

Breaking down anonymity: digital surveillance of irregular migrants in Germany and the Netherlands

Broeders, Dennis

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DISSERTATIONS

Breaking Down Anonymity

*Digital Surveillance of Irregular
Migrants in Germany and
the Netherlands*

DENNIS BROEDERS

AMSTERDAM UNIVERSITY PRESS

Breaking Down Anonymity

IMISCOE

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Breaking Down Anonymity

Digital Surveillance of Irregular Migrants
in Germany and the Netherlands

Dennis Broeders

IMISCOE Dissertations

AMSTERDAM UNIVERSITY PRESS

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

The Who, 1978

CONTENTS

	Acknowledgements	9
	List of abbreviations	11
I	Introduction and research questions	13
	1.1 The irregular migrant as a policy problem	13
	1.2 Turning inwards: internal migration control	14
	1.3 Research questions: internal migration control at crossroads?	16
	1.4 Case selection: Germany and the Netherlands as 'most likely' cases	17
	1.5 Outline of the study	22
2	The state, surveillance and irregular migrants: theoretical perspectives	27
	2.1 Introduction	27
	2.2 The changing nature of European borders: a story in metaphors	28
	2.3 The surveillance state and internal migration control	38
	2.4 The limits of state surveillance	49
	2.5 A new regime of internal migration control?	57
3	Guarding the access to the labour market	61
	3.1 Setting the scene: political mindsets and policy frameworks	61
	3.2 Political economies of irregular migrant workers	66
	3.3 Labour market surveillance in Germany and the Netherlands: a typology	74
	3.4 Exclusion from documentation	78
	3.5 Exclusion through documentation	97
	3.6 Conclusions	105

4	Police surveillance, detention and expulsion	111
4.1	Introduction	111
4.2	Internal surveillance: the state in control and/or the penal state in action?	113
4.3	Police surveillance	124
4.4	Detention as an instrument of migration control	130
4.5	Expulsion	137
4.6	Conclusion: factories of identification?	149
5	European tools for domestic problems	153
5.1	Introduction	153
5.2	EU policymaking: transfer of competence or a European tool shed?	154
5.3	Schengen, Amsterdam and Prüm: a bird's-eye view of European cooperation in Justice and Home Affairs	159
5.4	Matters of scale and weight: EU return and readmission policies	164
5.5	Creating digital borders: a network of EU migration databases	167
5.6	Conclusions	180
6	Conclusion: breaking down anonymity	185
6.1	A new regime of internal migration control	187
6.2	Policy gaps: 'white spots' and 'black holes'	193
6.3	Follow the leader?	197
6.4	Breaking down anonymity, marginalising citizenship?	197
	Dutch summary/<i>Nederlandse samenvatting</i>	201
	Bibliography	209
	Discography	224
	Notes	225

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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	BundesGrenzschutz (German federal border guard authority)
BKA	BundesKriminalamt (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 Administratie (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 naturalisation authorities)
IOM	International Organization for Migration
IT	information technology
JVA	Justizvolzugsanstalt (German regular prison)
KMar	Koninklijke Marechaussee (Dutch royal constabulary)
NA	not available
NGO	non-governmental organisation
OM	Openbaar Ministerie (Dutch public prosecution department)
PNR	passenger name record
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	Sozialdemokratische Partei Deutschlands (German Social Democratic party)
UN	United Nations
UNHCR	UN 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 to the presence of irregular migrants has mounted in most Western European societies for years, yet their presence remains. Their exact numbers are obviously unknown – only estimates of various kinds and sources are available¹ – 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 European Union. Television and newspaper images, such as those of irregular migrants storming the barbed wire 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 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, irregular immigration was seen as a ‘normal’ by-product of the guest worker schemes. Many immigrants skipped the recruitment station, travelled on a tourist visa to their 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 labour, especially in industry. When the oil crisis and the restructuring of industry in Western Europe echoed in the economic recession, the guest worker programmes 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, irregular immigrants gradually transformed from 'adventurers' into 'vagabonds' in the public and political eye (Bauman 1998).

Immigration policy since the 1970s, especially in the northern member states of the EU, can be characterised 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 of 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 rhetoric, 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 legitimate and, especially, bogus asylum seekers, irregular immigrants and 'unwanted' immigrants overall. The external borders of the EU (including seaports 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 walls 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 visas themselves have been modernised, becoming 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 realisation that borders alone cannot halt irregular 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 as well as to work, housing, education and other institutions of society. Access to public services has become an instrument of migration policy (Van der Leun 2003; Pluymen & Minderhoud 2002). The central notion in the development of these policies on irregular resident migrants is *exclusion*. Engbersen (2001: 242) suggests that 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 legitimate or illegitimate use thereof by irregular migrants. Information is a keyword in these internal exclusion policies. In more recent years, internal migration control overall has become more and more closely linked with digital and technical surveillance. Within the blooming field of surveillance studies there is an emergent group of researchers who combine 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 and 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 must 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 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 no longer suffices 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*. This is because expulsion is impossible to execute without a correct and documented legal identity. The development in which ‘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 organise 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 organisation of the state’s knowledge production will have to be thoroughly reorganised. The story of the development of internal control on illegal aliens should therefore be a story of organising and reorganising 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 organise 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 organisations that try to circumvent states’ best efforts. Internal control will require increased surveillance and surveillance powers and – if border policy is any indication – it is likely that the rich welfare states found in the northwest of the EU, in particular, will fund and use the latest technologies 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. 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 on the horizon 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 EU itself. In the case of external migration control, the EU and related cooperation schemes, such as the intergovernmental Schengen agreements, were instrumental in the development of new policy initiatives. Europeanisation 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 for national implementation (Monar 2001). As internal migration control develops at the national level in various member states, it is most likely that some sort of counterpart will develop at the level of the EU, either as a full-fledged 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 are as follows: *How do national and EU-level 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 of irregular 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 legal and illegal immigration. In recent years, irregular 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, 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; 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 was 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, while 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 Germany and the Netherlands' founding membership of both the EU 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, this is seen in their EU membership, but also, more specifically, in 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 (already 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 EU'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 other's policy

innovations for domestic use (Guiraudon 2000; Monar 2001; Broeders 2009).

Germany and the Netherlands also share a number of economic features that are relevant in relation to irregular migration. They can both be characterised as advanced and affluent welfare states that are in more or less permanent need of recalibrating and restructuring (Ferrera & 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 unauthorised 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 and 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 7,000 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 'guesstimates' 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 the countries' 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 or 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 computerisation and the use of other new technologies are considered important parts of the working process. This 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 most likely cases 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 were to emphasise 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 decentralised 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 role, a significant one in some instances. Wherever this is the case, such a role will be discussed, though 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.

Choosing a selection of most likely cases means choosing for the homogenisation of the sample of countries on key aspects 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 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 irregular immigrants, a tradition of periodic regularisations and a bureaucracy with a looser grip on a more ‘informal’ society and economy, would provide a contrasting yet hardly interesting case. It would be a ‘least likely case’, a country that would not provide much insight into the buildup 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 at 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 of irregular migrants is emerging and developing. Research on Italy is likely to reveal that this is not – or is 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 EU. 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 to a restriction to the Dutch and German cases. 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 of irregular migrants.

1.5 Outline of the study

The political and legal developments in the internal migration control on irregular migrants will be analysed 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 analysed, focusing on those developments that are of value to Dutch and German domestic policies of internal migration control. The analysis will deal with both policymaking 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 buildup 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 globalisation challenges its dominant position (see for example Schinkel 2009; Wacquant 2009; Bauman 2004; Lyon 2003). The ‘penal state’, the ‘security state’ and 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 analysed 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 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 emphasise 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 organisational and operational logic that derives from it. The radically different demands these logics ask of bureaucratic organisation, digital surveillance and surveillance, in general, weave a central thread through the empirical chapters. The general question of 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 of whether their bureaucracies and their digital infrastructure are able to instrumentalise 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, respectively, in the chapters on the labour market, 'police surveillance, detention and expulsion' and on EU developments.

Chapter three deals with the issue of guarding access to the labour market. Generally, irregular migrants are trying to better their lives and the main method to do this is through 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. The question remains: is this traditional site of the societal and institutional exclusion of irregular migrants 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 organising 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 of irregular migrants to be effective, the issue has to be politically prioritised 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; this 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 thus is: if and to what extent can the Dutch and German detention systems fulfil this role?

Chapter five focuses 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 EU’s political weight 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 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 that are operating, in particular, 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 national level.

Chapter six will conclude and reflect on the findings of the research and will answer the research questions.

1.5.2 *A note on data and statistics*

Like most studies, this book builds on the work of numerous scholars who have researched various aspects of migration – regular and irregular – government policy and surveillance. Again, like most studies though, this book could not be pieced together on the basis of existing scientific studies; sources thus also include ‘grey’ literature, studies conducted by NGOs and studies commissioned by government agencies and ministries. Interviews with policymakers and officials of the various Dutch and German government agencies enforcing policies of internal migration control would have been a valuable contribution to this book but proved difficult to incorporate into the research design. The wide scope and number of the agencies involved, problems of accessibility and willingness to cooperate and Germany’s division of labour between the federal authorities and the authorities of the Länder made it problematic to get an even handed set of interviews within the timeframe available for this research project. Though this is unfortunate, the material that was available did allow me to document the changes and developments in Dutch and German policies that I set out to research in a convincing manner. In the empirical chapters the various ‘types’ of sources are clearly indicated in the text and references. Seeing as policy development is the prime interest of this study, the information and data that the Dutch and German government provide often comes into play, particularly when the scientific literature does not offer a ‘peer-reviewed’ source. Therefore, in terms of data and statistics, 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 programmes 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 of the official statistics, it should be realised 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 analysed, allowance must 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 ultimately not 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 available information. However, in light of the central theme of this book, we should perhaps also be glad with some of the research material's limitations. 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 Lyon in 2005. We are accustomed to think of the border in terms of territorial lines dividing the world into countries. While 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 be 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 Fortress Europe, coined by those who oppose it, draws attention to border and migration policies by 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 organisations 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 liberal states of the West have been seemingly unsuccessful, for the most part, in stopping unwanted immigration has spurred public and academic debates on the question of 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 broad 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 as well as new security threats such as terrorism and irregular 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 globalisation, international migration and Europeanisation. 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 quickly take us through the border’s development and its changing nature and location as well as lead us to the central role that surveillance plays in managing present-day migration, wanted or not. 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 policymakers. 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 certain parts of the policy problems at hand and thus produce fast tracks to certain policy solutions. Conversely, they also undervalue and stray attention away from other options, as the following metaphoric ‘history’ of European migration control illustrates.

2.2.1 *Fortress Europe*

The metaphor of 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. Northern EU member states in particular had enormous political and 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, irregular immigrants became a new prime category of unwanted immigrants. As the number of irregular immigrants rose, the 'fight' against irregular 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 categorised 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 harmonise visa policy. Visa policy was 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 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 and 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-Mexico border are simply too long to control – let alone seal off. For example, Germany 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 21 December 2007, Germany's neighbours to the east are full-fledged Schengen members, meaning that the burden of external control shifted to them with new and even longer external Schengen borders in the east. Due to the long borders, 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 & Guiraudon 2000), or is becoming 'remote control' (Zolberg 2002) or is moving 'upwards, downwards and outwards' (Guiraudon 2001). Classical border control, characterised by gates and guards, is changing as Anderson and Bigo (2002: 19) describe it:

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 this 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 minimum delay. On the flipside, the border is meant to filter out contraband, terrorists and irregular migrants. Border officials thus face the challenge of restricting irregular 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 must 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 '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 and 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 politically and 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 discouraging those unwanted aliens who 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 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 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 behaviour 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 prisoners under a perpetually watchful 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 social behaviour. 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 globalisation. For the elite it is a privilege, bordering on an obligation. The 'vagabond', by contrast, hopes to achieve his international mobility despite 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 as 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 of unwanted immigrants. Far from it. Considering the fact that

undocumented immigrants try to hide and submerge in Western European societies, it is institutions, such as the labour market, social security and health care institutions, where they emerge and may 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. 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 Panopticon. (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 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 and auxiliary status with fewer legal rights than the UN refugee status. This means that most of 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 how

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 of 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 behaviour 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 ‘internalisation 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 irregular 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 behaviour 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 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. 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 populations, be they mobile or otherwise. 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 – to use another cliché – 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 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 of 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 and 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 was 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 in terms of the information density of modern surveillance. Surveillance is rapidly being computerised, networked and internationalised and is strengthening its focus on international mobility, whether regular or not (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. 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 and 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 recognised 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 rationalised 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 organisations 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, more and more, 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 informal⁵) 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 globalisation, 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'. Torpey (1998, 2000) argued that modern states – and the formation of the international system of nation states in which they are embedded – have monopolised the 'legitimate means of movement'. He saw a development similar to Weber's notion of 'monopolisation 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 monopolisation 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 formalised 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 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 effectively exclude them. That goes especially for the successful implementation of expulsion policies. The practical organisation 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. As Torpey has said: ‘Individuals who remain beyond the embrace of the state necessarily represent a limit on its penetration’ (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 and/or the 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 have to be placed at the places where irregular migrants 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 irregular 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 irregular 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 irregular immigrants use and need for their daily lives. It is a strategy of exclusion through the delegitimation and criminalisation of all those who may be employing, housing and aiding irregular 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 public and 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 irregular 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 (by lawyers and judges) and from abroad (by 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 irregular status of the migrant and (b) establish and 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, in turn, is 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 been increasing their detention capacity for irregular migrants and rejected asylum seekers with the aim of facilitating expulsion (Jesuit Refugee Service 2005; Welch & Schuster 2005). Both countries have also been investing heavily in database systems that are able to register, track and identify the resident migrant population. They are also 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 outside of the focus of this study.

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 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 pertaining to their role as 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 and 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 and 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 more simply: 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 and 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 and 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) rightly 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, which 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 and 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 are 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.

As such, in the case of irregular migration, the state more and more turns 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 wanting to restrict and control irregular migration. Databases are used for pre-emptive surveillance that aims to anticipate unwanted behaviour by means of classification and profiling (Salter 2005: 43) and for the identification and re-identification of terrorists, criminals and, increasingly, irregular migrants. In border policy there is a long-standing practice of pre-emption, for example, in visa policy. The citizens of some countries need to apply for visa and other 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 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 formalised 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 standardised and de-contextualised, while the individual bureaucrat is losing elements of its discretionary space. Bovens and 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 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 migrant and the immigration official will be characterised 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 authorising 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, visas and all sorts of databases related to immigration policy and security policies. 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 2009). 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 the EURODAC database that registers asylum applicants, including their fingerprints, and will be expanded with the Visa Information System (VIS), which will register fingerprints and the application details of anyone who requests an EU visa. These are vast databases that can be accessed throughout the EU and, in the case of the (not yet operational) VIS, even outside of it in consular offices. 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). Member states such as Germany and the Netherlands, especially, 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 of 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 and 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 legal and 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 better fit the profile of northern member states of the EU, such as the Netherlands and Germany. 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 logics, political or otherwise, 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 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 organisations to avoid the production of knowledge about their activities by making them either unobservable or indeterminable; or, put another way, the strategic production of fog (Bommes & Kolb 2003: 5). 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). Both countries also show examples of institutional 'innovations' on behalf of irregular migrants – though these are 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-Mexico 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, irregularisation 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 US, Andreas (2000) described the enormous investments in the guarding of the US-Mexico 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 provocatively: stupid policies can sometimes make smart politics.

Political rhetoric may also be harsher than the official policy practice for reasons of self-interest. Though it is certainly not something that governments often publicly admit to, 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 the 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 US 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 various categories of regular and 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 among different agencies or levels of government. As Cornelius et al. (2004: 15) state:

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.

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 Rušinović 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 Bommers and Kolb (2003: 5) 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 flipside 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 on databases may also increase blind spots in the panoptic gaze. Databases are, after all, never 'street-smart', nor do they possess 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. In particular, illegal aliens, who lack all but the most basic set of rights, do not seem to have very vocal defenders or, for that matter, many of them. In the past, groups such as the White 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 (Rušinović et al. 2002). Public opinion and civil rights groups are set even farther 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. Seemingly applicable to Western Europe as well is Gilliom's (2001: 124) observation for the US: 'Our nation is adopting widespread policies of surveillance and control with a barely stifled yawn or even muted applause.'

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 ongoing social processes 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, real and forged documents, partners, etc. 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 social 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 or 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 irregular migrants apprehended in the Netherlands, 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 particularly, 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 of 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 the German states bring into play for the internal migration control on irregular migrants. Though it is clear there are 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 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 cases, 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, 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 institutions, both formal and informal, come up with. Policy innovations provoke counter-innovations that aim to neutralise 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 and 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.

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 of whether there is a development in state policies towards irregular migrants in certain countries of the EU where policies of societal exclusion (the first logic) are supplemented with policies of exclusion focused on identification and expulsion (the second logic). In that sense, its 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 hypothesised 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 social and political problem
- Internal migration policy on irregular migrants is dominated by the policy goal of exclusion.
- This exclusion follows two distinct 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. Recognising irregular mi-

grants 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 indispensable for effective exclusion (paradoxically, this exclusion often initially requires a radical embrace of irregular migrants).

- Exclusion is increasingly executed through a system of digitalised bureaucratic registration and surveillance. A technical and computerised 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 organisation of bureaucratic documentation and registration make a shift towards the supplementary use of the second logic also a shift in the organisation of the instruments and procedures of migration control. A reorganisation is needed 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 organisation 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 of 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 three) 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. The 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 organisation of registration and documentation systems. In chapter four 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 organisation 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 must 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 instrumentalise the second logic of exclusion. After all, expulsion in a 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 temptingly valuable source of information for those member states that seek to construct effective expulsion policies. Organising 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, except political trouble-makers and vagrants, were welcome in the Netherlands. 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. Particularly 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 penalisation of employers have deep 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, in particular, 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 or 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 rebirth 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 labour migration were taken in the 1970s in the field of employer sanctions. The primary aim then was to 'demagnetise' 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 and 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. Those were the days when many government policies in the Netherlands were characterised by the principle of *gedogen* – roughly translated as 'toleration' in English – 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-paying jobs. The enforcement regime on irregular labour is lax and in a number of sectors such as agriculture and horticulture, where despite 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 changed. The start of the third phase is marked by publication of the Commission Zeevalking's 1989 report, which 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 more recent chords in Dutch policy on irregular migrant was the publication of the government's white paper on irregular migrants (*Illegaleennota*) in 2004. In the 2004 white paper, the labour market was declared a major policy priority. The Minister for Aliens Affairs and Integration wrote 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 was 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. Schönwälder, Vogel and 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 legalised. 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 to the phenomenon of illegal migration and residence started in earnest in the early 1990s (Schönwälder, 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, which could only be resolved with a broad and intensely debated political 'asylum compromise' in 1993. The compromise 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 past the peak of the asylum crisis, attention began to shift towards irregular migration. Since 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. The Kohl government, in particular, began to draw linkages between unemployment and illegal labour in the run-up to the 1998 elections (Boswell 2003: 63-64). In Germany, the internal control on irregular migrants is mainly implemented through a system of residence permits, work permits and registrations that was already in place when the political attention shifted towards this issue. Hailbronner, Martin and Motamura (1998: 205) stress how Germany already had a highly developed system of registration and surveillance in which different agencies could access each other's databases. Moreover, 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 organisations 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 and 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. This chapter analyses how these countries try to translate and organise this changed political view of exclusion into practical policies. Paragraph 3.2 first looks 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 developments in the Netherlands and Germany and illustrate 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 had 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. In the words of Block and 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 have found themselves in opposite corners, for example when the needs of the capitalist economy – cheap labour, long hours and weeks, no unions, etc. – clashes 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 market expansion, at one end of the spectrum, and movements for social protection and market force limitations, at the other. In real political life, these ideal types do not just clash, but they 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 when 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 six-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 opportunities 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 regular and irregular labour migration. These two histories have laid competing claims on the priorities and resources of the government. Nowadays, they still do.

3.2.2 *Immigrant labour: between market and welfare state*

Immigration is a 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 industrialised 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's 2006 white paper presented its plans to attract more international professionals '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 who 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 lacking even the status of denizens. This defensive stance of the Dutch and the 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). Both countries have rich economies, elaborate and redistributive welfare states and tightly regulated formal labour markets. To put it bluntly: both countries are rich and redistributive welfare states. 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 public and 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 and, to some extent, even regular migrant workers to keep the system functioning and legitimised. 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 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 means of greasing the wheels of trade and industry. Marxist theorists, especially, 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 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 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 regular and 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 globalisation, 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 globalisation 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 globalised economies, especially in the large ‘global’ cities, where the labour market polarises (Stalker 2000: 133; Sassen 1991). Marcuse (1989) calls this the ‘hourglass economy’, in which the lower and top ends of the economy grow at the expense of the middle.

Burgers and Engbersen (1996: 624) maintain that 'opportunities' for irregular migrants in the global city tend to concentrate in two economic spheres. In the 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 jobs are often taken by irregular migrant labourers. The lower strata of the Dutch and German economies – the 'shadow', 'underground' or 'informal' economies – are roughly in the same league in terms of size. Schneider and Ernste (2000, 2002: 35-36) estimate that, between the years 1989 and 1993, the informal economy ranged from 11.8 to 13.5 per cent of official GNP for the Netherlands and from 10.5 to 15.2 per cent of official GNP for Germany. However, there are also other methodologies and estimates that show larger variation or even 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 and Tsuda (2004), is inevitable. In other words, states may produce laws and rhetoric about curtailing immigration all they want, but the policy result will nevertheless fail to 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 irregular 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 while turning a blind eye when it comes to the irregular migrant work force. In the US, 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 translations. For example, given a tradition of protection of the private sphere in both countries work in private households, such as domestic work and care work, is likely to be a blind spot. Both the public's resentment of governments controlling what happens behind closed doors and a small expected 'return' on the inspections makes private households a relatively expensive and unattractive site for labour market controls. Freeman (1998) has pointed out the clientelist nature of immigration politics in the US. 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). Unsurprisingly, clientelism finds more fertile ground in political systems that have a tradition of professional lobbying in mainstream politics, as is the case in the US. In Germany and the Netherlands, which lack 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 unionised counterparts (for example, the union of the construction industry) may influence policy. Even though political and business elites may look favourably on globalisation 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 and Straubhaar (2003) point out that hiring irregular workers saves employers 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 suggest, if not assume, 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 external and 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 and 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 characterised 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 of 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, concerning the role of the state in balancing between the double movement of 'capitalism' and 'welfare', on the one hand, and 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 two, both countries are expected to develop a policy programme 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, as 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 and Guiraudon (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 responsabilisation strategy). When governments shift responsibilities to private parties (especially employers, subcontractors, and 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 organisations functioning in the informal

economy cannot be effectively deputised. 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 summarised 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. Deputising employers – administrative requirements – authentication of ID documents	1. Organising inter-agency cooperation	Targeting the ‘deputable’ → targeting the ‘undeputable’
	2. Instrumentalising discontent – industrial self-restraint – private snitching	2. Linking database systems (labour, residence, social security and migration, etc.)	
	3. Limiting discretionary powers	3. Mandatory cross-checking of data	
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 may include government institutions (such as the work permits office), but are primarily private parties such as employers, sub-contractors 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 deputed. Employers are obviously the prime targets for deputation 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 checking documents and verifying their authenticity turns them almost into deputy immigration officials. A third possibility is that the state organises 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 who bend the rules (and, in so doing, increase their margin of profit) can become a source of information on irregular practices. However, there are limits to deputation as it relies on self-restraint, 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 organisations 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 deputed must 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 an international relations theory by 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, organisations and individuals that cannot be ‘deputed’ at all. Furthermore, some employers, who 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 real and 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 labour market by using a system of paper and digital gatekeepers, the second logic requires a database system that can identify or re-identify irregular migrants. This makes deputa-tion much more an affair of organising procedures *within* the govern-ment. In essence, it requires new policies that change procedures and routines within certain government institutions, shifting tasks from ‘mere’ exclusion of irregular migrants to contributing to the detection, and identification of, irregular migrants. Sometimes it will mean new tasks and procedures and sometimes it will entail a limitation of discre-tionary room to manoeuvre. It requires the organisation of interagency cooperation and, in particular, 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. 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 re-moval, rather than at refusing entry and discouragement. Needless to say, the second logic requires a much more hands-on approach, mak-ing surveillance and control even more important. Policies aimed at immigrants, instead of employers, require a different mode of opera-tion for the authorities involved. Controls are vital, but are only effec-tive if apprehension and identification become an integral part of the control procedures: first to detect illegal status and then turning irregu-lar migrants over to the authorities that will establish their identity. Dif-ferent authorities will have to cooperate as they all have different sources and data systems that can be used for investigation and identi-fication. And finally, a chain approach is necessary to make this an ef-fective strategy resulting in the return of the irregular migrant to his country of origin. Investing in control systems like this is only mean-ingful if the whole chain – of control, detection, identification, incar-ceration, deportation (see also chapter four on this issue) – is staffed, 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 choose its interventions well. The following paragraphs will analyse 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-checking. Anyone – natives and legal aliens alike – must fill out forms, hand over documents and 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 Dutch and German labour law. Over the years, a dense web of restrictions has developed: regulations and registrations that together have formed paper and, more and more, digital walls 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 Germany. The exclusion also serves to prevent irregular migrants from holding tax-paying jobs on which they can build a claim for regularisation at a later stage. As can be seen in the typology described in the previous paragraph, ‘exclusion from documentation’ comprises 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 issue documents – or refuse to do so – 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, a maze of bureaucratic institutions and registrations impede access to the labour market. Vogel (2001: 329-335) describes the obstacles through the example of two fictional 'irregular migrants' (with a different migration history) looking for work. Both Carol – a Pole who entered on a tourist visa – 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 obligated by law to ask for a prospective employee's social security card and the income tax card before hiring him (Sinn et al. 2005: 46). To take up a job in the regular economy, this means that migrants must possess both cards, which are impossible to get if they are not registered in the local registration office (*Einwohnermeldebehörde*) – as in the case of Carol – or registered with restrictions for work – in the case of Maria. In any case, both Carol and Maria would need a work permit. For Carol, this is impossible due to his illegal residence. For Maria, this is extremely difficult because her prospective employers would first have to consider prioritised unemployed candidates suitable for the job. If Maria could find an employer to hire her, she 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-checking. However, she would still lack a tax card and a work permit, without which few employers would hire her. The chances of getting either would be slim. If either Carol or Maria were to use falsified papers, they would probably be detected at a later stage, as their employers would send the statutory health insurance provider the documents, which would be cross-checked by a computer programme. As Vogel (2001: 333) explains: '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-checking of the health insurance provider is likely to result in notifying the local branch of the federal labour office, which would investigate on the basis of local files and other registrations and would contact the employer for clarification on missing data and documents. Data cross-checking 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 legally obtain a 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 possible for irregular migrants. Irregular migrants can always try to work on the SoFi number of a legal compatriot or obtained otherwise. There have been cases of groups of people that were all working on one and the same SoFi number. By now, though, the tax authorities have inserted in their database an ‘alert’ 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 would only have one number in their dealings with various government agencies and administrations, instead of the many that were in use before. This 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 about one person is now made easier for government authorities. The municipalities issue the Citizen’s Service Number when people register themselves in the Municipal Basic Administration. Ironically, this produces a decentralisation vis-à-vis the limited number of tax offices that could once 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 must 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 obligates employers to check the identity of employees 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 of them 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 2006 year plan, the Dutch Labour Inspectorate added extra weight to employer's responsibilities when it announced that employers not cooperating 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 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 (Barensen & Eijkelenboom 2006). This is a government service, but it 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...' may be the accusation). The tax authorities were looking into something similar for the link between identity documents and the SoFi 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 (*Eerstedagmelding*). The government introduced a compulsory notification to the tax authorities prior to the actual first workday of new employees. 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; Barensen & Eijkelenboom 2006: 69).

In both countries employers – in a broad sense – are encouraged to function as gatekeepers to the institution of the labour market. They are encouraged 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, sectors 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 particularly Germany), commercial temp agencies and agriculture and horticulture (particularly 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, employer federations and unions jointly introduced an agency for compliance in the construction sector (*Bureau Naleving Bouwnijverheid*) that gathers information and tips from sector workers and employers and exchanges this information with the controlling authorities (Podium 2006: 1). The employers' federation for agriculture and horticulture (*LTO Nederland*) runs a special programme to certify specialised temp agencies for the sector to ensure they won't send irregular migrant workers to the employers using 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 as controls and fines increase. Unions also have important incentives to stand 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 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 guides 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 or digital walls. In the Netherlands, especially, the existing maze of bureaucratic requirements was not originally set up 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 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, which results in thicker digital or paper walls that effectively shut out irregular migrants. This legalistic approach is also found in Germany – perhaps even more so. The Dutch's more lenient approach, grounded in a tradition of *gedogen* ('toleration'), is hardly a part of German 'bureaucratic history'. In 2001, Cyrus and 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 centralised 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 street-level bureaucrats. The research concludes that these important gatekeepers of the labour market have a legalistic, 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 organisation. 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 German 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 practice of cross-checking and exchanging data 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-level bureaucrat's room to manoeuvre and deputising employers can only attribute to the exclusion of irregular migrants from the labour market insofar 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 labour and/or 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 must 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!*'. This has resulted in 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 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.

Organisation and manpower

In 1999, the Netherlands Court of Audit established that the Labour Inspectorate (*Arbeidsinspectie*) employed approximately 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 Social Intelligence and Research Unit (SIOD), 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 organisations 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 (35FTE) were transferred to the SIOD and the Labour Inspectorate aimed to be back at normal strength (100FTE) 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 involving irregular migrants is now being investigated by the SIOD, the new investigative branch of labour market control.

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 deputised 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 (Schönwälder 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 centralised. Since the entry into force of the new law (*Schwarzarbeitsbekämpfungsgesetz*), it is the federal customs organisation 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 and 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).

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 other workers 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 2,000-5,000 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 2,000 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 could now fine employers directly, instead of through the channel of the public prosecutor. The procedure is faster and administratively less complex, but above 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, contracting and subcontracting 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 was upped 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 five 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 up to € 5,000 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 prosecutor's office after the irregular migrant already entered the repatriation procedures, which complicates the collection of

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

<i>Year</i>	<i>Controls</i>	<i>Reports of offence/ administrative fines</i>
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

Source: Arbeidsinspectie 2000-2007

* From 2005 onwards, it is not the number of reports of offence, but the number of administrative fines that is counted. In reality, the number of administrative fines in 2005 is well over 2,500 because in many cases both employer and facilitator are fined (Arbeidsinspectie 2005: 67).

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*

	<i>2003</i>	<i>2004</i>	<i>2005</i>	<i>2006</i>
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 2008¹²

Between 2003 and 2006 the number of controls increased significantly. The number of employers who were inspected more than doubled, while the number of employees who 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 five' of sectors in which the employment of irregular workers is the highest: (1) retail trade, (2) agriculture 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 (most notably 1, 3 and 4) and some, such as temp agencies, have become problematic sectors in recent years. In the latter case, it has been an official government policy to deregulate the sector of employment intermediation that cleared the way for a fast rising number of legal, shady and criminal temp agencies that mediate in the demand for irregular 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 (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 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 organisations 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.

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 involving irregular migrant labour, were widespread in the Amsterdam garment industry (Raes et al. 2002). Until 1993, it was estimated that 10,000 illegal workers, migrant or otherwise, 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 organised crackdowns through the introduction of a Clothing Intervention Team, which organised 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 in Amsterdam also had a lot to do with changing strategies among retailers (who were relying more on imports from low wage countries).

A traditional Dutch sector in which irregular migrant labour is common is agriculture and horticulture. For years, the Labour Inspectorate noted a 20 per cent average of violations of the Aliens Employment Act during their controls. Only recently, has this figure started dropping, reaching 17.5 per cent in 2005 and 13 per cent in 2006 (Arbeidsinspectie 2007b). The percentage of irregular resident migrants involved in labour market fraud is, however, relatively stable (18 per cent). The sector as a whole is marked by specific characteristics: the vast majority of irregularly employed aliens are Poles and other migrants from Middle and Eastern Europe. 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. Ninety-two per cent of these permits are granted to Poles and other migrants from Middle and Eastern Europe. The Labour Inspectorate attributes the drop in labour law violations to the wider availability of permits, measures taken by the sector itself and an increase of controls. However, this general picture contrasts sharply with a geographically more specific part of the sector.

If agriculture 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 introduction of the administrative fine), the Westland still lives up to its reputation. While the Labour Inspectorate found 13 per cent of violations of the Aliens Employment Act for the sector as a whole (not including the Westland), the WIT scored 35 per cent 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, and/or simply because of profitability, because the chance of getting caught is a calculated risk or 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 possible, economically or politically.

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, has been 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, the food industry and agriculture (Liedtke 2005; Bundesregierung 2005: 107). However, Schönwälder 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 Berlin's construction boom in the 1990s, special teams were formed to counter illegal employment in construction. According to Martin and Miller (2000), the very large teams, composed of policemen and labour inspectors, organised 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 a 'sectoral shift' is in progress. Private employment of irregular migrants is supposed to become relatively more important. Van der Leun and Kloosterman (2006) hypothesise 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 control agencies. Female migrants, in particular, tend to be employed in domestic work, which is only very seldom a tax-paying 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 regular and 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 countries such as Germany, the UK and the Netherlands tend to employ domestic workers on live-out conditions (Anderson 2000; Jordan 2006). In her characterisation 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 as can be seen from other studies such as those by Philip Anderson (2004) and Lutz (2007). Because 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 and Vogel (2006: 104) indicate that most of the women they interviewed who 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 criticised in the ensuing parliamentary

and public debates. It 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 for 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 eleven 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). Vogel's qualification of faster ('*schneller*') had to do with the increased possibilities for checking and cross-checking documents as the result of new technologies. Faster thus applies to the databases, registrations and crosschecking undertaken via the 'back office' of the control authorities, though also to the increasing opportunities authorities have for carrying out checks 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) underscores the contribution that online 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 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 regularise 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 and 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?

A question remains as to 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 no data at all are 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 employers' compliance with 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 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 parallel, if not somewhat contradictory, 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 (with higher fees) 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. There are thus indications that some employers remain incorrigible, and therefore can't be deputised, 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 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.

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 four). 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 1998 introduction of the Linking Act required various education and housing authorities 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 reorganisation, within and between various agencies. One reason for this is that all policies dealing with apprehension, incarceration and expulsion are at their very core only within the jurisdiction of the state itself. Deputising private individuals, private organisations or even semi-public organisations 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 lookalike 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 and 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 Ministry of Foreign Affairs is developing a Document Information System Civil Status, a database containing the document characteristics and markers needed for the authentication of foreign passports and IDs 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. Lookalike fraud, that uses legal documents, is one of the reasons 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 Administratie Systeem* – VAS) and is now part of a more comprehensive police database, the *Politie Suite Handhaving* (PSH – V). 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 Minister for Aliens affairs and Integration stressed the need to connect databases and to facilitate

the exchange of information among several authorities in order to fight identity fraud and 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 have 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 was 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 (lookalike) 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 2004 Dutch white paper on irregular migrants 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 deputising 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 German customs inspectors are an example of mixing two functions – policing and labour market controls – to a much greater extent than what was even proposed in the Netherlands. In connection to illegal employment, German inspectors have the authority to establish identities, conduct interrogations, confiscate evidence and to search and arrest suspects. This is 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 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. Fines may 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 ultimately expel them – that is, for a government that seriously places ‘irregular resident migrants’ as a policy problem at the same level as labour market fraud. Legally speaking, this was always the logical thing to do, but there are many indications that the police have not seen 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. Though how this translates in day-to-day practice is unclear. 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 changes implemented in Dutch and German policing, in general, and developments within the Aliens Police more specifically. (This topic will be dealt with in chapter four.) 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.

Since the early 1990s, the Netherlands has seen an increase in political pressure that is put on the police – and especially the Aliens Police, or Aliens Department, as they were previously known – to actively deal with the irregular migrant population (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) point out that 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 among 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 registered 1 per cent 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 don't seem to feel a need or political pressure to register these figures more accurately. If we assume that at least some number of irregular migrants apprehended during a labour market control is 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).

Germany's situation is similar to that of the Netherlands. The political pressure to do something about irregular migrant employment and irregular residence is clear, 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 that have been found suggest that the numbers may be – 'disappointingly' – low, especially against the background of an unmistakable political pressure to increase the number of apprehensions. Still, a more sophisticated registration that could provide information about the increase or decrease of apprehended irregular migrant workers over the years has not been implemented by the authorities, nor demanded by politicians. It does not seem to be 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 must be 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 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. Notably, when the labour agencies suspected the presence of irregular migrants at a certain worksite, the police were called in to 'surround' the worksite and, if necessary,

arrest irregular migrants. Immigration officials were then 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 had 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 no longer have need for police assistance.

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 detailing the 'fight against undeclared labour in 2004-2005' by the Senate¹⁶ of the *Land* Berlin, however, gives different indications. Despite the fact that Berlin has traditionally been a hotbed for irregular migrant labour – especially in construction – the numbers of apprehended irregular migrants have been dropping, plummeting from 1,340 persons in 2000 to 404 in 2004. A number of reasons account for this drop. The first is the fact that the apprehensions and procedures resulting 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's 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 customs offices' statistics and 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).

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 being 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 Vogel's characterisation 'higher, faster, more'. An added characterisation 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 is 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 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 characterised 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 a 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 mouths are. 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. In Germany, the customs authorities – solely responsible for labour market controls since 2004 – have been ‘fully deputised’ 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 is thus aimed at the irregular migrant, his apprehension and ultimately expulsion, is hard to tell. The data are either missing or foggy at best.

As usual, the level of 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 available statistical information 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 – or the development of its size over time – can be accurately determined, thus rendering 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, 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 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, journalists and, for that matter, parliament have no way of evaluating the control system and its recent operational changes in any real, empirical sense.

What do these developments in policymaking – with all the restrictions on its interpretation – amount to in terms of 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 is 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'). There are also some indications that the new guest worker schemes indicate a willingness to cater to needs of a segmented labour market. Furthermore, there are notorious 'white spots' where the authorities cannot and/or will not intervene with controls. Governments are restricted and often reluctant when it comes to controlling 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 markets – of which governments are fully aware – but they are 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' with 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 then, the intensity of the control regime has been pushed up further. The fact that the greenhouses of the Netherlands' 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 prioritise for control and, by default, they de-prioritise 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 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 European 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 organise a chain approach of police surveillance, detention and expulsion. Or at least, that is what logic would dictate. The closer organisations are to the actual expulsion, the more dominant the organisational 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 'organisational single-mindedness'. The police have ample room to manoeuvre between the various political demands and societal claims on their organisation. 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 favouring 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 centres 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 organisational 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 least in Germany and the Netherlands. 'Unwanted', irregular migrants are more and more 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 phrased by the German Ministry of the Interior (Bundesministerium des Innern 2008: 154). This raises the question of 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?

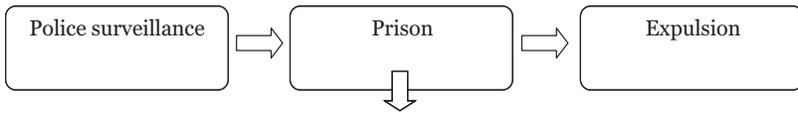
There are two interesting theoretical takes on the issue of police surveillance and detention and to a lesser extent on expulsion. Migration control literature, as also discussed in chapter two, offers explanations for the intensification of these policies, while the criminological theory on the 'new 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. Paragraphs 4.3, 4.4 and 4.5 will deal with the policy

developments and implementation in Germany and the Netherlands in terms of, respectively, police surveillance of 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 criminological theory, in particular, 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 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 and 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 instrumentalised 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. As Cheliotis (2006: 315) observes:

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.

The goal of policy programs characterised 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' is rising incarceration figures in Western countries; first and foremost in the US, but increasingly also in Western Europe as well. Moreover, this 'dangerous underclass' that is managed through detention is increasingly a 'coloured underclass', consisting of African Americans in the US 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 criminalise 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' (Ericson 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 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 organisations. 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 national and international 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 organisations also carries the risk of what Sheptycki calls '*compulsive data demand*', meaning that these organisations 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 of irregular migrants differs from a perspective of migration control. A new penal approach to irregular migrants is likely to favour 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 programmes for the normal prison regime. Expulsion is likely to be limited, perhaps confined to the return of criminal migrants (both legal and illegal). Furthermore, the arrests themselves would probably suffice for the statistical indicators that have to be met. Migration control theory, by contrast, 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 and 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 arranging documents for 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 on:

(1) 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 not, however, 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 centres 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). Still, if countries such as Germany and the Netherlands are implementing policies that adhere to the second logic of exclusion that 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, if not 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 fulfil 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 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 and Bowling (2004: 206) note a sharp increase in immigration-related detention capacity in the UK (see also Gibney & Hansen 2003). And even in the US, 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 immigrant detention. For example, Bosworth (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, 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 its 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 organising 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-as-ghetto metaphor is not the only popular metaphor. Agamben's metaphor of the camp, ultimately 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 materialisation 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 Bay¹⁷ is a good fit), it seems a top-heavy metaphor for the administrative 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 who 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; Cornelius et al. 2004). Legal inclusion and legal exclusion of regular and irregular migrants are sometimes simultaneous processes and there is pressure on both directions. Either way, it points to the importance of citizenship and legal status – or lack thereof – 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). The question is: how far does the state want 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’?

4.2.3 *Expulsion*

If we disregard 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 organisation 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, by contrast, focuses on the preoccupation of politicians to keep – or 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 migrants, would-be migrants and the domestic population. In the context of the UK, Gibney and 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 and 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 organisations. The answer¹⁸ to the removal gap lies primarily within the governmental organisation 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 scrutinising 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 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 a 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 recognises 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 that 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 attractive 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 five on the development of EU migration databases.

4.2.4 *Factories of identification?*

Combining 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: does the state apparatus of policing, detention and expulsion 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 in addressing the root causes (either of criminal behaviour or of illegal residence), it only addresses the visible manifestation of irregular migrants: their presence itself. Irregular migrants are arrested (i.e. removed from the street) and detained (i.e. taken out of sight). The new penal approach thus 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 (i.e. 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*, which 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 organisation 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 states must effectively organise police, detention and expulsion into a chain that can ‘secure the pre-conditions of removal’, meaning all measures that serve the identification, localisation and documentation of irregular migrants (Noll 1999: 268).

4.3 Police surveillance

The police in Germany and the Netherlands are organised in different ways. Like many government organisations 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 seaports and airports. In 2005, this *Bundesgrenzschutz* was rebaptised 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 Schwarzarbeit* (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 of irregular migrants. In the Netherlands, the regular police is organised into 25 districts. Moreover, within these district police forces, there are special units that have been delegated the task of internal surveillance of regular and irregular migrants within the police force. These units were called Aliens Services (*Vreemdelingendienst*) until 2003 when a re-organisation renamed them the Aliens Police (*Vreemdelingenpolitie*). Especially in the Netherlands, there are clear indications that the internal control on irregular migrants was stepped up due to political pressure in recent years, even though this intensification is also a source of strain between the police organisation and the national government on the issue of who determines policing priorities.

4.3.1 Trends in police surveillance: priorities and organisation

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 of 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 behaviour (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 who 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 (collectively known as the *Randstad*). The officers indicated that the detention capacity shortage was larger than recorded in the official figures and 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 came to rise.

In 1994, the Law on Compulsory Identification was introduced. This significantly widened the possibilities and competences that the police had to increase controls and identity checks. It also called upon the police to cooperate with other control organisations, 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 1,360 FTE). According to Boekhoorn et al. (2004: 126), this had an unforeseen side effect. In the Netherlands, police surveillance of 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 of irregular migrants could now be considered a specific responsibility of the 'specialists', and not so much one of their own 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 expulsions of irregular migrants (Boekhoorn et al. 2004: 115). In 2003, the Aliens Service was thoroughly reorganised and 'renamed' Aliens Police. This reorganisation served both a long-standing desire of the Aliens Service organisation to focus more on their operational tasks and the political wish to increase operational surveillance. Up 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 approximately 1,500 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 reorganisation meant transferring all paper surveillance out of the police organisation and into the hands of the Immigration and Naturalization Service (IND) and the municipalities. It also meant an intensification of the means for the operational surveillance of irregular migrants (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 organisation at the same time received extra staffing to be able to increase the controls that the government insisted on. An extra 450 FTEs were added to the ranks of the Aliens Police, which totalled 1,050 FTE after the completion of the reorganisation, this time all for the operational surveillance of irregular migrants.

In Germany, the internal control on irregular migrants is much less characterised by organisational 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 specialised 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 *Ausländerbehörde* (foreign-resident authority) take care of the paper surveillance as they are responsible for all administrative dealings with both legal aliens (organising their administration and their identity documents) and illegal aliens (organising the removal orders) 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 misdemeanours, 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 organisations’ 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. In six of the sixteen *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 available to get some impression of police surveillance of 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 migrants¹⁹ during this timeframe, rising from roughly 12,000 apprehensions in 1998-1999 to roughly 23,000 apprehensions in 2003-2004 (see table 4.1).

Table 4.1 *Apprehended irregular migrants specified by reason of apprehension in the Netherlands, April 1998 – April 2004*

<i>Reason for apprehension</i>	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004
Aliens Law	6,604 (55%)	6,428 (52%)	6,978 (46%)	7,742 (44%)	10,564 (46%)	9,629 (42%)
Criminal Law	2,859 (23%)	3,439 (28%)	5,125 (34%)	6,667 (38%)	8,664 (38%)	9,076 (40%)
Other laws*	2,538 (22%)	2,516 (20%)	3,069 (20%)	3,133 (18%)	3,697 (16%)	4,253 (18%)
Total (100%)	12,001	12,383	15,172	17,542	22,925	22,958

* Includes (non-limitative) the *Opiumwet* (narcotics law), *Algemene Plaatselijke Verordening* (local decree) and *de Verkeerswet* (traffic law)

Source: Boekhoorn et al. 2004: 157

Though the police are not always very accurate at ‘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. An increase would in fact 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 favours the control on criminal and public disorderly irregular migrants over ‘normal’ irregular migrants. An alternative explanation posits that the general buildup of the exclusionary Dutch illegal aliens policy in the last decade marginalises 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 ‘marginalisation 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 reorganisation of the Dutch Aliens Police in 2003 have translated into a general increase in the

active surveillance of irregular migrants, other than the criminal irregular migrants that are prioritised by the police themselves. The available data (computed on the basis of police datasets) run only to 2004. As the reorganisation and the recruiting of new operational personnel took quite some time and severely burdened the organisation (Boekhoorn & Speller 2006), even an extra two years wouldn't have told us much more. Data from 2006 onwards could tell us more if and when they become available. In order to monitor the effects of the reorganisation 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 identity investigations and 150 secondary identity investigations per month. In some districts, this has already led to a professionalisation of the identification process and the introduction of an *identiteitsstraat* (literally an 'identification street') in the police station, where all the practical and technical means available for identification are lined up. The police regard this professionalisation 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. Given the differences in population size of the two countries, however, it cannot be considered much.

Table 4.2 *Irregular migrants in police statistics in Germany, 1996-2005*

	<i>Suspects without legal residence¹</i>	<i>Suspects without legal residence minus illegal migrants apprehended at the border²</i>	<i>Illegal residence as offence³</i>
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 Aufenthalt*

² *Tatverdächtige abzüglich der an den Grenzen aufgegriffenen unerlaubt eingereisten Ausländer*

Source: Kreienbrink & Sinn 2006: 16

³ *Straftat: Illegaler Aufenthalt nach Ausländergesetz*

Source: Bundeskriminalamt 2007: 42; 2005: 44

There is another aspect of the apprehension figures in table 4.2 that 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 even increases 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 irregular migrants in Germany are 'less criminal' than those apprehended in the Netherlands. In light of the marginalisation thesis, this might be explained by a relatively better position, room to manoeuvre and opportunities 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 area of the so-called 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 behaviour 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 the fact that some violations of the law can only be made by immigrants, such as breaches of immigration and residence laws. The significance of this category within the general 'foreign' prison population, the majority of them irregular migrants, will be elaborated below.

4.4.1 *Trends in administrative detention in Germany and the Netherlands*

The detention of irregular migrants is an increasingly substantial part of internal migration control policies in which detention is instrumental to achieving certain policy goals that are otherwise considered unachievable. 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 include groups other than asylum seekers to discern a number of semi-separate groups of irregular migrants who 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 their sentence, which they typically serve in a regular prison. In the second place, there are asylum claimants who are detained during the procedure of their asylum application in so-called 'pre-admission detention'. Not all countries use this practice whereby 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 no longer have a legal right of residence 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 centred on two main issues. The first is the prevention of abscondment. Detention is obviously the ultimate form of localisation, one of Noll's (1999) 'pre-conditions 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) writes that one of the main justifications for immigrant detention in the Netherlands is insufficient cooperation of an irregular migrant with the authorities when it comes to establishing 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 which 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 an administrative detention and is not considered a punitive measure, but rather, a measure to safeguard other purposes, mainly expulsion (Dünkel et al. 2007: 377). Conversely, 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 law. For example, illegal entry, producing false documents and not leaving the country while classified as a *persona non grata* are all punishable offences (Van Kalmthout et al. 2007: 64).

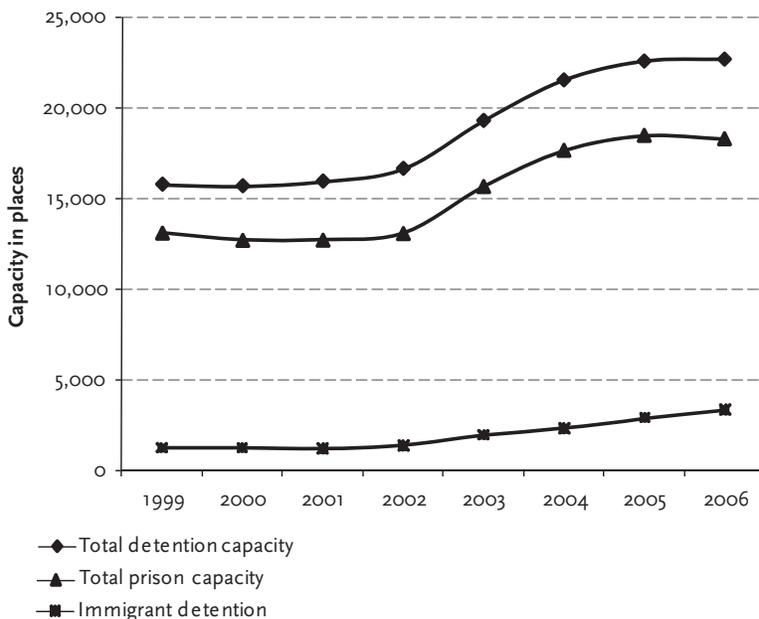
Secondly, the EU member states vary considerably in terms of the time an irregular migrant can be held in detention: countries may measure the length of stay in hours, days or months. Some even lack any maximum prescribed by law. The length of administrative detention in Germany and the Netherlands is long as compared to most other European countries. The German authorities can detain irregular migrants up to eighteen months. The administrative detention for irregular migrants is initially six months, which can be extended by another twelve months. This maximum length of eighteen months is, however, an exception. On average, the administrative detention lasts six weeks. Obviously, this 'average length' is based on detainees who both stay shorter and much longer than the six-week period. Research published in 1990 shows that the proportion of detained irregular migrants awaiting expulsion who spend more than six months in custody is roughly 10 to 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 by the local Foreign Nationals Agency. In Germany, the constitution requires all decisions concerning the deprivation of liberty 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 realised or even remains just 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 shows that long-term detention of fifteen up to eighteen months is no exception (Van Kalmthout & Hofstee-van der Meulen 2007: 650).

4.4.2 *Detention capacity and organisation*

The expanding role of detention for the organisation of internal migration control on irregular migrants should be visible from the growth of the detention capacity and changes in the organisation of the administrative detention regime. The build-up of the detention regime in the Netherlands provides insight into the importance the Dutch government attaches to detention (and ultimately expulsion) as well as 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, instead 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’ in Ter Apel opened its doors, adding another 394 places for immigrant detention with a view to expulsion. Since 1998, a large number of new venues have come to be used, including the so-called *grens hospitia* (‘border shelters’), the expulsion centres at Amsterdam Airport Schiphol and Rotterdam Airport, new detention centres in Zeist and Rotterdam and two detention boats in Rotterdam. It is noteworthy that the Dutch expulsion centres were introduced as part of a government programme entitled ‘Towards a safer society’. In other words, the intensification of expulsion policies through these centres 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: first, short-term detention exercised right 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); second, detention to prepare for the expulsion of irregular resident migrants. If we set the rise in immigrant detention capacity against the background of the overall expansion of the Dutch detention capacity in the same time period, the following picture emerges. Total detention capacity has steadily risen since the 2000s, though, in recent years, it seems to be stabilising (and even sloping downwards a little). In comparison, 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)

Sources: 1999-2002 from DJI 2004: 9; 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.

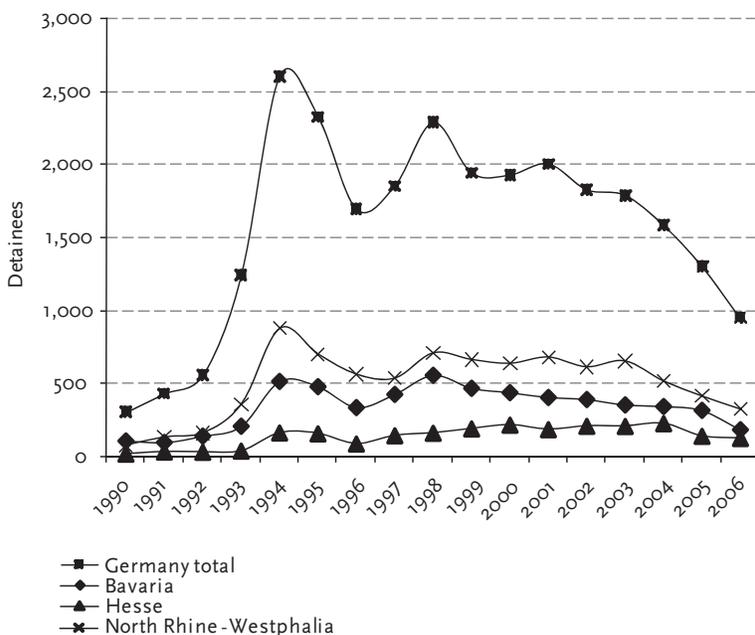
The German regime for the detention of irregular migrants differs from the Dutch case in a number of aspects. First of all, the prison system is decentralised. The *Länder* are responsible for the buildings and the personnel, which attributed to large differences between facilities and regimes. Furthermore, 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. In the Netherlands, notably since the 1990s, detention facilities have been 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 realised within JVAs – 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, on numerous occasions throughout the 1990s and the 2000s, 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 (Dünkel et al. 2007: 377–8).

Due to its decentralised organisation, the detention capacity's development 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 rather, the actual *stock* of detained foreigners who are pending removal on one specific day (1 January) 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 *Bundesländer* seem to take up the lion's share of the detained foreigners pending removal (again, on 1 January of each year). The top three of the sixteen *Bundesländer* are also depicted in the graph.

The current capacity for the administrative detention of irregular migrants awaiting removal is roughly 2,250 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.

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



Source: Dünkel et al. 2007: 379-380; adapted

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 three in the graph. This is odd because it has a specialised immigrant detention centre 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). This means that, on average, every place in Köpenick was used almost seventeen 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 one in three 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: the irregular migrant is expelled or he is released back onto the streets. In the latter case, it is likely 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) with an immigration dossier, 18 per cent were 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 over the year (IND 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 actually expelled is much lower and

even lies below 40 per cent. This is a rather low percentage, especially when set against the background of extending detention lengths and rising costs: an estimated € 35,000 detention costs per successful expulsion. The absolute number of expulsions from the Netherlands has also been on the decline 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 check at his last known home 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 (IND 2006). A *supervised departure* provides that the immigrant’s travel documents be held by the authorities until he has effectively passed the border. The absolute numbers for both categories have dropped since 2003, signalling a trend of a decreasing effectiveness of expulsion policies.

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

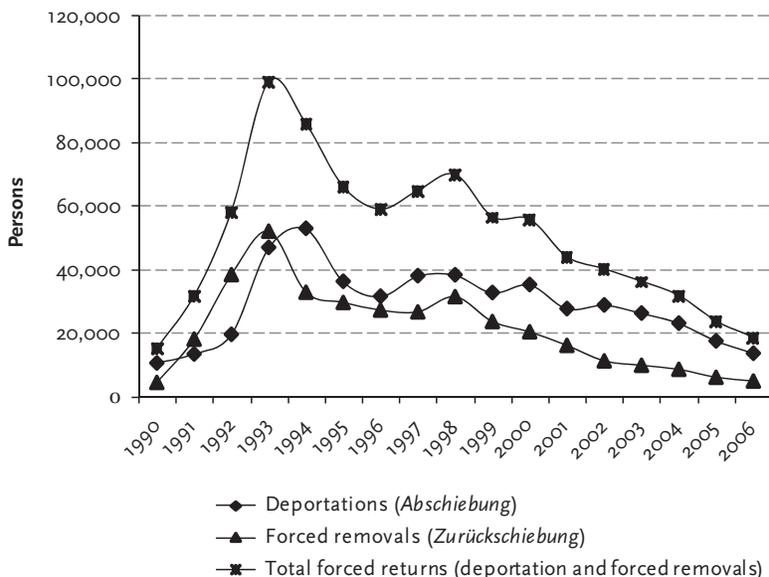
	<i>Deportations</i> (uitzetting)	<i>Supervised departure</i> (vertrek onder toezicht)	<i>Total actual departure</i>
2000	9,947	15,262	25,209
2001	9,498	7,049	16,547
2002	12,015	9,055	21,070
2003	11,374	11,006	22,380
2004	9,215	9,800	19,015
2005	8,912	NA	
2006	7,765	NA	

Sources: Minister voor Vreemdelingenzaken en Integratie 2003: 8; Ministerie van Justitie 2004: 48-49, 2005: 37-38, 2006: 48, 2007: 42

There is also an important connection between the length an irregular migrant is detained and the chances of his 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 than 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 detained under three months (67 per cent). This percentage dropped significantly as time went on; only 19 per cent of those 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 who were expelled were in detention for less than 28 days. Conversely, the average detention length of irregular migrants 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 who may eventually prove to be 'und deportable'.

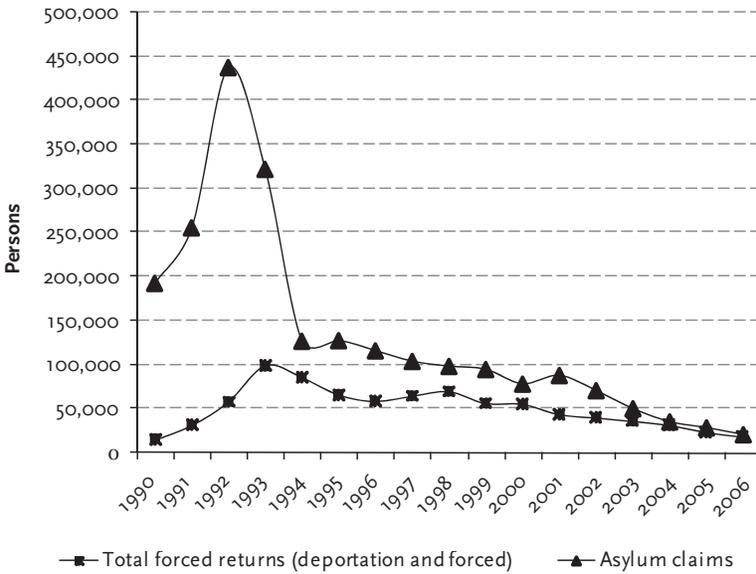
The history of German expulsion policy is closely entwined with the sizable migration flows into this country, especially in the years after the fall of the Berlin wall. According to Ellerman (2008: 173), the immigration authorities conducted fewer than 8,000 deportations in 1985, a number that climbed to 15,000 in 1990, peaked at 47,000 in 1993 and stabilised at around 35,000 by 2000. More recently, the German figures have 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' comprises 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, not of internal migration control. *Zurückschiebung*, or removal, is meant to return an apprehended irregular migrant 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 six 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 was 13,894 and the total number of forced removals was 18,623.

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

Source: Bundesministerium 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 (Düinkel 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'. Düinkel et al. (2007: 383) say that the average stay in immigrant detention is six weeks. However, they 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 favour 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). Kreienbrink (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

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



Sources: Bundesministerium des Innern 2007: 151 & 289; Bundesamt für Migration und Flüchtlinge 2006

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.

As can be seen from graph 4.4, the gap between the number of expulsions and the number of asylum claims is closing fast and they 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' has grown 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 disclosing 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 country of origin, or often the country the immigration authorities suspect to be the country of origin, or both. The problems with irregular migrants primarily involve the destroying of identity papers, lying or withholding information about identity and country of origin and refusing to cooperate with the immigration authorities and the embassies of their countries of origin. The burgeoning number of undocumented cases in immigrant detention during the last decade is a significant 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 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, formalise 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 opportunities 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 sought counter-measures to professionalise 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.

Organising identification: centralisation and professionalisation

Both Germany and the Netherlands have implemented organisational changes in recent years to increase the effectiveness of the expulsion process. Often, these organisational changes were meant to increase the professionalisation of the authorities involved in expulsion policies. Identification has proven to be a very specialised task that benefits

from centralisation, 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 instate 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 centre for 'return issues' that specifically deals with the most 'difficult' countries of origin in terms of the identification, recognition and documenting of irregular migrants who are 'suspected' to be their nationals. Right now, the centre deals with fourteen countries, thirteen of them being in sub-Saharan Africa. 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 centralisation as well. Normally, all *Ausländerbehörde* have the jurisdiction to issue expulsion orders but, in the *Bundesland* Baden Württemberg, only four central *Ausländerbehörde*, out of 120 in total, can issue them. According to Ellerman (2005: 1230-1231), this centralisation 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 organisational change. Following the priority given to the problem of irregular migration in 2003's white paper on return (*Terugkeernota*) and 2004's white paper on irregular migrants, in 2005, the government decided to create a new return migration organisation. The Return and Departure Service (*Dienst Terugkeer en Vertrek – DT&V*), became operational in 2007 to deal with both 'voluntary' and forced returns. The DT&V has since taken over a number of tasks related to return from the IND, the Aliens Police and the Royal Constabulary.

Pressuring migrants

Getting uncooperative irregular migrants to cooperate with the authorities in establishing their identity seems like a direct path to identification and subsequent 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 incarceration itself, the regime usually proves harsher than that of normal prisons as the facilities and circumstances are below regular prison standards. There is often overcrowding, a lack of medical and legal aid and poorly trained, if not 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 who 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 rely on immigrant detention to learn the identity of irregular migrants by means of repeated interviews, language tests (though often considered expensive and inaccurate; see Kreienbrink 2007: 137) and research of files, documents, registrations and data-banks. During the evaluation of the German immigration law in 2006, the question was also raised if the authorities should be able to search immigrants' homes for clues of their nationality and identity (Kreienbrink 2007: 135). Once authorities suspect – but do not necessarily prove – they have determined an immigrant's nationality, they often must present the individual at the embassy or consulate of the suspected country of origin. The embassies must then acknowledge the immigrant as a citizen before they might be willing to provide a new passport or *laissez-passer*. Depending on the available proof of identity and nationality, the presentation of the immigrant is done either on paper or in person (Van Kalmthout 2005: 140-142). A 'paper presentation' requires the irregular migrant to complete a form answering questions regarding identity, place of origin, family, etc., which is then examined by embassy personnel. An in-person presentation means that the irregular migrant will be interviewed 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 will 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 of any country of origin, but in the hope of coming upon the right one. However, this so-called 'embassy shopping' yields little result and a lot of protest from the legal profession (Van Kalmthout 2005: 194).

Pressuring countries of origin

Presenting immigrants to embassies is not just meant to put pressure on the irregular migrant. It is also meant to influence the behaviour of the countries of origin. Many countries of origin prove very uncooperative. As Western states get keener on expulsion, the number of uncooperative countries is on the rise. In 1990, German authorities dealt

with the representatives of ten countries on a regular basis. By 2000, that number had risen to 80 (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 wishing to expel irregular migrants, they must 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 of 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 bilateral 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 Romania very cooperative, while the absence of such a tempting prospective explains the Vietnamese obstructionist tactics. The negotiation of readmission agreements at the EU level, 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 and signed agreements (see chapter five). For the German case, Ellermann (2008: 180-183) describes how, in order to increase the number of readmissions, interior officials in Bielefeld (Nordrhein Westphalen) circumvent diplomatic and political levels,

trying to establish liaison structures with officials of the interior ministries in some countries of origin. 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 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 individual in custody. The German authorities check the Central Aliens Register (AZR), the central database of the immigration authorities that is also fed by various public and semi-public authorities who are legally obligated 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 national and international 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 alphanumeric information – names, dates, places, and physical characteristics – meaning that authorities still need at least a name to make a match between a detainee and the database information. In light of this structural flaw, the German and Dutch authorities have embarked on a strategy to include in their databases a number of biometric identifiers. Identifiers such as digitalised fingerprints, photographs suitable for facial recognition and retina scans would mean that the authorities no longer need to rely on the immigrant's cooperation. The use of biometric information would allow them to make sweeping searches of the available data. At both the national and the international levels (especially in the EU), migration control has seen a real turn towards the use of biometric data. Progress is only being made slowly, however, as the use of biometrics is technologically and legally challenging as well as costly.

In Germany there were early pleas for a more structural approach to the use of biometrics in matters of immigration and identification. In 2001, the Sussmüth commission proposed storing all the data of visa applicants in a central register and making 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 expedite the identification of irregular migrants who travelled in on a visa. In 2006's evaluation of the immigration law, the plea was repeated. However, the photographic data currently available in the AZR are not sophisticated enough to be used for identification purposes (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 made available for searches by immigration authorities and the police for purposes of identifying irregular migrants. The biometric identifier in this database is also photograph-based facial recognition. The technology of this system is more sophisticated than the AZR, but due to its relatively short existence, 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 fingerprints. This goes for some police databases, but especially for the so-called HAVANK database, the central storage system of government-collected fingerprints administered by the National Criminal Investigation Department (*Nationale Recherche*). One section of HAVANK contains 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 improve the effectiveness of identification. The ultimate aim was to gather biometric data on all people embarking on 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 five). Once gathering biometric data on the various groups that enter Germany and the Netherlands takes on a grander scale and more data are stored, the identification process will become less dependent on the

cooperation of individual migrants for revealing 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-checking 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 the 'brave new world' of modern surveillance techniques provides. More and more, the immigration authorities turn to database systems for the identification of irregular migrants. Where possible, the database systems 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 regular and 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, in particular, the rising incarceration rates are not translated into more expulsions. This important counter-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 realised the value of frustrating the identification process has lifted identification to an even more central place in policymaking. Theoretically, the migration control perspective best explains 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 and Hansen (2003: 15) characterise 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 clearinghouse for irregular migrants, i.e. as a stopgap en route to expulsion. This is especially noteworthy considering how 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 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 eighteen months in Germany and, theoretically, even longer in the Netherlands. But the lengthy and very costly detention of an irregular migrant who 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 who have 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 regime has a 'new penological' character. 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 well below normal standards. Overcrowding, a lack of medical and legal aid, poorly trained, if not unqualified, staff and the lack of all activities and

education preparing 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 encourages 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 were 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 a criminal offence) and some of the efforts of immigration authorities to expel irregular migrants (such as presenting aliens to various countries and 'informalising' diplomatic relations to increase expulsion rates, as is done in 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 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 albeit ultimately Janus-faced status. In essence, the lack of a known citizenship among irregular migrants both facilitates the 'exceptional' handling of immigrants by the state, as well as restricts the state in achieving its aims. First, there is 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, this 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, an individual irregular migrant will find himself more and more cornered between the rock of prison and the hard place of expulsion. Still, 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, thus using 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 is at the European level.

5 European tools for domestic problems

5.1 Introduction²¹

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 the Schengen states, in particular, have a joint agenda when it comes to border control, visa policy and immigration and asylum policy. These are issues around which a significant policy agenda – 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 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 the previous chapters showed, countries such as the Netherlands and Germany are quite serious about the development and implementation of internal surveillance of 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 EU-level policymaking. Their hope is that the EU's political weight will increase the leverage on unwilling and uncooperative countries of origin. The biggest frustration of expulsion policies, which is the impossibility of identifying irregular migrants, could also potentially benefit from a European approach. The fact that an irregular migrant could have entered the EU at any external border means that he may have left traces of his identity and/or 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 to the EU to provide additional tools.

This chapter analyses the policies and instruments developed at the level of the EU that can ‘aid’ member states in their domestic ‘fight against illegal migration’, as it is phrased in the official documents of the EU. 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 these policies be viewed as the instrumental use of EU resources for domestic agendas 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 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 shown below, in the internal migration control in individual member states such as Germany and the Netherlands. The following 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 policymaking: 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 capacities for new wars. European nations decided to bring production of coal and steel, being the raw materials for the weapons of mass destruction in the immediate post-war days, under supervision of the European Coal and Steel Community, Europe's first truly supranational organisation. Even today, and in contrast to most international organisations, the core of the EU still is, in essence, a very supranational treaty: the EEC treaty, which is now referred to as the first pillar of the EU. 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 Europeanisation 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 are revoked because the European Court of Justice determines they are in violation of the EU treaties. In other words, the EU moulds the behaviour 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 EU, 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 should note that Europeanisation usually is (Broeders 2009).

Besides 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, the executive, seek out the European level not so much

to devise common solutions for common problems, but to escape domestic constraints on policymaking (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 behaviour as 'venue shopping': agencies making a vertical escape from the various domestic constraints on policymaking 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 organisations responsible for control and security (such as police and intelligence organisations operating at the international level), but also more and more 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. As Lahav and Guiraudon put it: 'International organisations and supranational participation legitimize the role of certain actors in policy-making that defend a logic of control' (2006: 207). Instead of being restrained in their autonomy, the EU level of policymaking makes it possible to avoid national constraints and to strike alliances with 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; they alone can operate at both national and international levels. According to Wolf, the strategic use of this new arena can be seen as a new version of the ancient *raison d'état*. 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 organisation of decision-making. Even so, allowance must be made for the fact that most EU cooperation started from a very national, narrowly framed perspective, though developing along the way into a common policy framework, including the community method of decision-making. Trading in francs, guilders and German marks for euros wasn't achieved overnight either. It remains to be seen whether national governments can maintain the EU as an escape route and withstand the communitarisation 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, restrictive policies and limited – if not sometimes totally lacking – 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 EU's foreign policy agenda, 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 becoming 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 of 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 the 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 visa and become irregular its validity expires. These migration histories 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 been developed 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 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 delegitimise and criminalise 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 instrumentalisation 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 member states brings the level of ‘identity management’ (Muller 2004) through 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 potentially makes cross-checking a matter of seconds. Considering the state-of-the-art technology applied in establishing these new EU databases, the limit may indeed be approaching the sky from a purely technological perspective. Whether or not governments merge different bodies of information will 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’. This means 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 the surveillance of regular and irregular migrants. Whether or not they will be used for the domestic internal surveillance of irregular migrants depends on: (1) if and to what extent national governments can and will 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 and 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 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 characterised 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 recognised and taken into account. A European Commission proposal to counter illegal employment stipulated that member states should ensure the fulfilment of employer obligations and safeguard the rights of migrant workers so that the cost of an irregular migrant worker would be equal to, if not exceed, that of a legal worker (Cholewinski 2004). Even though this proposal was never translated into a common policy, the discourse and analysis of the problems posed by irregular migration were distinct from those in later years. The second period, running from 1990 to 1999, is characterised by intergovernmental cooperation outside the institutions of the EU proper and the so-called post-Maastricht Treaty measures. This period includes cooperation in semi-formalised intergovernmental groups such as the Ad Hoc Immigration Group, EU working groups and, in particular, the Schengen Group. All of these institutions functioned outside of the European Community's 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) – basically an inventory of 'flanking measures' – that associated or even equated, 'Schengen' with securitisation and the image of 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. The convention 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 also 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, as it were. With the entry into force of the Treaty of the European Union 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 EU. 'Combating unauthorised 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 EU (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).

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 EU. The second was the transfer of some 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 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 pillars), 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 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. This database 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. '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. 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).

At the top of the political agenda is the comprehensive plan to combat illegal immigration, formalised in the European Commission's June 2003 'Communication on a Common Policy on All Aspects of Illegal Immigration'. The comprehensive plan centres 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 cooperation and coordination 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 recognising 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. This plan 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 it, too, 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’ who are to assist and advise consulates, carriers and host country border control authorities in their task of separating real from false documents. It 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, fingerprints, vehicle registration, non personal and personal data (Balzacq et al. 2006: 13). This adds to – and in many cases doubles – all kinds of data exchange 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.

In the slipstream of these first three migration databases, the EU member states have already started discussing proposals for a second generation of data systems. This new generation of databases is being aimed at travellers usually considered ‘unproblematic’ from a migration policy perspective, such as EU citizens and travellers who have no need for a visa. The EU is debating the setup of a Passenger Name Record (PNR) system similar to the one that the US authorities are operating. Such a system would require airlines to forward all passenger information (such as payment information, seat number, meal preferences, etc.) to EU authorities prior to landing. This information can be stored and analysed. Though the PNR system is primarily intended to be of use in counter-terrorism, the data it will generate would also be of interest for fighting organised crime and irregular migration. Furthermore, in March 2008 the European Commission launched its proposal for the so-called Border Package, which includes the introduction of an EU-wide Entry-Exit System (CEC 2008). This proposed system would require establishing a new EU-wide database to register all

travellers to the EU as they enter or exit at the external borders of the EU. In order to be fully effective, this new system would have to be interoperable with the older databases, particularly the ones using biometric identifiers (Guild et al. 2008). EU citizens also come into play, now that, as of 2009, member states have started to 'roll out' the European biometric passport. In 2019, all EU citizens should be in possession of a machine-readable passport with biometric identifiers that can be swiped on entering and leaving the EU territory. To this end, the European Commission's Border Package envisages an Automated Border Control System that will automatically verify the authenticity of an EU passport and, by default, the citizenship of its bearer. Although these data will not be stored, the European Commission states that the system will nonetheless 'read and extract the information from the travel document, capturing biometrics and performing the verification to enable entry or exit, as well as random checks of the SIS and national databases' (European Commission, quoted in Guild et al. 2008: 3). In short, the new EU proposals are only partly aimed at irregular migrants, though are testimony of the enthusiastic political embrace of new technologies and, more importantly, continuing on the path of making biometric identification the cornerstone of EU policies on mobile populations.

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. Germany, in particular, has used its political weight within the EU to initiate 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 on *internal* migration control, it, by and large, does not take into account the development of a common European border strategy, including Schengen, or the establishing of border control agencies such as FRONTEX. The remainder of this chapter will focus first on the European efforts to come to a common return policy and the EU's 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 tools of migration policy. In terms of instruments, this chapter will analyse the development of a European network of immigration databases that can be used to control migratory movement and

help identify irregular migrants hiding 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 four) 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 European 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 'externalising' 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 programme 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 believed to have transited through their country *en route* to the EU. This means taking 'back' transit migrants who are not nationals and for whom, under international law, there is no obligation to do so. 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 negotiations with neighbouring 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 in negotiating readmission clauses with their own sending countries, they fear getting 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 fruitful negotiations are those with countries that are in line for EU membership, such as the CEE countries during the 1990s, or 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 European 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, sometimes indefinitely. For some countries neighbouring the EU the most important carrot the EU can offer are so-called visa facilitation agreements, which can make the Schengen border less hard for some of their citizens. However, many of the EU member states do not 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 into more informal arrangements particularly with 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 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 as a council directive on the mutual recognition of expulsion decisions on third-country nationals and the council decision on the organisation 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 organise 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 losing control over the management of migration because of the risk that immigrants disappear into illegality during the phase reserved for the independent organisation 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 organisation 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 five-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 16 May 2008, has been to keep the limit of six months, yet allow a further maximum extension of 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 these are the main causes for most delays of expulsion, the room to manoeuvre 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 four). 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

5.5 Creating digital borders: a network of EU migration databases

The EU migration databases have developed over a long period of time. They began with the Schengen Information System (SIS) as part of the Schengen Convention in 1995 and extend into the near future with the expected launch of the SIS II and the Visa Information System. Along the way of their development, the setup 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 a 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 put their 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 comprises a central database (called C-SIS), which is 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 of 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 that can be entered into the SIS, the most important category is that of lost and stolen 'identity papers', which in 1998 already 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 names, known aliases, initials of middle name, date and place of birth, distinctive physical features, sex, nationality, whether persons are considered 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 unrestricted 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, in 2005, there were more than 30,000 terminals in the Schengen Area where the SIS can be accessed.

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, 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, though 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 organisation, 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 the individual 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 pre-occupation 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, entries on irregular migrants (article 96) do, in turn, take up the lion's share of 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*

<i>Year</i>	<i>Entries</i>	<i>Entries on wanted persons</i>	<i>Entries on art. 96</i>	<i>Hits on art. 96</i>
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	NA

Sources: Bundesministerium des Innern 2002-2005; House of Lords 2007: 22; CEU 2005b, 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, some 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 whom 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. 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. Looking at the national figures on the hits for article 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 by another country into the SIS under article 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 article 96. The German statistics indicate that the external

hits have consistently been higher than the internal hits (though the differences have been getting smaller in recent years). Roughly translated, this means that there are more 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. For Germany thus 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*

	<i>Germany</i>		<i>The Netherlands</i>	
	<i>Internal hits¹</i>	<i>External hits²</i>	<i>Internal hits¹</i>	<i>External hits²</i>
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

¹ hits recorded internally in response to an alert entered abroad

² hits recorded abroad in response to a national alert

Source: CEU 2007b

The distribution of internal and external hits for the Netherlands suggests that use of the system for internal migration control is relatively more important 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 its redevelopment.

The SIS has also proved to be a popular instrument. The rapid growth of the Schengen group, even outside 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 the European Commission recently 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 new organisations, 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 European 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).

Since 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. First, there is 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. Second, there is 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). The 'one-to-many' searches, in particular, 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 with 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 with access as well as for a wide variation between member states. As Boswell (2007) has argued, these developments add up to security agencies utilising migration policy tools for counter-terrorism and other security aims, rather than a securitisation 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 derived from *European Dactylographic 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 was 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 one comprises the prints of all individuals fourteen 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 two 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 three contains the fingerprints of aliens found illegally present in one of the member states. These last prints are checked against category one and two 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, fingerprint data, sex, reference number used by the member state of origin, date when the fingerprints 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)*

Category	2003		2004		2005		2006	
	Entries	Hits	Entries	Hits	Entries	Hits	Entries	Hits
Asylum claimants (cat. 1)	246,902	19,247 ^a	232,205	40,759 ^a	187,223	31,636 ^a	165,958	27,014 ^a
Aliens crossings the external border irregularly (cat. 2)	7,857	673 ^b	16,183	2,846 ^b	25,163	4,001 ^b	41,312	6,658 ^b
Aliens found illegally present in a member state (cat. 3)	16,814	1,181 ^c	39,550	7,674 ^c	46,229	11,311 ^c	63,413	15,612 ^c

Sources: CEC 2004, 2005a, 2006, 2007

^a fingerprints of an asylum seeker sent in by a member state 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 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 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 European 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

Through the use of category three 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 migrant who is silent about his identity. In other words, it could ‘re-identify’ him (Broeders 2007). Just as the SIS and SIRENE systems 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	16,082	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

Sources: 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 three (roughly 31,000 of a total of 63,000) and more than half of the hits on category three data (almost 9,000 of a total of 15,621). Moreover, the hits are on a steady increase, especially for the Netherlands, since the system has been in operation. Again, there are no figures available that can directly link category three hits to actual expulsions made possible by identification data obtained through EURODAC. However, the increasing use of EURODAC data by Germany and the Netherlands suggests that the category three data are considered useful in helping to solve the domestic identification problems. The popularity of the category three

data among certain member states did not go unnoticed. In June 2007, the European Commission published an evaluation of the first three years that the EURODAC system was in operation (CEC 2007) which emphasised the future possibilities of this specific category of data. The high use of this category led the European 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 one and two. This takes EURODAC another step into the direction of being a database on irregular migrants in addition to an asylum related database. Furthermore, the European 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. Generally, irregular migrants have three possible migration histories. They have 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 European 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'. 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 of 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 who 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 European 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 twenty 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 setup 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, will share a common technological platform so that the systems are compatible, interoperable and able to cross-check, connect and maybe even exchange information. The databases themselves will remain separate but at the functional level SIS users can – and will or must? – have their entries and queries

checked against the VIS database and vice versa. The central systems of the VIS and the SIS will be next-door neighbours 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 maximisation 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 family members and companies who vouch for the visa recipient – and who may be held accountable should he or she overstay the visa – are also registered. For these groups, 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 ten 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 European Commission, into a new and largely unknown dimension, both technically and financially (CEC 2003: 26). In a best scenario – optimal synergy with the SIS II – along with the inclusion of 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 European 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 four). 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 externalise 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 'informalising' 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 five-year re-entry ban are enthusiastically embraced. In short, progress is slow and does not stray much from the domestic agendas 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 once all systems are online they 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 include biometric identifiers signifies a crucial new step in the internal surveillance of 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 fingerprint' 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 a 'suspect' legal category such as asylum applicants and from 'suspect' countries of origin, such as countries that require a visa to travel into the EU as possible, in order to get at the much smaller group of immigrants who 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 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 organisations (Broeders & Engbersen 2007). More recent proposals for a PNR system, an Entry-Exit System and the introduction of the biometric EU passport are testimony of the member states continuing on the path of making biometric identification the cornerstone of EU policies on mobile populations. This proposed second generation of migration databases casts the digital dragnet out even wider and will take in data from nearly all travellers entering and exiting the EU territory.

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 agendas. 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 constraints: a policy laboratory for new migration control measures far away from national democratic and public scrutiny. The 'pick and choose' approach to EU instruments according to national agendas 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 are relatively unconcerned about the presence of irregular migrants on their territory do not actively use the system. So far, instrumentalisation 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, 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 II, 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-connecting them to 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, such as a visa application or a dossier of an asylum request, 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 anonymity

If nothing else, the preceding chapters have proven that the border is a social fact in this so-called borderless Europe. Though this book 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 must 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 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 fulfil their only legal obligation to their country of residence: the imperative to leave the country.

Of course, most irregular migrants are not willing to fulfil that legal obligation. They have usually come for a reason. Most have come in search of a better life and with the belief they can 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. To get irregular migrants to leave the country, the state has 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 societal institutions. Blocking an irregular migrant's access to the legal documents and registrations that would give him access to these institutions has been labelled 'the first logic of exclusion' in this study. This is in fact the 'traditional' policy of internal migration control on irregular migrants. Over the years, the effectiveness of this strategy has proven 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, in particular, 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. It is also important for the identification of irregular migrants. Information and communication technology can serve both logics of exclusion. For the first logic, it is an indispensable tool to guard and shield off the institutions of the welfare state to anyone who is labelled 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 recognise 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 of 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 analysed. 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 organisation of the expulsion process. There the emphasis shifts to the organisation 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 must 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, summarised by Vogel's (2006) characterisation '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 characterised 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, greater 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 officially registered very low percentage and the unknown percentage that may be hidden in the figures registered under general breaches of the Aliens or Residence Acts. In either case, the authorities apparently do not feel the need or the political

pressure to register these figures more accurately. And yet, 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 professionalisation 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. The newer database systems, once online, 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 over the immigrant himself in terms of identification. A tempting prospect for the immigration authorities. A ‘surveillant assemblage’ aimed at regular and 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 contradiction 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 taken by many countries of origin considered sources of irregular migration: a disinclination to take back migrants who cannot be identified beyond a doubt as their own citizens. Taking back these immigrants is rarely in their political or economic interests and, especially in the case of transit migrants, they refuse to get stuck with what they consider 'European problems'. Both the irregular migrant and the country of origin are well aware of this 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. Thus, 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 – may 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 of European scale. This means that *internal* migration control on irregular migrants can benefit from initiatives and instruments applied at the EU level. In recent years, thus, 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 often turns actual readmission into a mere paper reality, not 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 externalise 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 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 of 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-fingerprint 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 (e.g. asylum applicants) and from 'suspect' countries of origin (e.g. those requiring a visa to travel into the EU) as possible. This will help get at the much smaller group of immigrants who cross 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. Cutting off the 'identity routes' of asylum and visa application, due to high risk of identification through the new network of migration databases, might provoke a counter-reaction. A possible side effect may be irregular migrants' greater dependence on smuggling and trafficking organisations (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. 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. It 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 data 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 to 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 digitalising 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. The gathering of data, or at least those data that are published, does 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 permits many opportunities for the frustration or watering down the original intent of policymakers. 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. These policy gaps will be discussed below under the headings of ‘white spots’ and ‘black holes’. The white spots can be likened to the blank spaces on old maps indicating that this was uncharted and un-mapped territory. Strictly speaking, black holes are, to a large degree, uncharted 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 policy subjects although it should be realised that those white spots on old maps also came with a caution for danger: *hic sunt dracones!* 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 formal and ‘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 construction sector during the Berlin’s 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 inspectors to 930, hardly something that can be achieved – politically or 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 clearinghouse for irregular migrants, i.e. being a short stopover 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 well below normal prison standards. 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 how authorities hope that the harsh detention regime will encourage these irregular migrants to try their luck elsewhere once put back on the streets. The de facto functioning of the detention system as a deterrent brings the notion of the state of exception to mind. Both countries are stretching their policies to adapt to the 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 the German approach of 'informalising' diplomatic relations

to increase expulsion rates) all brush up 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 crime, especially 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' irregular migrants have is the ability to destroy or hide their legal identity so as 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 an overall application of biometric identifiers in the new systems of digital surveillance that are being set up at both the national and the international levels. These biometric databases aim to break to the anonymity that now so often shelters irregular migrants from expulsion. Even though these systems cannot cover all irregular migrants, they will make the 'identity routes' into Europe (irregular migrants who originally came on a legal visa or through the asylum procedure) a dangerous route for migrants who 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 manoeuvre 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 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 in which EU member states have taken a keen interest in each other's policies and copied them when deemed successful. Particularly 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 one another's shoulders to see what is being done about the problem of irregular migrants. Successful policy innovations are always of interest to government agencies and policymakers working on the same problem. The European Commission's reaction to the successful use of EURODAC for the domestic surveillance of 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 three 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, marginalising 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 associations 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 has 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 marginalising 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. Particularly 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. And yet, 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. The question remains what the digitalisation 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 US underscores how 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 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 public and private 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 – 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 come as the direct result of using new database technology that aims to break down irregular migrants' anonymity. For one thing, the breaking down of their *legal* anonymity through biometric identifiers linking them back to their legal identity may lead to further anonymity in 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-personalisation 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 whom the SIS says should be refused at the border, as this decision was already made 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: digitalising the border is a reaction to the immigrant's successful identity-hiding strategy. The marginalization of immigrant citizenship, adding a new layer to their 'alienation', is however a sad and worrisome side effect.

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In a paradoxical evolution, the second logic of exclusion puts the spotlight on the *individual* irregular migrant, while the new technologies used to do so depersonalise and de-individualise 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), writing about citizenship and immigration, characterised 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 uitsluitingsbeleid 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 twee) 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 kerninstituten 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 instituten, is het nettoresultaat de uitsluiting van die instituten. De staat trekt een muur op van documenten en juridische regels en vereisten rondom zijn maatschappelijke instituten 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 drie) 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 ‘identificatie-fabriek’. De capaciteit van de vreemdelingendetentie is bovendien in de 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 achttien maanden, in Nederland in theorie niet beperkt in duur). Al deze investeringen in detentie en identificatie leveren echter niet het resultaat 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 vijf). 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 leegaal 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 bouwdrank 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 zes) 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 uitgedoed: 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.

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Notes

- 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 many European countries have recently 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.
- 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 wouldbe immigrants and, through discouragement, prevent their arrival.
- 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'.
- 6 These countries have followed a strategy of selective inclusion of specific categories of illegal migrants through regularisation programmes. An increasing number of European countries have adopted such regularisation 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).
- 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).
- 8 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 than that of a small- or medium-sized firm. Government can also be subdivided in different layers and institutions that have different and sometimes conflicting interests.
- 9 Literally: 'The executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie' (Marx & Engels 1990/1888: 15).
- 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).
- 11 See www.lto.nl under 'projecten': 'certificering van uitzendbureaus'. Or see www.kies-ria.nl (both accessed 10 January 2008).
- 12 www.zoll.de/do_zoll_im_einsatz/bo_finanzkontrolle/lo_statistik/index.html (accessed 15 January 2008).
- 13 There are of course exceptions. Private carriers, such as airlines and shipping companies, have especially been deputised 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).
- 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.
 - 15 There may be overlap in these figures as the statistics count offences rather than individual persons.
 - 16 In Berlin, which is one of three German city state *Bundesländer*, the senate is the state's executive body or government.
 - 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' – if they were, they would have, to a certain degree, had access to due process and legal protection – but they were named 'enemy combatants', a status beyond the law (Loader & Walker 2007: 89).
 - 18 In Cornelius and 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 empirical fact, as there are no immigration policies that are perfectly implemented or do not have unintended consequences (Cornelius & Tsuda 2004: 4-5).
 - 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 per cent). This may be used as a rule of thumb when looking at the figures presented in table 4.1.
 - 20 Besides Germany, these countries are Finland, Ireland, France and Cyprus.
 - 21 Parts of this chapter are based on two earlier studies: Broeders (2007) and Broeders (forthcoming).
 - 22 France, Germany, the Netherlands, Belgium and Luxemburg.
 - 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).
 - 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 make 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).
 - 25 Aus (2006: 12) points out that, even though the overwhelming majority of the entries in category two 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 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.

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