and itinerary. Irregular migration is a phenomenon on a European scale. This means that *internal* migration control on irregular migrants can benefit from initiatives taken and instruments constructed at the EU level. So, in recent years the EU's 'fight against irregular migration' has been taken to a higher policy level. In terms of policies there have been some breakthroughs in the negotiations of readmission agreements and the development of a rudimentary return policy. However, the uneven distribution of benefits between the contracting parties in EU readmission agreements turns 'readmission' in practice often into a paper reality rather than enhanced cooperation. The advantage of negotiating with the political mass of the EU is undone by the insistence of the member states to negotiate readmission agreements not just for the return of nationals but also for the "return" of transit migrants. Again, the issue of transit migrants gives some of these countries the (well founded) idea that the EU tries to externalize its migration problems. The negotiation of a Common Return Policy shows every sign of national states hanging on to sovereignty and at the same time looking for new instruments to curtail migration. Common elements, such as agreeing to limit the maximum length of administrative detention of irregular migrants, are stretched up to the point where even the strictest member states, such as Germany and the Netherlands, hardly have to adjust their legislation. Restrictive elements such as the five year re-entry ban are enthusiastically embraced. These initiatives are however unlikely to tip the balance in the EU and domestic 'fight against illegal immigration'.

The real progress can be found on the level of EU instruments. Especially the development of a network of EU migration databases, equipped with state of the art biometric database technology, will be an enormous push for the internal migration control on irregular migrants. These systems are potentially the newly installed 'turbines' of the Dutch and German 'factories of identification', or those of any other member state that is developing policies of internal migration control following the second logic of exclusion. The SIS (II), Eurodac and the VIS (will) operate on an unprecedented scale that is likely to grow even further as a result of technological advancements and the political desire to increase the 'interoperability' of the systems. Steps towards linking the various databases have been taken

and have not met with substantial resistance. These systems will block access for some migrants at the border (as registration may lead to a refusal at the border or at a consulate when trying to obtain a visa) serving an EU wide version of the first logic of exclusion. They will however be of the highest value for the internal migration control at the member state level, as these systems may be able to re-identify parts of the irregular migrant population apprehended and detained in EU member states. The use of these systems for internal migration control is the result of political pressure from those member states that consider 'irregular migrants' an important (policy) problem. For example, even though Eurodac was originally devised for the prevention of 'asylum shopping', the German intervention in 1998 made the system just as important for the internal control on irregular migrants. The active use of Eurodac for internal migration control by a small number of member states, first and foremost Germany and the Netherlands, underlines the value of this EU database for domestic use. The fact that all of the EU migration databases (will) include biometric identifiers signifies a crucial new step in the internal surveillance on irregular migrants. The biometric database turns 'internal migration control' into 'internal migration control 2.0', so to speak. The second generation of the SIS will include biometric identifiers and the VIS will even become the largest 'ten finger print' database in the world. The amount of data stored on potential irregular migrants is enormous and is set to grow at great speed as the Eurodac database fills up and the VIS and the SIS II will go online. These European databases seek to register as many immigrants from 'suspect' legal categories (asylum) and 'suspect' countries of origin (visa) as possible, in order to get at the much smaller group of immigrants that crosses the line into irregularity at a later stage. These systems can be used to re-identify irregular migrants who try to conceal their identity and thus contribute to solving the main bottleneck of domestic expulsion policies. However, the more effective these systems will turn out to be, the more likely irregular migrants are to adapt to changing circumstances. If the 'identity routes' of asylum and visa will be cut off due to a high risk of identification by the new network of migration databases, this might provoke a counter reaction. A possible side effect may be an increasing use and dependence of irregular migrants on smuggling and trafficking organizations (Broeders & Engbersen 2007).

In sum, Germany and the Netherlands, with a little help from their European partners, are constructing a policy approach to internal migration control that is ultimately meant to break down the anonymity of irregular migrants. The intensifications of policies of societal and institutional exclusion are supplemented with the new policy priority of immigrant identification, for which new policies and instruments have been developed and (will be) taken into use. Surveillance by means of database technologies and biometrics are set to become an integral aspect of internal migration control over the years to come, making it

harder and harder for irregular migrants to keep their identity a secret once they are apprehended by the police. Information and exclusion were always kindred phenomena and the digital age has greatly enlarged the information base of the modern state which now stretches far beyond its own borders encapsulating the citizens of other nations instead of 'just' its own.

However, there is a classic distinction between information and knowledge. Information is just raw date that has been structured and made accessible; it becomes knowledge only after it has been selected, validated and interpreted (WRR 2002: 38). That means that vast amounts of data can be both a valuable source of information and knowledge, but can also lead to an information overload. It takes well organised procedures and often the input of the human factor to make good use of the information stored. It remains to be seen if and to what extent state authorities will be able make useable knowledge of the information gathered. The information gathered in this study gives only limited insight into this question for the systems currently available. However, the rather early stage of digitalizing borders with a view to internal migration control combined with the already heavy use of the Eurodac data system makes it likely that the Netherlands and Germany will push through to make these systems 'work' for them: producing knowledge to increase expulsions.

Throughout this study it has been noted that the information that government agencies publish, even in combination with the various academic studies that provide data for smaller or larger parts of the policy process, do not add up to a picture that enables one to get a full view of policy implementation or a clear view of its effectiveness. Data gathering, or at least those data that are published, do not allow for more than indications of developments and effectiveness of policy. This lack of reliable data means that governments themselves are 'dancing in the dark' even though they are bound to have more information than is out in the open. However, it also means that scientists, journalists and parliament for that matter, have no way of evaluating the control system and the recent changes in its operation in any real empirical sense.

6.2 Policy gaps: 'white spots' and 'black holes'

Even though it is clear that internal migration control in Germany and the Netherlands is developing into an increasingly active policy approach that takes both logics of exclusion on board, it is certainly not a development without setbacks and limitations. Cornelius et al.'s (2004) statement that the policy gap in immigration policy has to be seen as a fact, rather than a hypothesis, does not need to be questioned on the basis of this study. The translation of political agendas into policy programmes and finally into the daily practices and activities

of government control agencies, allows for many possibilities of frustrating or watering down the original intent of policy makers. Even though a policy gap is hardly an unexpected empirical finding, the nature of this gap or more accurately gaps, can offer insight into the flaws of the policy-programmes or into the flaws of the political choices behind those policy programmes. After all, not every frustration of policy has to be considered a loss for a democratic, constitutional state. The 'policy gaps' will be discussed below under the headings of 'white spots' and 'black holes'. The white spots can be likened to the white spaces on old maps indicating that this was unchartered and unmapped territory. Strictly speaking, black holes are to a large degree unchartered too. However, in the context of this study black holes are policy venues chosen and maintained by the government even though there is not much light at the end of the tunnel. These are policies in which governments stretch their own legal framework to get the job done, even though the chances of achieving policy goals remain slim and the costs may be considered high. Black holes then, are usually harsh on its policy subjects although it should be realised that the unchartered white spots on the old maps also came with a caution for danger: *hic sunt dragones*! Being outside government control – in a white spot - also means being outside government protection. The fact that governments resort to strategies that lead to black holes has much to do with the fact that their 'fight against irregular migration' is a fight in which action and reaction follow each other at a fast pace. New policy initiatives are often quickly 'countered' by innovations on the side of irregular migrants and the (bastard) institutions that help them sustain their irregular residence. The results may often be a stalemate between government agencies and irregular migrants .

White spots are those sectors of society and the economy where irregular migrants are to be expected, but which are left unchartered or even left alone altogether. In this study they are mostly found on the labour market. From the perspective of the state white spots can be the result of policy choices or of circumstances. It is no secret that irregular migrant workers are especially found in specific sectors of the economy and there are some indications that governments have turned a blind eye in some cases (for example the Berlin construction sector during the 'building boom'). Furthermore, there are notorious 'white spots' where the authorities cannot and/or will not intervene with controls. Governments are restricted as well as reluctant to control private households, thereby de facto – and knowingly! -consenting to widespread fraudulent domestic work, including domestic work by irregular migrant workers. This lack of control also places domestic workers in a vulnerable position in a potentially exploitative environment. White spots are not necessarily safe places. White spots also develop simply because the state's resources are too limited in comparison to the problem it tries to counter. In spite of intensifications in funding and manpower, leading to more controls with higher fines, policy gaps cannot altogether be avoided: there are simply

too many companies to control. The Dutch government now estimates that it annually controls less than 2 per cent of all Dutch companies. That is after the ranks of the Labour Inspectorate have been doubled in the past two decades. The 2007 European Commission proposal to control 10 per cent of all companies every year would require beefing up staff levels from the current 180 to 930 inspectors, hardly something that can be achieved – politically and practically - in the short term. White spots are therefore inevitable and result in a certain degree of labour market segmentation in the Dutch and German economies. There is a demand for irregular (migrant) labour in parts of the economy that is de facto 'left alone'. Even though labour market segmentation is not the intention of policy, some foreseeable segmentation results from the policy choices that are made, or in some cases simply cannot be avoided.

Black holes are those instances where policies take on elements of the 'state of exception', in which the law is stretched up to, and sometimes even over its limits. The main example of a black hole in the development of internal migration control in Germany and the Netherlands is the functioning of the system of administrative detention. Given the difficulties with identification, immigrant detention cannot optimally function as a clearing house for irregular migrants, i.e. being a (short) stop over preparing them for expulsion. This is especially noteworthy in light of the fact that the data strongly suggest that the overall majority of successful expulsions in both countries are effectuated in the first weeks and months of detention. The longer detention lasts, the less likely that the outcome will be expulsion. Still, both governments keep significant numbers of irregular migrants in a lengthy, harsh and very costly detention regime. Considering that these irregular migrants will eventually end up on the streets again makes it an irrational policy approach in terms of expulsion policy, whereas making detention capacity available for newly apprehended irregular migrants with a higher chance of being deported would seem a more effective and rational approach. It seems however that the Dutch and German governments place much value on the idea that the long and harsh detention regime may serve as a deterrent for current and future irregular migrants. 'Undeportable' irregular migrants are held for a long time in a detention system that is essentially not meant for long stays. The regime is usually harsher than that of normal prisons as the facilities and circumstances are sober. Overcrowding, a lack of medical and legal aid, poorly or even unqualified staff and a lack of all preparatory activities and education that prepare regular prisoners for their return to society add up to a harsh regime, especially considering the long period irregular migrants can be legally detained in Germany and the Netherlands. The detention regime should therefore also be considered a black hole. One might speculate that the authorities hope that the harsh detention regime 'stimulates' these irregular migrants to try their luck elsewhere

after they have been turned back on the streets. The de facto functioning of the detention system as a deterrent brings the notion of the state of exception into mind. Both countries are stretching their policies to adapt to the circumstances and problems they face in order to increase effectiveness. The length and conditions of immigrant detention (especially in the Netherlands where illegal residence is not even a criminal offence) and some of the efforts of immigration authorities to expel irregular migrants (such as presenting aliens to various embassies and 'informalizing' diplomatic relations to increase expulsion rates (Germany) all brush against the limits of the legal system and allow degrees of exception.

With the intensification of internal migration control policies, irregular migrants have 'responded' with what can be called evasive manoeuvres. Closing off the formal labour market and access to certain institutions, such as education and the housing market, led to a turn towards the informal economy and the 'creation' of new informal institutions and networks paralleling those in the 'formal' labour market and society. The intensifications of labour market controls in those sectors of the economy where analysis showed irregular migrant labour to be a common phenomenon, seems to lead to sectoral shifts, in which irregular migrants migrate to other, less controlled sectors of the economy. In the Netherlands there is evidence that the increase in the control regime and the overall societal exclusion resulting from internal migration control leads to an increasing resort to (petty) crime among irregular migrants. With other avenues closed to them this subsistence crime helps them to get the money they need to enable their stay in the Netherlands. The most important 'weapon of the weak' that irregular migrants have, is of course their ability to destroy or hide their legal identity in order to avoid expulsion. Despite all efforts of the police, the detention and immigration authorities and the diplomatic corps a simple lie still goes a long way in frustrating government policy. The latest bid by the state to outwit the irregular migrant is the overall application of biometric identifiers in the new systems of digital surveillance that are being set up at both the national and the international level. These biometric databases aim to break to the anonymity that now so soften shelters irregular migrants from expulsion. Even though these systems cannot cover all irregular migrants, they will make the 'identity routes' into Europe (irregular migrants that originally came on a legal visa or through the asylum procedure) a dangerous route for migrants that wish to avoid expulsion. Biometrics may prove to be a 'killer application' in the struggle between the state and the irregular migrant. Only time can tell what the situation will look like in a few years from now when the application of biometrics in immigration procedures is rolled out and the stored data available for the identification of irregular migrants increases. No doubt, a new evasive maneuver will follow and it will most likely follow the direction of previous moves: deeper down into irregularity.

6.3 Follow the leader?

This study draws its empirical material from the cases of Germany and the Netherlands. Those countries were chosen on the assumption of being most likely cases in light of the developments in internal migration control. Obviously that does not mean that these are the *only* two countries that could be fitted into the mould of likely cases. Just as there are relevant differences between Germany and the Netherlands, there are relevant similarities between these two countries and other EU member states. Though nothing can be said about the developments in the internal migration control on irregular migrants in other countries in any empirical sense, there are some reasons to assume that policy innovations in some countries, such as Germany and the Netherlands, may 'spread' to other countries if they come to be regarded as possible solutions for their problems with irregular resident migrants. Immigration policy is a policy area where the EU member states have take a keen interest in each other's policies and copied them if they were deemed to be successful. Especially during the 1990s when asylum migration to Europe was at its height, member states copied policy innovations of each other (that is those geared to restricting access to asylum procedures) out of fear of becoming the 'most attractive country' for asylum seekers. The large numbers of asylum applicants primarily affected the Northern member states which subsequently tried to shift the 'burden' to one another by competing with restrictive policy innovations. It is not unlikely that states will also look over each other's shoulders to see what is done about the problem of irregular migrants. Successful policy innovations are always of interest to government agencies and policy makers working on the same problem. The European Commission's reaction to the successful use of Eurodac for the domestic surveillance on irregular migrants is a case in point. As the figures indicated a success in the domestic 'fight against illegal migration' the primary reaction was to increase the effectiveness and spread the success by making the use of category 3 data obligatory for all member states. If the new digital infrastructure will increase identifications and expulsions in Germany and the Netherlands, it is also likely that the (use of) digital infrastructure itself will spread wider over Europe.

6.4 Breaking down anonymity, marginalizing citizenship?

Immigration, whether it is legal or illegal, and immigration policy are directly linked with citizenship. As Torpey wrote in 2000 nation states are both territorial and membership associations, indicating that there are always geographical and bureaucratic lines that separate those that belong from those that do not. So far, nothing new: immigration policy was always about exclusion and exclusion – at the level of nation states – was always about citizenship. However, in much of the contemporary debate on citizenship the focus has been

on the positive side of citizenship; on the build up of rights and on the active citizenry. An important strand of migration studies literature focused on the development of denizen's rights - despite government attempts to limit rights - and the positive influence of international legal norms and their constitutional translations on the acquisition of immigrant rights. Though these studies document a very real development, there are also studies that document developments that are less about expanding rights and more about marginalizing the value of the citizenship of third country nationals. This study, dealing with the presence of the 'ultimate' non-citizen in the eyes of the state where he has taken up residence, also documents such a development. Especially in the context of detention and expulsion the concept and legal status of citizenship emerges as a central but Janus-faced status. In essence the lack of a known citizenship of irregular migrants both facilitates the 'exceptional' handling of these immigrants by the state, as well as severely restricts the state in achieving its policy aims. Firstly, the fact that irregular migrants willingly hide their legal identity and citizenship makes them all the more vulnerable vis-à-vis the state. Lack of citizenship is often also a lack of legal/diplomatic representation, which gives the detaining state authorities more 'leverage' in their dealings with irregular migrants. The immigrant's valuable lie comes at a high cost. With the growing importance of immigrant detention in countries such as Germany and the Netherlands, the individual irregular migrants finds himself increasingly cornered between the rock of prison and the hard place of expulsion. On the other hand, the lack of citizenship puts the state authorities in an impossible position at the international level, as the lack of citizenship blocks the state's possibilities to deport irregular migrants. This is the stalemate between third country nationals and western states today. Question remains what the digitalization of internal migration control will do to the already vulnerable status of the citizenship of irregular third country nationals. What does the breaking down of anonymity mean for their citizenship?

The new digital reality has altered many aspects of citizenship and not just for irregular migrants. The new digital environment we all use and have grown accustomed to, has produced new rights and opportunities, but also new vulnerabilities. This goes especially for citizenship in the sense of a legal identity; registrations proving who you are and codifying which rights are granted to you by the state and other institutions. The fact that 'identity theft' is one of the fastest rising crimes in the United States, underlines that the digital environment does not just serve the interests of citizens, but also comes with new vulnerabilities. Citizenship has become identity management (Muller 2004). It is increasingly about being in control of the many data doubles that exist of personal (legal) identity in the registrations and databanks of government agencies and private companies. Most citizens of the western world have at least a certain level of control over their own data doubles or are

backed by (government) institutions and procedures that may help them correct faulty information or the misuse of their digital identities. But even for them control over their various digital identities, often built upon their legal citizenship, is becoming harder and harder. For irregular migrants there is no personal identity management or control over their data doubles. They can manipulate their identity through maintaining silence or telling lies about it as a poor man's version of identity management, but they do not have 'administrator access' to most of the data stored about them. Control over their data doubles is in the hands of government authorities, mostly those of European states. Moreover, their data doubles were often created with the proclaimed purpose of exclusion. This is of course more a result of the political choices made in internal migration policies, then a result of the digital techniques used. There are however, also consequences for the citizenship of irregular migrants that result directly from the use of the new database technology that aims to break down their anonymity. For one thing, the breaking down of their *legal* anonymity through biometric identifiers linking them back to their legal identity, may lead to a (further) increase of anonymity on many other aspects in the process of migration control. The use of these large databases makes the individual in the process of migration control and identification to a large extent irrelevant. If surveillance systems are 'in charge' of identification this leads to a double de-personalization in the identification process (Broeders 2009b). There is no point in asking a migrant who he is and what his story is, if you can just run his fingerprints through the system to get the answer. There is no point in giving any thought to a migrant of whom the SIS says he should be refused at the border, as the decision has already been taken when he was entered into the system. Personal elements both on the side of the migrant as well as on the side of the immigration official are taken out of the equation. The official 'becomes' the procedure (as delivered to him by the system) and the migrant 'becomes' what the system says he is. To a certain extent this is a logical development as digitalizing the border is a reaction to the successful immigrant strategy of hiding his identity. The marginalization of immigrant citizenship, adding a new layer to their 'alienation', is however a sad and worrying side effect.

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So the paradoxical situation evolves that the second logic of exclusion puts the spotlight on the *individual* irregular migrant, while the new technologies used to do that depersonalize and de-individualize him. The second logic of exclusion requires an exact legal identity, as only a documented irregular migrant can be expelled, whereas the first logic broadly excludes everyone that cannot prove he has a right of access. At the same time, the second logic takes the narrowest focus on individual identity possible. All that matters is the required identification and documentation that will make expulsion possible. Hindress (2000: 1487)

wrote about citizenship and immigration and characterized citizenship as a vital marker in the international system “advising state and nonstate agencies of the particular state to which an individual belongs”. The current development in the internal migration control on irregular migrants using database technology for identification and expulsion may take the value of citizenship even a step further down and reduce it to an international address label.

DUTCH SUMMARY/NEDERLANDSE SAMENVATTING

Irreguliere migranten, of illegalen zoals ze in het Nederlands meestal worden aangeduid, worden in een aantal West-Europese landen steeds meer gezien als een belangrijk politiek en beleidsmatig probleem. Met name in de jaren negentig, als het probleem van de asielmigratie zich enigszins stabiliseert, neemt de beleidsaandacht voor illegalen sterk toe. Naast maatregelen aan de grens en in het immigratiebeleid, ontwikkelen sommige landen een beleid van *interne* migratie controle. Immers, illegalen die de horde van grens genomen hebben en zich in een Europees land vestigen, zullen dat land niet snel 'spontaan' verlaten. Het migratiebeleid richt zich naar binnen, resulterend in een 'illegalenbeleid' dat kan worden gekarakteriseerd door het centrale principe van uitsluiting. Illegale migranten horen juridisch niet te zijn waar ze zijn en dienen bijgevolg uitgesloten te worden van alle mogelijkheden, bronnen van inkomsten en diensten die een illegaal verblijf kunnen verlengen. Dit beleid van uitsluiting heeft twee mogelijke vormen. Een meer 'traditionele' vorm van uitsluiting van maatschappelijke instituties en een tweede vorm van uitsluiting die zich richt op de identificatie van illegalen teneinde ze uit te kunnen zetten. Gezien de politieke aandacht voor illegalenbeleid kan worden verwacht dat het illegalenbeleid zich intensiveert. Tegen een achtergrond van snelle technologische ontwikkelingen en de brede toepassing van ICT in het overheidsbeleid kan bovendien worden verwacht dat de overheid daarbij steeds vaker gebruik zal maken van digitale registratie- en identificatiesystemen. Deze overwegingen leiden tot de volgende onderzoeksvragen voor dit proefschrift:

Hoe verloopt de ontwikkeling van het beleid voor interne migratie controle op nationaal en op EU niveau? Vullen staten het meer 'traditionele' beleid van maatschappelijke uitsluiting in toenemende mate aan met uitsluitingbeleid gericht op identificatie en uitzetting? En wat is de rol van (moderne) informatie- en surveillancesystemen in de vormgeving van dit beleid van uitsluiting en controle?

Om deze vragen te kunnen beantwoorden is gekeken naar het beleid in twee EU-lidstaten, te weten Nederland en Duitsland, en naar de ontwikkelingen op het Europese niveau. Het onderzoek richt zich op de vraag of er een bepaalde ontwikkeling in het beleid waar te nemen is en hoe deze eruit ziet. Daarom zijn de cases geselecteerd op basis van relevante politieke, economische en beleidsmatige *overeenkomsten* die het waarschijnlijk maken dat als de ontwikkeling zich voordoet, die bij deze landen waarschijnlijk het eerst te zien zal zijn. Nederland en Duitsland zijn dus zogenaamde 'most likely cases'. De Europese dimensie is voornamelijk van belang vanwege de ontwikkeling van een nieuwe infrastructuur van immigratiedatabanken die in het nationale illegalenbeleid kan worden ingezet.

Het theoretische raamwerk voor deze studie (hoofdstuk 2) is ontleend aan twee wetenschappelijke disciplines: 'immigratie studies' en de opkomende discipline van de 'surveillance studies'. De immigratie studies literatuur geeft inzicht in de redenen waarom grenscontrole steeds meer aangevuld wordt met 'binnenlands' migratie beleid en gaat in op de politieke preoccupatie van overheden met het controleren, of minimaal het schijnbaar controleren, van migratiestromen. De surveillance literatuur geeft inzicht in de wijze waarop bureaucratieën door middel van documentatie en registraties de bevolking inzichtelijk en controleerbaar probeert te maken. In een digitaliserende wereld nemen de mogelijkheden voor het registreren, opslaan en bewaren van persoonlijke data exponentieel toe. Overheden maken dankbaar gebruik van deze mogelijkheden en het immigratiebeleid is daarop beslist geen uitzondering. Het tegendeel is eerder waar; in toenemende mate zijn juist immigranten het onderwerp van de registraties van verschillende overheden. Vanuit het perspectief van interne migratie controle zijn er twee redenen voor deze 'migranten administratie' die samenhangen met twee verschillende logica's van uitsluiting die in dit proefschrift worden bestudeerd.

De eerste logica is die van '*uitsluiting van documentatie en registratie*'. Onder deze logica wordt surveillance ingezet om migranten uit te sluiten van de kerninstituties van de samenleving, zoals de formele arbeidsmarkt, het onderwijs, de woningmarkt en de regelingen van de verzorgingsstaat. Dit zijn de meer 'klassieke' vormen van het illegalenbeleid, met in Nederland als belangrijke ijkpunten de koppeling tussen een legale verblijfstitel en het verkrijgen van een Sofinummer en de invoering van de koppelingswet. Door het migranten onmogelijk te maken zekere documenten of registratienummers te bemachtigen, terwijl deze als voorwaarde gelden om toegang te krijgen tot bepaalde instituties, is het nettoresultaat de uitsluiting van die instituties. De staat trekt een muur op van documenten en juridische regels en vereisten rondom zijn maatschappelijke instituties en 'patrouilleert' deze met moderne identificatie- en datasystemen. Het doel is de ontmoediging van illegaal verblijf, het middel is rigoureuze maatschappelijke uitsluiting. Illegalen die zich niet laten ontmoedigen, zullen door de overheid zelf echter over de grens gebracht moeten worden. In recente jaren staat daarom het uitzettingsbeleid centraler in de interne migratie controle. Omdat anonieme illegalen praktisch en juridisch onuitzetbaar zijn, vereist dit een andere bureaucratische aanpak. Deze aanpak volgt de tweede logica van uitsluiting, die van de '*uitsluiting met behulp van documentatie en registratie*'. De tweede logica wordt van belang als de eerste niet optimaal werkt en ongewenste migranten zich niet laten ontmoedigen en illegaal (ver)blijven. De aandacht verschuift dan naar de ongewenste migrant zelf. Beleid dat deze logica volgt, probeert de migrant *zelf* juist te registreren en documenteren om hem met behulp van die

informatie uit te sluiten. Deze logica stelt alles in het werk om de anonimiteit, die illegalen relatief effectief beschermt tegen uitzetting, af te breken. De twee logica's zijn complementair in termen van hun bijdrage aan het illegalenbeleid , maar stellen heel verschillende eisen aan de inrichting, dataverzameling, werking en gebruik van de datasystemen die voor interne migratie controle aangesproken worden. Bij het klassieke illegalenbeleid, volgens de eerste logica, doet het er niet toe wie de illegaal is, zolang het systeem maar aangeeft dat hij geen recht op toegang heeft. Dat is eenvoudig te bepalen als iemand niet de juiste papieren heeft of niet kan laten zien dat hij op de juiste plaats geregistreerd staat. Bij de tweede logica van uitsluiting gaat het erom dat een onbekende illegaal *geïdentificeerd* kan worden en verbonden kan worden met officiële registraties en documenten die zijn identiteit en land van herkomst bewijzen en documenteren. Identificeren, in tegenstelling tot blokkeren, vereist een ander soort informatie en deels een ander soort databank, namelijk databanken die migranten kunnen traceren en identificeren. Ook 'de bureaucratie' zal daarmee, deels, anders georganiseerd moeten worden.

In drie empirische hoofdstukken is gekeken naar de ontwikkeling van de interne migratie controle op illegale migranten in Nederland en Duitsland om te zien of, hoe en in welke mate zich een ontwikkeling voltrekt waarbij de eerste logica van uitsluiting wordt aangevuld met beleid en instrumenten die zich op de tweede logica richten. Daarbij is gekeken naar de politieke en beleidsmatige ontwikkelingen en zoveel als mogelijk naar de ontwikkelingen in de implementatie van het beleid.

In het arbeidsmarktbeleid (hoofdstuk 3) staat traditioneel de eerste logica centraal. De arbeidsmarkt is immers de grootste 'magneet' voor illegale migranten. De afgelopen jaren is het beleid aangaande illegalen op de arbeidsmarkt sterk aangescherpt: de budgetten van de overheidsinstanties die verantwoordelijk zijn voor arbeidsmarktcontroles zijn sterk gestegen. De personeelssterkte is sterk toegenomen en de technologische toepassingen en systemen om werkgevers en werknemers te controleren en traceren zijn behoorlijk uitgebreid. De politiek verkondigde prioriteit om illegale arbeid aan te pakken heeft zich dus vertaald in een flinke (financiële) injectie in het systeem en de capaciteit van de autoriteiten op het gebied van arbeidsmarktcontroles. De nadruk ligt daarbij overduidelijk bij het investeren in de eerste logica van uitsluiting: meer controles, meer en hogere boetes, 'slimmere' controles – gebaseerd op een analyse van risicosectoren – en een bredere aanpak door de controletaak ook steeds te beleggen bij partijen buiten de overheid, met name de werkgever (de werkgever als hulpsheriff). De politieke wens om de arbeidsmarktcontroles ook bij te laten dragen aan de tweede logica van uitsluiting, is in de uitvoering nog niet of nauwelijks terug te zien. Aangezien de arbeidsmarkt één van de meest gecontroleerde sectoren is, zou het een logische

sector zijn om niet alleen te controleren op illegale arbeid, maar ook om gecontroleerde illegalen daadwerkelijk aan te houden over te dragen aan de autoriteiten die verantwoordelijk zijn het uitzettingsbeleid. Dit zou betekenen dat arbeidsmarktcontroles zich sterker dan voorheen ook op identificatie van illegalen zouden richten en, nog belangrijker, dat bij controle aangetroffen illegalen aan de politie worden overgedragen met als doel verdere identificatie en uiteindelijk uitzetting. De in de officiële registraties aangetroffen percentages voor illegalen die zijn aangehouden voor overtredingen van de arbeidswetgeving voor vreemdelingen zijn in beide landen echter extreem laag. Dat betekent dat deze aanhoudingen *of* zeer beperkt zijn *of* dat ze schuil gaan onder de bredere categorie van aanhoudingen die worden geregistreerd onder de algemene noemer van overtredingen van de vreemdelingenwetgeving (illegaal verblijf). Voor dat laatste zijn weliswaar aanwijzingen, maar het zicht op wat dan wel een realistisch percentage is, ontbreekt. Dat gebrek aan inzicht geldt echter ook voor de politiek die de prioriteit van meer aanhoudingen zelf heeft geformuleerd.

In de keten die loopt van toezicht door de politie, via vreemdelingendetentie naar uitzetting (hoofdstuk 4) is de tweede logica van uitsluiting dominant, zeker naarmate men meer aan het einde van de keten komt. De politieke nadruk op het uitzettingsbeleid als het sluitstuk van het illegalenbeleid mist zijn uitwerking niet op de organisatie en de inzet van de politie, het detentiewezen en de autoriteiten die verantwoordelijk zijn voor het uitzettingsbeleid. Waar de politie (traditioneel) nog betrekkelijk veel ruimte heeft om eigen prioriteiten te destilleren uit de vele claims op hun operationele inzet, geldt dat veel minder voor detentie- en uitzettingsautoriteiten. De procedures, technieken en systemen die in de gehele keten zijn geïntroduceerd om identificatie van illegalen mogelijk te maken, wijzen erop dat de vreemdelingendetentie – als spil in het proces – steeds meer gaat functioneren als een 'identificatiefabriek'. De capaciteit van de vreemdelingendetentie is bovendien in het afgelopen jaren spectaculair toegenomen. Juridisch gaat het hierbij om een administratieve detentie die in principe bedoeld is om uitzetting voor te bereiden. De omstandigheden in dit detentieregime zijn echter beduidend slechter dan in reguliere gevangenissen, hetgeen nog verergerd wordt door het feit dat vreemdelingendetentie in Nederland en Duitsland zeer lang kan duren (in Duitsland maximaal 18 maanden, in Nederland in theorie niet beperkt in duur). Al deze investeringen in detentie en identificatie leveren echter niet het reultaat op waar men op ingezet had. Het aantal uitzettingen loopt eerder terug dan op. De overheid loopt stuk op het verzet van landen van herkomst (die hun onderdanen vaak liever niet zien terugkomen en geen papieren ter beschikking stellen) en met name op de illegaal zelf, die met leugens over of het verzwijgen van identiteit en land van herkomst het uitzettingsbeleid zeer effectief weet te frustreren. Deze zeer effectieve frustratie van het uitzettingsbeleid ligt ten

grondslag aan het teruglopende aantal uitzettingen. Maar hij ligt ook ten grondslag aan een reeks van doorgaande en nieuwe investeringen door nationale en Europese overheden in nieuwe systemen van identificatie die tot doel hebben om steeds minder afhankelijk zijn van de illegalen zelf voor informatie over identiteit en herkomst.

De volgende stappen in de strijd om identificatie en uitzetting worden gezet op het niveau van de Europese Unie (hoofdstuk 5). Sinds het einde van de jaren negentig zijn de Europese lidstaten bezig met de opbouw van een netwerk van migratiedatabanken die in de toekomst een groot belang kunnen krijgen voor de interne controle op illegalen in landen als Nederland en Duitsland. Door aanpassing, uitbreiding en het oprekken van functies gedurende de ontwikkelingsfase van het Schengen Informatie Systeem (SIS), zijn opvolger het SIS II, Eurodac en het Visa Informatie Systeem (VIS) heeft de Europese Unie straks nieuwe digitale grenzen die de identificatie van grote delen van de illegalenpopulatie mogelijk sterk vereenvoudigen. Een illegaal kan op drie manieren in Nederland terecht gekomen zijn: hij reist illegaal in (de 'ware' illegale migrant), hij vraagt asiel aan en wordt illegaal als hij in Nederland blijft nadat zijn verzoek is afgewezen of hij reist legaal in op een toeristenvisum en wordt illegaal als de geldigheid daarvan verloopt (de zogenaamde *overstayers*). In een Europa zonder grenzen kan natuurlijk ook een andere lidstaat de asielaanvraag in behandeling hebben gehad of het visum hebben verleend. Deze drie achtergronden van illegaliteit vormen de bauwdruk voor het netwerk van Europese immigratie databanken.

Wie bij de grens, of later in bijvoorbeeld Nederland aangehouden wordt, kan worden geregistreerd in het Schengen Informatie Systeem (SIS). De andere twee routes van asielaanvraag en de visumaanvraag laten sporen na in de administraties van de immigratie- en asielautoriteiten van de lidstaten van de EU. Deze zogenaamde identiteitsroutes worden vastgelegd in twee nieuwere systemen: het Eurodac systeem en het Visum Informatie Systeem (VIS). Alle asielaanvragen die in de Europese Unie worden gedaan worden sinds 2003 in het Eurodac systeem geregistreerd en in de toekomst zullen alle toegewezen en afgewezen aanvragen voor een visum voor de Europese Unie worden geregistreerd in het VIS. Deze systemen zijn voor alle lidstaten toegankelijk. Het doel is dat deze databanken de onidentificeerbare en dus onuitzetbare illegalen kunnen 're-identificeren' op basis van de digitale voetsporen die ze hebben achtergelaten in de Europese bureaucratieën. Al deze databanken zijn technische hoogwaardige systemen die van alle geregistreerde migranten ook biometrische identiteitskenmerken – meestal de vingerafdrukken –vastleggen. Een illegaal die is opgenomen in deze systemen, is strikt genomen niet meer 'nodig' voor zijn eigen identificatie: een vingerafdruk volstaat. Met name voor de tweede logica van uitsluiting kan de toepassing van biometrie op een Europese schaal gerust een 'killer application'

genoemd worden, aangezien het in potentie grote delen van de voorheen onidentificeerbare populatie via een vingerafdruk naar een asieldossier of een visumaanvraag kan herleiden.

In het slothoofdstuk (hoofdstuk 6) wordt de balans opgemaakt van de ontwikkelingen in het nationale en Europese 'illegalenbeleid'. Er wordt geconstateerd dat het schip van staat in het interne migratiebeleid steeds meer in de richting van identificatie en uitsluiting draait. Met andere woorden: naast de intensiveringen in de 'uitsluiting *van* documentatie en registratie' wordt er in toenemende mate geïnvesteerd in het operationaliseren van de 'uitsluiting met behulp van documentatie en registratie'. Dat geldt het minst voor het arbeidsmarktbeleid, veel sterker voor het detentieregime en potentieel het meest voor de toekomstige integratie van de nieuwe Europese databanken in de nationale uitvoering van het interne toezicht op illegalen. Daarnaast worden nog enkele kanttekeningen geplaatst bij de voorziene en onvoorziene gevolgen van deze beleidsontwikkelingen. Door politieke keuzes en (gebrek) aan capaciteit ontstaan op de arbeidsmarkt zogenaamde 'witte vlekken': sectoren waarvan bekend is dat er veel illegale tewerkstelling is, maar die desondanks met rust gelaten worden. Ook ontstaan er 'zwarte gaten' als gevolg van het overheidsbeleid. Met name de langdurige administratieve detentie van onuitzetbare illegalen is vanuit het perspectief van het uitzettingsbeleid in hoge mate irrationeel en gaat gepaard met hoge humanitaire en economische kosten. In het beleid en de praktijken rondom detentie en uitzetting stuit de overheid tegen de grenzen van zijn eigen wetgeving en rekt deze soms zelfs doelbewust op. Tot slot werpt de ontwikkeling in het illegalenbeleid die in deze studie wordt gedocumenteerd een bijzonder licht op het begrip burgerschap dat in zaken van immigratie en immigratiebeleid zo'n centrale rol speelt. Enerzijds is burgerschap – in de juridische zin van nationaliteit - de cruciale variabele in het uitzettingsbeleid die bepaalt of uitzetting mogelijk of onmogelijk is. Anderzijds heeft de jacht op de identiteit van de illegaal tot gevolg dat zijn burgerschap tot op de kleinst mogelijk noemer wordt uitgekleed: de overheid is slechts nog geïnteresseerd in die informatie die een uitzetting mogelijk kan maken, alles daarenboven wordt in toenemende mate irrelevant geacht. De wetenschap waar iemand naar teruggestuurd kan worden is voldoende. Het burgerschap van illegalen devalueert daarmee tot het niveau van een adreslabel.

CURRICULUM VITAE

Dennis Broeders (1974) studied international relations at the University of Nijmegen. In 1999 he joined the Scientific Council for Government Policy (WRR) as a research fellow. The WRR is an independent strategic think tank for the Dutch government located in the Prime Minister's department. At the Council he worked on reports to the Government on immigration and integration (*Netherlands as an immigration society*, 2001), on decision making procedures in an enlarged EU (*Slagvaardigheid in de Europabrede Unie*, 2003) and on the working of social norms and values (*Waarden, normen en de last van het gedrag*, 2003). Later he became a project coordinator at the Council and was responsible for the reports *Media policy in the digital age* (2005) and *Identificatie met Nederland* (2007) on national identity and integration. In 2005 he joined the department of Sociology at the Erasmus University of Rotterdam as a part time researcher working on his PhD on the development of internal surveillance on irregular migrants in the Netherlands and Germany. An important part of this research is the EU-dimension of policy development. In the summer of 2008 he was a visiting research fellow at the Social Science Research Center in Berlin (WZB). His work is published in Dutch and international scientific journals such as *Sociologische Gids*, *Beleid en Maatschappij*, *Migrantenstudies*, *Built Environment*, *American Behavioral Scientist* and *International Sociology*.

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